

<b>Leiber Group, Inc. v Simon</b>
2020 NY Slip Op 32638(U)
August 10, 2020
Supreme Court, New York County
Docket Number: 655584/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

-----X

INDEX NO. 655584/2019

THE LEIBER GROUP, INC.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

ARNOLD SIMON,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS

Masley, J.:

In motion sequence number 001, defendant Arnold Simon moves, pursuant to CPLR 3211 (a)(7), and (a)(10), to dismiss plaintiff The Leiber Group, Inc.'s (Leiber) complaint and, pursuant to 22 NYCRR 130-1.1, for sanctions.

Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, accepted as true.

Nonparty GMX Technologies, LLC (GMX) is an agricultural technology business (NYSCEF Doc No. [NYSCEF] 7, Summons and Complaint ¶¶2). Defendant Simon is GMX's Chairman and CEO (id. ¶¶ 3, 9). In 2016, plaintiff Leiber, a portfolio company, took a position (12.5%) in GMX, which "was presented to Leiber as a developer and distributor of a proprietary agricultural treatment designed to enhance the yield of various crops" (id. ¶ 2). Leiber recognized that, as a start-up company marketing a new product with an inexperienced CEO, GMX posed significant investment risks (id. ¶ 3).

To mitigate those risks, Leiber insisted on “strong exit rights” (*id.* ¶ 4); “[t]he centerpiece to this risk-mitigation strategy was the inclusion of a heavily-negotiated put option in the [GMX]’s operating agreement, permitting Leiber, in its sole discretion and without any qualification, to sell its 12.5% stake back to GMX (the ‘Put Option’) for a specified price of \$8 million (the ‘Put Price’). Leiber could exercise the option on either the 2 1/2 or 3 1/2-year anniversary of the investment” (*id.* ¶ 5). “Leiber insisted that the operating agreement provide that Simon would also be personally responsible for payment of the full \$8 million Put Price”, making GMX and Simon jointly and severally liable for paying the Put Price (*id.* ¶ 7).

At the 3 ½-year anniversary of its investment, Leiber exercised the Put Option (*id.* ¶ 8). GMX claimed that it lacked the money to pay, but Lieber insists that, since GMX is not the sole obligor of the Put Option, Simon is personally responsible for payment of the Put Price as a primary obligor (*id.* ¶¶ 9, 10). Specifically, Leiber alleges that “Simon breached the operating agreement by 1) failing to cause GMX to pay the Put Price to Leiber; and 2) failing to personally pay Leiber the \$8 million Put Price upon Leiber’s valid exercise of the Put Option” (*id.* ¶12). Leiber further alleges that, in causing GMX to breach the operating agreement, Simon has also breached his fiduciary duties to GMX and Leiber as a minority member (*id.* ¶14). Accordingly, Leiber commenced this action for breach of the operating agreement and breach of fiduciary duty (*id.* ¶15).

Simon now moves to dismiss this complaint.

## Discussion

As a preliminary matter, Simon's counsel withdrew his improper claim splitting and indispensable party arguments (NYSCEF 17, tr. at 42:16-43:9; 46:10-16); thus, these arguments will not be addressed here. Also, Simon's request for sanctions was denied on the record. (*id.* at 50:3-15).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court "must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]).

"[A] contract is only ambiguous when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings" (*O'Brien v Progressive N. Ins. Co.*, 785 A2d 281, 288 [Del 2001]). Therefore, "the only question for this Court is whether or not the plain language of the contract suggests more than one interpretation" (*id.* at 289). "In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions" (*VLIW Tech., L.L.C. v Hewlett-Packard Co.*, 840 A2d 606, 615 [Del 2003]). The court shall dismiss "only if the defendants' interpretation is the only reasonable construction as a matter of law" (*id.*).

Section 5.06 (a) of the SOA provides, in relevant part,

"[s]ubject to the terms set forth in this Section 5.06, following (i) the 30-month anniversary of the date of this Agreement, and, (ii) if not exercised on or after such date, again on the 42nd-month anniversary of the date of this Agreement, Leiber, in its sole and absolute discretion, shall have the right, but in no event shall be obligated, to resell to the Company, at Leiber's sole and absolute discretion (each the '**Put Option**'), all or a pro-rated portion of the Membership Interest held by Leiber. The purchase price for the Put Interests under the Put Option (the '**Put Price**') shall be equal to eight million dollars (\$8,000,000)"

(NYSCEF 8, SOA). Section 5.06 (b) requires that

"Leiber shall give notice (the '**Put Notice**') in writing to the Company of its intention to sell the Put Interests pursuant to the Put Option within sixty (60) days of the applicable anniversary date (the '**Put Option Period**'). The closing of the purchase and sale pursuant to the Put Option shall take place on a date reasonably designated by Leiber but no later than thirty (30) days after the Put Notice (the '**Put Closing Date**'). At such closing, Leiber shall deliver to the Company certificates or instruments, if any, evidencing the Put Interests, duly endorsed (or accompanied by duly executed assignments) and otherwise in good form for delivery and free and clear of all liens other than as provided for in this Agreement, and the Company or Simon shall pay the Put Price in cash (by wire transfer of immediately available funds or by certified or cashier's check)."

(*id.* [emphasis added]).

According to Simon, "...or Simon" language in Section 5.06 (b) does not create new personal liability for Simon, but instead only becomes relevant at the closing, if the Put Option can be effectuated under the SOA and Delaware law. Simon argues that this language sets forth merely a process for closing rather than a personal payment obligation that is wholly unsupported by consideration, as the provision directs that the certificates be delivered to GMX, no matter who pays. In response, Leiber claims that the plain language of Section 5.06 (b) assigns Simon a primary obligation to pay the Put Price.

A reasonable person could conclude that this language, contained in a closing provision, is merely a procedural alternative as opposed to a payment obligation, as

GMX suggests, as could a reasonable person conclude that this language creates a payment obligation, as defendants suggest. As this provision is susceptible to more than one interpretation, the court cannot make any findings as a matter of law on this motion. Further, the allegations set forth in the complaint sufficiently plead a claim for breach of contract. Therefore, dismissal of the breach of contract claim is not appropriate at this juncture.

Leiber also alleges that Simon breached his fiduciary duty by (1) failing to cause GMX to pay the Put Price, resulting in GMX's breach of the SOA; (2) operating and managing GMX in a grossly negligent and reckless fashion; and (3) hiding his mismanagement and misconduct by failing to maintain and/or provide Leiber access to the GMX's books and records.

"A claim for breach of fiduciary duty is an equitable tort. It has only two formal elements: (i) the existence of a fiduciary duty and (ii) a breach of that duty" (*Hill v Myers*, 2020 Del. Ch. LEXIS 215, at \*5 [Del Ch Ct 2020]). Here, Leiber sufficiently alleges that Simon, as GMX's managing member, owed Leiber, a minority member a fiduciary duty and that Simon breach that duty. Simon argues that this claim is duplicative of the breach of contract claim. However, this court disagrees. Leiber's claim identifies breaches independent of and broader than Simon's alleged breach of the SOA. Leiber sufficiently alleges that Simon caused GMX to breach the SOA, operated GMX negligently, and hid his mismanagement of the company. These are independent of any alleged breach of the SOA by Simon.

All remaining arguments have been considered and do not alter the result of this decision.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that defendant file his answer within 20 days of notice of entry of this decision; and it is further

ORDERED that the parties are direct to email the court

([SFC-PART48@nycourts.gov](mailto:SFC-PART48@nycourts.gov)) a joint proposed preliminary conference order

(<https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/JMasley-PCO.pdf>)

within 30 days of notice of entry; if the parties cannot agree as to a PC Order, they may each submit a proposed PC Order.

8/10/2020  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	OTHER

APPLICATION:

CHECK IF APPROPRIATE: