

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp x Dec _____ Seq. No. 1 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
RICHARD D. SEGAL,

Index No.74512/2024

Plaintiff,

-against-

DECISION AND ORDER

RETHINK CAPITAL PARTNERS, INC., DOUGLAS
F. RAY, JONATHAN L. WINER, MICHAEL
WALDEN, SHAK CHOWDHURY, and ANDERSON
TAX, LLC,

Defendants.

-----X

The following papers numbered 1 to 5 were read on this
motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmations and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

Defendant Andersen Tax, LLC ("Andersen") brings its motion seeking to dismiss the complaint as against it based on failure to state a claim and documentary evidence.

The facts are as follows, as set forth in the complaint.
In April 2022, plaintiff and defendants Rethink Capital

Partners, Inc. (the "Company"), Ray, Walden and Winer entered into a Separation and Release Agreement (the "Separation Agreement") that provided that plaintiff would resign from his management position with the Company. The complaint alleges that "Under Paragraph 6 of the Separation Agreement," at the end of a two-year period, plaintiff would "withdraw as a Class A member of the Company and the Company was to purchase his membership interest in accordance with Section 10.6 of the Company's Operating Agreement." It further alleges that "Under Section 10.6(c), the purchase price (the 'Purchase Price') shall be 'the fair value of the Affected Class A membership interest immediately following the Purchase Event as determined by an independent valuation expert who is experienced in valuing companies such as the Company who is mutually agreed upon by the Manager and the selling Class A member. Such valuation expert shall be directed by the Manager and selling Class A Member to promptly prepare a written report of his determination.'"

In July 2024, Ray, Winer and Walden "caused the Company" to enter into an agreement with Andersen. According to the complaint, "Despite being retained by the Company, and despite Plaintiff still being a member of the Company," plaintiff was excluded "from all of their communications with Andersen and insisted that all communication between Plaintiff and Andersen go through the Company even though Plaintiff was entitled to

participate in conversations and document sharing with Andersen by virtue of his then-membership." In October 2024, Andersen issued a valuation report (the "Report") setting forth "the purported fair market value of Plaintiff's 40.9091% Class A interest as of April 15, 2024 at \$4,740,000.00." This is nearly the same price at which defendants valued "half of Plaintiff's membership interest in April 2022 when the Separation Agreement was executed." In the Report, Andersen stated that it "has relied upon information furnished by others, which is believed to be reliable. We have not independently verified the accuracy or completeness of the information" and "that Andersen primarily relied upon: "Discussions with Management," and "A forecast developed by Management."

"After receiving the Valuation Report, Plaintiff discovered that the projections and forecasts provided to Andersen are not conceivably reasonable or realistic. The forecast was not consistent with the Company's historical performance, current business operations or future prospects and was materially misleading." Plaintiff asserts that defendants "used their control of the valuation process to depress the value of Plaintiff's membership interest."

Plaintiff complains that Andersen failed to use "independent and objective judgment in reaching conclusions;" failed to "maintain objectivity and be free of conflicts of

interest in discharging professional responsibilities;" and was not "an independent or objective valuation expert" because it "took direction solely from the Company . . . excluded Plaintiff from conversations and meetings through which the Valuation Report was developed and precluded Plaintiff from giving input in the documents Andersen used to prepare the Valuation Report." Plaintiff also alleges that "Andersen accepted the information provided by the Company without independently verifying or assessing it and followed the Company's instructions, even though Andersen knew that the information was inconsistent with historical financials and the instructions were inconsistent with the valuation requirements of section 10.6 of the Operating Agreement," and that the "Report deviated from generally accepted valuation practices so strongly that it expressly disclaimed the reliability of the valuation as an indicator of a fair price for Plaintiff's membership interest."

There are four causes of action against Andersen: (1) aiding and abetting breach of fiduciary duty, because, knowing of defendants' fiduciary duty to plaintiff, Andersen created "inaccurate and misleading projections, excluding Plaintiff from the valuation process and preparing a valuation report that blatantly failed to comply with the requirements of the Operating Agreement. Anderson [sic] also failed to uphold the objectivity and independence required by an appraiser, taking

direction exclusively from the other Defendants, and issuing a Valuation Report that lowered the value of Plaintiff's membership interest based on projections that were so unreasonable and unreliable that even though Andersen disclaimed that it was not 'verifying' the data, any appraiser would have known the projections were misleading and that the valuation was being done under the wrong valuation standard and wrong valuation data;" (2) civil conspiracy as to all defendants, based on the fiduciary duties of the individual defendants, who "owe fiduciary duties, owe contractual obligations, and owe the duty of good faith and fair dealing to Plaintiff," yet "conspired with each other and with Chowdhury and Andersen to defraud Plaintiff and acquire his membership interest for a lower value." They did so, according to the complaint, when they "created inaccurate and misleading projections, excluded Plaintiff from the valuation process, and prepared a valuation report that blatantly failed to comply with the requirements of the Operating Agreement, failed to comply with generally accepted valuation methodologies, and understated the value of Plaintiff's membership interest," and then "Andersen knowingly accepted those facially deficient representations and looked the other way in the face of obvious omissions;" (3) breach of contract because "Plaintiff is an intended third-party beneficiary of Defendant Andersen's Valuation Agreement with the

Company insofar as Plaintiff's claim concerns an impairment of Plaintiff's right to a valuation of his membership interest under the Operating Agreement. Defendant Andersen knew that Plaintiff would benefit from the Valuation Agreement and that Plaintiff could be harmed by Defendant Andersen's breach of the Valuation Agreement." Plaintiff further alleges that "Andersen assumed the obligations of a valuation expert under Section 10.6 of the Operating Agreement to independently value Plaintiff's membership interest at the fair value of the interest as of Purchase Event occurring on October 15, 2024," but "breached the Valuation Agreement by failing to comply with the obligations set forth in Section 10.6 of the Operating Agreement, including by valuing Plaintiff's membership interest as the 'fair market value' rather than its 'fair value,' by valuing Plaintiff's membership interest as of April 15, 2024, and not as of the Purchase Event, by failing to maintain independence in its valuation, and by dishonestly preparing a flawed valuation in a manner inconsistent with generally accepted valuation principles and methodologies;" and (4) as to all defendants, a declaratory judgment. Plaintiff alleges that "A bona fide, justiciable, and substantial controversy exists between Plaintiff and Defendants as to the validity of the Valuation Report based on Defendants' improper efforts to artificially minimize the value of Plaintiff's membership interest in the Company. As alleged

herein, Andersen's valuation of the Company is invalid because the valuation does not satisfy the requirements of the Operating Agreement. Plaintiff has no adequate remedy at law for such harms and accordingly requires a remedy in the form of declaratory relief. Accordingly, Plaintiff seeks a judicial determination that the Valuation Report is invalid."

The Court begins by examining the section of the Operating Agreement, 10.6(c), that everyone agrees is the relevant section.¹ This section provides that

The purchase price ("Purchase Price") of an affected Class A Membership Interest to be purchased and sold pursuant to this Section 10.6 (the "Affected Class A Membership Interest") shall be the fair value of the Affected Class A Membership Interest immediately following the Purchase Event as determined by an independent valuation expert who is experienced in valuing companies such as the Company **who is mutually agreed upon by the Manager and the selling Class A Member** to promptly prepare a written report of his determination (the "Valuation Report"). **In the event that the Manager and the selling Class A Member cannot agree upon a valuation expert meeting the above criteria within thirty (30) days following the Purchase Event, each of the Manager and the selling Class A Member shall promptly select a valuation expert who meets the above criteria, and such valuation experts shall jointly select a third valuation expert who meets the above**

¹ Plaintiff argues that movant refers to documents outside the pleadings and urges the Court to disregard them. ("The Court cannot consider materials outside the Complaint without considering other materials outside the Complaint and without converting the motion to a motion for summary judgment, which is not appropriate at this time given that discovery has just begun."). While this is often the case, it does not apply here, where plaintiff quotes most, but not all, of Section 10.6(c) of the Operating Agreement. See, e.g., *Singh v. T-Mobile*, 232 A.D.3d 662, 664, 222 N.Y.S.3d 545, 550 (2d Dept. 2024). It is only right that the Court is able to see the entirety of the section that plaintiff quotes in part.

criteria, and such third valuation expert (and only such third valuation expert) shall be directed by the Manager and the selling Class A Member to prepare the Valuation Report. . . .

(Emphasis in bold added.). None of the facts alleged by plaintiff suggests that the procedure set forth above was followed. There is no allegation that Andersen was "mutually agreed upon" by plaintiff and defendants. Nor is there any allegation that each side "promptly select[ed] a valuation expert . . . and such valuation experts shall jointly select a third valuation expert" to be the only one to prepare the Valuation Report. Indeed, a review of the complaint shows that according to plaintiff, Andersen was hired solely by the Company, without any input from him whatever. That is the crux of his complaint.

It is clear from a review of the complaint that Andersen was not the valuation expert contemplated by section 10.6(c) of the Operating Agreement. As set forth by the First Department many years ago, "A cause of action is sufficiently stated so as to defeat a motion pursuant to CPLR 3211(a)(7) if upon any reasonable view of the facts alleged in the complaint, plaintiff would be entitled to recover." *Giannelli v. St. Vincent's Hosp. & Med. Ctr. of New York*, 160 A.D.2d 227, 231, 553 N.Y.S.2d 677, 680 (1st Dept. 1990). See also *Aristy-Farer v. State*, 29 N.Y.3d 501, 509 (2017) ("In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of

action under CPLR 3211(a)(7), our well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.”).

A reasonable view of the facts alleged demonstrates that plaintiff cannot recover any damages based on the Andersen valuation. This is not because plaintiff may not have valid claims against defendants - a finding which the Court cannot make at this juncture - but because the Andersen valuation simply cannot be the operative valuation, as it was not obtained in accordance with Section 10.6(c) of the Operating Agreement.

The Court thus finds that (1) the Andersen valuation cannot be used to value plaintiff's interests; (2) the parties must refer to the Operating Agreement to obtain a new valuation that complies strictly with section 10.6(c); and (3) this action must be dismissed, as it is based on a valuation that was not procedurally proper. This dismissal is without prejudice, so that plaintiff may assert his claims again, if he wishes, once a

procedurally proper valuation is obtained.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 10, 2025



HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Nelson Mullins et al.
Attorneys for Plaintiff
330 Madison Avenue, 27th Floor
New York, NY 10017

Yankwitt LLP
Attorneys for Defendant Andersen Tax, LLC
140 Grand Street, Suite 705
White Plains, New York 10601