SHORT FORM ORDER

INDEX NO.: 30392-06

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-21-09
SUBMITTED: 8-13-09
MOTION NO.: 006-MOT D
007-XMD

GREATER NY MARINE TRANSPORTATION, LLC.,

Plaintiff,

-against-

FELICISIMO BALICO, ROY L. WHITE AND JOHN D. WHITE,

Defendants.

PHILLIPS, WEINER, ARTURA & COX
Attorneys for Plaintiff and defendants Roy L. White and John D. White
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LAW OFFICES OF MYRON D. MILCH, PC, Attorney for Defendants
433 Hackensack Avenue
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Upon the following papers numbered 1 79 read on this motion and cross-motion for partial summary judgment ; Notice of Motion and supporting papers 1-16 ; Notice of Cross Motion and supporting papers 17-30 ; Answering Affidavits and supporting papers 31-50 ; Replying Affidavits and supporting papers 51-59 ; Other 60-79 ; it is,

ORDERED that the motion by the plaintiff for partial summary judgment is granted solely to the extent of dismissing the defendant's first counterclaim/third-party claim; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the cross motion by the defendant for partial summary judgment is denied.

The plaintiff, Greater NY Marine Transportation, LLC (hereinafter "GNY"), is engaged in the marine transport business, transporting fuel on barges owned and maintained by it. GNY was formed on October 22, 2002, when the defendant entered into an operating agreement with Roy and John White (collectively "the White brothers"). The defendant and the White brothers each have a one-third membership interest in GNY. The operating agreement provides that the defendant receive a guaranteed payment in the amount of $2,800 per week for

his services as a tanker man, among other things. On December 9, 2005, John White verbally offered the defendant $470,000 on behalf of himself and his brother to purchase the defendant's interest in GNY. Before the defendant could respond to their verbal offer, the White brothers made him a written offer in the amount of $500,000 on January 9, 2006. Between May 25 and June 3, 2006, the defendant sent the White brothers three separate proposals in which he would sell his interest in GNY to them for $500,000. All three proposals were rejected. On June 20, 2006, the accountant for GNY prepared and sent the following letter of understanding to the defendant regarding GNY's purchase of his membership interest:

> John White asked me to expedite this transaction to the satisfaction of all parties. Unfortunately, since GNY is a NY LLC and has elected to be taxed as a partnership, the proposal you submitted will not be feasible for tax purposes. Given the good-faith monies already paid to you and the location of GNY, any agreement must have venue in New York. Upon your acceptance of this letter of understanding, GNY will retain counsel to formalize this letter into a binding contract.
>
> The proposal is as follows:
>
> - The $70,000 advance you received in November 2005 will be deemed a guaranteed payment to you in 2005.
>
> - You will cease to be a partner after 12/31/2005.
>
> - The $100,000 received by you in January 2006 will be deemed a good-faith down payment to purchase your interest by GNY.
>
> - Upon receipt of this signed letter of understanding, an additional good-faith payment of $10,000 will be remitted to you.
>
> - It is expected that a binding legal contract will be sent to you within thirty days after receipt from you of this letter of understanding. You will then have fifteen days to have your counsel review the binding contract.
>
> - A mutually agreeable date will be set to meet at the offices of GNY to close the contract. You will receive an additional $60,000 upon closing.
>
> - GNY will make their best faith effort to remove you from any debt or loan concerning GNY for which you are personally liable. In the event this is not possible, all partners of GNY will hold you harmless in regards to such debt.

- The balance of $270,000 will be paid to you in thirty-six monthly installments at 6% per annum. Said payments will commence on the first day of the month, following the month of closing. The monthly payment will be approximately $8,214.00.

- Regarding other liabilities involving GNY, you will remain liable for any legal actions taken against GNY involving events or incidents that may have occurred (in part or in whole) prior to January 1, 2006. It is further agreed that you will be responsible for your share of all legal costs, fines, and/or any penalties. You will be held harmless for any action taken against GNY arising from events occurring after the binding contract is signed.

If this meets with your approval, please sign below and return in the envelope provided. We will then have our attorneys draw a contract. If you fail to respond by July 7, 2006, this proposal will be rescinded. Feel free to call if you have any questions. The better we communicate, the sooner we can finish the transaction.

The letter of understanding was signed by Dan Martin, GNY's accountant, and the defendant on a line next to the word "Agreed." On June 23, 2006, the defendant delivered it to John White, who gave him a check for $10,000 drawn on a GNY bank account. The check was negotiated by the defendant. A purchase agreement was prepared by GNY's attorney and sent to the defendant's attorney. It contained terms that were inconsistent with the letter of understanding. Most significantly, the purchase agreement included a restrictive covenant enjoining the defendant, inter alia, from competing, directly or indirectly, with GNY for a period of 48 months from the date of the closing and within a geographical radius of 75 miles from GNY's principal place of business. The defendant rejected the purchase agreement, and this action ensued.

GNY commenced this action for specific performance of the letter of understanding, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and breach of the parties' operating agreement. The defendant answered and counterclaimed, inter alia, for a judgment declaring the letter of understanding to be null and void. In addition, the defendant impleaded the White brothers.[1] GNY and the White brothers move for partial summary judgment on the second cause of action for breach of the implied covenant of good faith and fair dealing and for dismissal of the counterclaims/third-party claims. The defendant cross moves for partial summary judgment on his sixth counterclaim/third-party claim for a judgment declaring the letter of understanding to be null and void.

In support of their motion, GNY and the White brothers argue, inter alia, that the

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[1] The court notes that there is no record of a third-party action against the White brothers having been filed with the court (*see*, CPLR 1007).

letter of understanding is enforceable as a Type II preliminary agreement, which imposes on the defendant a duty to negotiate in good faith the additional terms that remained open, yet critical, to the sale of the defendant's membership interest. GNY and the White brothers argue that, by refusing to negotiate, the defendant breached that duty. In opposition and in support of his cross motion, the defendant argues, inter alia, that the letter of understanding is not a binding agreement because it evinces an intent not to be bound until a formal agreement is executed. The defendant also argues that, because he was denied access to GNY's books and records prior to signing the letter of understanding, he was fraudulently induced to sign it.

Ordinarily, when the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract. In some circumstances, however, preliminary agreements can create binding obligations. Usually, binding preliminary agreements fall into one of two categories (**Adjustrite Systems v GAB Business Services**, 145 F3d 543, 548). The relevant New York law describes Type I preliminary agreements as complete, reflecting a meeting of the minds on all issues perceived to require negotiation (**Brown v Cara**, 420 F3d 148, 153). They bind both sides to their ultimate contractual objective in recognition that, despite the anticipation of further formalities, a contract has been reached (**Adjustrite Systems v GAB Business Services**, *supra* at 548). Thus, one party may demand performance even though the parties fail to produce a more elaborate formalization of the agreement (Id. at 548). Type II preliminary agreements, by contrast, are binding only to a certain degree, reflecting agreement on certain major terms, but leaving other terms open for further negotiation (**Brown v Cara**, *supra* at 153). Type II agreements do not commit the parties to their ultimate contractual objective, but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework (**Id**. at 153, 157). A party to such an agreement has no right to demand performance of the transaction. Indeed, if a final contract is not agreed upon, the parties may abandon the transaction as long as they have made a good faith effort to close the deal and have not insisted on conditions that do not conform to the preliminary writing (**Adjustrite Systems v GAB Business Services**, *supra* at 548).

The court finds that, contrary to GNY and the White brothers' contentions, the parties' letter of understanding was a Type II preliminary agreement only insofar as it left open for further negotiation the date for the closing. A party may not insist upon terms differing from those set forth in the preliminary agreement or negotiate outside the framework set forth in its Type II agreement (28 NY Prac, Contract Law § 3:27, *citing* **Teachers Ins. and Annuity Assn. of Am. v Ormesa Geotherman**, 791 F Supp 401, 415; **Network Enters. v APBA Offshore Prods.**, 264 Fed. Appx 36). The purchase agreement prepared by GNY's attorney contained terms that were not included in the letter of understanding, most significantly, a restrictive covenant. The record does not reflect that the parties contemplated the inclusion of a restrictive covenant, which could have materially affected the purchase price, prior to the preparation of the purchase agreement. Thus, to the extent that GNY and the White brothers included in the purchase agreement terms like the restrictive covenant that did not conform to the letter of understanding, the defendant had no duty to negotiate such terms. Accordingly, the court finds that GNY has failed to establish its entitlement to judgment as a matter of law on its second cause of action for breach of the implied covenant of good faith and fair dealing and for dismissal

of the defendant's counterclaims/third-party claims except as indicated below.

GNY and the White brothers have established, prima facie, their entitlement to judgment as a matter of law on the defendant's first counterclaim/third-party claim for guaranteed payments in the amount of $2,800 a week after January 27, 2006. The defendant has proffered no evidence in opposition thereto. Accordingly, the motion is granted solely to the extent of dismissing the defendant's first counterclaim/third-party claim.

The defendant's second, third, and fifth counterclaims/third-party claims are derivative in nature. The Court of Appeals has extended the right to sue derivatively to members of limited liability companies (*see*, **Tzoliz v Wolff**, 10 NY3d 100). Thus, a member of an LLC has no individual cause of action to recover damages for a wrong against the LLC. Allegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the LLC only, for which a member may sue derivatively, but not individually. (*cf.*, **Abrams v Donati**, 66 NY2d 951, 953; **Elenson v Wax**, 215 AD2d 429). The pertinent inquiry is whether the thrust of the action is to vindicate a party's personal rights as an individual and not as a member on behalf of the LLC (*cf.*, **Albany-Plattsburgh United Corp. v Bell**, 307 AD2d 416, 419). When the allegations confuse a member's derivative and individual rights, the complaint will be dismissed, though leave to replead may be granted in an appropriate case (*cf.*, **Abrams v Donati**, supra at 953). The court finds that the defendant's second, third, and fifth counterclaims/third-party claims allege a wrong against GNY and not the defendant individually. However, the parties have not raised this issue, and it would be inappropriate to grant summary judgment on a ground not raised (see, **Yelder v Walters**, 64 AD3d 762, 765). Accordingly, the motion is denied without prejudice as to the defendant's second, third, and fifth counterclaims/third-party claims.

Whether the parties' letter of understanding is enforceable as a Type I preliminary agreement is not an issue that is currently before the court. Moreover, the defendant has failed to establish as a matter of law his claim of fraud in the inducement. Accordingly, the cross motion is denied.

Finally, the defendant's third-party action is procedurally improper. The impleader language of CPLR 1007 has been liberally construed and does not limit the amount that may be recovered (**George Cohen Agency v Perlman Agency**, 51 NY2d 358, 364-366) or the legal theory that may be asserted as the basis for a third-party claim (**Garrett v Holiday Inns**, 58 NY2d 253, 262-263). Nonetheless, the statutory language requires some minimal jural relationship, aside from possible common questions of fact or law, between the liability of the defendant asserted in the main action and the liability over claim in the third-party complaint. At the least, the third-party claim must be sufficiently related to the main action to raise the question of whether the third-party defendant may be liable to the third-party-plaintiff for the damages for which the latter may be liable to the plaintiff (**Zurich Ins. Co. v White**, 129 AD2d 388; **Long Is. Women's Health Care Assocs. v Haselkorn-Lomasky**, 10 Misc 3d 1068[A] at *8). Thus, the liability of the third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action (**Lucci v Lucci**, 150 AD2d 649, 150; **Hoboken**

Wood Flooring Corp. v Fischoff, 10 Misc 3d 1065[A] at *2).

It is clear that none of the third-party causes of action against the White brothers contains the claim-over component required by CPLR 1007 and controlling case law. The defendant's third-party claims do not arise from, nor are they conditioned upon, GNY's potential recovery against the defendant the main action (*see*, **Long Is. Women's Health Care Assocs. v Haselkorn-Lomasky**, *supra* at *7) As previously discussed, the defendant's second, third, and fifth counterclaims/third-party claims are derivative in nature. The fourth involves the White brothers' purported refusal to allow the defendant to inspect GNY's books and records. The sixth is for a declaratory judgment. The seventh is a claim for indemnification, but against GNY only.

When the defendant's claim against a third person implicates a party who is already in the main action as a plaintiff or co-defendant, the third person may be joined by way of a counterclaim against the plaintiff or cross claim against the co-defendant (*see*, CPLR 3019[a], [b] & [d]). Such counterclaims and cross claims may be asserted without the need for a connection of any kind to the plaintiff's original cause of action (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C1007:4 at 45). However, they must have a link to someone already named and joined as a party (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3019:6 & C3019:13).

Here, the defendant has asserted counterclaims against GNY that are essentially the same claims that the defendant has asserted against the White brothers in the third-party action. The court finds that the defendant's third-party claims should have been asserted as counterclaims against the plaintiff and the White brothers in the main action. Accordingly, the court deems the White brothers additional defendants on the counterclaims, and the caption is amended accordingly.

HON. ELIZABETH HAZLITT EMERSON

Dated: **December 1, 2009**

J.S.C.