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

PRESENT: EILEEN BRANSTEN Justice PART 3

Index Number : 650344/2008
SCHEPISI, HOLLY
vs.
ROBERTS, TODD
SEQUENCE NUMBER : 007
SUMMARY JUDGEMENT

INDEX NO. 650344/2008
MOTION DATE 5/2/12
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: Nov. 19 2012

EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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HOLLY SCHEPISI, NEIL McPHERSON, KEVIN DRAGAN, AEGIS ALABAMA VENTURE FUND, LP, AEGIS ALABAMA VENTURE FUND GP, LLC, AEGIS TEXAS VENTURE FUND II, LP, and AEGIS TEXAS VENTURE FUND II GP, LLC,

Plaintiffs,

-against-

TODD ROBERTS and TMR BAYHEAD SECURITIES, LLC,

Defendants.

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Index No. 650344/08
Motion Date: 5/2/12
Motion Seq. Nos.: 007, 008

BRANSTEN, J:

Motion Sequence Numbers 007 and 008 are consolidated for disposition. In Motion Sequence Number 007, plaintiffs Holly Schepisi ("Schepisi"), Neil McPherson ("McPherson"), Kevin Dragan ("Dragan") (collectively, the "Individual Plaintiffs"), Aegis Alabama Venture Fund, LP (the "Alabama Fund"), Aegis Alabama Venture Fund, GP, LLC ("Alabama GP"), Aegis Texas Venture Fund II, LP (the "Texas II Fund") and Aegis Texas Venture Fund II GP, LLC ("Texas II GP") (collectively, the "Corporate Plaintiffs") move for partial summary judgment. Defendants Todd Roberts ("Roberts") and TMR Bayhead Securities, LLC ("Bayhead") oppose.

In Motion Sequence Number 008, Plaintiffs move to dismiss Roberts' counterclaims. Roberts opposes.

I. BACKGROUND

The facts of this case were stated in detail in this court's decisions dated June 26, 2009, August 13, 2010, and May 2, 2012. The court therefore will repeat facts only as necessary.

Plaintiffs Schepisi, McPherson and Dragan, non-party Brett Hickey and Defendant Roberts were principals of a series of investment vehicles and related entities operating under the brand name "Aegis." Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Memo"), p. 8; *see also* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Def. Memo"), p. 4. Amongst these entities are Corporate Plaintiffs the Alabama Fund, Alabama GP, the Texas II Fund and Texas II GP. Pl. Memo, pp. 8-9; *see also* Def. Memo, p. 4. The Alabama Fund and the Texas II Fund are "Certified Capital Companies," otherwise known as "CAPCOs." Pl. Memo, p. 9; *see also* Def. Memo, p. 4. Alabama GP is the general partner of the Alabama Fund. Texas II GP is the general partner of the Texas II Fund.

Defendant Bayhead is a New Jersey-based licensed broker-dealer. Affidavit of Todd M. Roberts in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Roberts Aff."), ¶ 1. Bayhead is solely owned by Roberts. *Id.*

On November 8, 2007, Roberts on behalf of Bayhead and Hickey on behalf of the Texas II Fund executed an engagement letter (the "Texas II Fund Engagement Letter"). The Texas II Fund Engagement Letter confirmed that Bayhead would serve "as a financial

advisor and placement agent in connection with the initial funding of [the Texas II Fund]." Affirmation of Keara A. Bergin in Opposition to Summary Judgment ("Bergin Affirm."), Ex. 15, p. 1. Bayhead's responsibilities under the Texas II Fund Engagement Letter included finding potential investors and marketing the Texas II Fund to such investors. *Id.* As payment for its services, Bayhead was to receive "$400,000 in cash upon the closing of a transaction involving the sale of CAPCO notes in excess of $20 million." *Id.* The Texas II Engagement Letter further provided that "[the Texas II Fund] acknowledges and agrees that Todd Roberts will be performing services on behalf of Bayhead hereunder, while at the same time he is performing services on behalf of the Company as an indirect owner and a member of the [Texas II Fund's] Investment Committee. The [Texas II Fund] and Bayhead each consent to the dual role that Mr. Roberts will be playing in connection with th[e] [engagement of Bayhead], and each of them waive any conflicts of interest that might arise out of such dual role." *Id.* at p. 2.

Roberts claims that on February 12, 2008, the Alabama Fund hired Bayhead to serve "as a financial advisor and placement agent in connection with the initial funding of the [Alabama Fund]." Bergin Affirm., Ex. 26, p. 1. In an unexecuted engagement letter, the Alabama Fund agreed to pay Bayhead $250,000 in exchange for Bayhead's services. *Id.*

Roberts further asserts that, when Roberts and Hickey executed the Engagement Letters, Hickey represented to Roberts that (1) Hickey had the authority to sign the Engagement Letters on behalf of the Texas II Fund and the Alabama Fund; and (2) that the

principals of the two funds knew about and had approved the payments to Bayhead. Def. Memo, pp. 6-7; Roberts Aff., ¶ 23.

Roberts asserts that Bayhead subsequently performed the services contemplated in the Engagement Letters on behalf of the Texas II Fund and the Alabama Fund. Roberts Aff., ¶¶ 40-41. Plaintiffs dispute Roberts' claims. Bayhead received a combined total of $550,000 from the Alabama and Texas II Funds. Affidavit of Holly Schepisi in Support of Motion for Partial Summary Judgment ("Schepisi Aff."), ¶¶ 30-31.

II. ANALYSIS

A. Standard of Law

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made such a showing, the burden of proof shifts to the opposing party. *Id.*; CPLR 3212. To defeat the motion, the opposing party "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" or an acceptable reason for his failure to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Choice of Law

Texas II GP and the Texas II Fund are Delaware entities, and their Operating and Limited Partnership Agreements provide that they shall be governed by Delaware law.

Bergin Aff., Ex. 1, § 9.5 and Ex. 2, § 10.6. Alabama GP and the Alabama Fund are Alabama entities, and their Operating and Limited Partnership Agreements provide that they shall be governed by Alabama law. Bergin Aff., Ex. , § 9.5 and Ex. 4, § 10.6. Defendants implicitly argue that New York law does not apply (Def. Memo, pp. 20, 19 n. 15), but the parties do not undertake a choice of law analysis.

New York courts "enforce contractual provisions for choice of law." *Boss v. American Exp. Fin. Advisors, Inc.*, 15 A.D.3d 306, 307 (1st Dep't 2005), *aff'd* 6 N.Y.3d 242 (2006) (internal citation omitted). Moreover, "the law of the state in which an entity was incorporated . . . is controlling as to matters relating to its internal affairs." *Venturetek, L.P. v. Rand Publ. Co.*, 39 A.D.3d 317, 317 (1st Dep't 2007). The court will therefore apply Delaware law when analyzing claims related to the Texas II Fund and the Texas II GP. The court will analyze claims concerning the Alabama Fund and Alabama GP under Alabama law.

C. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs do not move for summary judgment on specific causes of action. Rather, Plaintiffs ask for partial summary judgment on several issues that they claim are determinative of multiple causes of action. Pl. Memo, p. 2 n. 3. Plaintiffs first seek summary judgment on the issue of whether the Alabama GP and Texas II GP Operating Agreements required Roberts to obtain supermajority approval from the disinterested board members of

Alabama GP and Texas II GP for the $550,000 payment to Bayhead and, if so, whether Roberts sought such approval. Plaintiffs next seek summary judgment on the issue of whether Bayhead performed any brokerage services on behalf of the Alabama and Texas II Funds in exchange for the $550,000 payment it received. Finally, Plaintiffs seek a declaration that the general partners made a good faith determination for cause to repurchase Roberts' partnership interests.

1. Supermajority Approval of Payments to Bayhead

Plaintiffs assert that Section 5.2(a) of Alabama GP's and Texas II GP's operating agreements (the "Operating Agreements") required Roberts to obtain supermajority approval of any payments to Bayhead. Plaintiffs further claim that Roberts failed to seek such approval.

Section 5.2(a), which appears in substantially identical form in both entities' Operating Agreements, provides that:

> [a]ll matters requiring the vote, consent or approval of the Members shall be determined by the affirmative vote or written consent of a simple majority of the Members; provided, however, notwithstanding the foregoing and any other provision of this Agreement to the contrary, in the event of any vote or written consent with respect to which any Member or Members has or have a conflict-of-interest . . . then, in each such case, the Member(s) that are so conflicted shall abstain from such vote or written consent, as the case may be, and such vote or written consent of the Members, for purposes of this Agreement, shall be determined by the affirmative vote or written consent of a Supermajority of the Members that are not so conflicted.

Bergin Aff., Exs. 1, 3. Plaintiffs argue that the $550,000 payment to Bayhead required supermajority approval under Section 5.2(a) because Bayhead is wholly owned by Roberts.

Defendants contend that another provision of the Operating Agreements, § 5.1, specifically exempted Roberts from Section 5.2(a)'s supermajority requirement. Section 5.1, which appears in substantially identical form in Alabama GP's and Texas II GP's Operating Agreements, states that:

> The Company, on its own behalf or on behalf of the Partnership, is hereby authorized to execute, deliver and perform, and each of Messrs. Brett A. Hickey and Todd M. Roberts, on behalf of the Company, are hereby authorized to execute and deliver, the Indenture, the Note Purchase Agreement and all documents, agreements, certificates, or financing statements contemplated thereby or related thereto, all without any further act, vote or approval of any other Person notwithstanding any other provision of this Agreement.

Bergin Aff., Exs. 1, 3.

As this court noted in its August 13, 2010 decision, Sections 5.1 and 5.2(a) both state that they apply "nowithstanding any other provision" of the Operating Agreements. Bergin Aff., Exs. 1, 3. Each provision appears to trump the other. It is, therefore, unclear whether Hickey and/or Roberts needed to obtain supermajority approval for actions that Section 5.1 would otherwise permit them to undertake "without any further act, vote or approval of any other Person." Bergin Aff., Exs. 1, 3.[1]

Furthermore, Roberts testified that the "intended purpose of Section 5.2 was to regulate the activities of the Funds after they were successfully licensed, capitalized and

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[1] The parties do not address whether the Letter Agreements and brokerage services contemplated therein fall within the language of Section 5.1. The broad language of Section 5.1 does not, on its face, definitively determine the issue.

operating . . . Prior to that time, [the] five principals anticipated and intended that only Hickey and [Roberts would] . . . have full authority to complete activities necessary to licensing and capitalization." Roberts Aff., ¶ 38. Consequently, under Roberts' interpretation, Section 5.2(a) would not have gone into effect until well after the transaction between Bayhead and the Texas II and Alabama Funds had been completed.

Alabama law provides that, "[i]f the terms of a contract are ambiguous in any way, the meaning of the contract presents a question of fact for the jury to resolve." *Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 975 (1998). Similarly, the Delaware Supreme Court has held that, "in a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (2012).

One could reasonably interpret the Section 5.1 of the Operating Agreements as exempting Roberts and Hickey from the requirements of Section 5.2(a). Conversely, one could just as reasonably interpret Section 5.2(a) as overriding Section 5.1's broad grant of authority to Hickey and Roberts. Summary judgment on the issue of whether Roberts was required to seek supermajority approval for the $550,000 payment to Bayhead is therefore inappropriate under both Alabama and Delaware law.

Because the court cannot determine whether the Bayhead transaction required supermajority approval, the court need not consider at this time whether or not Roberts obtained such approval. Plaintiffs' motion for summary judgment on the issues of whether

Roberts was required to seek supermajority approval of the $550,000 payment to Bayhead and whether Roberts obtained such approval is, therefore, denied.

2. Bayhead's Provision of Services

Plaintiffs argue that Bayhead did not actually perform any brokerage services on behalf of the Texas II or Alabama Funds. Plaintiffs contend that Bayhead's failure to perform brokerage services provides a second, independent ground for summary judgment. Pl. Memo, p. 18. In support of their argument, Plaintiffs point to the absence of documentary evidence proving that Bayhead carried out any brokerage services at all. Schepisi Aff., ¶¶ 64-71; Affidavit of Kevin Dragan in Support of Motion for Partial Summary Judgment, ¶ 5; Affidavit of Neil McPherson in Support of Motion for Partial Summary Judgment, ¶ 5.

In opposition to Plaintiffs' claims, Defendants offer Roberts' sworn testimony that Bayhead served as the Texas II and Alabama Funds' "financial advisor and placement agent." Bergin Aff., Ex. 61, 40:5-6. Roberts enumerates a detailed and extensive list of the services he claims Bayhead performed. Roberts testified that Bayhead "reviewed and assisted with the structuring of the investment notes[,] . . . interacted with the rating agencies to secure the bond ratings for those notes . . . [and] participated in the process of targeting potential purchasers for those notes and securing commitments to purchase those notes," among other services. *Id.* at 40:13-25.

To determine whether Bayhead provided the services it claims to have provided, the court would need to judge the credibility of the Individual Plaintiffs' and Roberts'

conflicting testimony. When "there are litigable issues of credibility that bear on material factual disputes, summary judgment is not appropriate." *Johnson v. Shapiro*, C.A. No. 17651, 2002 Del. Ch. LEXIS 122 at * 12 (Oct. 18, 2002); *see also Davis v. Sterne, Agee & Leach, Inc.*, 965 So. 2d 1076, 1089 (2007) (holding that "a court may not determine the credibility of witnesses on a motion for summary judgment.").

Accordingly, summary judgment on the issue of what services, if any, Bayhead performed on behalf of the Corporate Plaintiffs is denied.

3. For Cause Termination & Repurchase of Roberts' Interests

Plaintiffs' next move for summary judgment seeking a declaration that Plaintiffs had sufficient cause to (1) terminate Roberts as a limited partner of the Texas II and Alabama Funds; (2) to repurchase Roberts' limited partnership interests; and (3) to remove Roberts from the Texas II and Alabama Funds' Investment Committees.

Section 8.10 of the Texas II Fund's and the Alabama Funds' Agreement of Limited Partnership (the "Limited Partnership Agreements") provides that "the Partnership shall have the right, upon the good faith determination of the General Partner for cause, . . . to repurchase . . . any and all of the Partnership Interests held by each Partner . . . ." Bergin Aff., Exs. 2, 4.

Plaintiffs claim that Roberts' alleged failure to obtain supermajority approval of the $550,000 payment to Bayhead constituted a willful breach of his fiduciary duty to the Corporate Plaintiffs, thereby providing a sufficient basis to terminate Roberts for "cause" pursuant to the Limited Partnership Agreements. As previously discussed, Plaintiffs have

not established that Roberts was required to seek supermajority approval for the Bayhead transaction. *See* Point II(C)(1), *supra.* Material issues of factual remain regarding Roberts' alleged failure to obtain supermajority approval and whether such failure was sufficient cause for Roberts' termination. Summary judgment as to Plaintiffs' claim for a declaratory judgment is thus denied. *Johnson*, 2002 Del. Ch. LEXIS 122 at * 12 (holding that summary judgment is inappropriate when issues of material fact remained); *McGee v. McGee*, 91 So. 3d 659, 668 (2012) (holding that the court may only grant summary judgment if the movant has made "a prima facie showing that there is no genuine issue of material fact.").

D. Plaintiffs' Motion to Dismiss Roberts' Counterclaims

Roberts asserts ten counterclaims against the Individual Plaintiffs. All of Roberts' counterclaims are predicated upon the allegation that Plaintiffs terminated Roberts and repurchased his partnership interests without adequate cause and/or in bad faith. Plaintiffs concede that "[i]f the Court finds . . . that issues of fact preclude summary judgment on Plaintiffs' claims, then the Court should not dismiss Roberts' counterclaims." Memorandum of Law in Support of Plaintiffs' Motion to Dismiss Roberts' Counterclaims, p. 3. As previously discussed, the court has determined that issues of fact preclude summary judgment of Plaintiffs' claims. *See* Points II(C)(1)-(3), *supra.* The question of whether Plaintiffs terminated Roberts and repurchased his partnership interest in good faith and for cause involves issues of fact not appropriate for resolution on a motion to dismiss. Accordingly, Plaintiffs' motion to dismiss Roberts' counterclaims is denied.

III. CONCLUSION

For the reasons set forth above, it is hereby;

ORDERED that Plaintiffs Holly Schepisi, Neil McPherson, Kevin Dragan, Aegis Alabama Venture Fund, LP, Aegis Alabama Venture Fund GP, LLC, Aegis Texas Venture Fund II, LP and Aegis Texas Venture Fund II GP, LLC's motion for partial summary judgment, Motion Sequence Number 007, is denied; and it is further

ORDERED that Plaintiffs' motion to dismiss Defendants Todd Roberts' amended counterclaims, Motion Sequence Number 008, is denied; and it is further

ORDERED that plaintiffs are directed to serve an answer to the amended counterclaims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on December 11, 2012, at 10am.

Dated: New York, New York
November 19, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.