

Rothman v RNK Capital, LLC
2016 NY Slip Op 31325(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 150120/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ZOR ROTHMAN and REVERSING ENTROPY, LLC,

Index No. 150120/15

Plaintiffs,

Motion seq. no. 002

-against-

DECISION AND ORDER

RNK CAPITAL, LLC, GREY20 FUND LP, ORGANICA
WATER, SUNRAY POWER MANAGEMENT, LLC,
ROBERT KOLTUN, and JOHN DOES NOS. 1-2,

Defendants.

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BARBARA JAFFE, J.:

For plaintiffs:
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For defendants RNK, Sunray, Koltun:
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By notice of motion, plaintiffs move for an order requiring defendants RNK Capital, LLC, Sunray Power Management, LLC, and Robert Koltun to provide them with access to their book and records for inspection in order to determine, *inter alia*, defendants' current financial status, assets, liabilities, income, and expenses. Defendants oppose.

As I previously dismissed plaintiffs' claims against Sunray (NYSCEF 25), and as Koltun is not the proper party from whom an inspection may be demanded, I address plaintiffs' motion only as to RNK.

I. PERTINENT BACKGROUND

As set forth in my prior order, Rothman is the sole member of plaintiff Reversing Entropy (RE). RNK is an investment firm, in which Rothman is a passive investor who holds a five percent interest. (NYSCEF 11). It is undisputed that RNK's limited liability agreement contains

no limitation on a member's ability or right to review its books and records. (NYSCEF 53).

In their complaint, filed on or about December 31, 2014, plaintiffs allege as their first cause of action that when RE received a distribution from RNK's capital account in February 2013, RNK, without plaintiffs' consent and contrary to their agreement, deducted over \$17,000 from the distribution and refuses to pay it to RE despite due demand, and as their second cause of action, that RE is entitled to review RNK's books and records, that RE gave RNK reasonable notice of its intent to have its accountant examine the books and records, and that RNK refuses to make them available for inspection. **Plaintiffs' only claim against RNK is thus that it did not pay RE the full amount owed it.?????** (NYSCEF 1).

By letter dated November 16, 2015, plaintiffs' counsel wrote to RNK's counsel, reminding him of his letter dated October 29, 2015 advising that plaintiffs were exercising their rights to inspect the records and books of RNK, and that RNK had not responded. Counsel thus renewed his request that RNK make available its books and records for inspection by RE's accountant. (NYSCEF 37).

By letter dated December 7, 2015, counsel again made his request and gave RNK until December 14, 2015 to comply. (NYSCEF 38). In neither letter did counsel provide a reason or purpose for the demand.

On or about December 14, 2015, RNK rejected plaintiffs' demand as facially and substantially deficient under Delaware Law, observing that plaintiffs did not identify a proper purpose for the demands, and that in any event, Rothman's demand was identical to the second cause of action in plaintiffs' complaint. (NYSCEF 39).

By affidavit dated December 29, 2015, Rothman states that he needs to see RNK's

records as RNK and Koltun have, since ending their business relationship with Rothman approximately three years ago, kept him and RNK “in the dark” and refused to provide him with information about RNK’s assets, income, or operations. (NYSCEF 31).

II. CONTENTIONS

Plaintiffs argue that Delaware Law permits them inspection of RNK’s records as RE is or was a member of RNK at the time of the demand and that their demand complies with the statute as it was in writing and states the purpose of the demand. They also maintain such a right under New York Law. Plaintiffs assert that they seek the records as RNK have “effectively frozen out” Rothman and RE for at least three years. As RNK failed to provide the records despite plaintiffs’ proper demand, plaintiffs also seek sanctions for its frivolous behavior. (NYSCEF 34).

RNK contends that plaintiffs improperly demanded books and records after they commenced litigation against RNK, that requiring it to permit the inspection would be effectively granting plaintiffs judgment on their second cause of action, and that they have failed to state a purpose or establish a proper purpose for the inspection. RNK denies that plaintiffs’ alleged purpose, to receive information of which they have been “kept in the dark” or “frozen out of” or to investigate possible wrongdoing, is sufficient to allow inspection, and observe that plaintiffs did not specifically identify what documents they seek. (NYSCEF 43). At oral argument, RNK conceded that plaintiffs made a demand before commencing litigation. (NYSCEF 53).

In reply, plaintiffs argue that in 2014, RNK agreed to the inspection but that the parties’ could not agree on terms, and contend that they have stated a purpose in seeking RNK’s records by alleging that RNK failed to meet its legal and fiduciary obligations to RE to keep RE informed of RNK’s activities. (NYSCEF 45, 48).

III. ANALYSIS

The applicable provisions of Delaware Law, 6 Del. C. 18-305, provide that:

- (a) Each member of a limited liability company . . . has the right . . . to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company [certain documents];
- (e) Any demand under this section shall be in writing and shall state the purpose of such demand.

A member of a limited liability company (LLC) must establish, by a preponderance of the evidence, the existence of a "proper purpose" for inspecting the LLC's books and records, which is one "reasonably related to such person's interest" as a member in the LLC. Valuing one's ownership in a company or investigating possible mismanagement or wrongdoing constitute proper purposes. (*Sanders v Ohmite Holdings, LLC*, 17 A3d 1186 [Del Ch Ct 2011]). A member need not prove that misconduct or wrongdoing actually occurred but only provide a credible basis from which it may be inferred. (*Seinfeld v Verizon Communications, Inc.*, 909 A2d 117 [Del 2006]).

Moreover, the member bears the burden of proving that each category of books and records requested is essential and sufficient to his stated purpose. (*Sanders*, 17 AD3d at 1194). The court has broad discretion in whether to tailor the inspection to a member's stated purpose and in determining the proper scope of inspection. (*Thomas & Betts Corp. v Leviton Mfg. Co., Inc.*, 681 A2d 1026 [Del 1996]). Courts interpreting Delaware's inspection requirements require strict adherence to protect the corporation's rights. (*Amalgamated Bank v Yahoo! Inc.*, 132 A3d 752 [Del Ch Ct 2016]).

As RNK concedes that plaintiffs made their demand before commencing litigation, there

is no merit to RNK's contention that they are barred from seeking the documents as improper post-litigation discovery materials.


However, plaintiffs did not state a purpose in their demand letters; the purpose set forth by Rothman in his affidavit, to obtain information from RNK because RNK has refused to give him information, is insufficient. Moreover, Rothman never identified the specific documents he seeks. Plaintiffs have thus failed to meet their burden of demonstrating an entitlement to inspection of RNK's books and records.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order requiring defendants RNK Capital, LLC and Sunray Power Management, LLC to make available for inspection their books and records is denied.

ENTER:



Barbara Jaffe, JSC

DATED: July 14, 2016
New York, New York