

Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
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Wilmington, Delaware 19801-3733
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Date Submitted: July 18, 2011

Date Decided: July 20, 2011

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RE: Joel Mick

v.

Total Control Pest Management, Inc., Zaharias Fessarar

C.A. No. 11C-03-246-JRJ

Upon Defendant Zaharias Fessarar's Motion to Dismiss - DENIED

Dear Counsel:

The parties filed cross motions to dismiss. At oral argument on July 18, 2011, Total Control Pest Management, Inc. ("TCPM") withdrew its Motion to Dismiss and defendant Zaharias Fessarar ("Fessarar") withdrew one of the two grounds asserted in support of his Motion to Dismiss. The remaining issue for the Court to decide is whether the allegations of individual liability under the Shareholders Agreement are sufficiently pled against Fessarar.

Plaintiff Joel Mick ("Mick") alleges Fessarar breached the Shareholders Agreement and the implied covenant of good faith and fair dealing when Fessarar and TCPM refused to allow Mick access to stock certificates and corporate documents, and failed to convey to him 49% of the shares of TCPM.¹ Fessarar argues that he cannot be held individually liable for any breach of the implied

¹ Complaint at ¶¶ 23, 25 (Trans. ID 36671529).

covenant of good faith and fair dealing because the Shareholders Agreement creates no obligation, express or implied, for Fessarar to convey stock or provide access to stock certificates or corporate documents.²

In opposition to Fessarar's Motion to Dismiss, Mick argues that Fessarar is a signatory to the Shareholders Agreement "in his individual capacity."³ Under the Shareholders Agreement, Mick became a 49% shareholder of TCPM and the Shareholders Agreement specified that if he was fired, with or without cause, within the first two years after signing, he would lose his shares.⁴ Mick argues that by signing the Shareholders Agreement, Fessarar impliedly agreed "to refrain from arbitrary or unreasonable conduct" and to not use "oppressive or underhanded tactics" which would deny plaintiff the fruits of the Shareholders Agreement. Mick alleges that after the execution of the Shareholders Agreement, Fessarar for "personal reasons," actively and in bad faith undermined Mick's position with TCPM and caused him to be fired without cause in violation of the Employment Agreement.⁵ This wrongful conduct, claims Mick, breached the implied covenant of good faith and fair dealing.

To survive a motion to dismiss, the Complaint must give general notice of the claim asserted.⁶ The Court will dismiss for a failure to state a claim on which relief can be granted "only if it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief."⁷ On a motion to dismiss, the Court's review is limited to the well-pleaded allegations in the Complaint.⁸ In ruling on a motion to dismiss under Rule 12(b)(6), the Court "must draw all reasonable factual inferences in favor of the party opposing the motion."⁹

The implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract.¹⁰ The covenant is "designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive

² Defendant Zaharias Fessarar's Motion to Dismiss ("Mot. Dism.") at ¶ 8 (Trans. ID. 37676527).

³ Plaintiff's Response in Opposition to Defendant Zaharias Fessarar's Motion to Dismiss ("Pltf.'s Opp.") at p. 3 (Trans. ID 38630292).

⁴ Complaint at ¶ 11; Tab B to Pltf.'s Opp. ("Shareholders Agreement") at ¶ 4.6, 4.4(d) (Trans. ID 38630292).

⁵ See Complaint at ¶¶ 17-25. The Employment Agreement and Shareholders Agreement was contemporaneously executed; see Complaint at ¶ 10.

⁶ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)

or underhanded tactics to deny the other side the fruits of the parties' bargain.”¹¹

By signing the Shareholders Agreement, Fessarar impliedly agreed as a shareholder to refrain from arbitrary or unreasonable conduct and to not use oppressive or underhanded tactics which would prevent Mick from receiving the fruits of the Shareholders Agreement. The Shareholders Agreement defines and imposes “certain restrictions and/or obligations” on Fessarar, Mick, the corporation and the common stock of the corporation.¹² While the Shareholders Agreement creates no express obligation for Fessarar to convey stock or provide access to stock certificates or corporate documents, the Court cannot say at this juncture that plaintiff could not prove any set of facts that would entitle him to relief on his claim for breach of the implied covenant of good faith and fair dealing.

Mick alleges in the Complaint that Fessarar breached the implied terms of the Shareholders Agreement by, *inter alia*, firing him within the two years after signing, thus triggering the provision that mandated forfeiture of Mick's shares.¹³ Plaintiff alleges that Fessarar breached the covenant by now denying that Mick was or ever had been a shareholder.¹⁴ Mick alleges that Fessarar's breach of the Employment Agreement and his actions in connection with undermining Mick's ability to perform his duties violated his implied duty under the Shareholders Agreement to act reasonably, in good faith, and to refrain from arbitrary conduct as a shareholder of TCPM.¹⁵

With regard to the alleged breach of the implied covenant of fair dealing in the Shareholders Agreement, the Court finds the allegations in the Complaint to be sufficiently well-pleaded so that Fessarar is on notice of the claim brought against him. Drawing all reasonable factual inferences in favor of Mick, the party opposing the motion, the Court finds that the Motion to Dismiss should be **DENIED**.

¹¹ *PAMI-LEMB I, Inc. v. EMB-HNC, LLC*, 857 A.2d 998, 1016 (Del. Ch. 2004).

¹² See Shareholders Agreement at p. 1.

¹³ See Complaint at ¶¶ 19, 23.

¹⁴ See *id.* at ¶ 23.

¹⁵ See *id.* at ¶¶ 17-23.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ:mls

cc: Prothonotary