

Kim v Ferdinand Capital, LLC
2007 NY Slip Op 32065(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0104915/2005
Judge: Herman Cahn
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HERMAN CAHN

PRESENT: _____

PART 49

Index Number : 104915/2005

KIM, CHARLES

vs

FERDINAND CAPITAL LLC

Sequence Number : 002

COMPEL DISCLOSURE

C

INDEX NO. _____

MOTION DATE 1/3/07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 7/9/07 *Her Cols* _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X

CHARLES KIM, suing in his own right, and
Charles Kim, a member of Ferdinand Capital,
LLC, suing in the right of Ferdinand
Capital, LLC,

Plaintiff,

-against-

Index No. 104915/05

FERDINAND CAPITAL, LLC, CHRISTOPHER
MOSKAL and BRIAN FERDINAND,

Defendants.

-----X

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

CAHN, J.:

This action concerns a dispute over membership interests in a limited liability company which provides services to equity traders. Defendants move for summary judgment (CPLR 3212) to dismiss all claims asserted against defendant Ferdinand Capital LLC (the "LLC"), as well as all causes of action asserted on the LLC's behalf as plaintiff.¹

Facts

The following facts are taken from the complaint, the parties' affidavits and various documents submitted in connection with the motion, and are undisputed unless otherwise indicated.

The LLC is a Delaware Limited Liability Company created by the filing of a certificate of formation on February 6, 2002. At the time, defendant Brian Ferdinand ("Ferdinand") was its sole member and 100% owner of the LLC. The LLC did not have an operating agreement at the

¹ The motion to dismiss was interposed as a cross motion to plaintiff's motion to compel discovery. The discovery motion was denied without prejudice to renewal upon resolution of the motion to dismiss.

time of its formation.

The LLC facilitates the activities of equity traders, often day traders, by providing terminals and communications systems to track securities. The traders execute their trades through a licensed broker-dealer, Echo Trade LLC ("Echo Trade"). Echo Trade pays the LLC by remitting a portion of the commissions it receives from the traders. The traders who use LLC's services enter into operating agreements with Echo Trade, and become either members of Echo Trade or independent contractors associated it.

On March 3, 2003, plaintiff Charles Kim ("Kim") executed an operating agreement with Echo Trade (the "Echo Trade Agreement") and began trading at Ferdinand's offices. In August, 2003, the parties entered into discussions over whether Kim would purchase an equity interest in LLC. According to Kim, it was agreed that he would receive a 40% interest while Ferdinand would retain 60%.

Kim further asserts that in September 2003, Ferdinand discussed his desire to make defendant Christopher Moskal ("Moskal") a member of the LLC. Ultimately, Kim claims, the parties decided that the interests in the LLC would be divided with 51% retained by Ferdinand, 39% to Kim and 10% to Moskal. In support of this assertion, Kim relies on a two-page writing allegedly executed by the parties in October 2003 which refers to equity interests in an entity called "XEK" (the "XEK Writing").

The XEK Writing consists primarily of a number of columns listing names, dollar amounts and percentages. At the top of the first page, the following text appears:

Based on upon [sic] current equity and 25K Model in XEK

Current

XEK – Operating	25K
\$7,500.00 Brian Ferdinand	\$12,750.00 51%
\$2,500.00 Christopher Moskal	\$2,500.00 10%
\$5,000.00 Charles Kim	\$9,750.00 39%

The names of Ferdinand, Moskal and Kim appear next to the same percentages on the top of the second page under the heading “Profit Sharing Schedule.” Elsewhere, the XEK Writing refers to “Kenny Lee,” “Nabecl,” “Glass” and “Gerry,” whom defendants identify as other traders at LLC. Dollar figures appear next to some of those names, but without corresponding percentages. The XEK Writing also contains short notations and explanations such as “Loss is 2/3 Kim 1/3 Ferdinand” and “Kim needs to be made whole for \$4,000.00,” but does not set forth the comprehensive terms governing the operation of the LLC or the parties’ obligations.

The XEK Writing was not executed on behalf of the LLC and does not refer to it. However, Kim contends that “XEK” refers to the LLC operating reserve account at Echo Trade into which he, Ferdinand and Moskal deposited their capital contributions. He also maintains that the LLC maintained a second operating account, denominated “XEH,” to pay its general expenses and to deposit and distribute profits. November 1, 2003, Ferdinand and Moskal executed an operating agreement for the LLC (the “LLC Agreement”). The LLC Agreement awarded a 65% membership interest to Ferdinand and a 35% interest to Moskal. It did not mention either Kim or the XEK Writing.

Kim states that the LLC Agreement was executed without his knowledge. He claims that he performed managerial duties for the LLC, and has submitted affidavits from several traders who assert that he was held out as a partner and/or member of it. Kim asserts that he made approximately \$22,000 in capital contributions to the LCC and that he received distributions

attributable to his ownership interest between October and December 2003.

According to Kim, the LLC grew substantially during his tenure. However, he asserts that in September 2004 Ferdinand and Moskal excluded him from participation in the LLC. He alleges that he was denied distributions earned by him before and after that time. Furthermore, he claims that Ferdinand misused and misappropriated the LLC's funds.

The complaint sets forth seven causes of action. At issue on this motion are the first and fourth through seventh claims. As relevant here, the first cause of action is for breach of contract against Ferdinand and Moskal for excluding Kim from the LLC. The fourth cause of action is brought derivatively on behalf of the LLC against Ferdinand to recover for breach of fiduciary duty. In the fifth cause of action Kim seeks recovery of attorney's fees on behalf of himself and the LLC. The sixth cause of action is for a constructive trust on Kim's alleged 39% interest in the LLC, and the seventh cause of action seeks an accounting.

In moving for summary judgment, defendants contend that Kim has failed to establish that he was a member of the LLC under Delaware law. They note that the XFK Writing was not executed by the LLC and does not refer to it by name. Defendants contend that the XFK Writing was, at most, an agreement between Kim, Ferdinand and Moskal in their individual capacities to fund four proprietary traders and share the profits generated by their accounts. While defendants admit that there were discussions about granting Kim a small equity interest in August 2003, they deny that the negotiations went beyond the preliminary stages. According to defendants, Kim provided office support to the LLC and received a 1099 (tax) form reflecting that he was compensated for those efforts as an independent contractor. They note that he received a K-1 form for distributions from Echo Trade, not from the LLC, as did Ferdinand and Moskal. Moreover, defendants point out that the transfers allegedly evidencing Kim's capital

contributions were made in April 2003, several months before plaintiff claims the parties first discussed his potential membership.

Discussion

The motion for summary judgment is denied. The XEK Writing and Kim's allegations regarding the management of LLC accounts and his role in its operations raise triable issues of fact as to whether or not he was a member. Although defendants have submitted documentary and testimonial evidence which undermines various aspects of Kim's position, it is not at this stage of the litigation conclusive on the issue of his alleged membership in the LLC.

Under the relevant Delaware statute, a "limited liability company agreement" is "any agreement . . . written or oral, of the member or members as to the affairs of a limited liability company and the conduct of its business" (Delaware Limited Liability Act, 6 Del. Code 18-101[7][the "Act"]). The limited liability company is not required to execute the agreement (Id.). Under section 18-201(d) of the Act, "[a] limited liability company agreement may be entered into either before, after or at the time of the filing of a certificate of formation."

Defendants assert that section 18-301 of the Act governs the admission of members to a limited liability company. As is pertinent here, it provides:

(a) In connection with the formation of a limited liability company, a person is admitted as a member . . . upon the later to occur of:

(1) The formation of the limited liability company; or

(2) The time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person is admitted as a member of the limited liability company:

(1) . . . at the time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, upon the consent of all members and when the person’s admission is reflected in the records of the limited liability company.

Defendants argue that subsection (b)(1) applies here because the LLC had no limited liability agreement at the time of its formation. They contend that because Kim’s name is not “reflected” in the LLC’s records, he cannot now claim to be a member.

As a preliminary matter, the statutory sections cited are concerned primarily with fixing the time at which a person should be deemed to have been admitted to an LLC, not with defining the substantive requirements for membership (see e.g., ConnectU LLC v Zuckerberg, 482 F Supp 2d 2 [D Mass 2007]; see also Bobrow v Liebman, 15 Misc3d 1121[A], 2007 WL 1139417 [April 16, 2007][finding that analogous language of New York Limited Liability Company Law § 602[a][2] “concerns no more than the date on which a member becomes a member”). Insofar as the statute permits an LLC operating agreement to be oral, a person could be a member without that fact being reflected in the LLC’s records. Further, oral evidence regarding a person’s membership may in some cases prevail over the documentary record (see, ConnectU LLC, 482 F Supp 2d at 2). Accordingly, the cited statutory section is not dispositive of Kim’s membership status.

Morcover, even assuming the quoted statute controls, there is a question of fact regarding whether the XEK Writing and LLC’s financial records do in fact “reflect” Kim’s membership. Kim alleges, in effect, that the XEK Writing and the parties’ oral representations constituted the LLC’s first operating agreement. Although defendants dismiss the XEK Writing as a mere “arrangement” unrelated to the LLC, further discovery into its nature is warranted. It is undisputed that the parties discussed giving Kim an equity interest, that the agreement involved

at least two members of the LLC and that traders and other resources of the LLC were utilized in its execution. Kim alleges that the accounts employed belonged to the LLC, that he was held out the world as one of its members and conducted business on its behalf. That the XEK Writing was not executed by the LLC is immaterial because, as noted above, Delaware Law does not impose such a requirement. Nor is Kim's exclusion from the LLC Agreement dispositive in view of his allegations that it was executed without his knowledge and in contravention of the parties' existing agreement.

Kim's receipt of compensation as an independent contractor from the LLC and of distributions from Echo Trade may ultimately weigh against his claims. However, that evidence does not exclude the possibility that he was also a member of the LLC. Defendants, by acknowledging the XEK arrangement, concede that the parties were permitted to function in multiple capacities. Whether the XEK arrangement was a venture distinct from, or identical to, the LLC is a question of fact. Exploration of the relationship between their finances is necessary, including discovery into Kim's allegations regarding the use of LLC accounts and the distribution of profits through Echo Trade.

Kim's claims for breach of contract and an accounting thus survive summary judgment. Similarly, the derivative claims survive. Defendants' sole objection to them on this motion is, once more, that Kim is not a member of the LLC.

Finally, the cause of action for a constructive trust is viable. The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise and unjust enrichment (In Re Gupta, 38 AD3d 445 [1st Dept 2007]). Contrary to defendants' argument, the requisite relationship has been alleged because "[t]he acts of working in concert and managing a limited liability company clearly gives rise to a relationship

among the members which is analogous to that of partners who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests" (Willoughby Rehabilitation and Health Care Center, LLC, 13 Misc3d 1230(A), 2006 WL 3068961 [Sup Ct Nassau County Oct 26, 2006]; see, Melcher v Apollo Medical Fund Management L.L.C., 25 AD3d 482 [1st Dept 2006]; Salm v Feldstein, 20 AD3d 469 [2d Dept 2005]). Although the transfers identified by Kim predate the alleged formation of the LLC, that fact does not preclude the possibility that those funds were later pledged as a capital contribution. Moreover, Kim alleges that additional transfers will be confirmed by the LLC's records upon discovery.

In summary there are sufficient issues of fact to warrant denial of the motion for summary judgment.

Accordingly, it is

ORDERED, that the motion for summary judgment is denied.

Dated: July 9, 2007

ENTER:



J.S.C.

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