Favourite Ltd. v Cico
2019 NY Slip Op 31768(U)
June 17, 2019
Supreme Court, New York County
Docket Number: 652857/2016
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
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FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI, ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL, and UPPER EAST SIDE SUITES, LLC,

Plaintiffs,

-against-

BENEDETTO CICO, CARLA CICO, 151 EAST HOUSTON ACQUISITION LLC, ABC CORPS. 1-20, and JOHN DOES 1-20,

Defendants.
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Index No.: 652857/2016

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

This 2016 case involves alleged mismanagement of a company and misfeasance in connection with the sale of the company's building. Plaintiffs were given leave to file the second amended complaint (SAC) by order dated October 30, 2018 (Dkt. 277 [the October 2018 Decision]), a detailed decision setting forth the case's extensive procedural history and plaintiffs' clams. Familiarity with the October 2018 Decision is assumed and capitalized terms have the same meaning as in that decision. Defendants move to dismiss the SAC, which was filed on November 6, 2018 (Dkt. 282). The motion is granted in limited part.[1]

Defendants urge that dismissal is mandated because: (1) the Company's claims are being prosecuted without actual authority as the Company is acting at the direction of a

[1] Counsel are reminded of Commercial Division Rule 17, which this part's practices expressly adopts. Future noncompliant submissions will be rejected.

majority of its members instead of its Managers; (2) even if the Company can be duly directed to act at the direction of a majority of its members, the aggregate equity held by the directing members is less than 50%; (3) the claims are timed-barred; and (4) the SAC fails to sufficiently plead a claim for breach of fiduciary duty. All but a portion of the third argument lack merit.[2]

It is undisputed that the Operating Agreement provides, in section 5.1, that the Company is to be managed by its Managers and that the Managers have authority to bring litigation on behalf of the Company (*see* Dkt. 287 at 13-15). However, since the Cicos were removed as Managers, replacements have not been appointed because approval of 75% of the membership interests is required under section 5.14 (*see id.* at 18-19). That has not occurred because the Cicos own more than 25% of the Company and they have not (nor are they incentivized to) vote to authorize new Managers who could take remedial action against them (*see* Dkt. 313 at 7). The Cicos suggest that the Company is essentially paralyzed. That cannot be.[3]

The Operating Agreement is silent on what happens when it would be impossible to appoint new managers after the majority ousted the old ones. The parties to the agreement could reasonably expect under the circumstances that the default Delaware LLC statute would govern and fill the gap (*see Elf Atochem N. Am., Inc. v Jaffari*, 727

[2] Defendants also erroneously contend that the SAC's first and second causes of action improperly assert claims on behalf of the Remaining Member Plaintiffs (*see* Dkt. 284 at 14 n 7). The SAC's ad damnum clauses, however, make clear that on these causes of action, plaintiffs are only seeking damages on behalf of the Company (*see* SAC at 33).

[3] To be sure, one must question the wisdom of permitting removal of Managers by majority vote (under section 5.17) while requiring a 75% vote to appoint new Managers.

A2d 286, 291 [Del 1999]; *see also Nemec v Shrader*, 991 A2d 1120, 1131 [Del 2010]). That provision--6 Delaware Code § 18-402--provides that when there are no appointed managers, the vote of 50% of membership interests controls (Dkt. 313 at 8; *see Obeid v Hogan*, 2016 WL 3356851, at *18 [Del Ch June 10, 2016]). This makes sense. If more than half of the members (and certainly more than half of the unconflicted members)[4] want to cause the Company to sue the former Managers for misfeasance, they should be able to do so. The alternative suggested by defendants--perpetual inaction and effective immunity for their alleged misconduct--is, in contrast, unreasonable.

Defendants' argument that plaintiffs did not actually procure the consent of 50% of the members is not supported by sufficiently clear documentary evidence as required by CPLR 3211(a)(1) so as to warrant dismissal. Defendants challenge the membership status of some of those that provided consent and the authenticity of the signature pages. These disputed factual issues cannot serve as a basis for a documentary-evidence grounded dismissal.

Indeed, in reality, defendants seek dismissal for lack of standing (CPLR 3211[a][3]). Defendants have the burden of establishing lack of standing (*Brunner v Estate of Lax*, 137 AD3d 553 [1st Dept 2016]) and plaintiff need not definitively prove standing to proceed (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept

[4] The Cicos would be disabled from voting on the propriety of this action (*see Beam v Stewart*, 845 A2d 1040, 1049 [Del 2004]). Under Delaware law, where persons holding voting rights are conflicted, action should only be taken by a vote of an unconflicted majority to ensure that the presumptions of the business judgment rule are not rendered inapplicable (*In re Morton's Rest. Grp., Inc. Shareholders Lit.*, 74 A3d 656, 663 [Del Ch 2013]; *see Corwin v KKR Fin. Holdings LLC*, 125 A3d 304, 313 n 28 [Del 2015]). Thus, a vote by 50% of all membership interests may not be required (e.g., if only 75% are unconflicted, a vote of more than 37.5% should suffice).

2016]). If, as here, a question is raised about the Company's standing based on the validity or sufficiency of the consents, the topic must be explored in discovery and may be revisited on a motion for summary judgment (*see Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 59 [2d Dept 2015]).

To be sure, initially the Company itself was a plaintiff and more than 50% of the members commenced this action. Thus, this case was commenced by a proper plaintiff and the relation-back doctrine applies (*see* CPLR 203[f]; *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 547 [1st Dept 2013]; *c.f. U.S. Bank N.A. v DLJ Mortg. Capital, Inc.*, 141 AD3d 431, 433 [1st Dept 2016], *affd* 33 NY3d 84 [2019]). The relevant inquiry for statute-of-limitations purposes is whether the claims were timely as of the commencement of this action on May 27, 2016.

In that regard, defendants argue that the Company's breach of contract and breach of fiduciary duty claims are time-barred.[5] The parties agree that the applicable statute of limitations for both claims under Delaware law is three years (10 *Del C* § 8106; *see Wal-Mart Stores, Inc. v AIG Life Ins. Co.*, 860 A2d 312, 319 [Del 2004]). As defendants appear to concede (*see* Dkt. 284 at 12-17), most of the claims accrued on May 29, 2013, which is less than three years before this action was commenced. Thus, the action is mostly *not* time-barred.

[5] Defendants failed to explain when plaintiffs' proposed claims accrued in opposition to the motion to amend; therefore, there was no occasion to analyze whether they were time barred (*see* October 2018 Decision at 13 n 17). Nothing precludes defendants from raising the statute of limitations in their motion to dismiss.

There are, however, some exceptions, such as allegations concerning acts that occurred at the outset of the investment in 2007. They are time-barred. While plaintiffs argue tolling applies because they had no reason to know of the alleged wrongdoing until 2016, this contention is meritless (*see Wal-Mart*, 860 A2d at 319 [Delaware's discovery rule, which tolls the statute of limitations, only applies "where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of"]). Plaintiffs offer no explanation (not in the SAC nor in an affidavit in opposition to this motion) setting forth facts supporting their claim that they could not have sued earlier (*see Bean v Fursa Capital Partners, LP*, 2013 WL 755792, at *6 [Del Ch Feb. 28, 2013] ["Complaint alleges no facts to support a reasonable inference that Defendants concealed facts from Bean that would toll the statute of limitations or that he could not have discovered his claims because he reasonably relied on the good faith of a fiduciary"]).

Tolling does not apply to plaintiffs' complaint about how the Building was purchased in 2007 because they do not plausibly claim to have been unable to probe the details of the purchase for a decade, especially in light of their books and records rights under the Operating Agreement. The same is true for the Company's default on its mortgage in 2010 (which is not attributed to the Cicos' fault with any non-conclusory allegations of non-exculpated conduct). Likewise, tolling does not apply to claims for failure to make distributions prior to May 27, 2013 because plaintiffs would know if they

were not receiving any. Simply put, while the vast majority of the claims in the SAC accrued after May 27, 2013, those that did not are time-barred.

Finally, defendants' argument that the SAC fails to state a claim for breach of fiduciary duty with the specificity required by CPLR 3016(b) is rejected for the reasons stated in the October 2018 Decision, which addresses the SAC's detailed allegations concerning the Cicos' misfeasance (*see id.* at 8-9, 14-16).[6] The SAC more than suffices to put the Cicos on notice of their alleged wrongdoing by alleging each instance of misconduct (*see Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008], accord *Stewart Title Ins. Co. v Liberty Title Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]).

Accordingly, it is ORDERED that defendants' motion to dismiss the SAC is granted only with respect to the portions of the first and second causes of action alleging the Cicos' wrongdoing prior to May 27, 2013 and the motion is otherwise denied.

Dated: June 17, 2019

ENTER:

Jennifer G. Schecter, J.S.C.

[6] While some of the fiduciary duty breaches were deemed duplicative of alleged breaches of the Operating Agreement, that, obviously, does not mean such claims lack merit (*see id.* at 15). Relatedly, defendants' reliance on the economic loss doctrine (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1st Dept 1999]) is misplaced because the court has already rejected the duplicative fiduciary duty claims and only permitted those that are not expressly governed by contract that are based on the Cicos' extracontractual duties (their fiduciary duties to the company by virtue of their status as managers) (*see* October 2018 Decision at 14). To be clear, the Remaining Member Plaintiffs do not have a direct claim for fraudulent inducement (*see id.* at 16-17) and thus cannot seek to recover their initial investments in the Company. Their damages claims must be tethered to the particular acts of alleged wrongdoing. While the Operating Agreement's exculpatory clause may provide a complete defense to some of the claims, that issue turns on material disputed facts and is beyond the scope of this motion (*see id.* at 13 n 17).