Meissner v Yun
2015 NY Slip Op 31181(U)
July 6, 2015
Supreme Court, New York County
Docket Number: 650913-2012
Judge: Jeffrey K. Oing

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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JOERN MEISSNER, individually and derivatively on behalf of MANHATTAN REVIEW LLC,

Plaintiff,

-against-

TRACY YUN and MANHATTAN ENTERPRISE GROUP LLC,

Defendants.

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Index No. 650913/2012

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants move, pursuant to CPLR 3212, for partial summary judgment dismissing the first through fifth causes of action with respect to plaintiff's derivative claims. For the reasons stated herein, the motion is granted.

Factual Background

The following facts are not in dispute. In or about March 2005, plaintiff Joern Meissner and defendant Tracy Yun formed Manhattan Review LLC ("Manhattan Review") as a Delaware limited liability company to prepare students for standardized tests (1st Am. Compl., ¶ 1 [hereinafter, the "Compl."]). Meissner, a German citizen who holds a permanent resident visa - known as a green card - had previously instructed students in Europe and sought entry into the U.S. market (Compl., ¶¶ 1-2). Yun, a U.S. citizen

and New York State resident, was given operational control of the organization (Compl., ¶ 10).

In the years that followed, the relationship between the two soured, leading to the ultimate dissolution of the partnership and the company. In late December 2011, Yun filed a Certificate of Cancellation with the State of Delaware for Manhattan Review (Yun Aff., ¶ 3). It is not disputed that Meissner has not sought to nullify or revoke the Certificate of Cancellation. On or about January 3, 2012, Yun formed Manhattan Enterprise Group LLC, d/b/a Manhattan Elite Prep, as a Delaware limited liability company (Compl., ¶ 14).

The following facts are sharply contested. The parties disagree about the size of Yun's share of Manhattan Review. Meissner claims Yun was initially assigned a 20 percent stake which was later expanded to 30 percent, but grew no larger (Compl., ¶ 9). Yun contends that, "Meissner was never a bonafide owner," even though he did present her with an operating agreement proposing she become a 25 percent owner of Manhattan Review, an offer she never agreed to (Yun Aff., ¶¶ 3, 29). Rather, Yun claims she was the "sole owner" of Manhattan Review (Higgins Affirm., Ex. B, pp. 12-14). To this end, Yun claims she covered all start-up costs and expenses herself, ultimately paying over $700,000 to get the company running (Yun Aff., ¶¶ 3-

4). Thus, according to Yun, although both she and Meissner agreed to form Manhattan Review and he offered her a minority stake, she was the sole owner of the company (Higgins Affirm., Ex. B, pp. 12-14).

Meissner claims Yun became dissatisfied with her role and pressed him to either purchase her interest or increase her compensation and stake in the company (Compl., ¶ 12). After Meissner refused, he alleges Yun threatened to "ruin" and "destroy" Manhattan Review (Id.). Yun, however, accuses Meissner of engaging in "an unsustainably excessive lifestyle," leading Meissner to transfer $175,300 in Manhattan Review's corporate revenue in 2005 to an offshore bank account to pay off personal and business debt (Yun Aff., ¶ 41). Yun claims Meissner later promised, but failed to repay the amount taken from the company (Yun Aff., ¶¶ 43, 45).

Meissner asserts that in late 2011 Yun informed him of her intention to "close" the company, disconnect the phone lines, terminate its accounts, and leave its debt to Meissner (Compl., ¶ 13). By dissolving Manhattan Review and creating Manhattan Elite, Meissner charges that Yun appropriated the company's assets, materials, employees, and customers to benefit Manhattan Elite at Manhattan Review's expense (Compl., ¶ 14). Meissner also accuses Yun of withdrawing $200,000 from Manhattan Review's

operating account in late December 2011, shortly before dissolving the company (Compl., ¶ 22).

Additionally, Meissner contends Yun made deliberately false statements to the Kuehne Logistics University community where Meissner works in order to harm Meissner's reputation and force him to abandon his interests in Manhattan Review (Compl., ¶ 23).

In contrast, Yun claims she acted to protect herself and the business she created from Meissner's attempt to start his own enterprise at Manhattan Review's expense (Yun Aff., ¶¶ 68, 70). Yun contends Meissner removed and deposited almost all of Manhattan Review's funding into a bank account set up for a competing test preparation business named Manhattan Admissions LLC and cut her off from access to Manhattan Review's website, emails, and payment channels (Yun Aff., ¶¶ 17, 64; Yun Aff., Ex. 20).

I. The Complaint & Counterclaims

Meissner's complaint asserts six causes of action, individually and derivatively on behalf of Manhattan Review, against Yun and Manhattan Elite for: (1) breach of fiduciary duty (individually and derivatively against Yun); (2) usurpation of corporate opportunity (derivatively against Yun and Manhattan Elite); (3) self-dealing (derivatively against Yun and Manhattan Elite); (4) tortious interference with economic advantage

(derivatively against Yun and Manhattan Elite); (5) unjust enrichment (derivatively against Yun and Manhattan Elite); and (6) defamation (individually against Yun).

Defendants assert seven counterclaims for: (1) a declaratory judgment that Yun is the "sole owner" of Manhattan Review and its assets; (2) quantum meruit; (3) tortious interference with business relations; (4) conversion and, in the alternative, (5) judicial dissolution under Delaware Code Annotated, Title 6 § 18-805; (6) defamation; and (7) cybersquatting (Higgins Affirm., Ex. B, pp. 12-16). Additionally, defendants assert as an affirmative defense in their answer that Meissner lacks standing and the legal capacity to sue (Am. Answer, p. 4).

II. Procedural History

In motion seq. no. 001, this Court denied Meissner's motion for a preliminary injunction and summary judgment on the breach of fiduciary duty claim. The Appellate Division, First Department affirmed, finding that the "parties' sharply conflicting affidavits raise material factual issues that preclude summary judgment" (Meissner v Yun, 126 AD3d 565, 565 [1st Dept 2015]). The First Department also affirmed this Court's denial of Meissner's motion for a preliminary injunction, stating Meissner:

> did not demonstrate a likelihood that he would ultimately prevail on the merits of his claim. Nor did he demonstrate that he or Manhattan Review would suffer irreparable harm, since he failed to show that an award of money damages would not be fair compensation.

(Id. at 566).

Defendants now move for partial summary judgment dismissal of the first through fifth causes of action to the extent these are brought derivatively, arguing that Meissner lacks the legal capacity to bring derivative claims on behalf of a Delaware limited liability company in the absence of an action to nullify the Certificate of Cancellation.

In motion seq. no. 002, defendants moved to withdraw and/or substitute counsel pursuant to CPLR 321(b). That motion was permitted to be withdrawn pursuant to a Court order dated December 19, 2013 (NYSCEF Doc. No. 53).

Discussion

To pursue a derivative action on behalf of a dissolved Delaware limited liability company, a plaintiff must first successfully file a petition with Delaware's Court of Chancery to nullify or rescind the Certificate of Cancellation (Otto v Otto, 110 AD3d 620 [1st Dept 2013]; Matthew v Laudamiel, 2012 WL 605589, 2012 Del Ch Lexis 38 [Del Ch Feb. 21, 2012, No. 5957-VCN]). Absent nullification, a plaintiff lacks legal capacity to sue on behalf of a dissolved company.

In Otto v Otto, 110 AD3d 620, supra, the First Department held that the plaintiff lacked legal capacity to sue in a derivative action because she failed "to bring her derivative claims on behalf of the Delaware limited partnerships and limited liability company 'after or in conjunction with' a successful action seeking the nullification of the certificate of cancellation." The Appellate Court cited the Delaware Court of Chancery in Matthew v Laudamiel, supra, for the principle that derivative claims "must be brought in the name of the LLC by a trustee or receiver appointed under 6 Del. C. § 18-805, or directly by the LLC or derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation" (Matthew, supra, 2012 WL 605589 at *21-22).

In the instant case, Yun asserts that Meissner lacks standing or legal capacity to sue on behalf of Manhattan Review because he failed to nullify the Certificate of Cancellation she filed. Yun argues that Meissner's failure to file a petition in the Delaware Court of Chancery to revoke or nullify Manhattan Review's Certificate of Cancellation precludes a derivative action under the standard articulated in Matthew and Otto.

Meissner's assertion that Yun "is trying to have it both ways" (Pl. Memo In Opp., p. 6) by claiming sole ownership while asserting Meissner lacks legal capacity to pursue a derivative

action is unavailing. Meissner argues that if Yun is correct that she is the sole owner of Manhattan Review and Meissner has no stake, then Delaware courts will bar him from nullifying the cancellation. Meissner essentially asks this Court to allow standing in the instant case on the premise that he will fail in Delaware to undo Yun's cancellation if a trier of fact finds her to be Manhattan Review's sole owner. Meissner's argument is beside the point; he failed to take a preliminary step necessary to sue on behalf of a defunct company. Thus, how a Delaware court will rule on the cancellation issue is not dispositive.

More importantly, a plain reading of Delaware Code Annotated, Title 6 § 18-805, does not support Meissner's concern. That section allows "any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor" to modify the Certificate of Cancellation. If Meissner is correct in his assertion that he was Manhattan Review's majority shareholder, or even just a shareholder, consideration by a Delaware court of his petition would be warranted. Further, even if Yun was the sole owner, given Meissner's alleged role in the company, consideration would also be available pursuant to the "person who shows good cause" clause under section 18-805. In fact, Delaware courts generally have wide discretion to determine "good cause" (Matter of OKC Corp.,

1982 WL 17809, *3 [Del Ch June 22, 1982, No. 6687]; see also Del. Code Ann. tit. 8, § 279).

Meissner's attempt to factually distinguish Otto from the instant case based on Yun's stake in the company and the number of parties in Otto is equally unavailing. The First Department in Otto was clear: to bring a derivative claim on behalf of a Delaware limited liability company that has previously filed for cancellation, a plaintiff must first pursue an action to nullify the Certificate of Cancellation (110 AD3d at 620). Contrary to Meissner's contention, the Otto Court did not base its decision on the number of parties or the dissolver's ability to dissolve the LLC. A careful reading of the Appellate Court's discussion of the cancellation issue reveals no hint that it would have ruled differently if either factor Meissner points to were changed.

Moreover, Meissner's contention that Yun must be the majority shareholder to file a Certificate of Cancellation is simply incorrect. Section 18-802, the statute that provides for the dissolution of a limited liability company, states that:

> On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.

Thus, the statute's purpose is to allow dissolution "when an LLC cannot continue to function in accordance with its chartering agreement" (Haley v Talcott, 864 A2d 86, 94 [Del Ch 2004]). Additionally, "the ultimate determination of whether a decree of dissolution should issue is committed to this court's equitable discretion" (Vila v BVWebTies LLC, 2010 WL 3866098, *6, 2010 Del Ch Lexis 202, *19 [Del Ch Oct. 1, 2010, No. 4308-VCS]). In Haley, supra, though neither member in the two-member relationship possessed a majority share, the Delaware Chancery Court granted dissolution.

Lastly, Meissner incorrectly asserts that defendants' participation in this lawsuit waived their right to raise the standing and legal capacity issues. While Meissner is correct that a lack of standing or legal capacity defense "must be raised in a pre-answer motion to dismiss or the answer, or else it will be waived" (Security Pac. Natl. Bank v Evans, 31 A.D.3d 278, 280-81 [1st Dept 2006]), defendants did not waive the defense. Similar to the defendant in Otto, supra, who invoked section 18-805 in a pre-answer motion to dismiss, in the instant case, defendants asserted Meissner lacks standing and legal capacity to sue in their answer (Am. Answer, p. 4). Moreover, defendants also raised this defense in their opposition to Meissner's summary judgment motion, (Mtn Seq. 001, Memo in Opp., pp. 18-19),

although neither this Court nor the Appellate Division reached the issue in denying Meissner's motion (Feb. 26, 2014, NYSCEF Doc. No. 1; Meissner v Yun, 126 AD3d 565 [1st Dept 2015]). Thus, defendants preserved the issue by previously raising the defense in their responsive pleading and opposition papers.

Moreover, the cases Meissner cites in support of this waiver argument are wholly inapplicable. In Sherrill v Grayco Builders Inc., 64 NY2d 261 [1985], the Court of Appeals held that a party's participation in litigation precluded arbitration, while in Miraglia v H & L Holding Corp., 67 AD3d 513 [1st Dept 2009], the First Department held that a particular party's conduct waived its right to worker's compensation exclusivity. Similarly, in Finn v Church of Art for Living, 90 AD3d 826 [2d Dept 2011], the Second Department held defendant's participation constituted a waiver of personal jurisdiction. None of these cases cited address the standing and legal capacity issue. Though there are instances where participation in litigation waives procedural and substantive rights that may otherwise exist, the aforementioned cases do not stand for the proposition that lack of capacity to sue may be waived in this context.

Accordingly, defendants' motion for partial summary judgment to dismiss the first through fifth causes of action, to the extent that these claims are asserted derivatively, is granted.

Accordingly, it is

ORDERED that defendants', Tracy Yun and Manhattan Enterprise Group LLC, motion for summary judgment dismissing plaintiff's derivative causes of action (first through fifth) is granted, and those derivative claims are hereby dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel are directed to contact the Clerk of Part 48 at (646) 386-3265 to schedule a status conference.

This constitutes the decision and order of the Court.

Dated: 7/6/15

HON. JEFFREY K. OING, J.S.C.