

Nimble Ventures, LLC v Liquid Digital Capital Mkts. Holdings, LLC
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2020 NY Slip Op 32055(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 651762/2020

Judge: Barry Ostrager

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER. PART IAS MOTION 61EFM

Justice

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Nimble Ventures, LLC, Plaintiff,	INDEX NO. <u>651762/2020</u> MOTION NO. <u>002</u>
- v -	
Liquid Digital Capital Markets Holdings, LLC, Liquid Digital Holdings LLC, and Michael Graves, Defendants	DECISION & ORDER ON MOTION

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OSTRAGER, J.

Before the Court is Defendant Michael Graves's Motion to Compel Arbitration and to Stay and Partially Seal the Complaint in this action. Having heard oral argument on June 23, 2020, and for the reasons set forth below, the motion is denied except to the extent of staying the portion of Count V that is against defendants Liquid Digital Holdings LLC and Liquid Digital Capital Markets Holdings LLC pending the resolution of the preliminary injunction proceedings in Delaware Chancery Court.

Plaintiff Nimble Ventures LLC is a lender to and investor in defendant Liquid Digital Holdings LLC ("Liquid Digital"). Defendant Michael Graves is an officer of Liquid Digital. The Complaint alleges that Graves made a series of misrepresentations with respect to Nimble's investment in Liquid Digital and improperly transferred funds to himself and his alleged alter egos and that as a result, defendant Liquid Digital breached its contractual obligations to Nimble, and Nimble suffered harm. The Complaint includes five counts: Count I for breach of a Loan Agreement against Liquid Digital Capital Markets and Liquid Digital Holdings; Count II for fraud against Graves; Count III for negligent misrepresentation against Graves; Count IV for

unjust enrichment against Graves; and Count V for actual and constructive fraudulent transfer against all defendants. Only defendant Graves moves to compel arbitration.

In support of his motion to compel arbitration, Graves argues that the parties' relationship is governed by an LLC Agreement (NYSCEF Doc. No. 28) which contains an arbitration provision. In opposition, plaintiff argues that the Complaint is for breach of a different agreement, a Loan Agreement (NYSCEF Doc. No. 29), which does not contain an arbitration provision and has a New York forum selection clause. Graves makes additional arguments about the connection between the LLC Agreement and the Loan Agreement in support of his motion.

After receiving a draft complaint substantially identical to the one filed in this action, defendant Graves filed a Demand for Arbitration with JAMS on March 17, 2020 against Nimble in which Liquid Digital Holdings and Liquid Digital Capital Markets Holdings were named as nominal claimants. However, the Liquid Digital entities appear to dispute that Graves had authority to initiate arbitration against Nimble on behalf of Liquid Digital. *See* NYSCEF Doc. No. 51 (Affirmation of Joanne Polie) ¶ 22 – 23 and NYSCEF Doc. No. 38 (April 8, 2020 Email from Liquid Digital CEO Patrick Whalen). On May 14, 2020, JAMS agreed to proceed with the arbitration, over objections. *See* NYSCEF Doc. No. 68.

Following JAMS' determination that it would proceed with the arbitration, Nimble commenced an action in Delaware Chancery Court to enjoin the arbitration. *See* NYSCEF Doc. 62 (the "Chancery Complaint"). Nimble states that it filed in Delaware because the LLC Agreement, which contains the arbitration clause on which Graves relies, requires litigation there. On June 8, 2020, Nimble filed a preliminary injunction motion in the Delaware action. The motion asks that court to declare that the purported dispute is not arbitrable and to enjoin Graves' JAMS arbitration on the ground that Graves had no authority to initiate the arbitration. As of the

date of argument on this motion, the preliminary injunction proceeding in Delaware had not been resolved.

As a preliminary matter, Count I of the Complaint is properly before this Court. Count I refers explicitly to breach of the Loan Agreement which contains a New York forum selection clause. The Loan Agreement itself does not contain an arbitration clause and is independent of the LLC Agreement. Additionally, Count I is alleged against defendants Liquid Digital Holdings LLC and Liquid Digital Capital Markets Holdings LLC only and those entities have not moved to compel arbitration before this Court.

With respect to Counts II through V against defendant Graves, the Court finds that there is no basis to compel arbitration on the claims against defendant Graves in his individual capacity. Even if, as Graves argues, the allegations in the Complaint ultimately fall under the LLC Agreement rather than the Loan Agreement, the arbitration clause in the LLC Agreement does not entitle defendant Graves, as an individual, to compel arbitration of claims against him individually. The arbitration provision in Section 13.6 (b) of the LLC Agreement provides (with emphasis added) that:

Notwithstanding anything to the contrary contained in Section 13.6(a), each Member hereby agrees that **the Company shall have the right to elect to arbitrate and compel arbitration** of any dispute hereunder through final and binding arbitration before JAMS (or its successor) (“JAMS”). **The Company may commence the arbitration process** by filing a written demand for arbitration with JAMS, with a copy to the applicable Member(s); provided, however, that either the Company or such applicable Member(s) may, without inconsistency with this arbitration provision, apply to any court in accordance with Section 13.6(a) and seek injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved.

The “Company” is defined as “the limited liability company formed pursuant to the Certificate” (p. 6), which is Liquid Digital Holdings LLC. Thus, the above quoted language, if anything, gives defendant Liquid Digital Holdings LLC the option of arbitrating claims that arise under the

LLC Agreement. Therefore, to the extent that Count V of the Complaint against the Liquid Digital defendants arises under the LLC Agreement, those claims are stayed pending the resolution of the preliminary injunction proceedings in Delaware. However, there is no agreement entitling Graves, as an individual, to arbitrate the claims plaintiff Nimble has brought against him. Thus, the Court finds that plaintiff Nimble's claims against defendant Graves are properly before this Court as Graves is subject to general jurisdiction in New York.

The portion of the motion that seeks to partially seal the Complaint is likewise denied. As both parties acknowledged, the Court favors transparency and public accessibility, and the Court cannot redact documents absent good cause shown. Here, the Court finds that defendant Graves' fear of reputational harm based on the allegations of fraud and embezzlement do not constitute good cause within the meaning of 22 NYCRR 216.1.

Defendant Graves also asks the Court to order the withdrawal of certain third-party subpoenas issued by plaintiff Nimble. Based on the papers and the record at this time, the Court declines to direct plaintiff to withdraw the subpoenas. The parties are directed to meet and confer with respect to discovery issues, and, if unable to reach a resolution, request a conference with the Court to determine specific issues.

Accordingly, it is hereby,

ORDERED that defendant Graves' motion to compel arbitration and partially seal the Complaint is denied except to the extent of staying the portion of Count V that is against defendants Liquid Digital Holdings LLC and Liquid Digital Capital Markets Holdings LLC pending the resolution of the preliminary injunction proceedings in Delaware Chancery Court; and it is further

ORDERED that defendants shall Answer the Complaint within 20 days of the date of this decision; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 29, 2020 at 9:30 a.m.

Dated: June 26, 2020,


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE