Johnson v Johnson & Asberry Communications, LLC
2019 NY Slip Op 32390(U)
August 8, 2019
Supreme Court, New York County
Docket Number: 160792/2018
Judge: Tanya R. Kennedy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

----------x

MELISSA JOHNSON,

Petitioner,

-against-

Index No.: 160792/2018
Motion Sequence #002

JOHNSON & ASBERRY COMMUNICATIONS, LLC

Respondent.

----------x

HON. TANYA R. KENNEDY, J.S.C.:

Petitioner, Melissa Johnson ("Johnson"), commenced this special proceeding with respect to her membership interest in Respondent, Johnson & Asberry Communications, LLC (the "Company") and to fix the fair value of her membership interest in the Company pursuant to Section 1005(b) of the New York Limited Liability Company Law. The Company now moves, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), to dismiss the petition based upon documentary evidence and for failure to state a cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson and Tiffany Asberry ("Asberry") were the sole owners and joint co-managers of the Company, which was created in March 2011 to provide public relations and communication services to its clients, many of which are governmental agencies (Petition, ¶¶ 4-5). Johnson was a minority shareholder, owning 49% of the Company (*id.*, ¶ 3).

Johnson and Asberry entered into the Company's operating agreement on March 20, 2011 and made equal capital contributions (*id.*, ¶¶ 9-10). Johnson maintains that Asberry withdrew

funds from the Company account in June 2011, resulting in the account being overdrawn (*id.*, ¶ 11).

Johnson also maintains that she devoted almost all her professional time to the Company and performed most of the client and administrative work, while Asberry provided minimal contributions (*id.*, ¶¶ 13-14, 17). Asberry allegedly failed to maintain timesheets which reflected her client and administrative work in accordance with client requirements and the Company's course of conduct (*id.*, ¶¶ 21-23). This failure allegedly often forced the parties to agree to estimate Asberry's percentage of administrative work she performed (*id.*, ¶ 23).

Sometime in July 2017, Johnson approached Asberry to negotiate a buyout of Asberry's interests since Johnson performed all the client and administrative work (*id.*, ¶ 24). However, Asberry rejected the offer the following month (*id.*, ¶ 25). Johnson, through her former counsel, requested in November 2017 that Asberry provide Johnson her timesheets to resolve issues regarding year-end payments owed to both individuals, which Asberry refused (*id.*, ¶¶ 26-28).

The Company's operating account maintained $27,591.57 in profit funds and overhead for 2016 and 2017 as of December 23, 2017 (*id.*, ¶ 29). However, Johnson alleges that Asberry withdrew 51% of Company funds, instructed Johnson to withdraw 49%, and decided that $5,000 would remain in such account as capital (*id.*). According to Johnson, the Company custom was to divide the overhead according to the amount of time each person performed administrative work (*id.*, ¶ 30). Although Johnson and Asberry allegedly agreed that Johnson would receive 80% of the overhead from 2016, Asberry paid herself 51% of such overhead (*id.*).

While Johnson attempted to amicably resolve this matter over the next few months,

Asberry sent Johnson an email on May 31, 2018, including a "written consent in lieu of meeting," dated May 29, 2018, which Asberry signed in her sole capacity (*id.* ¶ 32). The email also included a May 29, 2018 new operating agreement which Asberry signed as "Co-Founder" and "Majority in Interest Member" (*id.*). The new operating agreement did not reference the initial operating agreement and set forth a new method of calculating income and distributions, which adversely affected Johnson as a minority shareholder (*id.*, ¶¶ 33-34). During this same time, Asberry allegedly withdrew $38,465.75 from the Company account without authorization and deposited such funds into a new Company account naming herself the sole signatory (*id.*, ¶¶ 38-39). Once Johnson received Asberry's email and discovered Asberry's withdrawal of funds, Johnson rejected the new operating agreement and inquired where the withdrawn funds were located (*id.*, ¶ 40).

On June 11, 2018, Johnson received from Asberry a FedEx delivery of documents containing (1) an "exchange agreement" between AHC and Asberry wherein Asberry transferred her membership in the Company for a 100% membership interest in AHC; (2) notices dated June 7, 2018, including a "notice of action in lieu of a meeting," a "notice of merger," and a "notice of dissenters' rights;" (3) a "written consent of the majority in interest" of the Company authorizing the merger of AHC and the Company, dated June 7, 2018; (4) an "agreement and plan of merger" between AHC and the Company, dated June 7, 2018; and (5) copies of Limited Liability Company Law §§407, 509, 1002, and 1005 and Business Corporation Law §623 (*id.*, ¶ 41). The relevant portion of the Notice of Merger indicated that:

> "Pursuant to Section 1002(e) of the LLCL, you have the right to file with the Company a written notice of dissent (the "Notice of Dissent") from the Merger. Such notice must be filed, in accordance with Section 623 ('Section 623') of the

> New York Business Corporation Law (the 'BCL'), *within twenty (20) days of the date of this Notice*. Pursuant to Section 1005(a) of the LLCL ('Section 1005(a)'), *within ten (10) days of receiving such Notice of Dissent*, the Company is required to send to you a written offer (the 'Offer') to pay in cash the fair market value (the 'FMV') of your Membership Interests . . .
>
> If you and the Company fail to agree on the price to be paid for your Company Membership Interests within ninety (90) days of the Offer, pursuant to Section 1005(b) of the LLCL, the appraisal procedure provided for in paragraphs (h), (i), (j), and (k) of Section 623 shall apply" (Asberry Supporting Affirmation, Exhibit A, pgs. 2-3) (emphasis added).

Johnson filed a Notice of Dissent within twenty (20) days of her receipt of the Notice of Merger, on June 27, 2018 (Petition, ¶ 49). On July 5, 2018, the Company sent Johnson a check in the sum of $2,450, along with a letter from Asberry indicating that such sum constituted the fair value of Johnson's membership interest (the "Offer") (*id.*, ¶ 51). Johnson, through her counsel, rejected the Offer on July 12, 2018 (*id.*, ¶ 52). However, Johnson and the Company failed to negotiate a price for Johnson's membership interest within ninety (90) days of the Offer, by October 3, 2018 (*id.*, ¶ 53). The Company also did not initiate a special proceeding to determine Johnson's rights under Limited Liability Company Law §1005(b) (*id.*).

On November 19, 2018, Johnson commenced this proceeding, pursuant to Limited Liability Company Law §1005(b), to determine her rights as a dissenting member and to fix the fair value of her membership interest in the Company (*id.*).

The Company now moves to dismiss the petition, maintaining that the documentary evidence conclusively establishes that it paid Johnson the fair value of her interest. Specifically, the Company maintains that Johnson was paid for her interest as evidenced by the UPS delivery

confirmation of the $2,450 check, which contradicts Johnson's claim that she has yet to receive payment (Asberry Supporting Affirmation, Exhibits B, C).

However, Johnson argues in opposition that the Company failed to present any documents demonstrating that she received the fair value of her interest in the Company. Johnson also notes that she rejected the Company's Offer for various reasons, including that the Offer was "arbitrary and made in bad faith" and that the Company has yet to produce the Company's financial records in response to her repeated requests to inspect them (Petition, ¶ 52).

While the Company maintains that the petition fails to state a cause of action because Johnson commenced this proceeding past the thirty-day expiration period set forth under Business Corporation Law §623(h)(2), Johnson argues in opposition that the petition is timely filed. Both parties present differing interpretations regarding calculation of the time periods set forth under Limited Liability Company Law §1005(b) and Business Corporation Law §623 to commence this proceeding, which this Court will address herein.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.,* 5 NY3d 582, 590-591 [2005]).

Here, a factual issue exists regarding the fair value of Johnson's membership interest in the Company. Johnson rejected the $2,450 offer and requested an inspection of the Company's financial records, which the Company has yet to produce. The Company has not presented evidence which conclusively refutes Johnson's claim that she has not received the fair value of her

membership interest in the Company. The fact that Johnson was paid a sum of money is not evidence that the payment reflected the fair value of her membership interest. Therefore, the existence of this factual issue precludes dismissal under CPLR 3211(a)(1).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court is required to "afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide [petitioner] the benefit of every possible favorable inference" (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591) [internal citations and quotation marks omitted].

Limited Liability Company Law §1005 provides that:

> (a) *Within ten days after the occurrence of an event* described in section ten hundred two of this article, the surviving or resulting domestic limited liability company or other business entity shall send to each dissenting former member a written offer to pay in cash the fair value of such former member's membership interest. Payment in cash shall be made to each former member accepting such offer within ten days after notice of such acceptance is received by the surviving or resulting domestic limited liability company or other business entity.
>
> (b) If a former member and the surviving or resulting limited liability company or other business entity *fail to agree on the price to be paid for the former member's membership interest within ninety days after the surviving or resulting domestic limited liability company or other business entity shall have made the offer* provided for in subdivision (a) of this section, or if the domestic limited liability company or surviving domestic limited liability company or other business entity shall fail to make such an offer within the period provided for in subdivision (a) of this section, the procedure provided for in paragraphs (h), (i), (j) and (k) of section six hundred twenty-three of the business corporation law (or any successor provisions or statute) shall apply, as such paragraphs may be amended from time to time.
>
> (c) A payment under this section shall constitute a return of a member's contribution for the purposes of section five hundred eight of this chapter

(emphasis added).

Business Corporation Law §623 states, in pertinent part, that:

> (h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:
>
> (1) *The corporation shall, within twenty days* after the expiration of whichever is applicable of the two periods last mentioned, *institute a special proceeding* in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares . . .
>
> (2) If the *corporation fails to institute such proceeding* within such period of twenty days, *any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period.* If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct (emphasis added).

The Company argues that calculation of the ninety-day period set forth in Limited Liability Company Law §1005(b) commenced ten days after the merger on June 21, 2018, which the Company maintains was the last date that the Company could make an offer in accordance with said statute, and ended on September 19, 2018. The Company also maintains that once the ninety-day period commenced on June 21, 2018 and ended on September 19, 2018 without any agreement regarding the price to be paid for Johnson's shares, the Company had twenty days after the ninety-day period, or by October 9, 2018, to commence a special proceeding pursuant to Business Corporation Law §623(h)(1). Further, the Company argues that since it did not commence a special proceeding, Johnson was required to commence the instant proceeding

pursuant to Business Corporation Law §623(h)(2) no later than thirty days thereafter, or by November 8, 2018. According to the Company, the petition is untimely since it was filed eleven days after the November 8, 2018 deadline, on November 19, 2018.

The Company cites *ALF Naman Real Estate Advisors, Inc. v Caspag Harbor Management*, LLC, 2012 WL 4892399 (Sup Ct, New York County 2012) ("*Capsag*") in support of its argument that the ninety-day period under Limited Liability Company Law §1005(b) commenced on June 21, 2018. However, the *Capsag* court calculated the time periods set forth in Limited Liability Company Law §1005(b) and Business Corporation Law §623 in accordance with Johnson's interpretation herein.

The merger notice in *Capsag* was sent to the dissenting member, ANRE, on July 15, 2011 which provided an offer and indicated that "should ANRE have any objections to the offer, New York law provided for ANRE to file a 'notice of dissent' within 20 days of the Capsag merger notice, or by August 4, 2011" (*id.*). ANRE served a notice of dissent on August 4, 2011 and the merged corporate entity sent ANRE a letter reiterating its offer to the dissenting member eight days after its receipt of the notice of dissent, on August 12, 2011 (*id.*).

Eighty-seven days later, on November 7, 2011, the dissenting member sent the merged corporate entity a letter rejecting the offer (*id.*). The *Capsag* court noted that the merged corporate entity tendered an offer letter within the ten-day time period set forth under Limited Liability Company Law §1005(a) and that the dissenting member tendered a rejection letter within the ninety-day time period under Business Corporation Law §623. The *Capsag* court also found that the merged corporate entity did not commence a special proceeding within twenty days after

the expiration of the ninety-day negotiation period pursuant to Business Corporation Law §623(h)(1), and that the dissenting member failed to commence the proceeding therein within the expiration of that twenty-day period under Business Corporation Law §623(h)(2), thirty days thereafter. As such, the *Capsag* court dismissed the petition as untimely.

Here, the June 7, 2018 Notice of Merger which Asberry sent Johnson indicated that Johnson was entitled to file a notice of dissent "in accordance with Section 623 of the New York Business Corporation Law *within twenty (20) days of the date of this notice*" (Asberry Supporting Affirmation, Exhibit A, page 2) (emphasis added). The documentary evidence establishes that Johnson timely filed her notice of dissent within the twenty-day period, on June 27, 2018.

The Company then tendered an Offer to Johnson "representing the fair value of her interest" in accordance with Limited Liability Company Law §1005(a) within ten days of the Company's receipt of Johnson's notice of dissent on July 5, 2018 (*id.*, Exhibits B. C). Johnson and the Company then had ninety days following the Company's July 5, 2018 Offer to reach an agreement by October 3, 2018 regarding Johnson's fair value of her membership interest.

Contrary to the Company's contention, Johnson correctly maintains that calculation of the ninety-day period set forth in Limited Liability Company Law §1005(b) commenced on July 5, 2018, the date of the Offer, within the ten-day period following Johnson's notice of dissent, and ended on October 3, 2018.

Since the parties failed to reach an agreement, the Company was required to commence a special proceeding within twenty days, by October 23, 2018 (*see* Business Corporation Law§623[h][1]). Inasmuch as the Company failed to commence a special proceeding, Johnson

was entitled to commence this proceeding within the following thirty days, by November 22, 2018 (*see* Business Corporation Law §623[h][2]).

Unlike the dissenting shareholder in *Capsag* which commenced the appraisal proceeding past the thirty-day deadline, Johnson filed this proceeding three days before the end of the thirty-day period, on November 19, 2018. Therefore, this proceeding is timely.

Accordingly, it is

ORDERED that the motion by respondent Johnson & Asberry Communications, LLC to dismiss the petition is denied and the respondent is directed to serve and file an answer within five days after service of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 28, 2019.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 8, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY