SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

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DAVID H. STORPER,

Plaintiff,

-against- Index No. 652550/2015

INVESCO, LTD., WL ROSS & CO. LLC,
INVESCO PRIVATE CAPITAL INC.,
ROSS CG ASSOCIATES L.P., ROSS CG GP LLC,
MICHAEL J. GIBBONS and WILBUR L. ROSS,

Defendants.

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Masley, J.

Defendants Invesco, Ltd. (Invesco), WL Ross & Co. LLC (WL Ross), Invesco Private Capital Inc. (Invesco PC), Ross CG Associates L.P. (Ross CGA), Ross CG GP LLC (Ross CG GP), Michael J. Gibbons and Wilbur L. Ross move, pursuant to CPLR 3212, for summary judgment and dismissal with prejudice of the second amended complaint.

Invesco is the parent company of Invesco PC and WL Ross, a global investment and private equity firm. Ross CGA is one of a number of WL Ross affiliates which manage WL Ross's investments. Ross is the chief executive officer (CEO) of both WL Ross and Invesco PC, a limited partner in Ross CGA, and the sole member of Ross CGA's general partner, Ross CG GP. Gibbons is WL Ross's chief financial officer (CFO).

Plaintiff David H. Storper, an investment manager, was a founding member and senior executive at WL Ross from April 2000 through October 15, 2012. As a senior

executive, Storper was required to invest personally in the "general partner" (GP) entities, companies created to oversee the private equity funds affiliated with WL Ross. In exchange for his investments, Storper received a limited partner ownership interest, known as a capital or ordinary interest, in each GP entity, including Ross CGA, a limited partnership formed in 2003. As a Ross CGA limited partner, Storper received a right to earn incentive compensation, also called "carried" or "carry" interest, or, a share of Ross CGA's profits, as defined in the Ross CGA amended and restated agreement of limited partnership (Ross CGA amended LPA).

Storper was the largest initial investor in Ross CGA, and was entitled to receive 25% of ordinary interest in Ross CGA, as well as 15% of any carried interest earned (*see* Ross CGA amended LPA, §§ 4 [i]-[j], 8 [b] [iii]). Carried interest is earned by Ross CGA, and the amount depends upon the performance of an investment fund known as the Taiyo Fund, which is managed by Ross CGA.

Pursuant to the Ross CGA amended LPA, a limited partner may withdraw from Ross CGA upon six months' written notice, or be required to withdraw upon 24 hours' written notice by Ross GP, and will be deemed to have withdrawn upon the expiration of the 24 hours (*see id.*, § 11 [a]-[b]).

Upon the withdrawal by a limited partner, 90% of his or her capital account must be distributed within 30 days after the withdrawal, and the remainder must be distributed within 30 days after the end of the corporate fiscal year (*see id.*, § 11 [c] [ii]). The balance in the capital accounts is to be valued "as of the date of withdrawal" (*id.*). A

withdrawn partner ceases to receive further monetary distributions (*see id.*, § 11 [c] [i]).

When Storper left his employment with WL Ross in October 2012, Ross CGA ceased issuing distributions to him. Storper alleges that defendants intentionally and knowingly secreted the relevant terms of the Ross CGA amended LPA by, among other things, indicating that he would remain a limited partner in all the WL Ross-related funds, even after his retirement from WL Ross.

Among other incidents, Storper cites to WL Ross's lack of reaction to a list of entities, including Ross CGA, in which Storper believed that he had a carried interest and/or other direct investment. The list was prepared by Storper's attorneys, who emailed the list to Invesco on June 12, 2012, during the parties' negotiations of the terms of Storper's separation from WL Ross. Storper further alleges that none of the defendants, nor anyone acting on their behalf, advised him, or his representatives, that defendants intended that Storper would be deemed to have forfeited his rights to monetary distributions from Ross CGA, upon his retirement from WL Ross.

Storper contends that the separation agreement reflected the parties' mutual understanding that Storper's economic rights would be preserved (*see* Separation Agreement, § 4 [b] [reserving Storper's right "to any rights [Storper] maintains as a member or retired or former member of any entity responsible for the management of investments for WL Ross"]).

In 2015, Storper commenced this action on allegations that he remained a limited partner in Ross CGA after his retirement from WL Ross because Ross CGA failed to send

him a written notice of withdrawal, and, thus, he is entitled to receive monetary distributions; that Ross improperly seized Storper's interest in Ross CGA, and that defendants concealed that seizure. Storper alleges that Ross unilaterally, and without notice, converted Storper's capital interest in Ross CGA in an improper purchase transaction in which Ross paid nothing, and then improperly forced Ross CGA to finance the majority of the improper deal.

Before joinder of issue, defendants moved to dismiss the complaint, in part. By decision and order dated July 7, 2016, Justice Jeffrey K. Oing granted the motion in part, and dismissed that part of the first cause of action for breach of contract arising out of events prior to July 21, 2009 on statute of limitations grounds, and the first through sixth causes of action for breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, tortious interference with contract, and an accounting.

Storper then served a second amended complaint. In that complaint, Storper seeks to recover $4 million, and asserts a contract cause of action arising out of allegations that Ross CG GP, Ross CGA's general partner, breached the Ross CGA amended LPA by (1) failing to pay Storper carried interest and profits after he retired from WL Ross, (2) allocating excessive expenses to Storper's capital accounts in 2007, 2009, and 2011, (3) improperly reducing Storper's capital account balances in Ross CGA in 2013, and (4) failing to pay Storper appreciation on his capital accounts between October 15, 2012, when he retired from WL Ross, and April 2014, when his capital accounts balances were

returned to him. Storper also contends that Ross CGA failed to obtain audited financial statements.

In their answer, defendants deny all allegations of misconduct.

Defendants now move for summary judgment in their favor on the remaining breach of contract claim.

Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562). Summary judgment will be granted where the plaintiff lacks evidence supporting a necessary element of his claim (*Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 553 [1st Dept 2003], *affd* 3 NY3d 295 [2004]).

As a threshold matter, the court notes that the substantive issues of this contract dispute are governed by Delaware law (*see* Ross CGA amended LPA, § 18 [h]).

Defendants contend that Storper is not entitled to profits or carried interest from Ross CGA after his retirement from WL Ross in October 2012 on the grounds that his retirement triggered his automatic withdrawal as a Ross CGA limited partner, and that, if written notice of such withdrawal is required, the distribution of Storper's capital accounts constitutes such notice.

In opposition, Storper contends that, pursuant to the Ross CGA amended LPA, he can only be removed as a Ross CGA limited partner by a written notice of withdrawal sent by the general partner, Ross CG GP. Storper further contends that, because defendants admittedly never sent him a withdrawal notice, Storper remains a Ross CGA partner to date. Storper alleges that Ross confiscated his carried interest in Ross CGA in December 2012, after his retirement, because Ross discovered that there had been a sudden increase in the value of that interest, and that defendants intentionally concealed that information from him.

The fundamental rules of contract construction give priority to the intention of the parties, and require the court to construe the agreement as a whole, giving meaning and effect to all of its provisions (*see E.I. du Pont de Nemours & Co., Inc. v Shell Oil Co.*, 498 A2d 1108, 1113 [Del 1985]). Where the contract's language is clear and unambiguous, the court must interpret it as written, and not resort to parol evidence (*see Hibbert v Hollywood Park, Inc.*, 457 A2d 339, 343 [Del 1983]).

The Ross CGA amended LPA provides that: "[a]ny Partner **may be required** to withdraw by the General Partner, upon 24 hours' written notice, and such Partner shall be

deemed to have withdrawn upon the expiration of such 24-hour period" (Ross CGA amended LPA § 11 [b] [i] [emphasis added]).

That agreement further provides that a withdrawn partner is not entitled to receive profits or carried interest from Ross CGA, as follows: "[t]he Carried Interest Percentage of a Withdrawn Partner shall be reduced to zero and such Withdrawn Partner shall cease to participate in the Profits and Losses of the Partnership after the date of withdrawal" (*id.* § 11 [c] [i]).

The language, "may be required," unambiguously demonstrates that the contracting parties intended that the required withdrawal of a limited partner could be triggered by 24 hours' written notice. The fact that the Ross CGA amended LPA does not set forth any other, or additional, criterion for the required withdrawal of its limited partners demonstrates the parties' intent that the required withdrawal be triggered only by 24 hours' written notice.

Nothing in the Ross CGA amended LPA may be interpreted as linking retirement from WL Ross with the required withdrawal from Ross CGA for any purpose or reason. Therefore, pursuant to the express terms of the Ross CGA amended LPA, a limited partner can be deemed withdrawn from Ross CGA only upon 24 hour's written notice.

However, the Ross CGA amended LPA does not define what constitutes "written notice" sufficient to trigger a required withdrawal. There is no dispute that defendants did not issue a formal written notice of required withdrawal. However, the written notices sent by WL Ross's counsel to Storper's counsel include statements to the effect

that Storper was a retired member under the various GP entities (*see e.g.* Invesco/Ben Gruder to Edmonds & Co., P.C./Robert Edmonds June 19, 2012, April 1, 2013 emails). Similarly, the Ross CGA Schedule K-1's indicate that Storper's share of Ross CGA's profits had been reduced from 15% to 0.4% in 2012, and then to "none" in 2013. A trier of fact could find that those notices constitute sufficient notices for purposes of the Ross CGA amended LPA withdrawn partner provision. Therefore, triable issues exist regarding what constitutes the required written notice.

Contrary to defendants' contention, the requirement of a formal written notice of withdrawal issued by Ross CGA was not effectively waived by Storper's alleged admissions during his deposition. Storper merely testified that he is a retired member of certain funds, including non-parties WLR Recovery Associates II LLC (WLR II) and WLR Recovery Associates III LLC (WLR III) (*see* David Storper, June 28, 2016 tr at 107, line 13 to 109, line 14). Significantly, Storper also clearly testified that he believed that he remained a Ross CGA limited partner through the date of the deposition (*see id.* at 109, lines 15-23).

In any event, contrary to defendants' contention, Storper's testimony regarding his status in other WLR entities is simply irrelevant to his partnership status in Ross CGA. Pursuant to the terms of the limited liability company agreements (LLCA) of WLR II and WLR III, upon Storper's retirement from WL Ross, he would become a retired member of WLR II and WLR III, but his investments would remain with the company and he would retain all economic rights (*see* WLR II LLCA § 11 [c]; WLR III LLCA § 11 [c]). Thus,

those terms are significantly different from the terms of the Ross CGA amended LPA, which require the return of a withdrawn partner's investments and the forfeiture of all economic rights in Ross CGA.

Whether Storper is entitled to distributions by Ross CGA after the April 2014 distribution presents genuine triable issues of material fact not appropriate for resolution here. Defendants contend that Storper is not entitled to those funds on the ground that he was deemed withdrawn from partnership status in 2012. As held above, triable issues exist regarding whether he had withdrawn or remained a Ross CGA limited partner.

On the other hand, Storper contends that defendants breached the Ross CGA amended LPA by, among other things, failing to pay out Storper's capital in full. Storper further contends that, as a Ross CGA limited partner through April 15, 2014, he should have been allocated at least $2.3 million in carried interest and ordinary income, in addition to the amount distributed to him in April 2014, as reflected in a revised Ross CGA schedule of partner's capital balances through the end of 2013, prepared by nonparty Marcum LLP, Ross CGA's accountant.

Similarly, whether defendants charged excessive expenses against Storper's capital account raises triable issues of fact not adequately resolved by the undisputed documentary evidence and testimony.

Defendants contend that, in arguing that excessive expenses were charged, Storper is relying on a financial document that defendants admit was incorrect. Defendants contend that, contrary to Storper's contention, Ross CGA did not incur expenses of

$80,735 in 2009 and $63,058 in 2011, as indicated on the incorrect financial document. Defendants further contend that Ross CGA's actual expenses are correctly specified in its annual partnership tax returns as $5,500 in 2009 and $8,115 in 2011, and consist almost entirely of sums paid to Marcum LLP for accounting services. Defendants contend that Storper's capital account, as demonstrated in his Ross CGA Schedule K-1's, were allocated even smaller amounts in connection with the actual expenses, for example, $850 in 2009 and $1,220 in 2011.

However, Storper contends that some of the expenses are questionable. In particular, he cites to a $36,960 payment by Ross CGA to WL Ross and Invesco which is listed as a loan payment, without further explanation. No explanation has been revealed during discovery. For example, when questioned about $29,000 of that payment, Ross CGA's chief financial officer, nonparty Michael Meotti, testified, "[y]ou know, I'd have to look into that further" (*see* Ross CGA, WL Ross, & Ross CG GP by Michael I. Meotti, July 20, 2016 tr at 293, lines 19-22).

Storper also cites to a unilateral reduction of $92,420 in his Ross CGA capital account. The court notes that the parties now agree that $73,800 of that sum had been distributed to Storper in May 2010, which was accounted for by reducing Storper's capital account balances (*see* Storper memorandum in opposition at 21).

The parties now dispute the propriety of the $18,820 balance of the reduction. Defendants contend that the balance of the reduction is a proper partnership-wide reconciliation, while Storper contends that the chart created by defendants does not

conclusively demonstrate the propriety of that reduction. Here, again, the undisputed record does not conclusively demonstrate that the reconciliation was, indeed, proper.

Next, defendants contend that Storper is not entitled to receive the appreciation on his capital accounts that occurred between his retirement from WL Ross in 2012 and the return of his capital account in Ross CGA in 2014.

In opposition, Storper contends that, because Ross CGA did not return his capital account balances within the time period specified by the Ross CGA amended LPA, he is entitled to the appreciation on the accounts.

The Ross CGA amended LPA requires that, upon a limited partner's withdrawal, he or she is entitled to receive 90% of his or her capital account within 30 days, with the remainder to be paid 30 days after the end of the corporate fiscal year (*see* Ross CGA amended LPA, § 11 [c] [ii]). That agreement also provides that the value of the balance of a capital account must be valued as of the date of the withdrawal (*see id.* at § 11 [c] [ii]).

There is no dispute that Ross CGA held funds in Storper's capital account well past the date that it should have distributed them to Storper. No guidance for this situation can be found in the Ross CGA amended LPA. That agreement is silent regarding the valuation date, in the event that Ross CGA fails to timely pay the capital account balance. Therefore, whether Storper is entitled to receive the appreciation presents a triable issue of fact.

For the forgoing reasons, that branch of the motion for summary judgment on the

breach of contract action asserted against defendants is denied.

Next, the parties dispute whether Wilbur Ross may be held personally liable for Ross CG GP's alleged breach of contract on theories of alter-ego and piercing the corporate veil.

Defendants contend that summary judgment must be granted in Ross's favor, inasmuch as Storper's claim against Ross is based merely upon Ross's alleged domination and control of Ross CG GP and Storper's own alleged animosity toward Ross.

In opposition, Storper contends that the record includes substantial evidence that Ross created Ross CG GP as a sham entity with which to defraud investors, and used that entity to improperly and unilaterally seize Storper's capital interest in Ross CGA.

Pursuant to Delaware law, to impose liability under a claim to pierce the corporate veil, the plaintiff must demonstrate evidence that supports "an inference that the corporation, through is alter-ego, has created a sham entity designed to defraud investors and creditors" (*Crosse v BCBSD, Inc.*, 836 A2d 492, 497 [Del 2003]; *Doberstein v G-P Indus., Inc.*, 2015 WL 6606484, *4, 2015 Del Ch LEXIS 275, *12-14 [Del Ch 2015]), and that the individual defendants and the defendant entity operated as a single economic unit (*Trevino v Merscorp, Inc.*, 583 F Supp 2d 521, 528-529 [D Del 2008]).

In determining whether the entity to be pierced has an independent corporate existence, Delaware courts consider a variety of factors, including:

> "(1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence

> of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder"

(*id.*, 583 F Supp 2d at 528-529, citing *United States v Pisani*, 646 F2d 83, 88 [3d Cir 1981]). "While no single factor justifies a decision to disregard the corporate entity, some combination of the above is required, and an overall element of injustice or unfairness must always be present, as well" (*Trevino v Merscorp, Inc.*, 583 F Supp 2d at 529 [internal quotation marks and citation omitted]).

Whether Ross CG GP's corporate veil may be pierced to reach Ross presents triable issues of fact sufficient to preclude summary judgment.

The record includes evidence that may be interpreted by the trier of fact as demonstrating the Ross CGA is controlled entirely by Ross CG GP, its general partner, which, in turn, is dominated completely by Ross, and that Ross used that corporate structure to defraud Storper.

Ross CG GP was admittedly created by Ross and is the general partner of Ross CGA, created to be the manager member of the general partner of the Taiyo Fund (*see* Ross CGA LPA at § 2). Defendants' deposition testimony indicates that Ross CG GP is a "flow through," having no employees or assets, and performs no function (Ross CGA, WL Ross, & Ross CG GP by Meotti tr at 80, line 6 to 82, line 4). Wilbur Ross testified that Ross CG GP does not "conduct business in any ordinary sense. All it does is admit and eliminate partners," and receive and make financial distributions (Wilbur L. Ross, Jr., July 14, 2016, tr 178, line 2 to 180, line 13). Ross also testified that Ross CGA "did not

manage anything. It was simply a flow-through entity," and "performed no function" (*id.* at 121, lines 13-19). Ross testified that Ross CGA suffered from recurring capital deficits, typically resolved by monetary infusions from other entities that he controlled (*see id.* at 254, lines 6-10). Ross also testified that the obligations to provide management services to the Taiyo Fund were "personal to me [and] involved WL Ross & Co. providing services" (*id.* at 122, lines 3-5).

The record also includes evidence that, while Ross CG GP was intended to manage Ross CGA, Ross personally held authority to reallocate carried interest, upon a partner's departure (*see id.* at 202, lines 20-24). At the end of 2012, Ross directed Ross CG GP to transfer Storper's share of the carried and ordinary interests to himself (*see* Ross CGA, WL Ross, & Ross CG GP by Meotti tr at 258, lines 9-15). Certainly, Delaware law permits "a person [to] be admitted as the **sole** member of a limited liability company" (6 Del C § 18-301 [d] [emphasis added]), and recognizes that "no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company" (*id.*, § 18-303 [a]; *see Cigna Health & Life Ins. Co. v Audax Health Solutions., Inc.*, 107 A3d 1082, 1096 [Del Ch 2014] ["[L]imited personal liability is one of the core benefits of creating a separate business entity"]). Here however, whether Ross used Ross CG GP and Ross CGA to defraud Storper presents triable issues of fact sufficient precluding summary judgment.

For the foregoing reasons, that branch of the motion for summary judgment

dismissing the breach of contract claim asserted against Ross is denied.

Accordingly, it is

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a status conference in room 242, 60 Centre Street, on February 7, 2018 at 10:30 AM.

Dated: January 8, 2018

ENTER:

J.S.C.

HON. ANDREA MASLEY