Lengyel-Fushimi v Bellis
2021 NY Slip Op 32498(U)
November 29, 2021
Supreme Court, Kings County
Docket Number: Index No. 512764/2021
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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PETER LENGYEL-FUSHIMI,

Plaintiffs, Decision and order

- against - Index No. 512764/2021

ANTHONY BELLIS, ZACHARY KINNEY, and KINGS COUNTY BREWERS COLLECTIVE, LLC,,

Defendants, November 29, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to allege any cause of action. The plaintiff has opposed the motion. Moreover, the plaintiff has moved seeking a more responsive answer from the defendants. In addition, intervenors Gregor Rothfuss, Evangelos Pefanis, and Jeffrey Lengyel have moved pursuant to CPLR §1012 seeking to intervene. The motions have been opposed respectively and arguments held. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, in 2012 the plaintiff and defendant Anthony Bellis formed Kings County Brewers Collective, LLC [hereinafter 'KCBC']. Zachary Kinney joined at a later date and each of them contributed $33,000. An operating agreement was executed between the parties on January 15, 2014. Further, the owners attracted twenty-four investors who became non-managing members of KCBC. The plaintiff alleges that disagreements arose

between the managing members and the other managing members changed the operating agreement in violation of the operating agreement itself. Further, the plaintiff was terminated as a manager and an officer of the Company and has been denied access to corporate books and records as well as entitlement to any income. The plaintiff instituted this lawsuit and has asserted the defendants downgraded plaintiff's membership share in violation of the operating agreement. The complaint alleges causes of action for a declaratory judgement, breach of contract, breach of implied covenant of good faith and fair dealing, a violation of New York Limited Company Law §409 and breach of fiduciary duty. In an order dated July 15, 2021 the court summarily noted that there were questions of fact regarding the activities of the defendants and that consequently the motion to dismiss was denied. This decision supplements that conclusion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14

AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

It is well settled that "a motion to dismiss the complaint in an action for a declaratory judgment 'presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). The basis for this cause of action is an allegation the defendants breached the provisions of the Operating Agreement regarding the Class A shares of the plaintiff. Since the court has already determined that any change to the status of any member owning Class A shares required a unanimous vote, there are surely questions whether the plaintiff can succeed upon that claim. Consequently, the motion seeking to dismiss the first count is denied (see, Tilcon New York Inc., v. Town of Poughkeepsie, 87 AD3d 1148, 930 NYS2d 34 [2d Dept., 2011]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action

fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

As noted, the court has already determined that Article 10.1 of the operating agreement which states that the agreement "shall not be modified or amended in any respect except by a written instrument executed by all of the Members" (id) was potentially breached when the defendants reduced the plaintiff's Class A shares to Class D shares without a unanimous vote of approval. Therefore, there are surely questions whether a breach of contract occurred and consequently the motion seeking to dismiss the breach of contract claim is denied.

Turning to the cause of action for a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). However, New York does not recognize a separate cause of action based upon such implied covenant of good faith and fair dealing when it is merely duplicative of breach of contract claims (see, Impax Laboratories, Inc., v. Turing Pharmaceuticals AG, 2017 WL 4357893 [S.D.N.Y. 2017]). Since the claim based upon a breach of the covenant of good faith and fair dealing is duplicative of the breach of contract claim the motion seeking to dismiss that cause of action is granted.

Next, concerning the fourth and fifth causes of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the causes of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendants failed to honor the terms of the operating agreement entered into between the parties and downgraded his Class A shares without authority. Consequently, the motion seeking to dismiss the fourth and fifth causes of action is granted. Thus, the causes of action for declaratory judgement and breach of contract remain. The remainder of the complaint is dismissed.

Turning to the motion to intervene, according to the proposed complaint of the intervenors, Rothfuss is a Class B member and Pefanis and Lengyel are Class C members. The proposed complaint alleges that the Class A members transferred to themselves treasury shares comprising 42.3% of the company's value thereby diluting the value of all other shareholders. Second, the proposed complaint alleges the defendants awarded themselves distributions without approval of the memnership.

Lastly, the proposed complaint raises the facts of the present lawsuit and the plaintiff's allegations the defendants are attempting to dilute his ownership stake as well. Thus, the proposed amendment contains direct claims against the defendants for breach of contract, breach of fiduciary duty and declaratory judgement and a violation of LLCL §409 and derivative claims on behalf of the corporation for breach of duty, corporate waste, breach of contract and declaratory judgement.

It is well settled that pursuant to CPLR §1012(a)(2) a party may intervene as a matter of right "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (id). The Court of Appeals has explained the right of intervention as available only where the judgement will bind the potential intervenor "by its res judicate effect" (Vantage Petroleum v. Board of Assessment Review of the Town of Babylon, 61 NY2d 695, 472 NYS2d 603 [1984]). That definition was further refined to cases where the potential intervenor is in "privity" with the parties to the lawsuit (Green v. Sante Fe Industries Inc., 70 NY2d 244, 519 NYS2d 793 [1987]). Thus, a party demonstrating a possible legitimate ownership interest in property may intervene in a real tax property lien case (NYCTL 1999-1 Trust v. Chalom, 47 AD3d 779, 851 NYS2d 211 [2d Dept., 2008]). However, where the potential intervenor has no interest in either the real property

or the outcome of the litigation then the motion seeking intervention should be denied (Citibank N.A. v. Plagakis, 8 AD3d 604, 779 NYS2d 576 [2d Dept., 2004]).

The core claim of the intervenors, namely that the defendants have taken acts which harmed the company, are sufficiently connected to the lawsuit which concerns allegations the defendants sought to improperly adjust ownership interests. The defendants' primary ground for opposing the motion is the fact it is barred by LLC Law §609 and §610. LLC Law §610 states that "a member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company" (id). Notwithstanding, members of a limited liability company may initiate derivative suits on the LLC's behalf (Tzolis v. Wolff, 10 NY3d 100, 855 NYS3d 6 [2008]). Further, individual members may sue a corporation "to enforce a member's right against or liability to the limited liability company" (LLC Law §610). The defendant's arguments that there are "no remaining or existing "claims"" in this case, or that "the case is now resolved" and there "is nothing to decide" (see, Affirmation in Opposition, page 6) fails to appreciate the legitimate claims the plaintiff and the intervenors have raised. Of course, further discovery will sharpen the issues, however, viable causes of action have

been presented, they have survived a motion to dismiss and they remain outstanding. The claims of the intervenors are sufficiently related to the plaintiff's claims and therefore the motion seeking intervention is granted.

Turning to the plaintiff's motion seeking to dismiss counterclaims, the defendant's answer contained two counterclaims. The first alleges the plaintiff failed to sign certain documents and seeks a declaratory ruling ordering the plaintiff to sign these documents. The counterclaim does not explain the nature of these documents and thus they cannot support a claim for any sort of relief. The failure to include the nature of these documents renders the entire counterclaim vague and insufficient. In any event, the court already ruled that the plaintiff is not required to execute any loan documents sought by the defendants and to the extent the counterclaim references those documents the court has already ruled on this issue. In any event, the motion seeking to dismiss this counterclaim is granted.

The second counterclaim does not assert any concrete wrong allegedly committed by the plaintiff. It asserts in conclusory fashion that the plaintiff is "required to meet his obligations" (see, Counterclaims, ¶ 12) and "the sole purpose of this action is harassing and annoying the Defendants with meritless and vexatious claims solely for its own benefit, harming the

Defendants in an amount to be proven at trial, including legal fees" (see, Counterclaims, ¶ 16). However, those allegations do not assert any causes of action, they are merely conclusory statements that have no substantive legal basis. Thus, this counterclaim also fails to state any cause of action and consequently it is likewise dismissed. Thus, the motion seeking to dismiss the counterclaims is granted.

At this juncture the motion seeking a clearer complaint is denied without prejudice. The parties will engage in discovery and the exchange of such discovery should narrow the precise defenses and supplemental submissions should clear any ambiguity at this time. The plaintiff may move again at a later date if the confusion still persists.

So ordered.

ENTER:

DATED: November 29, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC