

Crespi v PHD GBW

2023 NY Slip Op 34509(U)

December 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 501376/2019

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BENJAMIN N. CRESPI, individually and
derivatively on behalf of GREEN BUILDING
WATERFRONT LLC,

Plaintiff, Decision and order

- against -

Index No. 501376/2019

PHD GBW, BOBBIQUE LLC and 450 UNION LLC,
Defendants,

December 21, 2023

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PHD GBW LLC, individually and derivatively
on behalf of GREEN BUILDING WATERFRONT LLC,
Counterclaim-Plaintiffs,

- against -

BENJAMIN N. CRESPI,

Counterclaim-Defendant

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5

Benjamin Crespi, the plaintiff and counterclaim defendant has moved seeking to dismiss counterclaims filed by PHD GBW LLC [hereinafter 'PHD']. PHD has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on April 30, 2015 the defendant PHD (also known as Pilot), Akiva Reich and the plaintiff Ben Crespi entered into a limited liability company agreement concerning an entity called Green Building Waterfront LLC [hereinafter 'GBW']. Pilot maintained a fifty percent share of the corporation while Crespi and Reich maintained twenty five percent each. The agreement stated it intended to execute a lease for space located at 450 Union Street in Kings County,

however, the agreement did not state the purpose of such lease. Indeed, Section 5 of the agreement entitled 'Purposes; Powers' states the "purposes of the Company are: (i) to engage in any lawful act or activity...and (ii) to do any and all other acts and things which may be necessary, appropriate or incidental to the carrying out any or all of such acts and activities" (id). An exhibit to the agreement includes a license agreement whereby Green Building Waterfront LLC as licensor and Bobbique LLC as licensee agreed that Bobbique would be able to utilize a portion of the agreed upon space as an exclusive food provider. Further, defendant 450 Union LLC entered into a short term lease with GBW for a period of six months from May 1, 2015 through October 31, 2015. Following the completion of the lease GBW decided to sell its assets to 450 Union LLC, essentially terminating Crespi's relationship with the corporation. Crespi instituted this lawsuit and alleged numerous causes of action. All the causes of action were dismissed in a decision dated December 12, 2019 except for the cause of action for quantum meruit (see, Decision and Order [NYSCEF Doc. No. 39]). PHD filed an answer and asserted two counterclaims, first that Crespi breached the operating agreement by committing improper acts. Second, PHD asserts, derivatively on behalf of GBW that Crespi breached the operating agreement by engaging in improper acts. Crespi now moves seeking to dismiss the counterclaims on the grounds they

have no merit. As noted, the motion is opposed.

Conclusions of Law

Pursuant to BCL §1312 and Limited Liability Law §808 a foreign corporation not authorized to do business in the state of New York may not maintain any actions within the state (Pergament Home Centers, Inc. v. Net Realty Holding Trust, 171 AD2d 736, 567 NYS2d 292 [2d Dept., 1991]). There really is no dispute that PHD is not authorized to do business in New York. However, Limited Liability Law §808(b) states that "the failure of a foreign limited liability company that is doing business in this state to comply with the provisions of this chapter does not impair the validity of any contract or act of the foreign limited liability company or prevent the foreign limited liability company from defending any action or special proceeding in any court of this state" (id). In Reese v. Harper Surface Finishing Systems, 129 AD2d 159, 517 NYS2d 522 [2d Dept., 1987] the court explained that 'defending any action' includes the right to file any counterclaims and even third party claims (see, also, MacQuesten General Contracting, Inc. v. HCE, Inc., 296 F.Supp2d 437 [S.D.N.Y. 2003]). Therefore, Limited Liability Law §808 does not bar the counterclaims.

Turning to the content of the counterclaims themselves, they essentially assert that Crespi breached the operating agreement

in numerous ways. Preliminarily, demand futility has been presented. PHD owns half of GBW and is authorized to take all actions necessary on behalf of the company. Thus, it would be futile to demand PHD take action against itself.

Concerning the counterclaims, first they allege Crespi failed to inform GBW that he had an arrest record which delayed securing the liquor license which delayed the opening date of the restaurant. Second, that Crespi alienated vendors which necessitated others to intervene and handle his job. Lastly, that he mishandled payments to regulatory authorities which caused fines to be levied. The operating agreement states that "no Member, whether in such Member's capacity as a Member or, if applicable, Manager or Officer, nor any affiliate of any Member, shall have any personal liability to the Company or any of the Members for damages for any breach of duty as a manager or as an Officer of the Company, and/or when acting with the consent of the Members; provided that the foregoing provision shall not eliminate or limit the liability of any Member if a judgment or other final adjudication adverse to such person establishes that the acts or omissions of such person were the result of fraud or bad faith and willful and intentional misconduct or constituted such other conduct which under applicable law precludes the elimination or limitation of such liability" (see, Limited Liability Company Agreement of Green Building Waterfront LLC


¶9(b) [NYSCEF Doc. No. 6]). Thus, pursuant to the operating agreement no personal liability can attach to Crespi unless "the acts or omissions...were the result of fraud or bad faith and willful and intentional misconduct" (id). At this juncture, the contents of the counterclaim must be accepted as true. Thus, the counterclaim surely alleges sufficient facts that Crespi acted with bad faith or wilfully or intentionally. Of course, discovery will further sharpen these issues and will narrow the questions of Crespi's conduct. However, it cannot be concluded that there is no basis to assert Crespi may not be shielded by Paragraph 9(b) of the operating agreement. Crespi argues that he cannot be liable for the intentional breach of a contract since breaches of contract do not qualify as bad faith or wilful events. However, pursuant to Limited liability Company Law §409 all managers must act "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" (id). In In re L&N Twins Place LLC, [2020 WL 7211235, S.D.N.Y. 2020] the court explained that there is ambiguity whether an operating agreement can change the requirements of that statute. Further, the court in In re L&N Twins Place LLC discounted Kagan v. HMC-New York, Inc., 94 AD3d 67, 939 NYS2d 384 [1st Dept., 2012] cited by Crespi, which seems to hold the operating agreement can change those requirements because it relied upon Delaware law. Therefore, there are valid

counterclaims that have been filed against Crespi. As noted, further discovery will evaluate the strength of those counterclaims. However, at this juncture the motion seeking to dismiss the counterclaims is denied.

So ordered.

ENTER:

DATED: December 21, 2023
Brooklyn NY



Hon. Leon Ruchelsman
JSC