

Holdrum Invs., N.V. v Edelman

2013 NY Slip Op 30369(U)

January 31, 2013

Supreme Court, New York County

Docket Number: 650950/2011

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 650950/2011
HOLDRUM INVESTMENTS NV
VS.
EDELMAN, ASHER B
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *and cross-motion are*
decided in accordance with the annexed memorandum
opinion.

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/31/13

acc, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

-----X
Holdrum Investments N.V. individually
and derivatively on behalf of Museum
Partners L.P.,

Plaintiff,

Index Number:

-against-

650950/2011

Asher B. Edelman,

Defendant.

-----X
Hon. Anil C. Singh, J.:

Plaintiff moves for summary judgment on its fifth and seventh causes of action and to dismiss defendant's affirmative defenses. Defendant opposes the motion and cross-moves for summary judgment dismissing plaintiff's fourth cause of action.

Parties' Allegations and Procedural Background

The underlying facts are set forth in the court's order dated December 6, 2011 (the December 2011 Order) and, therefore, need not be repeated in detail.

Museum Partners L.P. (Museum) is a Delaware limited partnership, organized pursuant to an agreement of limited partnership dated December 1996 (the Agreement) for the purpose of obtaining a substantial ownership position in a French publicly-traded company, Société du Louvre (Louvre), whose holdings include Taittinger Champagne, Banque du Louvre, Baccarat Crystal and French hotel chains (*id.* at 1-2; complaint, ¶¶ 2, 9-10). Louvre was controlled by the Taittinger family and Museum

allegedly sought to obtain a sizable share in Louvre, thereby obtaining control of it, or forcing the Taittinger family to buy Museum out at a significant profit (*id.*, ¶¶ 12-13).

Holdrum Investments N.V. (Holdrum) was a limited partner of Museum under the Agreement, and Asher B. Edelman (Edelman) was the general partner of Museum under the Agreement (*id.*, ¶¶ 1, 3).

Holdrum contends that the strategy of seeking to force up the price of Louvre's shares was unsuccessful; that therefore, Edelman commenced a lawsuit in France to obtain control of Louvre but that this, too, was unsuccessful; and that Edelman then sought to pursue the strategy by bringing a lawsuit in the United States District Court in New York, but this lawsuit also was unsuccessful (*id.*, ¶¶ 15-17).

Holdrum contends further that Edelman commenced another lawsuit in Supreme Court, New York County, on behalf of Museum, asserting claims of fraud and conversion and that this lawsuit was also unsuccessful (*id.*, ¶¶ 18, 20). It states that these lawsuits were not congruent with Museum's purposes; that this activity constituted a waste of Museum's assets; that Edelman diverted Museum's assets to his personal investment purposes; and that Museum should be wound down in accordance with the Agreement's provisions (*id.*, ¶¶ 19, 21, 23). It seeks summary judgment on its cause of action for dissolution of Museum (seventh) and for summary judgment on its claim for an accounting

(fifth) and for dismissal of Edelman's affirmative defenses.

Edelman alleges that he came to an agreement with Holdrum's principal in March 2011, under which Holdrum would be bought out of its interest in Museum and that a \$10,000 down payment was made, and accepted by it (Edelman affidavit dated August 31, 2012, ¶¶ 3, 5). He states that he plans on dissolving Museum, but that Holdrum's interest should reflect its acceptance of this downpayment (*id.*, ¶ 5). He states further that the cost of an accounting at this time would be an unnecessary burden, since such relief is only proper at the conclusion of litigation (*id.*, ¶¶ 6-7, 9).

Edelman's answer denies Holdrum's allegations and asserts that, in February 2007, several other limited partners in Museum withdrew, but that Holdrum chose to remain, implicitly acquiescing in and ratifying Edelman's conduct in managing Museum (answer, ¶¶ 1-3, 20, 22, 24). His cross-motion states that it seeks dismissal of plaintiff's fourth cause of action, but this cause of action seeks a settlement of the account among the partners and defendant's claim that dissolution of a Delaware limited partnership cannot be done by a New York court (Edelman affidavit, ¶ 8) is relevant to plaintiff's seventh cause of action for dissolution of Museum.

Summary Judgment

A party seeking summary judgment must make a prima facie

case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Delaware has substantively the same standard for summary judgment (*see Zimmerman v Crothall*, 2012 WL 707238, *5 [Del Ch 2012]; *Twin Bridges L.P. v Draper*, 2007 WL 2744609, *8 [Del Ch 2007]).

The court notes that Holdrum did not submit an affidavit by a party with personal knowledge in support of its motion, but only in reply, attached to its memorandum in further support of its motion (Thornton affidavit dated October 10, 2012). Consideration of such papers is generally inappropriate under the rule that prevents "a movant from remedying basic deficiencies in

its prima facie showing by submitting evidence in reply, thereby shifting to the nonmoving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond" (*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]). Moreover, this affidavit is equivocal on the issue of whether Holdrum ratified Edelman's conduct since it stated that Thornton "was on board with continuing [Museum's efforts] ... [to pursue] the lawsuits" (Thornton affidavit, ¶ 6). There is also a dispute as to the purported terms of the alleged sale of Holdrum's interest in Museum (*id.*, ¶ 12).

Provisions of the Agreement

The Agreement provides that it "shall be governed by and construed in accordance with the laws of the State of Delaware applicable to contracts made and to be performed entirely within such State" (Section 14.3).

The Agreement also provides that Museum's purposes "are to acquire ... securities of a specific entity [known to each limited partner] ... and to enter into ... all activities and transactions ... as the General Partner may deem necessary and advisable to achieve capital appreciation in the carrying out of the foregoing purposes" (Section 2).

The Agreement further provides that Museum shall be dissolved upon the earlier of the election of the general partner

or on December 31, 1998 (Section 8.1).

Delaware Law

"[T]he parties to a Delaware limited partnership have the power and discretion to form and operate a limited partnership 'in an environment of private ordering' ... [with] 'maximum flexibility' ... [and the] 'basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements'" (*Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 170 {Del Supr 2002} [internal citations omitted]; *Seibold v Camulos Partners, LP*, 2012 WL 4076182, *10 n 97 [Del Ch 2012]).

In this matter, the conduct of Edelman in managing Museum included pursuing litigation in various forums as part of a strategy of either obtaining control of Louvre or increasing its shares to such a level that the Taittinger family would be forced by market pressure to buy out Museum's investment in order to retain their control of Louvre. Whether Edelman pursued this strategy appropriately or should have sought dissolution is, at best, a matter of fact that cannot be determined on a motion for summary judgment. Holdrum has not established, as a matter of law, that Edelman's conduct was wrongful, particularly in light of the interwoven issues of Holdrum's alleged ratification, waiver, laches and whether it was "reasonably practicable to carry on the business" (*In re Silver Leaf, L.L.C.*, 2005 WL

2045641, *10 [Del Ch 2005]). While the time set forth for dissolution of December 31, 1998 has passed, Museum was actively moving forward in pursuing control of Louvre by the various lawsuits, and Edelman has presented evidence that the limited partners accepted continuation of this strategy in hopes of a favorable outcome. Viewing the evidence in favor of Edelman, as the nonmoving party, Holdrum's motion for summary judgment must, therefore, be denied.

Edelman seeks dismissal of Holdrum's claim for dissolution of Museum, contending that New York courts lack the power to dissolve a Delaware limited partnership. This proposition has both logic and authority that support the proposition that a "claim for dissolution and an ancillary accounting [of a Delaware limited liability company] is one over which the New York courts lack subject matter jurisdiction" (*Rimawi v Atkins*, 42 AD3d 799, 801 (3d Dept 2007)). Dissolution of limited liability companies and limited partnership are treated similarly under Delaware law (*In re Seneca Investments LLC*, 970 A2d 259, 262 n 13 [Del Ch 2008]). Moreover, the Appellate Division, First Department has held that the argument "that the courts of New York lack subject matter jurisdiction to dissolve a foreign corporation ... to be without merit" (*In re Dissolution of Hosp. Diagnostic Equip. Corp.*, 205 AD2d 459, 459 [1st Dept 1994]). There is no basis to treat a foreign limited partnership differently from a foreign

corporation and, since this court must follow the binding appellate authority of *Hospital Diagnostics*, Edelman's cross motion to dismiss Holdrum's cause of action for dissolution of Museum is denied.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied.

Dated: *JAN 31*, 2013

ENTER:


J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE