SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOLDRUM INVESTMENTS N.V. *individually and derivatively on behalf of* MUSEUM PARTNERS L.P. :	Index No. 650950/2011
PlaintiffS, :	
-against- :	
ASHER B. EDELMAN :	
Defendant.	

MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS AND IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS AND IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

This Memorandum of Law is submitted in opposition to the motions for summary judgment and to dismiss and in support of the cross motion for summary judgment. The facts are as stated in the Affidavit of Asher B. Edelman ("Edelman Affidavit") and will be repeated herein only as necessary. The terms are as defined in the Edelman Affidavit.

INTRODUCTION

Pursuant to the Partnership Agreement at Paragraph 14.3, Delaware law applies to all litigation regarding the Partnership. Because of this, plaintiff made a Motion to Amend the Complaint.

The Second Amended Verified Complaint upon which plaintiff relies in this action was allowed by the Court pursuant to the decision and order of this Court dated February 7, 2012, however, it was never filed with the Court and never served on us. The only copy counsel has, which is attached to the Affirmation of Jeff Davis ("Davis Affirmation") as Exhibit 1, and was also attached to the previous Motion to Amend the Complaint, is not verified. The Second Amended Verified Complaint basically reiterates the same arguments as the Amended Verified Complaint, citing to Delaware law.

Plaintiffs combined motions for summary judgment and to dismiss are unsupported by applicable law. The only case law cited in support of Plaintiff's motion for summary judgment on the seventh cause of action only allows a Delaware Chancery Court to enter a decree of judicial dissolution. Plaintiff offers no statute or case law to support its argument that this Court has the authority to enter such a decree. As clearly stated in Delaware law, this Court does not have the authority to enter a decree of judicial dissolution. Further, as stated in the Edelman

Affidavit, the Partnership will be dissolved at the end of the year. Mr. Edelman will then distribute the remaining assets pursuant to Delaware law.

On its motion for summary judgment on the fifth cause of action, plaintiff only offers a Uniform Partnership Act Statute, which does not bind this Court. Plaintiff fails to cite to **any** Delaware Revised Uniform Partnership Act ("DRUPA"), which is the binding legal authority here. No such statute exists. Plaintiff asks this Court to force the defendant to do something that will cost between $30,000 and $40,000 and yet offers no legal support for this demand. There is no applicable law that would force the Partnership to have to provide a formal accounting.

Plaintiff's Motion to Dismiss Defendant's Affirmative Defenses 2 through 8 is also unsupported by any applicable law. Delaware law only requires that a pleading be simple, concise, and direct. The proper forum for adducing the underlying facts regarding the affirmative defenses is through discovery, not a motion to dismiss. Plaintiff is attempting to avoid mandatory discovery by bringing these motions.

Defendant's cross motion for summary judgment on the fourth cause of action is appropriate and should be granted. Plaintiff asks for personal damages under a derivative cause of action. Despite this obvious flaw, plaintiff's demand for the return of its initial investment is improper. Plaintiff offers two reasons that it is entitled to the return of its initial investment, neither of which has a basis in any applicable law. Firstly, plaintiff misquotes a Delaware statute in the Second Amended Verified Complaint, implying that upon the winding up of a partnership, partners are first entitled to the return of their partnership investment. This is not the case.

Secondly, plaintiff claims a lost investment opportunity while providing absolutely no proof of this lost investment opportunity. Discovery demands and responses have already been exchanged in this case. Defendant has turned over all of the Partnership tax returns to plaintiff.

Plaintiff has repeatedly stated that it will turn documents over to defendant and has continuously failed to do so. Rather than address these issues at the Court conference on July 18, 2012, plaintiff served and filed these motions, thereby invoking a stay of discovery. This is an obvious attempt by plaintiff to avoid participating in mandatory discovery.

POINT I

PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS SEVENTH CAUSE OF ACTION SEEKING DISSOLUTION OF THE LIMITED PARTNERSHIP

6 Del.C. §17-801 does provide that "a limited partnership is dissolved and its affairs shall be wound up upon the first to occur of the following:

> (1) At the time specified in a partnership agreement, but if no such time is set forth in the partnership agreement, then the limited partnership shall have a perpetual existence;
>
> ...
>
> (6) Entry of a decree of judicial dissolution under §17-802 of this title."

However, §15-406 of the Delaware Revised Uniform Partnership Act states:

> (a) If a partnership for a definite term of particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, so far as is consistent with a partnership at will.
> (b) If the partners, or those of them who habitually acted in the business or affairs during the term or undertaking, continue the business or affairs without any settlement or liquidation of the partnership, they are **presumed to have agreed that the partnership will continue.**"

Therefore, by its own previous inaction, plaintiff agreed that the partnership would continue. Further, defendant has decided and has informed plaintiff that the Partnership will be dissolved at the end of this year.

While plaintiff is correct that 6 Del.C. §17-802 states "On application by or for a partner the **Court of Chancery** may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement."

What plaintiff fails to address in its memorandum of law is that this Court is not the Court of Chancery. This Court does not have the power to enter a decree of judicial dissolution. On the face of the statute, the only court that has the power to enter a decree of judicial dissolution is the Delaware Court of Chancery. Plaintiff has offered no case law to support its contention that this Court, which is not the Delaware Court of Chancery can enter a decree of judicial dissolution for a Delaware Limited Partnership.

Summary Judgment on the Seventh Cause of Action should be denied.

POINT II

PLAINTIFF SHOULD NOT BE GRANTED SUMMARY JUDGMENT ON ITS FIFTH CAUSE OF ACTION FOR AN ACCOUNTING

Plaintiff offers no statutory evidence or case law in support of its contention that it is entitled to an accounting if this Court enters a decree of judicial dissolution. Delaware has a Revised Uniform Partnership Act ("DRUPA"). However, plaintiff does not refer to this when asking this Court for Summary Judgment for an accounting. Rather, plaintiff refers to the Uniform Partnership Act, which does not bind this Court.

Nowhere in DRUPA is there an unqualified right to an accounting – either before or after dissolution. DRUPA §15-807(b) states that "Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business or affairs…" There is no provision anywhere for a formal accounting.

There is no basis in law for a formal accounting and therefore summary judgment on the fifth cause of action for an accounting should be denied.

POINT III

PLAINTIFF'S MOTION TO DISMISS THE AFFIRMATIVE DEFENSES SHOULD BE DENIED

Pursuant to the Partnership Agreement, any and all claims related to the Partnership should be decided pursuant to Delaware law. Plaintiff cites only New York cases in support of its Motion to Dismiss Defendant's Affirmative Defenses.

Nevertheless, there is no basis in Delaware law for dismissal of defendant's affirmative defenses. Rule 8(c) of the Delaware Chancery Court Rules states: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense."[1] Rule 8(e)(1) of both the Delaware Chancery Court Rules and the Superior Court Rules of Civil Procedure only require that "Each averment of a pleading shall be simple, concise and direct." There is no Delaware Rule equivalent to CPLR §3013, which plaintiff cites in its memorandum of law.

Under Rule 12(f) of the Chancery Court Rules, the proper motion would have been a Motion to Strike the Affirmative Defenses. Even if the proper motion was made herein, it would be legally deficient. In James River-Pennington, Inc. v. CRSS Capital, Inc. v. James River Corporation 1995 WL 106554 (Del. Ch.) at 12, the Court held that "A Court generally views an affirmative defense as a new matter constituting a defense offered under the assumption the Complaint is true but a legal defense exists to the Complaint's assertions."

[1] Rule 8(c) of the Delaware Superior Court Rules of Civil Procedure is essentially identical, but it states "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppels, failure of consideration, fraud, illegality, injury by fellow servant, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

In Coit v. American Century Corp. 1987 WL 8458 (Del. Ch.) at 253, the Court held that the plaintiff "confuses the requirement of proper pleading with that of adducing sufficient proof at trial." The Court in Coit goes on to assert that "If the plaintiff needs to know the underlying factual basis ... the proper route is through discovery, not a motion to strike." The Verified Answer herein correctly gives the plaintiff notice of the defenses and allows for further factual investigation through the proper forum of discovery, which plaintiff is attempting to avoid by making these motions.

Regardless of the application of New York or Delaware law, the affirmative defenses have been properly pled. The Motion to Dismiss Affirmative Defenses 2 through 8 should be dismissed.

POINT IV

DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FOURTH CAUSE OF ACTION SHOULD BE GRANTED

Under Delaware law, "summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Twin Bridges L.P. v. Draper 2007 WL 2744609 (Del. Ch.) at 8. See also Zimmerman v. Crothall 2012 WL 707238 (Del. Ch.)

Plaintiff improperly asks this Court for personal damages under a derivative cause of action. Plaintiff also mischaracterizes 6 Del. C. §17-804 in the Second Amended Verified Complaint. 6 Del. C. §17-804(a) states "Upon the winding up of a limited partnership, the assets shall be distributed as follows: (1) To creditors... (2) Unless otherwise provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for

distributions... (3) Unless otherwise provided in the partnership agreement, to partners first for the return of their contributions and second representing their partnership interests..." Pursuant to the statute, plaintiff is not first entitled to the return of its contribution. Therefore, plaintiff is not entitled to the return of the $400,000.

Under this same cause of action, plaintiff makes a claim for the lost benefit from an alleged missed investment opportunity. First, these personal damages are not appropriate under a derivative cause of action. Second, plaintiff has refused to turn over any documents to demonstrate that there even was a specific investment opportunity and to prove what lost profits there were from this missed investment opportunity. In PJ King Enterprises, LLC v. Ruello 2008 WL 4120040 (Del. Super.) at , the Court held that "It is axiomatic that a claim for lost profits requires evidence of lost revenues, minus the costs associated with generating those revenues." Plaintiff objected to almost all of defendant's discovery requests, but agreed to provide documents pertaining to the supposed lost profits. However, to this date, no documents have been provided, even though defendant has continually asked for them. Rather than provide documents, plaintiff instead made these motions in an attempt to avoid participating in necessary and mandatory discovery.

CONCLUSION

For all of the reasons heretofore stated, plaintiff's motions for summary judgment and to dismiss should be denied in their entirety and defendant's motion for summary judgment on the fourth cause of action should be granted in its entirety.

Dated: New York, New York
September 4, 2012

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