

Cogent Film Finance LLC v Brown
2008 NY Slip Op 33497(U)
December 22, 2008
Supreme Court, New York County
Docket Number: 602575/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHÉ

PRESENT: _____
J.S.C. Justice

PART 10

Index Number : 602575/2007

COGENT FILM FINANCE LLC

vs

BROWN, ALAN R.

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/22/08

JJG
HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Supreme Court of the State of New York
New York County: Trial Term 10

-----X
Cogent Film Finance LLC and Cogent Asset
Management LLC,

Plaintiffs, Index # 602575/07

-against-

Decision/Order

Alan R. Brown,

Defendant.

-----X
Gische, J.:

Pursuant to CPLR 2219(a) the following numbered papers were considered in connection with the motion to dismiss counterclaims:

PAPERS

Notice of Motion, DE affirm., discovery.....	1
Pl. MOL.....	1A
Defd. MOL, exhibit.....	2
Reply MOL.....	3

FILED
JAN 05 2009
COUNTY CLERKS OFFICE
NEW YORK

Upon the aforementioned paper the decision and order fo the court is as follows:

Plaintiff Cogent Film Finance LLC ("Film LLC") along with an allegedly separate entity Cogent Asset Management LLC. ("Asset of LLC") have brought an action against Alan Brown ("Brown") for a declaratory judgment that he is a terminated member of Film LLC and for the return of certain monies which plaintiffs allege were unearned advances and/or loans. Brown filed an answer with counterclaims asserted against the plaintiffs and also against Robert Doeberl ("Doeberl") and Glen Beigel ("Beigel")(collectively "counterclaim defendants" or "movants"). The first counterclaim is for breach of contract against all counterclaim defendants. The second counterclaim is

for breach of fiduciary duty against Doberl and Beigel only. The counterclaim defendants now move, pre reply, to dismiss the counterclaims asserted against them.

In deciding whether Brown has stated a cause of action, thereby defeating the motion to dismiss, the court will consider whether he has a cause of action rather than whether he has properly stated one within the four corners of his counterclaims. CPLR § 3211 (a) (7); Guggenheimer v. Ginzberg, 43 NY2d 268 (1977); Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). The facts in the pleading will be accepted as true and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by the moving parties in connection with their motions (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

The parties agree¹ that in late 2006 or early 2007 they entered into some business relationship with the goal of financing and producing film projects. They further agree that as part of their relationship, Brown was to procure the film projects based upon his industry experience and contacts. They further agree that in late 2006 or early 2007, Film LLC, a Delaware Limited Liability Company, was formed to effectuate their business plan. Delaware Law requires that a Delaware Limited Liability Company have an operating agreement controlling its governance, existing either before, after or at the time of the filing of a certificate of formation. 6 Del.C. §18-201.

¹The agreement is evident from a comparison of the pleadings. Otherwise no evidence has been provided by either party on this motion.

No party has produced a written operating agreement. Brown claims that their agreement was oral.

Movants claim that at inception the members of Film LLC were Sascoview LLC and Brown each with a 50% interest. They allege that the members of Sascoview LLC are Doeberl and Brown. Brown agrees that he had a 50% interest in Film LLC when it was formed, and alleges that the other 50% interest was held by Doeberl and Beigel. The formation documents filed with the State of Delaware are not before the Court. Movants claim that in April 2007, the parties amended their agreement so that Brown only had a 1/3 interest in Film LLC. Brown denies that the parties amended their agreement. No written amendment to the Limited Liability Company operating agreement has been provided to the court. Movants claim that in May 2007 the majority members of Film LLC terminated Brown as a member because he was not performing his duties under their agreement. Brown alleges that at all times he performed his duties under the parties' agreement. Brown denies that he was or could be terminated and/or that the movants had a controlling interest in Film LLC which would authorize them to terminate Brown's interest in Film LLC.

In the first counterclaim Brown alleges that movants breached their contractual obligations to him as a member of Film LLC by taking his contributions of knowledge and contacts within the film industry and then, without authority, ousting Brown as a member without letting him share in the anticipated profits. The second counterclaim is for a breach of fiduciary duty based upon Doeberl and Biegel diverting, for their own benefit and to the exclusion of Brown, business opportunities that were procured based upon Brown's knowledge and contacts in the film industry.

The counterclaims when read in their most favorable light state causes of action for both breach of contract and breach of fiduciary duty. Clearly all parties agree that there was some agreement between them to enter into a business venture. The fact that they disagree over the terms of the agreement and who was a party to that agreement and what the terms of the agreement were, is not a basis to dismiss the counterclaims at the pleading stage. This is particularly true because no party has produced any written agreement or written amendments thereof, which might constitute irrefutable documentary proof of what they actually agreed to. Brown alleges that he fulfilled his part of the agreement by providing information about and contacts within the film industry. He claims that counterclaim defendants breached their business agreement with him by illegally and without authority ousting him from the company and the opportunity to share in profits. A wrongful ouster can constitute a violation of a Limited Liability Operating agreement. Walker v. Resource Development Co. Ltd., LLC, 791 A2d 799 (Del Ch. 2000). Contrary to counterclaim defendants position, the breach of contract claim posited is sufficiently particular for pleading purposes.

Delaware law also recognizes that members of an LLC can sue each other for breach of fiduciary duty. Blackmore Partners LP v. Link Energy, LLC, 86 A2d 80 (Del Ch. 2004). A diverted business opportunity is a recognized basis for such a claim of a breach of a fiduciary duty. McGowan v. Ferro, 859 A2d 1012 (Del Ch 2004).

Movants argue that claims which require piercing the corporate veil should be dismissed. This argument is a red herring. The operating agreement is between the individual members and therefore allows for direct actions between and among them. See: Walker v. Resource Development Co. Ltd., LLC, supra. Likewise a claim for

breach of fiduciary duty is an intra member claim. Who exactly the members are in Film LLC cannot be determined on this motion.

Accordingly, it is hereby:

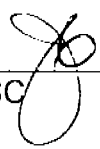
ORDERED that the motion to dismiss the counterclaims is denied and it is further

ORDERED that plaintiffs and additional defendants on the counterclaims will have 20 days from the date of this decision to interpose a reply.

This constitutes the decision and order of the Court. Any requested relief not otherwise expressly granted is denied.

Dated: New York, NY
December 22, 2008

SO ORDERED:



JG JSC

JUDITH J. GISCHE, J.S.C.

FILED
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK