

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

KAROLINE MOLBERG as Executor of the ESTATE OF ERIK MOLBERG, individually and derivatively on behalf of PHOENIX HOLDCO LP, and BLUE BEAR LTD,

Plaintiffs,

- v -

PHOENIX CAYMAN LTD. and VISHAL GARG,

Defendants.

Table with 2 columns: Field Name, Value. INDEX NO. 653841/2023, MOTION DATE, MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

On October 18, 2023, the Court heard oral argument on defendants’ Motion Sequence 002 to dismiss. In accordance with the decision on the Transcript of Proceedings of October 18, 2023, and as further elaborated here, the motion is denied.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, “the facts as alleged fit within any cognizable legal theory ... Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law ...” Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

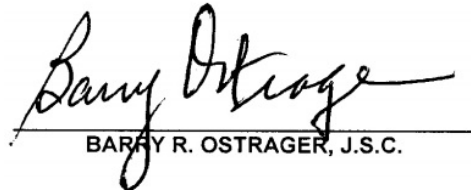
Plaintiffs allege that a Supermajority in Interest voted to remove defendant Phoenix Cayman Ltd., the General Partner of the Phoenix Holdco Limited Partnership, with cause pursuant to section 6.1(d) of the LPA, for failure to provide certain financial documents under section 8.2 of the LPA. “Cause” is defined as meaning the General Partner “has committed a knowing, willful and material breach of this Agreement that is not cured within 30 days after the

General Partner's receipt of a notice from the Partnership with respect to such breach." NYSCEF Doc. No. 5. Plaintiffs assert that a letter sent on April 28, 2023 satisfied the notice provision. NYSCEF Doc. No. 6. Defendants contend the purported notice was insufficient, the removal of the General Partner was ineffective as a result of the insufficient notice, and that the case must therefore be dismissed.

The documentary evidence does not irrefutably preclude plaintiff's claim. The April 28, 2023 communication sufficiently put defendants on notice that the LPA's thirty-day cure period was being triggered. Defendants do not cite to any authority supporting the proposition that failure to specifically reference the 30-day cure period or the cure period provision in the LPA, on its own, is sufficient to invalidate a notice. *See, e.g., Filmtrucks, Inc. v. Express Industries and Terminal Corporation*, 127 A.D.2d 509 (1st Dept. 1987) (finding that the correspondence at issue did not constitute proper notice to cure because it included ambiguous and non-imperative language, it was not sent by the proper party pursuant to the terms of the contract, and it failed to advise of the cure period and/or relevant provision in the contract). To determine whether a preliminary notice is sufficient, the standard is "one of reasonableness in view of the attendant circumstances." *D.K. Property, Inc. v. Mekong Restaurant Corp.*, 187 Misc.2d 610, 611 (App. Term. 2001). Considering the attendant circumstances in this case—the multiple correspondences from limited partners requesting the financials at issue, the ongoing lawsuit captioned *Black v. Phoenix* (index number 652460/2020) based on the same set of facts, and the fact that the April 28, 2023 correspondence was imperative in its demand for the documents and the cited basis for these documents—the April 28, 2023 Notice sufficiently notified defendants that the contractual cure period was being triggered.

The April 28, 2023 Notice also sufficiently identified the existence of a breach of the LPA. Dismissal of the action would be premature because there are questions of fact in this case as to whether the purported breach identified in the April 28, 2023 Notice was “knowing, willful, or material” (i.e., whether plaintiffs had cause to remove the defendant General Partner). Accordingly, at the November 6, 2023 hearing on plaintiff’s pending Motion Sequence 001 for a Preliminary Injunction, the parties need not address the issue of sufficiency of notice.

Dated: October 18, 2023


 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: