

**Estate of Alexander Calderwood v ACE Group Intl.  
LLC**

2017 NY Slip Op 30273(U)

February 10, 2017

Supreme Court, New York County

Docket Number: 650150/2015

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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THE ESTATE OF ALEXANDER CALDERWOOD,  
by its personal representative, Thomas B. Calderwood,

Index No.: 650150/2015

**DECISION & ORDER**

Plaintiff,

-against-

ACE GROUP INTERNATIONAL LLC, ECOPLACE  
LLC, and STEFANOS ECONOMOU,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with its February 29, 2016 decision, which held, *inter alia*, that the Estate is merely a Withdrawing Member of the Company. *See* Dkt. 75 (the Prior Decision).<sup>1</sup> Defendants now move, pursuant to CPLR 3211, to dismiss the second amended complaint filed by the Estate on March 21, 2016. *See* Dkt. 79 (the SAC). The Estate opposes the motion and cross-moves, pursuant to CPLR 3211(c) and 3212, for partial summary judgment on the first cause of action in the SAC regarding the Full Call Right in section 9.4 of the Agreement. Defendants oppose the cross-motion. For the reasons that follow, defendants' motion to dismiss is granted and the Estate's cross-motion for summary judgment is denied.

*I. Background & Procedural History*

The Prior Decision sets forth the relevant factual background, the terms of the Agreement, the standard on a motion to dismiss, and Delaware's rules of contractual interpretation, which are not repeated here. Unless otherwise indicated, the facts recited herein are based on the Prior Decision, the SAC, and the documentary evidence submitted by the parties.

<sup>1</sup> References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system. All capitalized terms not defined herein have the same meaning as in the Prior Decision.

The SAC contains three causes of action: (1) breach of contract for Ecoplace's failure "to honor the Estate's assertion of its 'Full Call Right' to purchase Ecoplace's interest in [the Company]"; (2) "breach of contract, including the duty of good faith and fair dealing, related to Ecoplace's failure to pay distributions"; and (3) a declaratory judgment "that the Estate may share information with third parties," and that it may specifically "share [the Company's] financial and business information for the purpose of pursuing this litigation and with investors, lenders, and other capital sources." *See* Dkt. 79 at 5-7.

On April 20, 2016, defendants filed the instant motion to dismiss. They seek dismissal of: (1) the SAC as against the Company and Economou due to the SAC not actually asserting any cause of action nor seeking any relief against them; (2) the first cause of action regarding the Full Call Right based on the plain meaning of sections 9.4(b) (the Unresolvable Deadlock prerequisite) and 9.4(e) (the Full Call Right being "personal" to Alex and non-transferrable) of the Agreement; (3) the second cause of action because the Company's financial statements, which have been provided to the Estate, do not show that section 4.1 of the Agreement requires mandatory distributions; and that the SAC does not otherwise plead a claim for distributions based on the implied covenant; and (4) the third cause of action for a declaratory judgment, which is supposedly moot by virtue of the court's discovery orders and this action's dismissal. *See* Dkt. 84.

On June 9, 2016, the Estate opposed defendants' motion and cross-moved for summary judgment on its first cause of action regarding the Full Call Right. The Estate argues that: (1) Alex's Full Call Right did not "transfer" to the Estate and that there is indeed an Unresolvable Deadlock; (2) there are questions of fact about the Estate's entitlement to distributions; (3) the declaratory judgment claim sought by the Estate is neither currently moot, nor will it become

moot at the conclusion of this action; and (4) the Company and Economou are necessary parties for the purpose of effectuating any relief ordered against Ecoplace. *See* Dkt. 98.

Defendants filed their reply and opposition to the cross-motion on July 8, 2016 [*see* Dkt. 107], and the Estate filed a reply on its cross-motion on August 3, 2016. *See* Dkt. 108. The court reserved on the motion and cross-motion after oral argument. *See* Dkt. 110 (12/13/16 Tr.).

## II. Discussion

As an initial matter, the SAC is dismissed as against the Company and Economou. The Estate does not plead any cause of action against either of these defendants. Nor are the Company and Economou necessary parties. This case concerns the contractual obligations under the Agreement between the Estate, as Withdrawing Member, and Ecoplace, as Member. The Estate cites no authority for the proposition that a managing member of an LLC is a necessary party to a contractual claim involving the LLC where no claims are asserted against the managing member in his individual capacity. Nor does the Estate cite authority requiring an LLC to be a party in an action involving members' rights under the LLC's operating agreement.<sup>2</sup> The Company and Economou are dismissed from this action because their rights will not be prejudiced or inequitably affected absent their involvement. *See* CPLR 1001; *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543, 550 (2012).

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<sup>2</sup> Plaintiff's claims are direct, not derivative. Nor does plaintiff plead claims for breach of fiduciary duty. *See Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 (Del 2004); 13 Fletcher Cyc. Corp. § 5997 (Sep. 2016 Update) ("The corporation is a necessary and indispensable party in a derivative proceeding, since any right of recovery belongs to it. This rule has also been applied to a derivative proceeding brought by a member of a limited liability company (LLC), thus requiring the LLC to be joined as a necessary party to the action."), accord *Striker v Chesler*, 39 DelCh 193, 195 (1960) ("it is horn-book law that a corporation for whose benefit and in whose right a derivative action is brought is clearly a necessary party to such action and that if the corporation cannot be served the complaint must be dismissed.").

Turning now to the merits of the Estate's claim that it has a Full Call Right under the Agreement, the court holds that the Estate has no such right because that right ceased to exist upon Alex's death. To explain, Full Call Right is defined in section 9.4(b) of the Agreement:

**Following the occurrence of any Unresolvable Deadlock** during the period commencing on the third (3rd) anniversary of the Effective Date and ending on the fifth (5th) anniversary of the Effective Date, **Calderwood [defined as Alex] shall have the right** ('Full Call Right' and collectively with the Partial Call Right, the 'Call Rights'), but not the obligation, by providing written notice to the Investor (a 'Full Call Notice'), to acquire the Call Interest of the Investor at the Call Price, pursuant to the terms, conditions and procedures set forth in Section 9.4(c) below.

*See* Dkt. 88 at 51 (emphasis added).

Unresolvable Deadlock is defined in section 9.4(c)(i)(E) to mean:

[A] disagreement between **Calderwood and Investor [defined as Ecoplace]** regarding a **Major Decision** which (i) **Calderwood and the Investor** are unable to resolve despite good faith efforts within a period of ninety (90) days following the date on which such matter is brought before the Board for consideration **and** (ii) reflects a fundamental divergence in **each Member's views** regarding the desired strategic direction of the Company and which if not promptly resolved would be reasonably likely to result in further deadlocks on other matters.

*See id.* at 52 (emphasis added). Major Decision is defined in section 7.3 [*see id.* at 23] to include the "Major Decisions" set forth in Exhibit E to the Agreement. *See id.* at 104. Major Decisions include, for instance, matters concerning mergers, liquidations, and expenditures in excess of \$500,000. *See id.*

Section 9.4(e) further provides:

The Partial Call Right and Full Call Right described in this Section 9.4 **are personal to Calderwood and cannot be Transferred to any other Person.**

*See id.* at 54 (emphasis added). Person is defined to mean both natural persons and corporate entities [*see id.* at 95], and the Agreement specifically distinguishes between the two when appropriate. *See id.* at 22 ("A board of managers of the Company (the 'Board') is hereby

established and shall be comprised of **natural** Persons.”) (emphasis added). Transfer is defined to mean:

as a noun, any transfer, sale, assignment, exchange, charge, pledge, gift, hypothecation, conveyance, encumbrance or other disposition, voluntary or involuntary, by operation of Law or otherwise and, as a verb, **voluntarily or involuntarily, by operation of Law or otherwise, to transfer, sell, assign, exchange, charge, pledge, give, hypothecate, convey, encumber or otherwise dispose of.**

*See id.* at 97 (emphasis added).

The Estate has no Full Call Right since it is impossible for there to be an Unresolvable Deadlock – a condition precedent to the exercise of the Full Call Right – because Alex is no longer alive. Alex, thus, can have no disagreement with Ecoplace over anything, let alone management of the Company. While the Estate suggests that it has stepped into Alex’s shoes with respect to the issues for which there could be an Unresolvable Deadlock, the plain meaning of section 9.4(c)(i)(E), read in conjunction with section 9.7(b), refutes this notion. That is because there is no issue for which the Estate could possibly have the sort of disagreement contemplated by section 9.4(c)(i)(E), i.e., Major Decisions.

While Alex was alive, as a Member, he had the right to have input in the Company’s management, including Major Decisions. That is no longer the case because his interest converted to a Withdrawing Membership interest upon his death. The Estate, consequently, has no right to have any input in the Company’s management and only has the right to distributions. In other words, the Estate lacks the right to object to Ecoplace’s decisions with respect to the “strategic direction of the Company.” This precludes the Estate from satisfying the second prong of section 9.4(c)(i)(E), which, critically, characterizes the parties’ disputes as a “fundamental divergence in **each Member’s views.**” *See* Dkt. 88 at 52 (emphasis added). The fact that the

very definition of Unresolvable Deadlock presumes the deadlock is between Members demonstrates that a non-Member, such as the Estate, does not have a Full Call Right. By exclusively referring to disputes between Members, it is clear that section 9.4(c)(i)(E) did not contemplate a Full Call Right being exercised by virtue of an Unresolvable Deadlock between a Member and a non-member. This makes sense. Under the Agreement, only Members have a say in the Company's management. It, therefore, would make no sense for the Agreement to address disputes raised by a person with no right to input on management. Since the Estate cannot prove the existence of an Unresolvable Deadlock, it has no right to exercise Alex's Full Call Right.

This conclusion is consistent with section 9.4(e), which states that the Full Call Right is "personal to [Alex] and cannot be Transferred to any other Person." The Agreement's extremely broad definition of Transfer, which includes involuntary transfers by operation of law (which would appear to encompass the passage of Alex's rights to the Estate), supports the notion that it is only Alex that can exercise the Full Call Right. This, again, makes sense. A predicate to exercising the Full Call Right is twofold – being a Member and disagreeing with Ecoplace about a Major Decision. Both sections 9.4(c)(i)(E) and 9.4(e) demonstrate the parties' intent that only Alex, while he is alive and in his capacity as a Member, may exercise the Full Call Right. Alex ceasing to be a Member – which occurred upon his death under section 9.7(b) – terminated the Full Call Right.

Also consistent with this conclusion are the earlier portions of section 9, which contain rather broad restrictions on Alex's ability to transfer his Membership interests and provide Ecoplace with a right of first refusal. *See* Dkt. 88 at 49-51. That the Agreement prohibits Alex from transferring his Full Call Right is unsurprising. Section 9.4(e) did not, as it could have,

merely prohibit Alex from transferring his Full Call Right, but made clear that such right is “personal” to him. This language again demonstrates that only Alex, while alive, could exercise the Full Call Right. To permit the Estate to do so would be in contravention of the Agreement’s express language. Ecoplace’s motion to dismiss the portion of the first cause of action regarding the Full Call Right is granted, and the Estate’s cross-motion for partial summary judgment on that claim is denied.

Ecoplace further seeks dismissal of the Estate’s claims for distributions, which are governed by section 4.1 of the Agreement. *See* Dkt. 88 at 14-16. Section 4.1 sets forth the circumstances when the Estate is entitled to distributions. The meaning of that section is not in dispute. *See* Dkt. 84 at 16-17 (“As the plain language makes clear, Section 4.1 sets forth an ‘order and priority’ of Distributions and provides that the Estate, as successor to/assignee of a Withdrawing Member, will be paid only if any funds are available after distribution to Ecoplace in the amount of its Capital Contributions—which is \$10 million, see AGI Agreement § 3.1. The initial \$10 million distribution to Ecoplace required under Section 4.1 is thus a contractual condition precedent to the payment of Distributions to Members.”). It also is undisputed that, in discovery, the Estate has been provided with financial records of the Company sufficient to show whether distributions under section 4.1 are owed. *See id.* at 17-18. Neither the SAC nor the Estate’s briefs explain why, based on its review of these records, distributions are actually owed. Rather, the Estate theorizes that distributions must be owed given the value of the Company.<sup>3</sup> The Estate does not, however, provide any basis for its distributions claim that is actually grounded in the Company’s financials. Whether pleaded as a claim for an express or implied covenant breach (the latter of which does not seem tenable, as noted in the Prior Decision), this

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<sup>3</sup> In the Estate’s view, the Company must be worth more than the Full Call Right price because, otherwise, Ecoplace would be willing to sell at that price.

is insufficient. The Estate does not plead a claim for breach of fiduciary duty or any non-conclusory basis to question the financials. The Estate conclusorily claims, without explanation, that “the financial documents produced by [the Company] raise more questions than they answer.” *See* Dkt. 98 at 23.

The Estate’s distributions claim is dismissed without prejudice. That being said, the Estate may not replead this claim without first making a motion for leave to amend that satisfies the applicable standard under CPLR 3025(b) since there has been robust discovery.<sup>4</sup> *See Barry v Clermont York Assocs. LLC*, 50 Misc3d 1203(A), at \*8 (Sup Ct, NY County 2015), *mod. on other grounds*, 144 AD3d 607 (1st Dept 2016) (“The court providently exercised its discretion in denying plaintiff’s motion for leave to amend, since the motion was unsupported by evidentiary proof.”).<sup>5</sup>

Finally, the declaratory judgment claim regarding the Estate’s ability to share information with third parties is dismissed. The SAC claims:

Under section 7.10 of the [Agreement] and the confidentiality agreement signed by Thomas Calderwood, the Estate is entitled to share [the Company’s] financial and business information it receives with certain third parties, including third parties consulted for purposes of litigation, or, subject to an agreement to maintain confidentiality, with any existing or prospective investor, lender, or other capital source. The Estate is, therefore, entitled to a declaration that it may share [the Company’s] financial and business information for the purpose of **pursuing this litigation** and with investors, lenders, and other capital sources.

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<sup>4</sup> To be sure, it is possible that further financial disclosure (for instance, based on the 2016 financials) may reveal a basis to claim a right to distributions. At the present time, however, no such claim is before the court. A claim for distributions may only arise after reviewing future financial statements. In other words, a claim for distributions may not yet be ripe.

<sup>5</sup> It should be noted that while this motion was *sub judice*, on February 2, 2017, the Estate moved for leave to file a proposed third amended complaint. *See* Dkt. 112 (Seq. 006). The court will not opine on the merits of that motion or proposed pleading because it is not yet before the court.

SAC ¶¶ 40-41 (paragraph breaks and numbering omitted; emphasis added). As explained in the Prior Decision, a court does not issue advisory opinions. Leaving aside the lack of specificity about who exactly the Estate seeks to share its information with, since “this litigation” may be at its end, this claim appears to be moot. While neither party seeks summary judgment on the only remaining claim – the portion of the first cause of action regarding the Partial Call Right – the Estate has no such right because, under section 9.4(e), both the Partial Call Right and the Full Call Right are “personal” to Alex and cannot be transferred to anyone.

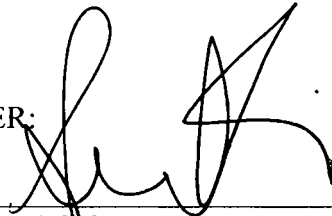
At this juncture, absent a reversal on appeal or a successful motion for leave to amend, the Estate will have no need to consult an expert in this action or to share the Company’s financial information with that expert. To the extent the Estate seeks a broader declaratory judgment about its right to share confidential information with third parties after this action (i.e., for purposes other than “pursuing this litigation”), the Estate must seek leave to replead a declaratory judgment claim that is more specific. Accordingly, it is

ORDERED that defendants’ motion to dismiss all claims in the SAC other than the portion of the first cause of action regarding the Partial Call Right as asserted against Ecoplace is granted, the SAC is dismissed as against the Company and Economou with prejudice, the portion of the first cause of action concerning the Full Call Right is dismissed with prejudice, and the second and third causes of action are dismissed without prejudice to the Estate moving for leave to amend in a manner consistent with this decision and without prejudice to the Estate commencing a future action for distributions based on the Company’s financials which it does not yet have; and it is further

ORDERED that the Estate’s cross-motion for partial summary judgment is denied; and it is further

ORDERED that the parties shall jointly call the court within two weeks of the entry of this order on NYSCEF to discuss a schedule for the remainder of this action.

Dated: February 10, 2017

ENTER:   
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J.S.C.

**SHIRLEY WERNER KORNREICH  
J.S.C**