

Walker v Classic Rests. Corp.
2017 NY Slip Op 30155(U)
January 23, 2017
Supreme Court, New York County
Docket Number: 654146/2016
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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KENNETH H. WALKER, on behalf of FOUR TREES
GLOBAL, LLC and LAWRENCE G. GRAEV, on
behalf of FOUR TREES GLOBAL, LLC,

Plaintiffs,

Index No. 654146/2016

- against -

CLASSIC RESTAURANTS CORP., ALEX VON BIDDER
and JULIAN NICCOLINI.

Defendants.

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Hon. C. E. Ramos, J.S.C.:

Defendants Classic Restaurants Corp. ("Classic"), Alex von Bidder and Julian Niccolini move to dismiss the complaint of plaintiffs Kenneth H. Walker and Lawrence G. Graev, on behalf of Four Trees Global, LLC ("Four Trees"), pursuant to CPLR 3211 (a) (3) and (7).

For the reasons set forth below, the Court partially grants the motion to dismiss to the extent of the first cause of action for breach of fiduciary duty, and the fourth cause of action for aiding and abetting breach of fiduciary duty.

Background

The allegations are taken from the complaint and assumed to be true for purposes of disposition. Classic owned the Four Seasons restaurant located in the Seagram building, at 99 East 52nd Street, New York (the "Flagship Restaurant"), and its trademarks, service marks, trade name, and designs (the "Licensed Marks"), including "The Four Seasons Restaurant" and its logo

(Verified Complaint, ¶¶ 1, 2). Niccolini, von Bidder and the Bronfman family (non-parties) are shareholders of Classic (*id.* at ¶ 31). Niccolini and von Bidder are also managing partners of the Flagship Restaurant (*id.* at ¶ 4).

In the summer of 2012, Walker and Graev discussed with Niccolini and von Bidder the possibility of commercializing and monetizing the Licensed Marks (Verified Complaint, ¶¶ 4, 5). On October 1, 2012, Niccolini, von Bidder, Walker and Graev formed Four Trees, a Delaware limited liability company, by entering into a Limited Liability Company Agreement (the "LLC Agreement") (*id.* at ¶ 6). Niccolini and von Bidder are majority members, each owning approximately 41% of Four Trees, while Graev and Walker each own approximately 9% of Four Trees (*id.* at ¶ 35). Walker, Graev, Niccolini and von Bidder are members of the board of managers (the "Board") of Four Trees (*id.* at ¶ 36).

Section 5 of the LLC Agreement, which is titled "Management of the Company," states:

"(c) No Member, by reason of such Member's status as such, shall have any authority to act for or bind [Four Trees] but shall have only the right to vote on or approve the actions herein specified to be voted on or approved by such Member" (Verified Complaint, Ex. A).

Section 19 of the LLC Agreement is an exculpatory provision, which states that:

"Neither a Manager nor officer shall be liable to [Four Trees], or any other person or entity who has an interest [Four Trees], for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such

Manager or officer in good faith on behalf of [Four Trees] and in a manner responsibly believed to be within the scope of the authority conferred on such Manager's or officer's willful conduct" (*id.*).

On October 1, 2012, Four Trees and Classic entered into a Master Trademark License Agreement (the "2012 License Agreement"), which granted Four Trees an exclusive license to commercialize and monetize the License Marks outside of New York City (Verified Complaint, Ex. B). The preamble of the 2012 License Agreement states that:

"[Four Trees] desires to use the Licensed Marks to open, or permit to be opened, new restaurants outside New York City and to sell additional products bearing the License Marks, while at all times maintaining the quality and reputation of the Flagship Restaurant" (*id.*).

The 2012 License Agreement also restricts its territorial scope by defining the territory as "the world except for the City of New York" (*id.*).

On October 15, 2014, Four Trees and Classic entered into an Amended and Restated License Agreement (the "2014 License Agreement"), which contains the same restrictive territorial language in the preamble (Verified Complaint, Ex. C). The 2014 License Agreement changes the definition of the territory to "the world with respect to both Licensed Restaurants and Licensed Products" (*id.*). In addition, section 4.1 of the 2014 License Agreement requires the quality of the licensed restaurants and licensed products to be comparable to that of the Flagship Restaurant (*id.*).

Walker and Graev allege that they worked with von Bidder and Niccolini over three and a half years to commercialize and monetize the Licensed Marks, by holding meetings within themselves and with third parties (Verified Complaint, ¶ 12). For instance, Walker and Graev allege that they met with several landlords in New York City to discuss opening a new four seasons restaurant in their buildings (*id.* at ¶ 55). In addition, Walker and Graev allege that Four Trees fully performed its obligation under the 2014 License Agreement by managing and expanding the portfolio of Licensed Marks, exploring prospective restaurant sites in multiple cities, and engaging a consulting firm to develop a business plan for the launch of a prepared food business to be operated under the Licensed Marks (*id.* at ¶ 89).

On March 16, 2016, Graev purportedly discovered that von Bidder and Niccolini were attempting to proceed with a new Four Seasons restaurant at a new location in New York City (Verified Complaint, ¶ 13). Neither Niccolini nor von Bidder had informed Walker or Graev that they were in advanced negotiations with the landlords of 280 Park Avenue for this purpose (*id.* at ¶ 60). Subsequently, Graev notified von Bidder that the proposed restaurant Niccolini and von Bidder sought to open at 280 Park Avenue could not use the Licensed Marks without a license from Four Trees, pursuant to the terms of the 2014 License Agreement (*id.* at ¶¶ 62, 63, 64). The parties were unable to reach a

resolution on this issue (*id.*).

On May 16, 2016, Four Trees received a "termination notice" from Classic, in which Classic purported to terminate the 2014 License Agreement pursuant to section 9 (Verified Complaint, ¶ 68). Section 9.1(B) of the 2014 License Agreement allows Classic to terminate the agreement immediately upon Four Trees' receipt of written notice from Classic in the event of a breach by Four Trees, in which:

"[Four Trees] fails to perform its obligations under this Agreement...and continues in default of such obligations for a period of thirty (30) days after written notice thereof from the Licensor to the Licensee (unless the default cannot be cured within the initial thirty (30) day period after written notice and the Licensee diligently and continuously proceeds to cure, and does in fact cure, such default, within ninety (90) following such initial period)" (*id.* at Ex. C).

The termination notice from Classic states that Four Trees had failed to perform its obligations under the 2014 License Agreement section 2.2 (Verified Complaint, ¶ 68). Section 2.2 of the 2014 Lease Agreement requires Four Trees to "use commercially reasonable efforts to commercialize the Licensed Marks...in order to maximize Gross Revenue" (*id.*).

After learning that the landlord would not renew the lease for the Flagship Restaurant, Niccolini and von Bidder, acting through an entity not known to Walker and Graev, signed a lease for a new Four Seasons restaurant at 280 Park Avenue, New York, on May 27, 2016 (Verified Complaint, ¶¶ 10, 17).

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In August 2016, Walker and Graev commenced this action on behalf of Four Trees against Classic, von Bidder, and Niccolini. In the first cause of action, Walker and Graev assert that von Bidder and Niccolini breached their fiduciary duties as members of Four Trees by conspiring in the unauthorized use of the Licensed Marks (Verified Complaint, ¶ 81). In the second cause of action, Walker and Graev assert that Classic breached the 2014 License Agreement because of improper termination (*id.* at ¶ 96). In the third cause of action, Walker and Graev seek a declaratory judgment that Four Trees undertook extensive efforts to commercialize the Licensed Marks (*id.* at ¶ 101). In the fourth cause of action, Walker and Graev assert that Classic aided and abetted von Bidder and Niccolini in breaching their fiduciary duties (*id.* at ¶ 110).

Discussion

Classic, von Bidder and Niccolini move to dismiss the complaint, in the first instance, on the ground that Walker and Graev lack standing to sue derivatively and have failed to plead demand futility. Classic, von Bidder and Niccolini also move to dismiss the complaint for a failure to state a cause of action.

Under CPLR 3211(a)(3), a complaint must be dismissed where "the party asserting the cause of action has not legal capacity to sue." Under New York's choice of law rules, matters of substantive law are controlled by the state in which the limited

liability company is formed (see *Lerner v Prince*, 119 AD3d 122 [1st Dept 2014]). Four Trees is a Delaware LLC, and thus, Delaware law governs.

Delaware Limited Liability Company Act grants a member of a limited liability company standing to pursue a derivative lawsuit (6 Del. C. § 18-1001). The right to bring a derivative lawsuit is limited to situations where the demand of pursuing the claim is wrongfully refused by the directors, or the demand is excused (*Rales v Blasband*, 634 A2d 927, 932 [1993]). The demand is excused when, "under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment" (*id.* at 933).

Here, section 5(c) of the LLC Agreement, which pertains to management of the company, does not prohibit derivative lawsuits as von Bidder and Niccolini assert. Rather, section 5 provides members the right to vote on or approve the actions specified in the LLC Agreement, and prohibits any member to act for or bind the company. By its explicit terms, this provision only limits individual member's managing authority by restricting any individual member from unilaterally causing Four Trees to take any particular action or binding Four Trees to any obligations; it does not prohibit those members from bringing a derivative

lawsuit.

Walker and Graev persuasively assert that demand is futile here, and sufficiently allege facts raising a reasonable doubt that Niccolini and von Bidder are independent and disinterested in the underlying transactions. Niccolini and von Bidder are owners of both Classic and Four Trees and allegedly engaged in self-interested dealing. They signed a lease for the new Four Seasons restaurant on behalf of Classic and allegedly have failed to pay Four Trees any license fee. In addition, litigation by Four Trees requires a majority vote by its Board. Niccolini and von Bidder are 50% of the Board, and would be interested parties in any lawsuit relating to their own misconduct. All these allegations create doubt as to their independence and are sufficient to plead demand futility.

In deciding a motion to dismiss under CPLR 3211(a)(7), the court must consider whether there can be a legally cognizable cause of action based on the allegations (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). The facts alleged in the pleadings are assumed to be true, and the court must accord a plaintiff the benefit of every possible favorable inference (*id.*).

Here, Walker and Graev fail to allege that Niccolini and von Bidder breached their fiduciary duties for several reasons. Walker and Graev allege that Niccolini and von Bidder breached

the fiduciary duties they owed to Four Trees by signing the lease to move the Flagship Restaurant, permitting the Flagship Restaurant to use the Licensed Marks, and failing to request a license to use the Licensed Marks within the New York City. First, section 19 of the LLC Agreement eliminates the personal liability of any manager or officer unless they acted in bad faith or conscious disregard of their duties to Four Trees. Walker and Graev did not allege that Niccolini or von Bidder acted in bad faith or conscious disregard of their duties to Four Trees.

In addition, the Flagship Restaurant is not a "licensed restaurant" and does not need to request a license to use the Licensed Marks. The preamble of the 2014 License Agreement allows Four Trees to use the Licensed Marks to open new restaurants outside New York City and to sell additional products bearing the Licensed Marks. The 2014 License Agreement also differentiates the Flagship Restaurant from a licensed restaurant by requiring Four Trees to maintain the quality and reputation of the Flagship Restaurant and requiring the quality of the licensed restaurants and licensed products to be comparable to that of the Flagship Restaurant. Although the Flagship Restaurant moved to a new location in New York City, the relocation of the Flagship Restaurant does not render it a licensed restaurant under the terms of the 2014 License Agreement. Therefore, Walker and Graev

fail to allege that Niccolini and von Bidder breached their fiduciary duties to Four Trees by relocating the Flagship Restaurant. On the same basis, the claim for aiding and abetting breach of fiduciary duty fails.

Walker and Graev also fail to allege that Classic breached the 2014 License Agreement for failure to give sufficient notice to terminate the agreement. Section 9.1(B) of the 2014 License allows Classic to terminate the agreement upon Four Trees' receipt of written notice when Four Trees fails to perform its obligation under section 2.2 of the agreement and continues in default for 30 or 90 days after written notice. Four Trees received the termination notice from Classic on May 16, 2016, pursuant to section 9.1 of the 2014 License Agreement. Neither section 9.1 nor section 2.2 of the agreement requires Classic to specify what commercially reasonable efforts are in the termination notice.

In addition, Classic is not contractually obligated to give Four Trees opportunities to cure before sending the termination notice. Section 9.1 of the 2014 License Agreement only provides Four Trees 30 or 90 days to cure the default after receiving written notice. Walker and Graev did not allege that Fours Trees attempted to cure the default after receiving the termination notice on May 16, 2016. Therefore, Walker and Graev fail to allege that Classic breached the 2014 License Agreement because

of improper termination.

However, Walker and Graev sufficiently allege that Classic breached the implied covenant of good faith and fair dealing. All contracts have an implied covenant of good faith and fair dealing in the course of performance, which embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract," and encompasses promises that "a reasonable person in the position of the promises would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

Here, Walker and Graev allege that Classic injured Four Trees' right to receive the benefits of the 2014 License Agreement. Classic purported to terminate the 2014 License Agreement on the ground that Four Trees failed to use commercially reasonable effort to commercialize the Licensed Marks. Walker and Graev allege that Four Trees undertook extensive efforts to commercialize the Licensed Marks, including exploring prospective restaurant sites and working on a business plan for prepared food under the Licensed Marks. Classic purportedly terminated the agreement on an improper ground, which injured Four Trees' right to use the Licensed Marks. Whether Four Trees used commercially reasonable efforts to commercialize the Licensed Marks is a question of fact, which cannot be determined

on a pre-answer motion to dismiss.

Allegations that establish a justiciable controversy concerning parties' legal rights are sufficient for seeking a declaratory judgment (*Harmit Realities LLC v 835 Ave. of the Ams., L.P.*, 128 AD3d 460, 461 [1st Dept 2015]). Walker and Graev allege that Classic breached the implied covenant of good faith and fair dealing of the 2014 License Agreement. Whether Four Trees used commercially reasonable efforts to commercialize the Licensed Marks concerns its legal rights under the agreement. Therefore, Walker and Graev sufficiently assert a cause of action for declaratory judgments.

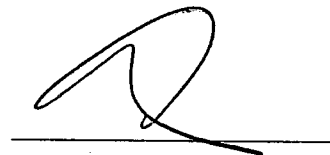
Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the first and fourth causes of action of the complaint are severed and dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days of entry of this order with notice of entry.

Dated: January 23, 2017

ENTER:



J.S.C.

CHARLES E. RAMOS