WL Ross & Co. LLC v Storper
2016 NY Slip Op 31284(U)
July 7, 2016
Supreme Court, New York County
Docket Number: 650107/2016
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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WL ROSS & CO. LLC, WLR RECOVERY ASSOCIATES II, LLC, and WLR RECOVERY ASSOCIATES III, LLC,

Plaintiffs,

-against-

DAVID H. STORPER,

Defendant.

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Index No.: 650107/2016

Mtn Seq. No. 001

DECISION AND ORDER

Relief Sought

Defendant David Storper ("Storper") moves, pursuant to CPLR 3211(a)(1) and (7), for an order dismissing the complaint.

Factual Background

Plaintiff WL Ross & Co. LLC ("WL Ross") is a global investment and private equity firm (Compl., ¶ 14). WLR Recovery Fund II ("Fund II") and WLR Recovery Fund III ("Fund III") are investment vehicles managed by WL Ross (Compl., ¶ 16). Plaintiffs WLR Recovery Associates II LLC ("WLR II") and WLR Recovery Associates III LLC ("WLR III") are the general partners of Fund II and Fund III, respectively (Compl., ¶¶ 16-18).

Storper worked for WL Ross as a Senior Managing Director from 2000 to October 2012 (Compl., ¶¶ 1, 15). As a result of his position with WL Ross, Storper became a "Principal Member" of WLR II and WLR III, which entitled him to 12.5% of the carried

interest from these entities (Compl., ¶¶ 1, 22). Under WLR II and WLR III's LLC Agreements, a member may retire voluntarily by prior written notice or may be required to retire upon twenty four hours written notice (WLR II LLC Agreement, § 11[a]-[b], Kupfer Affirm., Ex. E; WLR III LLC Agreement, §11[a]-[b], Kupfer Affirm. Ex. F). In exchange for continuing to receive carried interest after their retirement, members agreed not to compete with WL Ross, Fund II, or Fund III as an individual or as a principal, manager, agent, consultant, officer or employee for twelve months after retiring from WLR II and WLR III (WLR II LLC Agreement at § 4(g), Kupfer Affirm., Ex. E; WLR III LLC Agreement at § 4(f), Kupfer Affirm., Ex. F).

In or around July 2006, Storper executed an employment agreement with WL Ross (the "Employment Agreement"), wherein he agreed that during his employment with WL Ross and for one year afterward he would not "engage in, have an interest in, or otherwise be employed by or associate with ... any business or organization, engaged in the business of advising non-registered collective investment vehicles" (Employment Agreement at §5(c)(i), Meade Affirm., Ex. C).

In a letter agreement dated June 21, 2012 (the "Letter Agreement"), Storper and WL Ross agreed that "beginning July 1,

2012, [WL Ross] and its affiliates [would] release Storper from any and all restrictions on his ability to seek employment elsewhere" although all other restrictions in any agreement to which Storper and WL Ross or its affiliates were a party remained intact (Letter Agreement at § 5, Kupfer Affirm., Ex. A). While the Letter Agreement prohibited Storper from competing with WL Ross by, inter alia, assisting or establishing a competing firm between June 21, 2012 and October 15, 2012, it made an exception to this prohibition to permit Storper to work for a competitor as an employee (Id. at §§ 4-5).

On October 15, 2012, Storper entered into a Separation Agreement (the "Separation Agreement") with WL Ross, which incorporated the Letter Agreement by reference (Separation Agreement at § 1, Kupfer Affirm., Ex. B). The Separation Agreement provided that Storper could discuss his titles and responsibilities at WL Ross with third parties, but could not attribute to himself the "performance related information" of WL Ross or its affiliates in any "proprietary" way and prohibited him from criticizing or disparaging WL Ross or otherwise disrupting its operations (Separation Agreement at §§ 9, 11).

On February 11, 2014, Storper emailed Ross a press release concerning a new merchant banking business Storper had formed,

Armory Merchant Holdings LLC ("Armory") (Kupfer Affirm., Ex. D-1). Ross responded that same day, writing "congratulations! We will be happy yo [sic] look at co investments with you" (Id.).

On or about March 6, 2015, Storper commenced a proceeding in the Delaware Chancery Court for inspection of the books and records of a WL Ross affiliate, Ross CG Associates LP ("Ross CG"), captioned Storper v WLR Recovery Associates II LLC, et al. (the "Books and Records Action") (Compl., ¶ 31). In a pleading filed in the Delaware proceeding, WL Ross asserted that Storper was a retired member of WLR II and WLR III (Answer to Verified Compl., Kupfer Affirm., Ex. H).

On July 21, 2015, Storper filed an action against WL Ross, Ross CG, and related entities in the Supreme Court of the State of New York, Index No. 652550/2015 (the "Related New York Action"), maintaining that he remained a limited partner in Ross CG after he left his job as Senior Managing Director at WL Ross -- because he never sent or received written notice of withdrawal from the partnership -- and was therefore owed carried interest and profits for the period after his retired from WL Ross.

On January 8, 2016, plaintiffs filed this action asserting claims for breach of the WLR II and III LLC Agreements and the Separation Agreement.

Discussion

Breach of WLR II and III LLC Agreements (1st and 2nd Causes of Action)

WL Ross notes that the provisions regarding a partner's withdrawal from Ross CG and a member's retirement from WLR II and WLR III are, for all intents and purposes, identical, and argues that, as a result, if this Court determines in the Related New York Action that Storper remains a partner in Ross CG due to a lack of written notice, then Storper has not retired as a member of WLR II and WLR III (Compl., ¶¶ 2-4, 30). While not alleged in WL Ross's complaint, the record in this action and the related action indicate that the provisions of the WLR LLC Agreements and Ross CG's Limited Partnership Agreement requiring written notice of withdrawal or retirement were not observed.

In the complaint's first and second causes of action, plaintiffs allege that if Storper is not retired from WLR II and WLR III, he has breached the non-competition provisions in section 4(g) of the WLR II LLC Agreement and section 4(f) of the WLR III LLC Agreement by: (1) co-founding Armory which, like Fund II and Fund III, invests in undervalued companies; and (2) meeting with a current WL Ross-fund investor to pitch an

investment opportunity in an area in which WLR II and III also invest (Compl., ¶¶ 34-35, 40-42, 44, 58, 65).

Storper argues that this claim is barred by sections 4 and 5 of the Letter Agreement. This argument is unavailing. The LLC Agreements prohibit Storper from acting as a principal, manager, agent, consultant, officer, or employee of a competitor while he remains a principal member of WLR II and WLR III. The Letter Agreement only creates an exception to this prohibition for Storper to act as an employee for a competitor. As plaintiffs allege that Storper formed Armory himself, this action falls under the LLC Agreements' prohibitions against acting as a principal, officer, or manager.

Alternatively, Storper argues that the congratulatory email Ross sent him on February 11, 2014 is documentary evidence that supports the dismissal of this action under theories of waiver, laches, and equitable estoppel. An email can serve as documentary evidence if it is "essentially undeniable and ... will itself support the ground on which the motion is based" (Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc., 120 AD3d 431 [1st Dept 2014]). Ross's email does not meet this standard because it does not conclusively establish any of

defendant's defenses (Art and Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436, 438 [1st Dept 2014]).

A valid waiver "requires ... a voluntary and intentional relinquishment of a known and otherwise enforceable right" (Golfo v Kycia Assoc., Inc., 45 AD3d 531, 532-33 [2d Dept 2007] [internal citations omitted] [emphasis added]). Similarly, equitable estoppel requires the party to be estopped: (1) to act in a manner calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) with the intent that such conduct will be acted upon; and (3) knowledge, actual or constructive, of the true facts (Health-Loom Corp. v Soho Plaza Corp., 272 AD2d 179, 181 [1st Dept 2000] [emphasis added]). The email at issue does not demonstrate that Ross believed that Storper remained a principal member of WLR II and WLR III when he offered his tacit approval of Armory. Accordingly, the email, standing alone, is insufficient to support dismissal based on waiver or equitable estoppel (Melcher v Apollo Med. Fund Mgmt. LLC, 25 AD3d 482, 483 [1st Dept 2006]).

Laches is also unavailable as a defense because this action is at law commenced within the period of limitations (Cadlerock, L.L.C. v Renner, 72 AD3d 454, 454 [1st Dept 2010]; Garber v

Stevens, 94 AD3d 426, 427-28 [1st Dept 2012]; Fade v Pugliani/Fade, 8 AD3d 612 [2nd Dept 2004]). Even if this were not the case, Storper has failed to allege the necessary elements of knowledge, injury, or prejudice (Highbridge House Ogden LLC v Highbridge Entities LLC, 48 Misc 3d 976 [Sup Ct, NY County 2015]). Similarly, Storper has failed to allege facts supporting an unclean hands defense.

Storper next argues that the non-compete provisions in the LLC Agreements are overbroad, and therefore unenforceable. The case law on which Storper relies for this proposition involves post-termination restrictions on employment. The claim at issue here, however, concerns Storper's alleged breach of non-competition while remaining a principal member of WLR II and WLR III.

Lastly, Storper argues that WL Ross's assertion in the Delaware Books and Records Action that Storper was a retired member of WLR II and WLR III constitutes an informal judicial admission which refutes an essential element of a plaintiffs' claim thereby serving as a basis for dismissal (Kaisman v Hernandez, 61 AD3d 565, 566 [1st Dept 2009]; Silverman v Clark, 35 AD3d 1, 16-17 [1st Dept 2006]). This argument is unavailing.

Informal judicial admissions are evidence of facts previously admitted (Hill v King Kullen Grocery Co., Inc., 181 AD2d 812, 813 [2d Dept 1992]), while defendant's status as a member of WLR II and III is ultimately a legal question.

Accordingly, defendant's motion to dismiss the first and second causes of action is denied.

Breach of WL Ross Separation Agreement (3rd Cause of Action)

Plaintiffs allege that Storper has breached his contractual obligations under paragraph 9 of the Separation Agreement by telling a WL Ross investor that during his tenure at WL Ross he ran its shipping investment platform (Compl., ¶ 51). Clearly, this representation was merely a description of his responsibilities -- which is expressly permitted by section 9 of the Separation Agreement. As such, this statement cannot form the basis for a breach of the separation agreement.

Plaintiffs also allege that Storper breached his contractual obligations under paragraph 11 of the Separation Agreement by his: (1) statements in the Delaware Action that Storper had a "reasonable and creditable basis to believe that mismanagement may have occurred" with respect to WL Ross and its affiliated entities; and (2) statements in the Related New York Action that "glaring deficiencies of the most basic governance principles" in

WL Ross and its affiliates raised "serious doubts about [their] oversight and management" and indicated "a troubling pattern of irregular behavior"(Compl., ¶¶ 51-53, 70).

Statements made by parties in the course of a judicial proceeding are "absolutely privileged, notwithstanding the motive with which they are made, so long as they are material to the issue to be resolved in the proceeding[s]" (Kilkenny v Law Off. of Cushner & Garvey, LLP, 76 AD3d 512, 513 [2d Dept 2010]). As these statements were made in the course of judicial proceedings and were material to the issues to be resolved therein (i.e., inspection of the books and records of Ross CG, and whether Storper is entitled to carried interest and profit from Ross CG after his employment with WL Ross was terminated, respectively), these statements cannot form the basis for a breach of the separation agreement.

Accordingly, it is

ORDERED that defendant's motion to dismiss the first and second causes of action is denied; and it is further

ORDERED that defendant's motion to dismiss the third cause of action in the complaint is granted, and it is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear in Part 48 (Room 242) for a preliminary conference on July 27, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/7/16

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