

Directors Escape XpresSpa Corporate Takeover Suit

By **Rachel Graf**

Law360 (May 22, 2019, 6:21 PM EDT) -- A New York federal judge dismissed Tuesday a lawsuit alleging directors of a public shell company duped the co-founders of an airport spa chain into an undesirable merger, citing a lack of evidence that the co-founders had been misled.

U.S. District Judge Louis L. Stanton said the alleged misstatements and omissions that directors of Form Holding Corp. supposedly made to trick the co-founders into the merger either seemed accurate or didn't need to be disclosed, according to the summary judgment order.

XpresSpa Holdings LLC co-founders Moreton Binn and his wife, Marisol Binn, filed an amended complaint against FH directors Bruce Bernstein, Richard Abbe, Andrew Heyer, Salvatore Giardina, Donald Stout, John Engelman and Andrew Perlman in November. An earlier version had been partially dismissed a few months before.

The co-founders claimed the FH directors tricked them into merging with FH instead of competitors to further the directors' own interests. The directors accomplished this through a series of false statements and omissions, including their alleged claim that the FH merger was XpresSpa's "only option" and their assurances that the board was independent, according to the complaint.

But the court said Tuesday the plaintiffs didn't offer any evidence showing the statements about limited options didn't reflect "the actual state of affairs."

"The evidence shows that Mr. Binn knew that XpresSpa Holdings needed funding, had explored opportunities with various companies, and was running out of options," according to the order.

The co-founders had argued the board wasn't truly independent because the directors neglected to mention their "numerous and overlapping business relationships," but the court noted that these relationships were public information and didn't need to be disclosed.

The court also rejected challenges to the directors' independence based on alleged "quid pro quo" agreements.

"There is no evidence that Mr. Perlman, Mr. Bernstein or Mr. Heyer were promised compensation, appointment to Form Holdings' and other companies' boards, or the opportunity to invest in Form Holdings in exchange for their support of the merger," according to the order. "That they benefited from

the closing of the merger is not sufficient to raise a genuine dispute as to the existence of quid pro quo arrangements."

The court dismissed other allegations as well because those claims relied on the existence of misstatements.

Counsel for the parties didn't respond Wednesday to requests for comment.

The Binns are represented by Eric Small, Rosanne E. Felicello and Michael James Maloney of CKR Law LLP.

Form Holdings and the board members are represented by Francis J. Earley, John P. Sefick and Adam L. Sisitsky of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

Richard K. Abbe is also represented by Christopher Clark, Sandeep Savla and Matthew Catalano of Latham & Watkins.

The suit is Binn et al. v. Bernstein et al., case number 1:17-cv-08594, in the U.S. District Court for the Southern District of New York.

--Editing by Janice Carter Brown.