

Southern Advanced Materials, LLC v Abrams

2023 NY Slip Op 32698(U)

August 4, 2023

Supreme Court, New York County

Docket Number: Index No. 650773/2015

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

SOUTHERN ADVANCED MATERIALS, LLC,
Plaintiff,
- v -
ROBERT S. ABRAMS, ROBERT S. ABRAMS LIVING TRUST, and JOHN DOES,
Defendants.
INDEX NO. 650773/2015
MOTION DATE N/A
MOTION SEQ. NO. 010
DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 797, 798, 799, 800, 801, 802, 803, 804

were read on this motion to/for MISCELLANEOUS

Upon the foregoing documents, it is

In motion 010, defendants Robert S. Abrams and Robert S. Abrams Living Trust seek to preclude plaintiff Southern Advanced Materials (SAM) from introducing at trial (1) parol evidence in support of its claim for breach of contract and (2) any expert opinion or testimony not included in the expert reports disclosed before the parties filed, and the court resolved, motions for summary judgment and/or any expert opinion or testimony to support claims and theories of recovery that are now dismissed from the case. (NYSCEF 798, OSC [mot. seq. no. 010].)

Part I: SAM's Evidence of Dissolution

The sole issue for trial is whether nonparty CV Holdings, LLC (CVH) disposed of substantially all its assets. (NYSCEF 765, Decision and Order at 8 [mot. seq. nos. 008, 009].) Under the Operating Agreement, if CVH was dissolved, then SAM is entitled to a preferred return. The "Preferred Return" consists of: (1) Sam's investment; (2) a

Preferred Dividend of 10% compounded annually; and (3) a pro rata share of the 8.43%¹ remainder of the funds. (NYSCEF 774, Operating Agreement, §§9.7 and 13.1 of the Operating Agreement.) SAM alleges that Abrams breached the Operating Agreement by failing to pay SAM a Preferred Return when CVH was sold to Wendel.

The Operating Agreement provides that dissolution is disposition of “substantially all” of CVH’s assets. (*Id.* at § 13.1.) Upon dissolution, the Operating Agreement requires CVH to cease operations and wind up its affairs in accordance with Delaware law. (*Id.* at §§ 13.2, 16.3.) It also requires CVH to determine whether a preferred return payment is due the shareholders by looking “solely to the assets of the Company for the return of [their] Capital Contribution” and if the assets to be distributed are less than the Minimum IRR Shortfall – which is defined to mean a 30% internal rate of return – then the shareholder is entitled to be paid a preferred return. (*Id.* at § 13.3[a] and [c].)

The parties previously agreed that, under Delaware law, when a contract provision uses the phrase “substantially all” when referring to a company’s assets without defining that phrase, the phrase is deemed to have the same meaning it has when used in 8 Del C § 271. (NYSCEF 765, Decision and Order at 10 [Mot. Seq. Nos. 008, 009].) Delaware Courts have “eschewed a definitional approach to 8 Del C § 271 focusing on the interpretation of the words ‘substantially all,’ in favor of a contextual approach focusing upon whether a transaction involves the sale ‘of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation’.” (*Hollinger Inc. v Hollinger Intl.*,

¹ SAM owns 8.43% of CVH’s common interests. (NYSCEF 765, Decision and Order at 2 [Mot. Seq. Nos. 008, 009], citing NYSCEF 623, SAM’s 19-A Statement ¶¶ 1, 3; NYSCEF 706, Defendants’ 19-A Counterstatement ¶¶ 1, 3.)

Inc., 858 A2d 342, 377 [Del Ch 2004] [citations omitted]; see also NYSCEF 765, Decision and Order at 11 [Mot. Seq. Nos. 008, 009].)

Defendants insist that CVH never dissolved because “it was sold as a going concern for \$360 million and continues to operate today.” (NYSCEF 797, Defendants’ Memo of Law in Support at 5.) Defendants maintain that there are no assets remaining after the Wendel Transaction from which to make such asset distribution. (*Id.*) Further, they argue that, since Wendel purchased 100% of CVH, there are no shareholders remaining to receive such distribution. (*Id.* at 5-6.)

Defendants object to SAM’s proffered evidence of dissolution. SAM proposed evidence includes: (1) Abrams’ negotiations with the shareholders in connection with an unsuccessful 2010 transaction, five years before the Wendel Transaction; (2) Abrams’ negotiations with the other shareholders in connection with the Wendel Transaction; (3) Abrams’ failed negotiations with SAM eight months before the Wendel transaction; and (4) SAM’s understanding and expectations formed before and during the course of its investment of its right to receive a preferred return in connection with any transaction consummated by the company.

It is undisputed that the contract is unambiguous. Defendants object to SAM’s proffer as impermissible parol evidence, and thus, SAM’s evidence to show dissolution should be barred. SAM counters that it is not offering the evidence to interpret the contract but rather to establish that CVH was dissolved pursuant to the contract, triggering the Preferred Return.

The court rejects defendants’ contention that SAM is offering parol evidence to interpret the meaning of the contract. There is no dispute about the meaning of the

word “dissolution.” Rather, the debate is whether, as a matter of fact, there was a dissolution when certain assets and liabilities were removed from the CVH balance sheet before the equity was sold to Wendel. Accordingly, the court denied defendants’ motion on the record. (NYSCEF 811, tr at 12:12-15; 34:12-22.)

Part II: SAM’s Share of the Value of the Assets CVH Transferred to Abrams²

SAM’s valuation expert estimates that SAM should have received at least \$62 million instead of \$31 million pursuant to §§ 9.7 and 13.3 of the Operating Agreement. Defendants contend that SAM received double its pro rata share of the Wendel sale proceeds, and thus even if CVH was dissolved, SAM has been paid in full. (NYSCEF 811, tr at 23:19-24.) Should SAM establish dissolution, defendants object to the expert’s calculation to the extent that it includes a pro rata share of the assets and liabilities that CVH transferred to Abrams before the sale to Wendel.

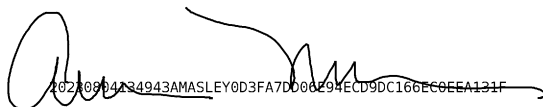
The court denies defendants’ motion because the Operating Agreement provides for a calculation of SAM’s pro rata share of any “remaining amounts” after CVH liquidates its assets and repays creditors. (NYSCEF 775, Operating Agreement at §13.2.) SAM has consistently asserted a right to a pro rata share of the value of the CVH assets transferred to Abrams including the value of SiO₂ as it was all one transaction. (See *e.g.*, NYSCEF 103, Second Amended Complaint at 15.) In other words, SAM seeks a pro rata share of the Wendel transaction, not just the \$360 million sale to Wendel. (NYSCEF 550, SAM’s Memo of Law in Support of Summary Judgment Motion at 20, 21, 23.) Indeed, defendants’ expert included SAM’s pro rata share of the

² To the extent that defendants label this argument that “SAM Should be Precluded from Introducing New Expert Evidence that is not Relevant to Damages,” the court agrees with defendants’ unassailable statement of law, but that is not the issue.

value of CVH in his calculation. (NYSCEF 580, Dec. 2, 2019 Expert Report of David W. Prager at 8.) The court is not confusing contract damages and SAM’s dismissed breach of fiduciary duty claim. Rather, if CVH was dissolved, then SAM is entitled to a Preferred Return under the Operating Agreement. SAM is not entitled to any other damages. To the extent that SAM seeks a percentage of Abrams’ proceeds from the Wendel sale, they are not part of the formula and are thus barred. The focus is on the value of CVH and Sam’s share of the value.

Accordingly, it is

ORDERED that defendants’ motion is denied.



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8/4/2023
DATE

ANDREA MASLEY, J.S.C.

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"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE