SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 48

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LCM HOLDINGS GP, LLC

Plaintiff

- against - Ind. No. 652878/12

LAURENT IMBERT

Defendant

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60 Centre Street
New York, New York
October 24, 2012

B E F O R E :

HONORABLE JEFFREY K. OING

Justice

A P P E A R A N C E S :

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Kathy Y. Jones
Official Court Reporter

Proceedings

THE COURT: The Court has before it the matter of LCM Holdings GP, LLC, versus Laurent Imbert. Index number 652878 of 2012.

This is motion sequence number one by defendant to compel arbitration on one hand and alternatively also seeking summary judgment or dismissal with respect to the fourth cause of action which seeks a declaratory judgment.

Would the parties enter their appearances for the record.

For the plaintiff.

MR. CORWIN: Good morning, your Honor. Leslie Corwin of Greenberg Traurig and with me is Caroline Heller also of Greenberg Traurig.

THE COURT: For defendants.

MR. FLEMING: Good morning, your Honor. Thomas Fleming of Olshan and with me is Renee Zaytsen from my firm.

THE COURT: Before we get started, there is a stipulation that I signed off on yesterday that I think resolves about maybe three quarters of the motion that I have in front of me.

MR. CORWIN: It does, your Honor.

THE COURT: Let me just have them for the record.

Proceedings

The order to show cause that was brought in and was signed off by Justice Sherwood. The first one sought to seeks pursuant to CPLR 7503(a) directing the parties to arbitrate before the Financial Industry Regulatory Authority the claims asserted in the complaint relating to defendant's business expenses incurred with Louis Capital Markets LP a broker dealer and FINRA member, the business expense claims in staying the proceeding insofar as they relate to the expense claims pending the arbitration. That's the first relief sought.

The second, third relief are virtually arising out of that business expense claim; is that correct?

MR. FLEMING: That's correct. Those all resolved.

THE COURT: Those are all resolved and they are out.

MR. FLEMING: Right.

THE COURT: So, the only remaining branch I have to look at is four and five which is alternative relief. One is dismissing the fourth cause of action or the fifth one seeking summary judgment on the fourth cause of action in your favor, defendant's favor.

MR. FLEMING: Correct, your Honor.

THE COURT: This is your order to show cause.

So, tell me, well, first of all, there is an

amended complaint that is going to be filed or has been filed.

MR. FLEMING: Correct. There is an amended complaint that adds another limited liability company defendant -- plaintiff to the caption.

THE COURT: But virtually the causes of action that are remaining, the fraud, I think -- those are still the same.

MR. CORWIN: Right. Whether it's one company or the other company, we now have before the court all parties that need -- that are needed with respect to the remaining causes of action in the complaint.

THE COURT: I just want to make sure that -- hold on one second.

So, I have for the record here except for the business expense claims.

MR. CORWIN: Correct.

THE COURT: The remaining causes of actions that we have here, first cause of action is breach of contract, obligation of fiduciary duty.

Second cause of action is unjust enrichment.

Third cause of action is fraud.

Fourth cause of action is the declaratory judgment.

So, essentially virtually stay the same.

MR. CORWIN: They stay the same, your Honor. Now that your Honor has signed the stipulation, we will file the amended with the court.

THE COURT: I think we can still go forward with respect to the fourth cause of action.

MR. FLEMING: One of the housekeeping details, we will need to do a stipulation to amend the caption, the current stipulation neglected that, so we can put both plaintiffs in the caption.

MR. CORWIN: I think for your Honor's purposes we are all in agreement on that.

THE COURT: That's unusual but that's good.

So, now turning to the matter at hand, counselor, you are looking for either dismissal of the fourth cause of action or summary judgment. Tell me why I should do one or the other.

MR. FLEMING: I would be glad to.

Your Honor, Thomas Fleming for the defendant Laurent Imbert.

The plaintiffs are two Delaware limited liabilities companies who together own a broker dealer called Louis Capital Markets. They both have parallel marketing agreements meaning the agreements are essentially the same other than the name and title. They are both signed in 2010.

Mr. Imbert is named as a manager in both of the agreements along with two other gentlemen. He was until June of this year the chief executive officer of Louis Capital Markets.

The first three counts are asserted against Mr. Laurent Imbert on the theory that he received fax distributions improperly and we'll get to those later on.

Today the fourth count is what we're addressing which asks for a ruling of declaratory judgment that Mr. Imbert is compelled to give up his membership shares which are quite valuable, a significant share of the company at a, you know, arbitrary price or price that he doesn't accept.

THE COURT: That's a result of a June 21, 2012, letter that Mr. Imbert received saying that you're fired and also not only are you fired but you are no longer a manager.

MR. FLEMING: Correct. On June 21, he received a letter stating that he is no longer a manager and what's not disputed, is that the treatment of his membership shares are determined by the operating agreement.

Under Delaware law there is no ability to strip a member of his property nor is there anything in the limited liability statute that gives managers the power to do that unilaterally, only if it's been agreed to --

THE COURT: Specifically, the provision that we're looking at is paragraph or section 10.03, transfers upon terminating of employment and it provides, in the event that the employment of a member other than a manager with the company or one of it's affiliates is terminated for any reason, such member shall immediately offer to transfer all of his membership shares in accordance with section 10.05.

Your argument is that at the time he was a manager. Therefore, 10.03 doesn't apply to him.

MR. FLEMING: Correct, Your Honor. It's that simple.

THE COURT: Well, it's not that simple.

Go ahead.

MR. FLEMING: The agreement makes clear that managers are to be treated differently than members and if you take a look --

THE COURT: But what happens though if there is a simultaneous terminating of that status?

MR. FLEMING: Of a manager.

THE COURT: Yes. This individual here Mr. Imbert was both an employee, CEO and a manager. What happens in the event there is a simultaneous termination of both status.

MR. FLEMING: What's clear is if he's a manager

which means there is only three managers.

THE COURT: I have questions for you too, Mr. Corwin.

MR. CORWIN: I understand, Judge.

MR. FLEMING: If he's a manager, there is no for sale. I would ask the Court to --

THE COURT: I understand that if he's a manager but I'm saying I got this June 2012 letter which says you are terminated as a CEO and you are no longer a manager. So, what happens -- it's almost as if it's like a will situation where you would have simultaneous deaths. Who goes first?

MR. FLEMING: I was about to go there, your Honor, because the agreement has another provision that deals with different treatments between members and managers. If he died as a manager, the agreement says there is one treatment upon the death of a member other than the manager and then there is another provision 10.02(c) which deals with the death of a manager. When a manager dies, he gets to keep his sales.

THE COURT: What's interesting is I looked at this Article 10 backwards and forwards last night. I did not see a provision in here which talks about where a manager is removed for cause what happens in that situation.

MR. FLEMING: It's very simple what happens, your Honor. He gets to keep his shares. The agreement provides that the manager gets to keep his shares just like on death of a manager, the manager gets to retain his shares.

THE COURT: What statute are you pointing to or relying on that says that?

MR. FLEMING: What I'm relying on is that the agreement --

THE COURT: The agreement is silent. So, you have to rely on something.

MR. FLEMING: The agreement is silent as to that, your Honor. It can only happen by virtue of the agreement.

So, the parties never agreed to strip a manager of his shares. And absent an agreement to do so, he doesn't lose his shares.

THE COURT: So, you're saying that if a manager is removed pursuant to 4.07 he gets to keep his shares.

MR. FLEMING: Precisely, your Honor, as if he had died. Under 10.02(c), if he dies, he gets to keep his shares.

THE COURT: Death and misconduct are two different things I think in the eyes of the church or whatever religious institution.

MR. FLEMING: Well, the Delaware statute and Delaware common law provides for no forfeiture or exposure for wrongdoing. That concept doesn't exist.

So, if the parties want to incorporate, they have to do that expressly and they haven't done it here.

Keep in mind that the managers own most of this company. They could easily have written in something that said if one of us goes this is what happens. They didn't do that and they made a clear distinction between treatment of managers versus the other members who were employees who would get 1 or 2 percent of the company by virtue of their service and might be fired or might retire or various other things might happen to them and they set up a buyout mechanism that was workable for employees who were in effect granted shares or interest as part of their performance and incentive compensation. But the manager and founders, they own 80 percent, maybe 90 percent of this company. They have interest worth millions of dollars. There's no compulsory sale. There's no mechanism that would establish a fair price.

THE COURT: If that's the cases, why do you have to say other than manager?

If you would just say if an employer self terminated, you have to give me back your shares. Why do you have to say other than manager?

MR. FLEMING: Which means at the time they signed it it's not clear whether other members will be admitted and over the course of these agreements like this they may admit employees as additional members and in fact they add another provision at the end designating something called operational members.

THE COURT: I saw that.

He's not an operational member.

MR. FLEMING: He is not an operational member. No question about that but they created the flexibility that if you gave interest or sold interest to people who weren't managers and they later left the company that the company would have the right to buy them back under this special appraisal process but for managers they provided no such mechanism and absent an agreement compelling somebody to transfer their property.

THE COURT: What's the Delaware law case that says no forfeiture for misconduct?

MR. FLEMING: It's cited in our brief, your Honor. Walker versus RES Development company, your Honor. They took the position there that the member shares was subject to the forfeiture.

THE COURT: You looking at your memo of law?

MR. FLEMING: Yes, your Honor, page 16.

THE COURT: Thank you.

This is where I have it marked. Walker, right.

Do you have a copy of the case handy?

MR. FLEMING: I am sorry, I don't, your Honor.

THE COURT: I got it. Hold on a second. All right. That's where we're at at this point. I heard your argument.

MR. FLEMING: Yes, your Honor. I think the Delaware law -- there is no case in Delaware that's ever heard that by virtue of bad acts or subject to the forfeiture. The Walker case specifically holds that absent an agreement to that affect a member can't be deprived of his shares.

THE COURT: Counsel.

MR. CORWIN: Leslie Corwin for the plaintiff.

Thank you, your Honor.

I listened to your Honor's questions and I think that what comes to light here and I think the Walker case which we've been discussing, if you read what's in their brief, that obviously has to do with the fact that it isn't addressed in the operating agreement. We believe it is addressed in the operating agreement.

Now, I think Mr. Fleming and I would probably agree on another thing. This isn't the best drawn up operating agreement. Neither of our firms did it. It is what it is. I certainly believe based on the facts and

circumstances of this situation and what was the intention here if you read 10.03, if you look in the definition section, Your Honor, of who a member is, it talks about the three people who were the members. Those are who the managers are. They were members.

It's clear based on the acts that -- and remember this all started out with bad acts on behalf of the defendant in this action. He was terminated. If you even look at his own letter, your Honor, he says he's giving up all positions.

THE COURT: Mr. Core, but you know what, interesting enough we may be jumping the gun here in a sense that although the company has a right under the operating agreement to remove the defendant as a manager, whatever right it has, but 4.07 which provides for removal of a manager provides as follows: A manager status as a manager of the company may be terminated by a vote of the majority of the board but only if such manager (i) is convicted of a felony which we don't have in this case (ii) commits any act or theft and/or fraud with respect to the company and (iii) is found guilty of any material violation including assisting any customer in the violations of any state or federal securities law or regulation or any applicable rule or regulation of self regulatory organization which results in revocation or

suspension for more than 12 consecutive months of such manager's securities license.

So, the most important portion of what I read here is double I.

MR. CORWIN: Correct.

THE COURT: It's any act of theft and/or fraud with respect to the company.

That's the entire case I have in front of me. There's been no finding yet. So that if there is no finding, any removal at this point is exactly that. It's tenuous. It's still sort of in court.

MR. CORWIN: With all due respect, your Honor, you are correct that is an issue and we think this all started because this was a theft and it was an intentional and everything else.

THE COURT: Right.

MR. CORWIN: But the fact is that it clearly was -- the intention under the agreement that if someone like Mr. Imbert who was a member and is defined there was to be removed and terminated and there is no dispute with respect to that, he doesn't keep an interest in the company. He in fact -- they admit in our papers, it would be nonsensical, your Honor, for somebody in his position. In fact, that's what he's doing right now, is trying to compete with the company, trying to set up his own

business. That was clearly never the intention that he would have an interest in.

THE COURT: If I were inclined to agree with you and agree with you absolutely that this operating agreement upon removal of a manager you have to -- you give up your shares, you turn in your shares, if I were inclined to agree with you, before I would agree with you, then I would want to know or at least would want to have a finding of sorts that he actually did the act that he is accused of such as to justify his removal because ultimately, if I go forward with this case, if this case goes forward and the finding is that the remaining three cause of actions are not sustained and plaintiff doesn't prevail on it, then he has to be reinstated as a manager, don't you think?

MR. CORWIN: No. That's the whole point. He said even though I don't agree with -- look at his letter. You have it before you. I give up all of my positions. Had he fought that, you are absolutely right, your Honor, we wouldn't have that cause of action.

THE COURT: Well, he's fighting it now.

MR. CORWIN: Because he retained counsel and he went out and he's doing this. Why -- where did he write a check, your Honor, for $740,000? Why did he write the letter that he did?

THE COURT: The letter is interesting for what it doesn't say. It doesn't say that I relinquish my shares to the LLC and it doesn't say that I am now turning over my shares and it doesn't say that I agree with you in terms of -- in terms of the removing. It doesn't say those buzz words. It just says I'm turning over all my positions that I have with the LLC. I am relinquishing my position. But what does that mean?

MR. CORWIN: And that's why I think we are going to unfortunately have to go outside the four corners of the agreement that's before your Honor and you are going to have to take testimony with respect to that.

All we're here is on a motion for summary judgment or to dismiss. As we all know under the Court of Appeals guidelines, especially dealing with documentary evidence, there are liberal standards and everything else.

In fact, as I said in my papers, were you to interpret this agreement my way, you could give us reverse summary judgment under 3212(b).

I think for the purposes of where we are right now, we could go on and on. There are clearly issues of fact with respect to this agreement, what it says, what it means, what Delaware law says.

If you go to the Delaware statute that they

define 18- I think it's 603 which we are all familiar with given it's all premised on does the agreement say what you think it says or it doesn't. Clearly, if there is no agreement, he's right, you can't throw somebody out for forfeiture but I say here that this agreement was and the intent was and because they would be in competition with each other, the intent was he would have to give up his interest.

THE COURT: My problem is that if in fact defense counsel argues that the only way you remove a person who is a manager, that doesn't mean that he gives up his shares. The only time it passes on like it's almost essentially like if you remove a manager, it essentially equates that with death of a manager and I'm not so sure I'm going with that because as I pointed out, you know, 10. -- my only comment is that 10.03 makes that exception. It says in the event of employment of a member other than a manager.

That to me is why do you even need to put that phrase in there, that qualifying language in there? If it's an employee, it's an employee. You don't need to put other than a manager. So, that if it's a simultaneous termination of the status of both employee and well as manager, does that mean then 10.03 gets triggered?

I don't know. Suffice to say.

MR. CORWIN: And then of course after that you have 10.10 and what the implications with that and what he should have done. I mean, we can go on and on as I said with this agreement which neither of us drafted but I guess us and the Court are stuck with right now.

THE COURT: It's a great law school agreement.

Response, defense counsel, briefly.

MR. FLEMING: Thank you, your Honor.

Just to be clear, your Honor, there are three possible categories of members. Members are simply shareholders, people who own a piece of the action. But you can be in a member just an investor.

THE COURT: Silent partner as they say.

MR. FLEMING: You could be a member who was an employee or you could be a member such as Mr. Imbert who was a manager and there were three managers and you could add new managers. All those things were possible.

The fact that he is a member and a manager is not particularly surprising because that's all the manager is going to be. He is also a founder.

What the agreement does in 10.01, 10.02, 10.03 is lay out what it takes to and under what circumstances shares can be transferred. 10.01 says unless you comply with 10.01, any transfer is void, and it says you can't

do anything not permitted by 10.01 or by Article 10.

10.02 on death draws a distinction between managers and members and 10.03 creates a rule for members who happen to be employees other than managers. If you wanted to carve out managers from 10.03, you couldn't have chosen better words to do so.

The intent is I respectfully submit that the managers who own most of the equity in this would get to retain their interest and become passive investors in the event of a lost in management position and not be subject to a forced sale at an arbitrary price to which they never agreed.

Also on the resignation letter, your Honor, the resignation letter, obviously Mr. Imbert had no choice but to send that. He disputed the termination but he wanted to make clear that he no longer had business ties with the company, that he wasn't a manager there, so he could go get a job elsewhere and not be subject to the claim and uncertainties.

THE COURT: I'm glad I looked at the Walker case. You know what the procedure process of the Walker case was?

MR. FLEMING: Not offhand, your Honor.

MR. CORWIN: Thank you, your Honor.

THE COURT: I like to look at stuff.

So, although you rely on of it and it's probably good case law in terms of what you're arguing, ultimately, it's the prior fact that makes those assessments at the end of the day.

MR. FLEMING: The starting point is a contract case, Your Honor. The starting point is the language of the contract.

THE COURT: It's a contract case but it has fiduciary qualifications that ordinary contracts do not necessarily have. Arms length contracts, especially the kind that I deal with every day emanating from Wall Street are not -- they don't have the fiduciary ingredient that LLC operating agreements tend to have with respect to three members and all this other stuff. There is a lot of interesting -- there is a lot of interplay in that.

I only say that to the contrary that although your arguments may have much weight and much credance but at the end of the day it's for a trier of fact to figure out after discovery as Mr. Corwin has indicated goes forward and we'll see what happens.

Ultimately, as I mentioned earlier, you know, 4.07 might not be satisfied. He's arguing to me that it has been or it can be but I'm not so sure because if it's not satisfied, there is no removal. So, we're done. I mean, your case is over.

MR. FLEMING: I think we will be able to persuade you that it wasn't satisfied.

THE COURT: Having said that, this is my decision and order with respect to that branch of the motions for either dismissal of the fourth cause of action, that branch seeking dismissal of the fourth cause of action is denied.

With respect to that branch of the motion seeking summary judgment on the fourth cause of action, that is also denied on the grounds that I find that based on the arguments here that there is a factual issue at least concerning whether or not the defendant has been properly removed or is -- can be shown that he should be removed or still remains removed although he has technically according to plaintiff's counsel they've already sent a letter saying that he's been removed and the second aspect is whether or not his removal requires him to turn over the shares in the LLC or not and that the operating agreement itself is clearly as Mr. Corwin indicated not a work of art, a legal work of art. It requires a lot of looking at and some discovery.

Accordingly, that's my decision with respect to those two branches of the motion. They are denied.

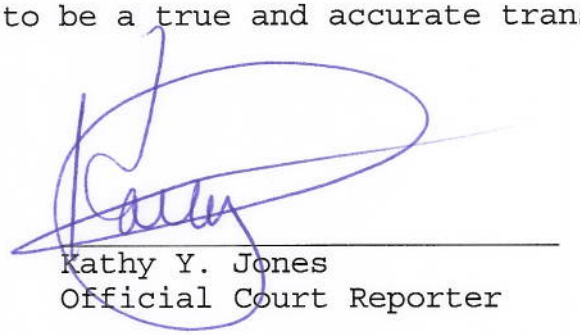
Since you are the moving party, please order the transcript. I'll so order it.

11/16/12 So Ordered

JEFFREY K. OING
J.S.C.

C E R T I F I C A T E

Certified to be a true and accurate transcript of the proceedings.



Kathy Y. Jones
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