

Sherman v Zampella
2022 NY Slip Op 31585(U)
May 12, 2022
Supreme Court, New York County
Docket Number: Index No. 655176/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ADAM SHERMAN,	INDEX NO. <u>655176/2021</u>
Plaintiff,	MOTION DATE <u>11/24/2021</u>
- v -	MOTION SEQ. NO. <u>001</u>
ANIELLO ZAMPELLA, COINDADO LLC, COTTONWOOD VENDING LLC	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (5.12.22), the defendants' motion to dismiss the complaint is denied except to the extent that it is dismissed against Aniello Zampella personally without prejudice.

Section 3.1 of the Operating Agreement provided for the admission of Adam Sherman as a member of Cottonwood upon consent of Mr. Zampella, who it is undisputed held 100% of the ownership interest in Cottonwood:

3.1 Admission. Upon approval by 65% of the ownership interest in the Company, a new Member may be admitted to the Company upon such terms and conditions as the Company sees fit.

(NYSCEF Doc. No. 14, § 3.1).

The Whatsapp messages and emails (NYSCEF Doc. No. 6, ¶¶ 19-21) are prima facie evidence that Mr. Sherman has an approximately 10% interest in Cottonwood and that any requirements set forth in the Operating Agreement for additional writings that were either never executed by the defendants (and therefore in breach of the Operating Agreement) or otherwise never provided to Mr. Sherman were waived (NYSCEF Doc. No. 14, § 3.2). According to Mr. Sherman, the first admission by Mr. Zampella appears in an email to Latham & Watkins on July 19, 2018, where Mr. Zampella advised Latham & Watkins of Mr. Sherman's membership interest:

Lastly, and we still need to have Latham draw this up, but: pending the license being granted due to Adam coming on board & helping in other ways, he would receive 9.9% equity in Cottonwood to be vested at the time DFS gives the green light & approves us for a trip to the moon...

(NYSCEF Doc. No. 6, ¶ 20). Mr. Zampella followed that up the next day with another email to Latham & Watkins advising that the Cottonwood structure chart didn't "reflect the 9.9% equity to be vested to Adam once we are granted license." (*id.* at ¶ 21). Additionally, two years later, Mr. Zampella confirmed Mr. Sherman's interest after the license had been granted, and once Mr. Sherman's interest vested, in Whatsapp messages between Mr. Sherman and Mr. Zampella dated July 13, 2020:

7/13/20, 12:24 PM - Adam: i own 10% of cottonwood, correct?
 7/13/20, 12:25 PM - Adam: so what makes you think i'm interested in just 'cashing out' for a few hundred k
 7/13/20, 12:25 PM - Aniello: because that's what you just said
 7/13/20, 12:25 PM - Adam: this is true, correct?
 7/13/20, 12:25 PM - Aniello: you seem to only ever want to discuss a quick cash out - and not the responsibilities that you promised and we never got
 7/13/20, 12:26 PM - Adam: you're not answering my question
 7/13/20, 12:26 PM - Aniello: you're not really answering mine either
 7/13/20, 12:26 PM - Adam: it's a y/n
 7/13/20, 12:26 PM - Adam: this.
 7/13/20, 12:26 PM - Adam: is that true, or not?
 7/13/20, 12:29 PM - Aniello: 10% of like nothing is still nothing

(*id.* at ¶ 19). Based upon the above allegations, Mr. Sherman therefore has standing to bring derivative claims on behalf of Cottonwood.

Additionally, according to the well pled complaint, Mr. Sherman provided sweat equity and it is undisputed that Mr. Zampella was the sole owner and managing member of Cottonwood. Stated differently, it does not matter at this stage of the proceeding that Mr. Sherman can not produce a written signed counterpart of the operating agreement (NYSCEF Doc. No. 14, § 3.2) that he was never provided by the defendants or that Mr. Zampella never executed an amendment to the operating agreement (*id.* at § 2.1). Mr. Zampella can not fail to provide documents or fail to execute an Amendment to the Operating Agreement and then claim that no Amendment to the Operating Agreement was executed and that therefore Mr. Sherman is not a member. Nor under the circumstances is he entitled to dismissal by arguing that Mr. Sherman, as a matter of fact, did not provide the called for capital contribution indicated in the Operating Agreement, that he did not accept Mr. Sherman's sweat equity as a capital contribution (*i.e.*, his cash compensation being only part of his compensation), and that therefore he is not a member mandating dismissal at this stage of the proceeding. For the avoidance of doubt, these writings are more than sufficient to satisfy the statute of frauds at this stage of the proceedings.

The claims against Mr. Zampella individually must however be dismissed without prejudice to the extent that they are premised on failing to convey Mr. Sherman 10% of his interest in Cottonwood because the offer and representations by Mr. Zampella to Mr. Sherman were made in his capacity as sole managing member of Cottonwood, not on his own behalf (*Landmark Ventures, Inc. v Kreisberg & Maitland, LLP*, 179 AD3d 492 [1st Dept 2020] citing *Savoy Record*

Co. v Cardinal Export Corp., 15 NY2d 1, 4 [1964]). It is clear based on the factual assertions that Mr. Sherman may wish to assert claims against Mr. Zampella in his individual capacity based on his alleged breaches of his obligations to Cottonwood, including without limitation, by allegedly misappropriating the opportunities of Cottonwood or establishing Coindado for the purposes of competing with Cottonwood or draining Cottonwood of its assets. Leave therefore is granted to Mr. Sherman to file an amended complaint within 30 days to properly articulate these claims.

The defendants are also not entitled to dismissal of Mr. Sherman's claims for unjust enrichment because they dispute the existence of the agreement with Mr. Sherman and, as such, he must be permitted to assert this claim in the alternative at this stage (*Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]).

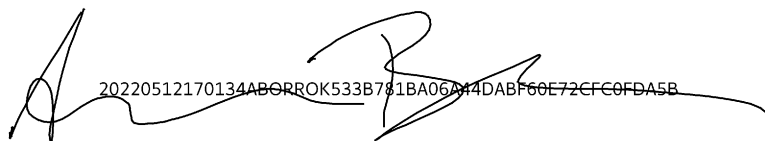
The defendants' remaining arguments are unavailing.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is denied except that that the claims against Aniello Zampella personally are dismissed without prejudice. Mr. Sherman may file an amended complaint within 30 days to replead any individual claims against Mr. Zampella, otherwise the claims against him shall be dismissed with prejudice; and it is further

ORDERED that the remaining defendants file their answer on or before June 27, 2022; and it is further

ORDERED that the parties appear for a status conference on August 4, 2022 at 11:30 a.m., at which the parties will provide a deposition schedule (names and dates).


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5/12/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE