

BCI Fin. Holdings LLC v RT Two LLC

2021 NY Slip Op 31771(U)

May 25, 2021

Supreme Court, New York County

Docket Number: 653394/2020

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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BCI FINANCIAL HOLDINGS LLC	INDEX NO.	<u>653394/2020</u>
Plaintiff,	MOTION DATE	<u>10/01/2020</u>
- v -	MOTION SEQ. NO.	<u>001</u>
RT TWO LLC,	DECISION + ORDER ON MOTION	
Defendant.		

-----X

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS

In this action arising out defendant’s alleged breach of an operating agreement, defendant RT Two LLC (“RT2”) moves pursuant to CPLR 3211 (a)(1)(3) and (7) for an order dismissing the complaint upon documentary evidence, as well as on the grounds of lack of capacity to sue and for failure to state a cause of action. Plaintiff BCI Financial Holdings LLC (“BCI”) opposes the motion or, alternatively, cross moves pursuant to CPLR 3025(b) for leave to amend the complaint.

Background

Unless otherwise noted, the following facts are based on the allegations in the complaint (NYSCEF # 8). BCI is a company whose business includes holding ownership interests in and managing Bankers Capital International, a New York City-based firm of investment bankers and senior advisors registered with FINRA, and BCI Financial Holdings Advisors Inc., a wholly owned New York corporation (*id.*, ¶ 8). RT2 is a putative member in BCI and a party to the Limited Liability Operating Agreement of BCI, f/k/a TechOps LLC, dated as of August 26, 2016 (hereinafter “Operating Agreement”) (*id.*, ¶ 7, NYSCEF # 7). While under the Operating Agreement, RT2 is defined as a single-member LLC with non-party Ron Tassinari as its sole member, the complaint alleges, upon information and belief, that RT2 has two members, Ron Tassinari and Bobby Tassinari (*id.*, ¶ 7).

Under Section 7.1 of the Operating Agreement, any Transfer of a “Controlling Interest” in RT2, as defined under Article 2 of the Operating Agreement, requires the prior written consent of the Manager of BCI, Todd DeMatteo (“Manger”) (*id.*, ¶¶

27, 28). This provision was specifically inserted by the members to preserve the relationship of the members and to protect each member from having to accept a third party whom they may otherwise reject (*id.*, ¶ 20). In addition, Article 7 was intended to ensure that Bobby Tassinari could not have any interests in BCI or Bankers Capital International and reflects the Tassinaris' express agreement that Ron Tassinari would be the sole member of RT2 and that any change thereto would require prior knowledge of, and written consent by, the Manager of BCI (*id.*, ¶¶ 15, 20, 31).

Specifically, Section 7.1 provides:

7.1 No Transfers.

(a) Except as otherwise specifically provided in this Agreement, and subject in any event to Sections 7.2 and 7.3, **no Interest Holder shall have the right to Transfer any Interest without the prior written consent of the Manager**, which consent may be withheld for any reason or no reason, in the sole discretion of the Manager. Upon the Transfer of all of a Member's Membership Interest, the Transferor shall cease to be a Member.

(b) **With respect to a Member that is not a natural person, a Transfer shall also include a Transfer of any Controlling interest, whether direct or indirect, in such Member by any owner thereof (an "Entity-Interest Transfer").**

(*id.*, ¶ 27; NYSCEF # 7, at 17) (emphasis added in the original).

Section 7.3(b) of the Operating Agreement addresses the consequences of a transfer of any interest made without the Manager's prior written consent while Section 7.5 imposes additional penalties for an improper transfer (*id.*, ¶¶ 29, 30).

Specifically, subsection (b) of 7.3, entitled "Transferee Not Member" provides that:

(b) If an Entity-Interest Transfer is made which is not in strict compliance with the terms of this Agreement, then the Member (the "Entity Interest Member") in which an interest has been transferred pursuant to such Entity-Interest Transfer shall, upon the occurrence of such Entity-Interest Transfer, **(i) forfeit all of its rights as a Member of the Company under this Agreement and pursuant to the Act and (ii) shall be deemed to be an Economic Interest Holder for all purposes, and shall be only entitled to receive its share of Net Profits and Net Losses,**

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other allocable items and distributions to which the Entity-Interest Member would have been entitled, to the extent of the Economic Interest held by such Entity-Interest Member. **An Entity-Interest Member shall be liable to the Company and the other Members for any losses or damages any of them may sustain by reason of any such Entity-Interest Transfer.** Each natural person executing this Agreement on behalf of any Member that is not a natural person agrees not to cause or permit, to the extent that he has the power and authority to do so, an Entity-Interest Transfer with respect to such Member if such Transfer is in violation of this Agreement.

(*id.*, ¶ 29; NYSCEF 7, at 18) (emphasis added in the original).

Section 7.5, provides that:

7.5 Certain Transfers of No Effect; Indemnity. Any Transfer or attempted Transfer of an Interest in violation of the terms of this Agreement **shall be null and void and have no effect.** Each Member and each Person to which such Member's Interest is Transferred or purportedly Transferred, jointly and severally, **shall indemnify the Company, the Manager, the other Members and their respective directors, officers, employees, representatives and agents against any and all loss, liabilities, damages and expenses, including, without limitation, legal fees, court costs, tax liabilities and/or loss of tax benefits, arising directly or indirectly from any Transfer or purported Transfer in violation of this Article VII.**

(*id.*, ¶ 30; NYSCEF # 7 at 19) (emphasis added in the original).

In or about June 2019, without BCI's or the Manager's knowledge or consent, RT2 admitted Bobby Tassinari as a fifty-percent owner of RT2, and therefore RT2 was no longer solely owned and controlled by Ron Tassinari and, instead, Ron Tassinari and Bobby Tassinari shared control of RT2 (NYSCEF # 8, ¶ 40). RT2 also amended its ownership disclosures with FINRA to list Bobby Tassinari as a fifty-percent owner on the official public records of Bankers Capital International (*id.*, ¶ 41). BCI did not become aware of RT2's transfer of a membership interest to Bobby Tassinari and RT2's filing with FINRA reflecting same until six months after the transfer, or around mid-December 2019 (*id.*, ¶ 42). Upon learning of the transfer, BCI demanded that RT2 withdraw the FINRA disclosure and asserted that the transfer of an ownership interest in RT2 to Bobby Tassinari was a violation of the Operating Agreement. (*id.*, ¶ 43). After BCI made numerous repeated demands and communications, RT2 withdrew the FINRA disclosure months later. (*id.*, ¶ 44). BCI alleges, however, that RT2's wrongful admission of Bobby Tassinari as an owner

directly and proximately resulted in substantial damage to BCI by causing a prospective buyer to terminate ongoing acquisition discussions upon discovering Bobby Tassinari's ownership interest in RT2 and his negative regulatory history (*id.*, ¶¶ 45, 51-54).

BCI commenced this action on July 27, 2020, by filing a summons and complaint asserting claims for (1) a declaration that (i) based upon the wrongful Entity-Interest Transfer of a fifty-percent ownership interest in RT2 to Bobby Tassinari, that RT2 forfeited all of its rights as a member of BCI, (ii) RT2 shall be deemed to an Economic Interest Holder of BCI for all purposes and not have any rights of a Member of BCI under the Operating Agreement, and (iii) the Entity-Interest Transfer shall be deemed null and void; (2) breach of contract based on RT2's transfer of a fifty-percent ownership interest to Bobby Tassinari without the knowledge of consent of BCI's Manager as required under Section 7.1 of the Operating Agreement which breach is alleged to have caused the termination of acquisition discussions with a prospective buyer, and approximately \$3 million in damages; and (3) indemnification for all losses, damages, expenses, including legal fees, under Section 7.5 of the Operating Agreement based RT2's breach of Section 7.1 (NYSCEF # 1, at 12-16).

RT2's Motion to Dismiss

RT2 moves to dismiss the complaint arguing that it fails to state a cause of action and is contradicted by documentary evidence, and that BCI lacks the legal capacity to bring this action. As for its argument that the factual and legal allegations in the complaint are contradicted by documentary evidence, RT2 asserts that based on the Operating Agreement, the restriction on Entity-Interest Transfers under Section 7.1(b) does not apply to RT2's transfer of a fifty-percent interest to Bobby Tassinari, which does not constitute a "Controlling Interest."

RT2 also argues that the complaint fails to state a claim for breach of contract, as BCI cannot show that any breach of the Operating Agreement was a proximate cause of damages since the alleged losses based on the termination of discussions with the prospective buyer are speculative. With respect to the claim for declaratory relief, RT2 argues that such relief cannot be granted as there is no justiciable issue since after the commencement of this action, RT2 negated the transfer and, as alleged in the complaint, withdrew the FINRA disclosure regarding the transfer. As for the indemnification claim, RT2 argues that as there was no breach of contract, the rights to indemnification under Section 7.5 were not triggered. With regard to the capacity to sue, RT2 asserts that BCI cannot bring this action as it did not obtain unanimous consent to its commencement from the Members as required under Section 5.11 of the Operating Agreement. RT2 submits the affidavit of Ron Tassinari who states, *inter alia*, that RT2 "never assigned more than fifty percent of its interest to a non-party member [and that] at the time of the

commencement of this action, RT2 had redeemed even the fifty-percent interest from the non-party member” (NYSCEF # 5, ¶15).

BCI opposes the motion, arguing that it cannot be said, as a matter of law, that the transfer of fifty-percent interest in RT2 to Bobby Tassinara, did not constitute a “Controlling Interest,” as defined under the Operating Agreement. In this connection, BCI notes that Operating Agreement does not define a “Controlling Interest,” as at least “51%” but rather, *inter alia*, as “the possession, directly or indirectly of the power to direct management or policies of a Person,¹ whether through ownership or other voting ownership interest by contract or otherwise” (NYSCEF # 7 at 4). BCI therefore argues that under Delaware law,² which governs, as provided on the choice of law clause in the Operating Agreement, the issue of control is a factual question that cannot be determined on this motion (*see e.g. In re Tesla Motors, Inc., Stockholders Litigation*, 2018 WL 156029, at *13 [Del Ch. Mar. 28, 2018] [noting that a shareholder with less than fifty-percent stock can still be a controlling shareholder and “actual control over business affairs may stem from sources extraneous to stock ownership”] [internal citations and quotations omitted]).

As for the breach of contract claim, BCI argues that it is adequately pleaded under Delaware law and proof of damages with certainty is not required at the pleading stage. It further argues that the complaint also sufficiently states a claim for indemnification based on allegations of the transfer of fifty-percent ownership in RT2 which triggered the Operating Agreement’s indemnification provision. With respect to the claim for a declaratory judgment, BCI asserts that contrary to RT2’s argument, the claim arises from a justiciable issue because the allegations of the transfer of a fifty-percent interest to Bobby Tassinari was not negated before the action was commenced. And, in any event, based on the breach, an issue exists as to RT2’s legal status under the Operating Agreement. As for its capacity to sue, BCI asserts that Section 5.11 of the Operating Agreement does not require unanimous consent of the Members to bring this action. Alternatively, BCI argues that if the court finds that the complaint is insufficient to state a claim, the court should grant it leave to amend under CPLR 3025(b), to correct any deficiency.

¹ The Operating Agreement, under Article 2, defines Person as “(i) any relative of such Person, or (ii) any Person that controls, is controlled by or is under common control with, such Person, or (iii) an officer, director, member, manager, partner or trustee (or relative of any thereof) of such Person.” (NYSCEF # 7, at 2, 3).

² Section 12.3 of the Operating Agreement, entitled “Application of Delaware Law” states:

“This Agreement, the application or interpretation hereof, and any dispute arising hereunder or in connection herewith, shall be governed by and in accordance with the laws of the State of Delaware applicable to agreements made and fully performed herein and specifically the [Delaware Limited Liability Company] Act.”

(NYSCEF # 7 at 29)

In reply, RT2 argues, *inter alia*, that the parole evidence rule precludes the court from relying on evidence beyond the terms of the Operating Agreement and argues that Delaware law generally holds that a stockholder with less than fifty percent of a corporation's outstanding stock does not become a controlling shareholder in the absence of evidence of "domination by the minority shareholder through actual exercised of direction over corporate conduct" (*Gilbert v El Paso Co.*, 490 A2d 1050, 1055 [Del Ch 1971]).

Discussion

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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff ... can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it" (*Acquista v. New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), *quoting*, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, viewing the facts alleged in light most favorable to BCI, the court finds that allegations in the complaint that RT2 transferred a fifty-percent interest to Bobby Tassinari without obtaining prior written consent from Manager as required by Section 7.1 (a) of the Operating Agreement are sufficient to provide a basis for the claims asserted in the complaint. With regard to RT2's argument that the transfer of the fifty-percent share does not constitute a transfer of a "Controlling Interest," under Section 7.1 (b), the court finds that the definition of controlling under Article 2 of the Operating Agreement does not depend on the ownership of a majority share of stock. To the contrary, the definition entails the ability to direct management or policy through various means, including but not limited to, ownership or voting ownership interest. Additionally, under Delaware law, the issue of control is not wholly based on the percentage of stock or other ownership (*In re Tesla Motors, Inc., Stockholders Litigation*, 2018 WL at * 13; *see also Leslie v Telephonics Off. Techs., Inc.*, 1993 WL 547188, at *2, n. 2 [Del. Ch. Dec. 30, 1993] [finding that fifty percent constituted a controlling interest based on the facts before the court]). Accordingly, it cannot be said that the Operating Agreement flatly

contradicts the allegations in the complaint that the transfer of ownership without the Manager's consent violated Section 7.1.

And, insofar as the statements in affidavit of Ron Tassinari conflict with the allegations in the complaint as to the transfer of a controlling interest to Bobby Tassinari, and that the transfer was negated, such statements are not a basis for granting dismissal (*see Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007] [noting that "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law"] [internal citations omitted]).

As for RT2's argument that the breach of contract claim must be dismissed as any damages resulting from the breach are speculative, such argument is unavailing as, at this stage of the litigation, the complaint sufficiently alleges damages were proximately caused by the loss of the prospective buyer caused by RT2's transfer of ownership to Bobby Tassinari (*see Anglo Am. Se. Fund, L.P. v S.R. Global Int'l Fund, L.P.*, 829 A2d 143, 156 [Del. Ch. 2003] ["Proof of [monetary] damages and of their certainty need not be offered in the complaint in order to state a claim"]).

Next, as to the claim for declaratory relief, this claim is not subject to dismissal as there are no allegations that the transfer was negated and, in any event, a justiciable issue exists as to RT2's legal status, including whether it forfeited its rights as a Member under Section 7.3(b) based on its alleged failure to obtain the Manager's consent to the transfer (*see e.g. Chanos v MADAC, Inc.*, 74 AD3d 1007, 1008 [2d Dept 2010] ["[t]o constitute a justiciable controversy, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect"] [internal citations and quotations omitted]). In addition, the complaint adequately alleges a claim for indemnification based on Section 7.5 of the Operating Agreement which provides for indemnification in the event of that a Member transfers its interest in violation of Section 7 of the Agreement.

Finally, as for RT2's argument that BCI lacks the capacity to sue based on Section 5.11 of the Operating Agreement, which requires the unanimous consent of the Members to certain actions, this provision does not pertain to the commencement of an action such as the instant one.³

³ Section 5.11, titled, Acts Requiring Unanimous Consent, provides:

"Notwithstanding any provision of this Agreement to the contrary, no action shall be taken by the Company or any material expense incurred in connection with any of the following events or transactions without the Unanimous Consent of the Members, which consent shall require the consent of any Member who may also be "a" or "the" Manager: (a) amending this Agreement; (b)

As the motion to dismiss is denied, the court need not consider the cross motion to amend.

Conclusion

In view of the above, it is

ORDERED that defendant RT Two LLC's motion to dismiss the complaint is denied; it is further


ORDERED that within 30 days of efileing this order defendant RT Two LLC shall file an answer to the complaint; it is further

ORDERED that a preliminary conference shall be held via telephone on July 21, 2021, with the telephone number to be provided by the court; it is further

ORDERED that prior to the preliminary conference, the parties shall meet and confer and complete to the extent possible the preliminary conference form posted with Justice Chan's Part Rules on the Commercial Division website (except for the dates for the compliance conference, note of issue, and time to move for summary judgment which shall be provided by the court); and it is further

ORDERED that the cross motion to amend is denied as academic. This constitutes the Decision and Order of the court.

5/25/2021
DATE


MARGARET CHAN, J.S.C.

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

applying for or consenting to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of the Company, of all or a substantial part of the Company's property, making a general assignment for the benefit of the Company's creditors, commencing a voluntary case under any bankruptcy law, or filing a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up or composition or readjustment of debts; (c) the issuance of additional Interests in the Company in accordance with the provisions of Section 5.4; or (d) the removal or replacement of the Manager."