

Human Nature Law Vegas Inc v Gildea
2018 NY Slip Op 30507(U)
March 23, 2018
Supreme Court, New York County
Docket Number: 653611/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HUMAN NATURE LAW VEGAS INC, individually
And derivatively on behalf of H.N. ENTERTAINMENT
US LLC,

Plaintiff,

Index No.: 653611/2015

-against-

SCOTT GILDEA, GILDEA & IVANIS LLP and
DANIEL CHOUKA

Defendants.

HN ENTERTAINMENT US LLC
Nominal Defendant

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MELISSA A. CRANE, J.S.C.:

This motion concerns Plaintiff Human Nature Law Vegas Inc. (“HNLVI”)’s ability to assert a derivative claim for conversion. HNLV brings this action individually and derivatively on behalf of H.N. Entertainment US LLC. (“HNEUS”), against Scott Gildea, Gildea & Ivanis LLP (collectively “Gildea defendants”) and Daniel Chouka. HNLVI is a member of HNEUS. The essence of this dispute is plaintiff’s claim that the Gildea defendants transferred \$1.4 million out of HNEUS’s bank account without approval.

Under HNEUS’ operating agreement, there are two management groups, the HNLVI managers and the “ROE” managers. The three ROE managers include defendant Daniel Chouka, who is currently in default in this lawsuit, and Jonas Nielson. Under section 5.2 of the LLC agreement, two out of three of the ROE managers must agree to bring a lawsuit:

Decision Requiring Majority Vote or Consent of Managers: Key Decisions
Requiring Majority Vote of ROE Managers.
Without limiting the generality of Section 5.1, but subject to Sections 5.3 and 5.4, the Managers shall have the power and authority, on behalf of the Company and any other entity controlled by the Company (a ‘Controlled Subsidiary’) to take

action upon the majority vote or consent of the Managers. Notwithstanding the foregoing, for each of the actions specified below, referred to as “Key Decisions,” in addition to the approval of a majority of the Managers, at least a majority of the ROE Managers must approve such action: . . .

(k) commence or settle any litigation or arbitration or hire or terminate any counsel in connection with such litigation or arbitration.”

Believing that demand would be futile, HNLVI brought this action without making a pre-suit demand on HNEUS. The Gildea defendants answered this first complaint and exchanged written discovery with plaintiff. In August 2016, HNLVI moved for partial summary judgment against the Gildea defendants on its conversion claim. The Gildea defendants cross-moved to dismiss on the grounds that HNLVI did not sufficiently plead demand futility, thus requiring dismissal of the derivative causes of action.

At oral argument in December 2016, the court (Rakower J.) denied the motion for summary judgment and granted dismissal without prejudice finding that the complaint did not adequately plead demand futility.

HNLVI then served a demand on all managers, including each of the ROE managers. Chouka responded that he would not approve. ROE manager Nielson did not respond. The demand letter deemed a lack of response the equivalent of no approval. Accordingly, plaintiff then amended the complaint to assert demand refusal instead of demand futility.

The Gildea defendants again moved to dismiss (motion seq no. 2). They argue that HNLVI has no standing to sue derivatively, despite the demand and refusal. They reason that, under section 5.2 of the operating agreement, plaintiff cannot bring a derivative lawsuit under any circumstances without approval of the majority of ROE managers, which plaintiff clearly does not have and will never obtain. Plaintiff cross moved to renew its earlier motion for partial summary judgment. However, as the court had earlier denied that motion with leave to replead,

the court's denial was without prejudice. Accordingly, the court deems the cross-motion a new motion for summary judgment.

HNEUS is a Nevada limited liability corporation ("LLC"). The parties do not dispute that Nevada LLC law applies. Nevada LLC law permits a LLC member to recover for the company where managers have refused to bring the action. This is the case unless the LLC operating agreement prohibits such action:

A member, including a noneconomic member unless otherwise prohibited by the terms of the articles of organization or operating agreement, may bring an action in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

Nevada Business Associations Law § 86.483 (*emphasis added*).

Accordingly, under Nevada LLC law, a member may bring a derivative action "unless otherwise prohibited" (*see also, Nama Holdings LLC v Greenberg Traurig, LLP.*, 62 AD3d 578 [1st Dep't 2009]; *Compare LNYC Loft, LLC v. Hudson Opportunity Fund I, LLC*, 154 A.D.3d 109 n. 1 [1st Dep't 2017] ["New York has not adopted the Uniform Act, though parties are free to incorporate similar provisions into their operating agreements. It should be noted that even in a state subscribing to the Uniform Act, parties can prohibit the use of SLCs by explicit provision in their operating agreement, rendering section 805 inapplicable"]).

Here, plaintiff has met the Nevada statute's conditions to initiate a derivative lawsuit: (1) the managers have refused to take action; and (2) nothing in the operating agreement prohibits a derivative claim.

The Gildea defendants argue the language in the operating agreement that "at least a majority of the ROE Managers must approve such action," prohibits plaintiffs from bringing their conversion claim without that approval. However, the use of the word "must" in the

context of approving a lawsuit generally, does not mean the parties contemplated to “otherwise prohibit” a derivative suit where demand has been refused. Accordingly, the court denies the Gildea defendant’s motion to dismiss for lack of standing.

Defendants contend that the cross motion for partial summary judgment should be denied because they have not yet answered the amended complaint. Notably, plaintiff has made a *prima facie* case for conversion in this case. The evidence set forth in the original summary judgment motion establishes *prima facie* that the Gildea defendants transferred almost \$1.4 million without approval from an HNLVI manager. The Gildea defendants have failed to interpose any substantive defense on this motion to plaintiff’s conversion claim. Perhaps the procedural posture of this motion is the reason why defendants have failed to counter showing. Accordingly, in an abundance of caution, the court denies plaintiff’s summary judgment motion without prejudice, until after the Gildea defendants have answered the amended complaint.. Accordingly, it is

ORDERED THAT the Gildea defendant’s motion to dismiss is denied: and it is further

ORDERED THAT plaintiff’s cross-motion for partial summary judgment is denied without prejudice: and it is further

ORDERED THAT Defendants must answer the complaint in 20 days from the e-file date of this decision and order and the parties are to appear for a conference on May 22, 2018 at 2:15 p.m. at the courthouse located at 71 Thomas Street, room 304.

Dated: New York, NY
March 23, 2018

ENTER:



J.S.C

HON. MELISSA A. CRANE
J.S.C.