SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

----------X

MARBO HOLDINGS CORP.,

Plaintiff,

- v -

FULTON CAPITOL, LLC, FULTON CAPITOL ASSOCIATES, LLC, MILLGREEN PROPERTIES, LLC, MILLGREEN MANAGER, LLC, AK FULTON HOLDING, LLC, AFP FULTON HOLDING LLC, HARTSTAR LLC, RH REALTY, DW FULTON HOLDING, LLC, FULTON HOTEL PROPERTIES, LLC, CHARLES HERZKA, WILLIAM ACHENBAUM, DAVID WELDLER, MAT FULTON HOLDING, LLC

Defendant.

----------X

INDEX NO. 653619/2015

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

Defendants Fulton Capitol LLC; Fulton Capital Associates, LLC; Millgreen Properties, LLC; Millgreen Manager, LLC; MAT Fulton Holding, LLC; AFP Fulton Holding, LLC; Hartstar LLC; RH Realty; DW Fulton Holding, LLC; Charles Herzka; William S. Achenbaum; and David Weldler ("Moving Defendants") move, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), to dismiss all causes of action Marbo Holdings Corp. ("Marbo") asserts against Moving Defendants.[1]

[1] The First Amended Complaint ("complaint") contains three internal discrepancies as to defendants. Plaintiff identifies David Weldler as a defendant in the caption but as a non-party in the body of the complaint. Conversely, plaintiff identifies WBA Atlanta Hotel,

Background

Marbo is a Delaware corporation with a 20% membership interest in defendant Fulton Capital Associates, LLC ("FCA"), a Delaware limited liability company. FCA is part of a network of entities structured to operate a hotel in Atlanta, Georgia ("Property"). Defendant Charles Herzka ("Herzka") owns a 24% membership interest in FCA and manages it. Defendants David Weldler and RH Realty, and three other non-parties are the remaining members of FCA.

FCA and WBA Atlanta Hotel, LLC ("WBA") each own a 50% membership interest in defendant Millgreen Properties, LLC ("Millgreen Properties"). Millgreen Properties is the sole member of defendant Fulton Capital, LLC ("Fulton"), a Delaware limited liability that owns the Property. Millgreen Manager, LLC ("Millgreen Manager") manages Fulton and Millgreen Properties, and Herzka and William S. Achenbaum ("Achenbaum") each own a 50% membership interest in Millgreen Manager. Marbo has no membership interest in Fulton, Millgreen Properties, or Millgreen Manager.

As for the other parties, Marbo alleges that defendants AK Fulton Holding, LLC; MAT Fulton Holding LLC; AFP Fulton Holding, LLC; Hartstar LLC; RH Realty; and

---

LLC and Achenbaum Family Partnership L.P. as defendants in the body of the complaint but does not name either in the caption. Because Marbo has made confusing and inconsistent allegations concerning David Weldler, WBA Atlanta Hotel, LLC and Achenbaum Family Partnership LP, and no affidavits of service have been filed to clarify whether these parties have even been served with process, I am proceeding as if David Weldler, WBA Atlanta Hotel, LLC and Achenbaum Family Partnership LP, are not parties to the action. I also note that defendants AK Fulton Holding, LLC and Fulton Hotel Properties LLC have not been served with the first amended complaint and are therefore not movants on this motion.

DW Fulton Holding, LLC are each owned or controlled by a member or officer of FCA, WBA, or Millgreen Manager.

Marbo alleges that it became a member of FCA when Ira Goldstone, on behalf of Marbo, purchased a 20% interest in exchange for $1,000,000.00. FCA is governed by an operating agreement dated June 11, 2003 ("FCA Operating Agreement"). The FCA Operating Agreement contains provisions relating to the management of FCA, and the parties dispute Herzka's power as manager pursuant thereto. Specifically, Marbo disputes the propriety of a series of debt restructuring transactions Millgreen Manager, through Herzka and Achenbaum, entered into on behalf of Fulton in 2012.

Prior to the 2012 debt restructuring, Fulton owed approximately $24 million to a secured lender, and it is undisputed that the Property had been operating at a net loss each year since 2007. In 2012, the secured lender agreed, among other things, to extinguish $16.9 million of Fulton's debt in exchange for payment of $7,500,000.00. To finance that transaction, Fulton, through its manager Millgreen Manager, executed two separate loan transactions with lenders unrelated to this action ("Refinancing Transaction").

Marbo alleges that Fulton, through its manager Millgreen Manager, executed a note for $16,975,000.00 to pay FCA and WBA members as direct or indirect payees, for no consideration and to Marbo's exclusion ("Insider Note"). Marbo further alleges that $1,573,842.00 of improper interest payments have been made to various defendants on the Insider Note. Marbo claims that it neither received notice of the transaction nor was provided an opportunity to participate, which alleged wrongful conduct underlies all causes of action against defendants.

Based upon the foregoing, Marbo asserts six causes of action, and each against a mixed set of defendants. Marbo seeks an accounting and monetary relief, asserting claims for: 2) breach of contract; 3) breach of implied covenant of good faith and fair dealing; 4) breach of fiduciary duty; 5) fraud; and 6) unjust enrichment. Moving Defendants move to dismiss the complaint based on documentary evidence and for failure to state a claim, arguing that the alleged wrongful conduct was contractually permissible, lawful, and otherwise the product of sound business judgment. Moving Defendants claim that Marbo is in a better position than it would have been had there been no Insider Note, because the cancellation of approximately $16.9 million of debt would have resulted in massive tax liability affecting all FCA members, including Marbo.

Discussion

"On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings [and] '[t]he scope of a court's inquiry . . . [is] to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.'" *1199 Hous. Corp. v Intl. Fid. Ins. Co.*, 14 A.D.3d 383, 384 (1st Dep't 2005). However, dismissal of a complaint is required when the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v Sommer*, 8 N.Y.3d 318, 324 (2007).

Standing

Moving Defendants argue that Marbo has no standing to bring this action because Marbo failed to show that Ira Goldstone executed the FCA Operating Agreement as a

representative of Marbo. In opposition, Marbo submits a copy of the first K-1 FCA issued to it, identifying Marbo as the 20% interest owner in FCA, not Ira Goldstone. In addition, Carol Goldstone, the executor and sole beneficiary of Ira Goldstone's estate, attests that "[e]very K-1 received was issued to Marbo, not Ira." Based on this documentation, Marbo has sufficiently alleged standing as a member of FCA, thus I deny dismissal for lack of standing.

Breach of Fiduciary Duty Cause of Action

In the fourth cause of action Marbo alleges that, by executing the Insider Note, and failing to offer Marbo an opportunity to participate in the Insider Note, Herzka and Achenbaum breached their fiduciary duty to Marbo. Although Marbo asserts the breach of fiduciary duty cause of action against Achenbaum, Achenbaum does not manage FCA and therefore, has no fiduciary duty to Marbo as a member. Accordingly, the breach of fiduciary claim is dismissed as to Achenbaum.

Herzka argues that the breach of fiduciary cause of action should be dismissed against him because the FCA Operating Agreement specifically and plainly permitted him, as manager of FCA, to execute the Insider Note. "Limited liability company agreements are contracts . . . [that may] displace otherwise applicable default provisions in Delaware's Limited Liability Company Act." *RED Capital Inv. L.P. v RED Parent LLC*, 2016 WL 612772 at 2 (Del. Ch. Feb. 11, 2016). The FCA Operating Agreement section 8.1 (ii), section 8.2 (iv), and paragraph 17.5 set forth the fiduciary duties applicable to the manager of FCA, and, to a certain extent, displace the otherwise applicable default provisions of the Delaware Limited Liability Company Act.

Section 8.1 (ii) provides that the "Manager shall have full, exclusive and complete discretion to manage and control the business and affairs of the Company, to make all decisions affecting the business and affairs of the Company and to take all such actions as it deems necessary or appropriate to accomplish the purposes of the Company as set forth herein."

Section 8.2 (iv) provides that "the Manager shall have the right, power and authority, in the management of the business and affairs of the Company, to do or cause to be done any and all acts deemed by the Manager to be necessary or appropriate to effectuate the business, purpose and objectives of the Company, [including] . . . the power and authority to . . . borrow money on behalf of the Company from banks, other lending institutions, any of the Members, or Affiliates of any of the Members, on such terms as it deems appropriate . . . ."

Finally, paragraph 17.5, in relevant part, provides that "[t]he provisions of this Agreement, to the extent that they restrict the duties and liabilities of [the Manager] otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such [Manager.] Whenever in this Agreement a [Manager] is permitted or required to make a decision (i) in its 'sole discretion' or 'discretion' or under a grant of similar authority or latitude, such [Manager] shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall have no duty or obligation to give any consideration to any interest of or factors affecting the Company or the Members . . .."

Section 8.1 (ii) and section 8.2 (iv), when individually read, do not explicitly disclaim the default principles in the Delaware Limited Liability Company Act, and simply confer power to manage FCA. *See CelestialRX Investments, LLC v Krivulka*, 2017 WL 416990 at 16 (Del. Ch. Jan. 31, 2017) (stating that the "removal of a manager's default fiduciary duties from an LLC agreement must be clear and unambiguous"). However, when collectively read with paragraph 17.5, the FCA Operating Agreement plainly permits Herzka, as manager, to consider any interest, including his own, and to discount any other member's interest, including Marbo's, when entering into loan agreements with members, thereby replacing default fiduciary duties to the extent such conduct would constitute improper self-dealing. *See* Paul M. Altman, Srinivas M. Raju, Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law, 60 Bus. Law 1469, 1484 (2005) (stating that "[t]he inclusion of such Sole Discretion Language in [the] LLC agreement . . . eliminat[es] any fiduciary duties that [the manager] would otherwise have when exercising discretion.").

Marbo alleges that Herzka improperly failed timely to give notice to Marbo of the Insider Note. The FCA Operating Agreement, however, does not require Herzka to notify Marbo about the Insider Note, and Marbo has not pled facts to show that the FCA Operating Agreement or Delaware law require otherwise. Further, the FCA Operating Agreement permitted Herzka to consider his own interests and provided him with broad discretion to enter loan agreements with "no duty or obligation to give any consideration to any interest of Members[.]" In short, Marbo's claim that the Insider Note constituted

self-dealing and improper exclusion of Marbo fails sufficiently to allege a claim for breach of fiduciary duty because the FCA Operating Agreement explicitly permits such conduct.

Accordingly, I dismiss Marbo's fourth cause of action for breach of fiduciary duty based on documentary evidence and for failure to state a claim.

Breach of Contract Cause of Action

In its second cause of action Marbo alleges that FCA, Herzka, Achenbaum and Millgreen Manager breached section 10 (ii) and paragraph 8.5 of the FCA Operating Agreement. As an initial matter, I dismiss the second cause of action against Achenbaum and Millgreen Manager because neither are parties to the FCA Operating Agreement. *See Allen v El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 178 (Del. Ch. 2014) ("only a party to a contract may be sued for breach of that contract").

Section 10 (ii) of the FCA Operating Agreement provides that when "additional funds are required in the Company . . . [a]ll Members shall have the opportunity to make the Working Capital Loans on a pro rata basis . . .." Here, there are no factual allegations to show that the purpose of the Refinancing Transaction and Insider Note was not to inject additional funding into FCA as "Working Capital Loans." Rather, the Refinancing Transaction and Insider Note were plainly executed to refinance FCA's pre-existing obligations and avoid tax liability. Under these circumstances, the transactions did not trigger the rights and obligations set forth in section 10 (ii) of the FCA Operating Agreement.

Marbo also asserts that Herzka breached paragraph 8.5 of the FCA Operating Agreement, which prohibits a manager from receiving compensation for his or her services. Herzka receives interest payments from the Insider Transaction not as the manager of FCA but as a lender to FCA. Because Marbo has failed to allege facts sufficient to support a claim for breach of contract, I dismiss Marbo's second cause of action in its entirety for failure to state a claim.

Breach of Implied Covenant of Good Faith and Fair Dealing Cause of Action

Marbo asserts that Herzka, Achenbaum and Millgreen Manager breached the implied covenant of good faith and fair dealing inherent to the FCA Operating Agreement. Again, I dismiss Achenbaum and Millgreen Manager from this cause of action as non-parties to the FCA Operating Agreement, which equally applies in the context of implied covenants. *See CMS Inv. Holdings, LLC v Castle*, 2015 WL 3894021 at 16 (Del. Ch. June 23, 2015).

As to Herzka, the complaint alleges that he breached the implied covenant of good faith and fair dealing by: 1) causing Fulton to execute the Insider Note; 2) causing Fulton to enter into the Insider Note without Marbo; and 3) causing Fulton to make improper payments and "engage in Self-Dealing Transactions."

Herzka argues that because the FCA Operating Agreement explicitly grants him discretionary authority, the implied covenant does not apply. *See, e.g., Union Fire Ins. Co. of Pittsburgh, P.A. v Pan Am. Energy LLC*, 2003 WL 1432419 at 6 n. 42 (Del. Ch. Mar. 19, 2003) (stating that "the express terms of the contract override the implied covenant"). However, under Delaware law, even though FCA Operating Agreement

may eliminate default fiduciary duties, Herzka remains bound by the implied covenant of good faith and fair dealing. *See* Del. Code Ann. tit. 6, § 18–1101(e) (2013).

Thus, even though Herzka has broad discretionary authority under the FCA Operating Agreement, that broad discretion must be exercised in good faith. *See Dawson v Pittco Capital Partners, L.P.*, 2012 WL 1564805 at 24 (Del. Ch. Apr. 30, 2012) ("Even where a contract creates completely discretionary rights, such rights must still be exercised in good faith"). Though Herzka may have had a good faith, independent reasons for executing the Insider Note, *i.e.*, to preserve debt and avoid massive tax liability, Herzka has not demonstrated as a matter of law an independent, good faith reason for his preferential treatment of certain FCA members as direct or indirect beneficiaries of the Insider Note. Accordingly, I deny Herzka's motion to dismiss Marbo's third cause of action for breach of the implied covenant of good faith and fair dealing.

Fraud Cause of Action

A claim rooted in fraud must be plead with the requisite particularity under CPLR § 3016 (b) and "the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *MP Cool Investments Ltd. v Forkosh*, 142 A.D.3d 286, 290–91 (1st Dep't 2016). Marbo asserts a cause of action for fraud against Millgreen Manager, Herzka, and Achenbaum on the basis that each had a duty to disclose the Insider Note.

Marbo's bare and conclusory allegation that Millgreen Manager; Herzka; and Achenbaum, as fiduciaries, have a duty of disclosure does not sufficiently plead that each

had a duty to disclose the Insider Note. Moreover, Marbo failed to allege scienter, justifiable reliance, and damages, and all the elements of fraud must be supported by factual allegations. *See MP Cool Investments Ltd.*, 142 A.D.3d at 290–91; *JP Morgan Chase Bank, N.A. v Hall*, 122 A.D.3d 576, 579 (2d Dep't 2014). Accordingly, I dismiss the fifth cause of action against all named Moving Defendants for failure to state a claim.

Unjust Enrichment Cause of Action

In the sixth cause of action Marbo asserts an unjust enrichment claim against Herzka, Achenbaum, and six of the entities that participated in the Insider Note, specifically Hartstar LLC; MAT Fulton Holding, LLC; AFP Fulton Holding, LLC; AK Fulton Holding, LLC; DW Fulton Holding, LLC; and RH Realty, based on the interest each receives as direct or indirect payees of the Insider Note.

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff" *Corsello v Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012). *Accord Kuroda v SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009). Marbo alleges that it owns a 20% membership interest in FCA, and that substantially all the other members of FCA and WBA receive preferential treatment as either direct or indirect payees under the Insider Note, to Marbo's exclusion.

As to Herzka and RH Realty, I dismiss this cause of action as against both because the FCA Operating Agreement already governs their relationship, which Marbo does not dispute. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 141 (1st Dep't 2014) ("The theory of unjust enrichment is one created in law in the

absence of any agreement"). *Accord Kuroda v SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009). With respect to the remaining defendants who participated in the Insider Note, Marbo fails to allege facts sufficient to show that these defendants simple participation in the transaction was "inequitable." Accordingly, I dismiss the sixth cause of action in its entirety.

Accounting Cause of Action

Marbo seeks an accounting against Fulton; Millgreen Properties; FCA; Millgreen Manager; Herzka; Hartstar LLC; Achenbaum; Achenbaum Family Partnership LP; MAT Fulton Holding, LLC; AFP Fulton Holding, LLC; AK Fulton Holding, LLC; DW Fulton Holding, LLC; and RH Realty.

Under Delaware law, a party may seek an accounting "(1) where there are mutual accounts between the parties; (2) where the accounts are all on one side but there are circumstances of great complication; and, (3) where a fiduciary relationship exists between the parties and a duty rests upon defendant to render an account." *Prospect St. Energy, LLC v Bhargava*, 2016 WL 446202 at 8 n. 77 (Del. Super. Ct. Jan. 27, 2016). It is undisputed that, except for Herzka and FCA nominally, none of the defendants named in this cause of action have a fiduciary relationship with Marbo. Marbo argues, however, that an accounting is appropriate because there are accounts between the defendants, but then fails to specify which defendants have mutual accounts. Accordingly, I dismiss this cause of action against all named Moving Defendants with exception of Herzka and FCA.

In accordance with the foregoing, it is

ORDERED that the motion of defendants Fulton Capitol LLC; Fulton Capital Associates, LLC; Millgreen Properties, LLC; Millgreen Manager, LLC; MAT Fulton Holding, LLC; AFP Fulton Holding, LLC; Hartstar LLC; RH Realty; DW Fulton Holding, LLC; Charles Herzka; William S. Achenbaum; and David Weldler to dismiss the first amended complaint is granted in its entirety as to the second, fourth, fifth and sixth causes of action, and those causes of action are dismissed in their entirety; and it is further

ORDERED that, as to the first cause of action for an accounting, the motion to dismiss is granted in part as to all moving defendants except Herzka and FCA, and the motion is denied as to these two defendants; and it is further

ORDERED that, as to the third cause of action for breach of the covenant of good faith and fair dealing, the motion to dismiss is granted in part as to all moving defendants except for Herzka, and the motion is denied as to Herzka; and it is further

ORDERED that defendants are directed to serve an answer to the first amended complaint pursuant to the time limits set forth in the CPLR as of the date of this order; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on September 27, 2017, at 2:15 p.m.

This constitutes the decision and order of the Court.

9/8/17
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE