E-FILE

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

PRESENT: CC Ramos

PART 53

Index Number : 602365/2009
STULMAN, GABRIEL
vs
JOHN DORY LLC,
Sequence Number : 002
PARTIEL SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

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

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT
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Is decided in accordance with accompanying memorandum decision and order.

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

Dated: 9/10/2010

CHARLES E. RAMOS J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

E-FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
--X
GABRIEL STULMAN,

Plaintiff, Index No. 602365/09

-against-

JOHN DORY LLC, JOSEPH CAMPANARO, personally, and ROBERT M. PRICE JR., personally,

Defendants.
--X

Charles Edward Ramos, J.S.C.:

In motion sequence 002, the defendants John Dory LLC ("John Dory"), Joseph Campanaro, and Robert M. Price, Jr. (collectively, the "Defendants") move pursuant to CPLR 3212 for partial summary judgment: (1) dismissing all or part of the first cause of action for breach of contract, the second cause of action for conversion, the third cause of action for declaratory judgment, and the fourth cause of action for rescission of the plaintiff Gabriel Stulman's complaint, and (2) dismissing the complaint in its entirety as against Campanaro and Price.

Background

In February 2007, Stulman, Campanaro, and Price formed John Dory, to develop and manage Market Table, a restaurant located in New York City (Complaint, ¶ 4). As equal managing members, each held a 20% interest with voting rights in John Dory, with the remaining 40% divided amongst non-voting investors. Campanaro and Price were responsible for the preparation of the food, while Stulman was responsible for overseeing the day-to-day operations at the restaurant.

After a dispute in March 31, 2008, Stulman resigned as a managing member of John Dory and relinquished his voting rights in exchange for $25,000, but retained a 20% interest in John Dory.

On May 1, 2009, Stulman received a letter from John Dory's counsel advising him that a merger had been effectuated between John Dory and John Dory Merger LLC ("JD Merger"), which resulted in the termination of his interest in John Dory[1] (Complaint, ¶ 7). The letter further offered Stulman $102,299.70, purportedly representing the fair market value for his interest in John Dory (Complaint, ¶ 12).

Stulman rejected the offer and thereafter, commenced this action alleging causes of action for breach of contract, conversion, declaratory judgment, rescission, and valuation on the basis that the merger was ineffective and that the offer in the letter did not represent the fair market value of his interest in John Dory.

Discussion

At issue in this action is the freeze-out merger[2] between John Dory and JD Merger effectuated by the written consent of Campanaro and Price, as the two voting members of John Dory (Dunne Aff., Exhibit D). The John Dory operating agreement (the

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[1] JD Merger was merged into John Dory, the surviving limited liability company.

[2] A freeze-out merger is defined as a merger by the majority, which forces the minority interest to give up its equity in the entity in exchange for cash or securities, while allowing the controlling interest to retain its equity (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 563 n. 2 [1984]).

"Operating Agreement") does not expressly prohibit a merger (*id.*, Exhibit H).

Pursuant to the Agreement of Merger (the "Merger Agreement"), Campanaro, Price, and the nine non-voting members of John Dory, excluding Stulman, would receive one unit of the surviving entity, also named John Dory, for each unit of their interest in the John Dory (*id.*, Exhibit E). Pursuant to the Merger Agreement, Stulman is only entitled to receive cash in exchange for his interest in John Dory.

Merger

The Defendants move for partial judgment arguing that the merger was properly executed pursuant to LLCL §§ 407(a) and is valid as a matter of law.

Stulman counters that the merger was invalid because notice of the merger was required and not provided. Stulman further alleges the merger was tainted by fraud, illegality, and self-dealing between Campanaro and Price. Finally, Stulman contends that the merger was inequitable because there was no legitimate purpose for the merger besides his removal as a member and he was not provided a fair price for his interest.

The relevant section of the Limited Liability Company Law states:

> "Whenever under this chapter members of a limited liability company are required or permitted to take any action by vote, except as provided in the operating agreement, such action may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken shall be signed by the

> members who hold the voting interests having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the members entitled to vote therein were present and voted..." (LLCL § 407 [a])

The Defendants argue that their merger was in compliance with the procedures set forth in the Limited Liability Company Law. This Court agrees. In fact, the record reflects that the Defendants went beyond the requirements of LLCL § 407(a), by obtaining the consent of all of the voting members and a majority of the equity interest in effectuating the merger (Transcript, June 15, 2010, 7:14-8:5).

Notice Requirement

Additionally, the Defendants argue that the plain language of LLCL § 407(a) does not require notice to members before any action is taken.

LLCL § 407(a) clearly provides that no notice is required if the consent of all the voting members is obtained. Furthermore, this Court has previously ruled that "[m]embers of a limited liability corporation may provide written consent in order to take action in lieu of an actual vote, unless the operating agreement provides otherwise (*Madison Hudson Assoc., LLC v Neumann*, 8 Misc. 3d 1025A [Sup Ct, NY County 2005, Ramos, J.]). Stulman has not alleged that any provision of the Operating Agreement limits the members' ability to act with written consent in lieu of an actual vote.

Stulman's arguments that notice of the merger was required are based only on the Business Corporation Law and the

Partnership Law, neither of which applies to John Dory, a limited liability company. (Stulman Memo, ¶ 8-9).

The record demonstrates that the majority voting interests obtained the written consent, as required by LLCL § 407(a), and thus, John Dory was under no obligation thereunder, to provide notice to Stulman prior to the merger (*see* Dunne Aff., ¶ 32, Exhibit D). Furthermore, Stulman fails to cite any support for his argument that the absence of a notice requirement prior to a merger in the Limited Liability Company Law is merely an inadvertent omission.

Limited Liability Company Law

The merger of John Dory is clearly within the scope of the Limited Liability Company Law, which provides default procedures for limited liability companies that apply in limited liability company proceedings, unless the operating agreement applies otherwise (*Overhoff v Scarp, Inc.*, 12 Misc 3d 350, 359 [Sup Ct, Erie County, 2005]).

Stulman is barred in law and equity from challenging the validity of the merger or seeking rescission of the merger, pursuant to LLCL § 1002, because the merger was approved by more than a majority of members,(LLCL § 1002 [c], [g]).

Furthermore, LLCL § 1005(b) provides that if a former member disputes the surviving limited liability company's calculation of the fair market value of the former member's interest, then a special proceeding must be commenced to fix its value pursuant to BCL § 623.

Stulman's papers fail to address LLCL § 407(a), and instead rely almost exclusively on *Alpert v 28 Williams St. Corp.*, which predates the enactment of the Limited Liability Company Law (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557 [1984]).

Alpert involved a freeze-out merger that was contested on the grounds that the merger was for the personal benefit of the majority and that there was no legitimate business purpose for the merger (*id.* at 564). The Supreme Court ruled that the majority had breached their fiduciary duty owed to the minority by effectuating a merger without establishing a strong and compelling legitimate business purpose (*id.* at 565).

The Appellate Division then reversed, holding that "[c]ourts will not interfere with the proper business judgment of directors in the absence of a showing of fraud, illegality, or self-dealing, so long as there is some proper corporate purpose for the merger other than the forced buy-out of the minority shares" and remanded the action to the Supreme Court (*Alpert v 28 Williams St. Corp.*, 91 AD2d 530, 531 [1st Dept 1982][internal citations omitted]).

Thereafter, the Supreme Court concluded that, as a whole, the transaction was fair and not tainted by fraud, illegality, or self-dealing and denied rescission of the merger (*Alpert*, 63 NY2d at 566). The Supreme Court's decision was affirmed by the Appellate Division.

Subsequently, the Appellate Division's decision was affirmed by the Court of Appeals, which held that "the majority's exclusion of the minority interests through a two-step merger does not violate the former's fiduciary obligations so long as the transaction viewed as a whole is fair to the minority shareholders and is justified by an independent corporate business purpose" and set forth the definition of an independent corporate purpose (*id.* at 566-567, 569-574).

In reconciling *Alpert* and the Limited Liability Company Law, it is clear that LLCL § 1005(b) codifies the remedies set forth in *Alpert*. The holding in *Alpert*, reflected in LLCL § 1005(b), provides that a former member is entitled to receive payment for its interest, but in the event the parties cannot agree on the fair market value of the interest, both *Alpert* and LLCL § 1005(b), reference the procedures set forth in BCL § 623 to fix the value (BCL § 623 [h] [i], [j], [k]). Furthermore, BCL § 623(k) provides that an action may be commenced if the merger is tainted by fraud, illegality, or self-dealing.

Stulman argues that he should be allowed to commence a plenary action for damages as opposed to a special proceeding merely to fix the value of Stulman's interest in John Dory because the merger lacked a valid business purpose and was tainted by fraud, illegality, and self-dealing.

Valid Business Purpose

The removal of members qualifies as an independent corporate purpose when the "removal of the minority shareholders, furthers the objective of conferring some general gain upon the corporation"(*Alpert* at 573).

In opposing Stulman's assertions, Price submits an affidavit detailing Stulman's breaches of his fiduciary duty and the Operating Agreement.

Price testifies that Stulman breached his fiduciary duty and the Operating Agreement by attempting to open a competing restaurant while he was still a managing member of John Dory, including locating spaces, raising money, and meeting with potential investors (Price Aff., ¶ 6). Price asserts his attempt to open a competing restaurant also breached Section 17.15 of the Operating Agreement because he failed to present this opportunity to the members of John Dory first (*id.* at ¶ 7; Dunne Aff., Exhibit H, § 17.15). Furthermore, Stulman deleted the beverage program from John Dory's computer before his resignation as a managing member and thereafter, he solicited John Dory employees for his new venture that opened in 2009 (Price Aff., ¶ 5, 8, 9).

While Stulman has asserted that the merger was only to remove him as a member of John Dory, Price's affidavit, which is unchallenged by any sworn testimony by Stulman, clearly demonstrates that the managing members were acting in the best interests of John Dory by removing Stulman as a member because he was attempting to compete against John Dory.

Fraud, Illegality, Self-Dealing

Stulman's allegations that the merger was tainted by fraud, illegality, and self-dealing are vague and not supported by any evidence that would allow this Court to conclude there was any wrongdoing in effectuating the merger (*e.g.* Dunne Aff., Exhibits

A, C; Stulman Memo, ¶ 16). Furthermore, as stated above, the Defendants have established that there was a valid business purpose in removing Stulman as a member.

Campanaro and Price

Stulman argues that Campanaro and Price are personally liable for the acts of fraud, illegality, and self-dealing they committed in effectuating the merger between John Dory and JD Merger because the business judgment rule does not shield members from such conduct.

The Defendants argue that the complaint should be dismissed as against Campanaro and Price because they were acting in their capacity as managing members of John Dory, and therefore, cannot be held personally liable for the effect of the merger.

As stated above, Stulman fails to substantiate any of his allegations of fraud, illegality, or self-dealing with testimony or documentary evidence. Therefore, the complaint is dismissed against Campanaro and Price, individually.

Article 18

Stulman argues that John Dory was required to use Article 18 of the Operating Agreement in determining the fair market value of his interest in John Dory.

However, Article 18 of the Operating Agreement does not apply to a merger, but rather it applies to "an arm's length transaction between an informed and willing buyer (under no compulsion to purchase) and an informed and willing seller (under no compulsion to sell)" (Dunne Aff., Exhibit H, p. 24).

Therefore, Article 18 of the Operating Agreement is applicable only between members seeking to purchase or sell their interests in John Dory and not in fixing the value of a member's interest after a merger.

Conclusion

Stulman has failed to establish that the merger of John Dory and JD Merger was improper or tainted with fraud, illegality, or self-dealing. Therefore, the merger was successful and Stulman ceased being a member of John Dory once the merger was effectuated. Consequently, Stulman's only remedy is to enforce his right to receive the fair market value of his interest, which shall be determined in a hearing before a referee.

Accordingly, it is

ORDERED and ADJUDGED that Gabriel Stulman is not entitled to a declaration that he is still currently a member in good standing of John Dory LLC, and it is further

ORDERED that the Defendants' motion for partial summary judgment is granted thereby dismissing the first, second, third, and fourth causes of action in complaint as against John Dory LLC and dismissing the complaint in its entirety as against Joseph Campanaro, and Robert M. Price, Jr., and it is further

ORDERED that the issue of the fair market value of Gabriel Stulman's interest in John Dory LLC is referred to Special Referee to hear and report with recommendations, except that, in event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue, and it is further

ORDERED that the plaintiffs' counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to placed this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of this Court.

Dated: September 10, 2010

J.S.C.

CHARLES E. RAMOS