Alsaidi v Alsaede
2022 NY Slip Op 32927(U)
August 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 512191/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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KAMAL ALSAIDI, individually and derivatively on behalf of MOUNTAIN OF SABER, LLC.,

Plaintiff, Decision and order

-against-

Index No. 512191/20

ALI ALSAEDE, CAPITAL A MANAGEMENT INC, ABDO ALSAEDE, AHMED NASSER, and ABDO M. NASSER

Defendants,

and

August 25, 2022

MOUNTAIN OF SABER, LLC.

Nominal Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking an injunction, the appointment of a receiver and to dismiss counterclaims. The defendants oppose the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior orders, property located at 797-815 Stanley Avenue in Kings County was owned by Abdo Alsaede. In 2005 Abdo Alsaede transferred his ownership in the property to an entity called Mountain of Saber LLC. According to the operating agreement, Abdo retained a one third interest in the corporation, and the remaining ownership is as follows: the plaintiff Kamal Alsaidi owns a third, and brothers Ahmed and Abdo Nasser owns the final third. The defendant Ali Alsaede is the son of Abdo Alsaede and the cousin of the plaintiff. Thus, the plaintiff is a one third minority owner of Mountain of Saber LLC. The

defendants have managed and maintained the properties since 2005. The plaintiff has alleged the defendants have engaged in various improprieties since then including failing to collect rents, misappropriating funds and awarding themselves unearned fees. The complaint alleges causes of action for breach of contract, fraud, unjust enrichment and breach of a fiduciary duty. The court sustained many of the causes of action and the plaintiff has now moved seeking injunctive relief, the appointment of a receiver and to dismiss counterclaims filed by the defendants. These motions are opposed as noted.

Conclusions of Law

Preliminarily, the motion seeking to dismiss the counterclaims is timely. It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the counterclaims are deemed true and all reasonable inferences may be drawn in favor of the party that filed such claims (Federal National Mortgage Association v. Grossman, 205 AD3d 770, 165 NYS2d 892 [2d Dept., 2022]). Whether the counterclaims will later survive a motion for summary judgment, or whether the party will ultimately be able to prove

its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Maslansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

It is well settled that a merger clause which states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). In this case the operating agreement states that "this Agreement contains a complete statement of all of the arrangements among the parties with respect to the Company and cannot be changed or terminated orally or in any manner other than by a written agreement executed by all of the Members" (see, Operating Agreement, Article XIII(B) [NYSCEF Doc. #26]). The first two counterclaims assert, essentially, that the plaintiff promised to give the defendant property in Sana, Yemen in exchange for the plaintiff's 33% share of the company and that the other members relied upon that promise. However, if true, that promise is not contained within the agreement itself and cannot, therefore, be considered. While that promise does not contradict any of the provisions of the operating agreement, contradiction is not the governing test whether such oral agreements can change any of the terms of the written agreement. Rather, parole evidence cannot

be used to modify or vary the terms of a written agreement that contains a merger clause (HSBC Bank USA N.A. v. Strong Steel Door, 36 Misc3d 1207(A), 954 NYS2d 759 [Supreme Court Kings County 2012]). Indeed, Article VI(A) of the operating agreement states that "the Members have contributed to the Company in exchange for their membership interests, their cash interest and other property as set forth on Schedule A, annexed hereto" (id). However, the operating agreement does not contain a Schedule A outlining the contributions of any party. There is a schedule called 'Mountains of Saber LLC Member Information' which merely lists the names, addresses and percentages of ownership of each owner, including the plaintiff, but does not delineate any contribution amount at all. Thus, any promise regarding specific property located in a foreign country is surely a matter not contained in the original operating agreement and cannot cause any changes to the agreement. Moreover, there is no ambiguity regarding the agreement that might permit oral modifications (Goetz v. Trinidad, 168 AD3d 688, 91 NYS3d 513 [2d Dept., 2019]). Therefore, the motion seeking to dismiss the first two counterclaims is granted.

The third counterclaim, to the extent it is different from the first two counterclaims, alleges the plaintiff never paid any consideration at all for his membership interest and thus is not an owner of Mountains of Saber. First, that is not a

counterclaim, it is merely a defense. To the extent the defense can be interpreted as a declaratory judgement seeking a determination the plaintiff is not a member since no consideration has been paid, then such counterclaim would exist. First, the defense of lack of consideration is personal to the parties to the contract (see, Nash v. Duroseau, 39 AD3d 719, 835 NYS2d 611 [2d Dept., 2007]). Thus, Ali has no standing to raise this defense. However, Abdo Alsaede as a member of the corporation has such standing. The plaintiff, however, does not present any concrete evidence establishing as a matter of law that any consideration was paid at all. Regarding consideration, which really permeates the first three causes of action, the plaintiff fails to present any evidence why this claim cannot be pursued. Although not presented within the motion to dismiss the counterclaims, Abdo Alsaede submitted an affidavit dated January 9, 2021, relevant to other motions, wherein he acknowledged that as the sole owner of the property he created Mountains of Saber and transferred a one third interest in the company to the plaintiff at the direction of his son. Mr. Alsaede states that "I never attained any money from Kamal Alsaidi, nor did he provide me any money or transfer of assets. It was at no time a gift to Kamal Alsaidi. I know of no money paid to my son from the Kamal Alsaidi as they worked out the terms themselves" (Affidavit of Abdo Alsaede, ¶ 4 [NYSCEF Doc. #18]). Thus, Abdo

fully admits that he transferred the one third interest to the plaintiff without any consideration at all upon the promise of future consideration. Whether that promise renders any consideration inadequate or whether a gift was really intended in any event are matters that will be resolved through discovery. Further, there may be other grounds, not contemplated here, regarding the membership status of the plaintiff. Thus, there is no basis to dismiss the third counterclaim. Likewise, the court has already held there are questions of fact whether the power of attorney allegedly signed by the plaintiff which permitted the defendant to, essentially, vote him out of the corporation, was authentic. That issue too must be resolved through discovery. Therefore, there is no basis to dismiss this counterclaim either.

Consequently, the motion seeking to dismiss the first two counterclaims is granted and the motion seeking to dismiss the third and fourth counterclaims is denied.

Thus, before the court can entertain any motion regarding injunctions or the appointment of a receiver the question whether the plaintiff is a member of the corporation and maintains standing to seek those reliefs must first be answered. Without resolving this issue the plaintiff cannot pursue equities where he may have no standing. Thus, the question of whether the plaintiff gave any consideration must be addressed. To further streamline this issue and not cause unnecessary delay, within

thirty days of receipt of this decision the plaintiff may file any motion seeking to establish his status as a member. The defendants may oppose the motion and will have two weeks to file opposition. The plaintiff will have one week to file a reply. There will be no adjournments or extensions to this time line unless all parties consent. The parties are directed to reach out to the court when all papers are submitted. Thus, the motions seeking an injunction and a receiver are not decided at this time.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn NY

Hon. Leon Ruchelsman
JSC