Shatz v Chertok
2019 NY Slip Op 32343(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 655620/2018
Judge: Jennifer G. Schecter

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

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DANIEL SHATZ, suing individually and derivatively on behalf of VAST VENTURES VI LLC,

Plaintiff,

-against-

DOUGLAS CHERTOK, VAST VENTURES LLC, VAST VENTURES V LP, and VAST VENTURES GP LLC,

Defendants,

-and-

VAST VENTURES VI LLC,

Nominal Defendant.

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Index No. 655620/2018

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Defendants Douglas Chertok and Vast Ventures LLC and nominal defendant Vast Ventures VI LLC (the Company) move for reargument of their motion to dismiss, which was denied to the extent that plaintiff was permitted to assert a single derivative claim for breach of fiduciary duty (Dkt. 20; *see* Dkt. 23 [6/18/19 Tr.]). Defendants contend that section 1.4 of the Company's operating agreement, which provides them with "sole and absolute discretion" to select the Company's investments, is an absolute bar to plaintiff's claims (*see* Dkt. 28 at 5). Ordinarily, defendants would be correct (*see Sullivan v Harnisch*, 96 AD3d 667 [1st Dept 2012]).

However, plaintiff's well-pleaded, plausible allegations of bad faith and express misrepresentations--made for the purpose of diverting the investment opportunity in a company in which defendants had an undisclosed interest to another fund managed by them--states a claim for breach notwithstanding the absolute discretion clause (*Richbell Information Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003] ["even where one has an apparently unlimited right under a contract, that right may **not be exercised solely for personal gain** in such a way as to deprive the other party of the fruits of the contract. This **limitation on an apparently unfettered contract right** may be grounded either on the construction of the parties' fiduciary obligations or on the purely contractual rule that **even an explicitly discretionary contract right may not be exercised in bad faith** so as to frustrate the other party's right to the benefit under the agreement"] [emphasis added]; *see Pleiades Publ., Inc. v Springer Science + Bus. Media LLC*, 117 AD3d 636, 637 [1st Dept 2014] ["While the agreement granted defendant the discretion to decide how to market and promote the RLS, defendant did not have the right to exercise that discretion in such a way as to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of its journals, or benefit itself at plaintiff's expense"]).

Indeed, these sophisticated parties surely understood that while freedom of contract is paramount and that LLCs are creatures of contract that can modify or eliminate default fiduciary duties, the implied covenant of good faith and fair dealing can never be waived (*see Miller v HCP Trumpet Investments*, 194 A3d 908 [Del 2018]

[Where an "operating agreement ... gave the Board 'sole discretion' to structure the transaction as it saw fit ... the mere vesting of 'sole discretion' did not relieve the Board of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing"], citing *Paige Capital Mgmt., LLC v Lerner Master Fund, LLC*, 2011 WL 3505355, at *32 [Del Ch Aug. 8, 2011] ["Unlike contractual provisions stating that the general partner has 'sole discretion' to make a decision for any reason, and then clarify that such 'sole discretion' means that the general partner need not consider any other interests ... the provision at issue in this case only says that [] General Partner gets to act in its sole discretion and does not further flesh out what that term means. That bare statement does nothing to absolve [the] General Partner of the duty to act for a proper fiduciary purpose; it simply says that [the] General Partner has the singular (i.e., sole) authority (i.e., discretion) to consider and decide this matter"]).

Simply put, as in *Juniper*, "the allegations here clearly go beyond claiming only that [defendants] should be precluded from exercising a contractual right; they support a claim that [defendants] exercised a right malevolently, for [their] own gain as part of a purposeful scheme designed to deprive [plaintiff] of the benefits of the [Company]" (*see Richbell,* 309 AD2d at 302).

The court has considered defendants' other arguments regarding facts supposedly overlooked or misapprehended and finds them unavailing--most notably, for the reasons previously stated on the record, defendants' contention that the subject investment cannot constitute a corporate opportunity.

Accordingly, it is ORDERED that defendants' motion for reargument is denied.

Dated: July 30, 2019

ENTER:

Jennifer G. Schecter, J.S.C.