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| Grossberg v Van Bakergem |
| 2016 NY Slip Op 50081(U) [50 Misc 3d 1211(A)] |
| Decided on January 15, 2016 |
| Supreme Court, New York County |
| Ramos, J. |
| Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on January 15, 2016

Supreme Court, New York County

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| <p>Erik Weller Grossberg, Plaintiff,</p> <p>against</p> <p>Derek Van Bakergem, Defendant.</p> <p>Derek Van Bakergem, Counterclaim-Plaintiff,</p> <p>against</p> <p>Erik Weller Grossberg and Wyatt Carder, Counterclaim-Defendants.</p> |
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Plaintiff: Peter Mahler, Esq. of Farrell Fritz, P.C.

Defendant : Tracee Davis, Esq. of Zeichner Ellman & Krause LLP

Charles E. Ramos, J.

Motion sequence numbers 002 and 003 are consolidated for disposition.

This action arises from a dispute among the members of [redacted] LLC ([redacted]), concerning membership purchase rights under [redacted] LLC Operating Agreement. [redacted] equal, one-third owners are plaintiff Erik Weller Grossberg (Grossberg), defendant Derek Van Bakergem (Bakergem), and counterclaim-defendant Wyatt Carder (Carder). In his two-count complaint, Grossberg seeks: (1) a declaration that Bakergem's "Purchase Election is a nullity," that Bakergem failed to timely respond to Grossberg's "Buy-Sell Offer," and that Grossberg is entitled to purchase Bakergem's membership interest in [redacted] for \$10,000; and (2) specific performance of the Operating Agreement, requiring Bakergem to sell his membership interest to Grossberg. Complaint, ¶¶ 47, 52.

In his answer, Bakergem asserts counterclaims against Grossberg and Carder for: breach of the Operating Agreement; breach of fiduciary duty; and declarations that Bakergem has not repudiated his election to purchase Grossberg's membership interest, and that both Grossberg and Carder are required to sell their interests in [redacted] for \$10,000 each.

Previously, Grossberg moved for summary judgment on the complaint and for dismissal of Bakergem's counterclaims. On July 21, 2015, this Court heard arguments on the motion and, on the record, granted summary judgment to Grossberg on the complaint and dismissed Bakergem's counterclaims (7/21/15 Decision). NYSCEF document number 62 at 32. Thereafter, Court issued an order dated August 5, 2015 (8/5/15 Order), granting Grossberg's summary judgment motion "as reflected in the Court's transcript" (NYSCEF document number 52); the Court so ordered the transcript on September 15, 2015. NYSCEF document number 62 at 33. On October 9, 2015, the Court issued an Order and Interlocutory Judgment (10/9/15 Judgment), essentially settling the Court's previous orders.

Grossberg now moves (in motion sequence number 002), for attorneys' fees and costs. In motion sequence number 003, Bakergem moves, by order to show cause, to reargue and renew the 10/9/15 Judgment. Upon granting reargument and renewal, Bakergem seeks an order granting him summary judgment on his claim for declaratory relief and allowing his counterclaims to proceed. Alternatively, Bakergem requests clarification of the 8/5/15 Order and for a stay of all related proceedings.

In connection with Bakergem's order to show cause, the Court granted his request that Grossberg and Carder be stayed from enforcing the 10/9/15 Judgment and disposing of any interest in *LLC* pending the outcome of Bakergem's instant motion for reargument and renewal.

Legal Analysis

CPLR 5015 and Reargument/Renewal (motion sequence number 003)

Bakergem seeks reargument of the summary judgment motion, arguing that the Court improperly rewrote the Operating Agreement by terminating Bakergem's purchase option before the conclusion of the 180-day option period provided in the Operating Agreement. In the alternative, Bakergem requests clarification of this Court's prior decision, explaining "why it terminated van Bakergem's purchase option and counterclaims on July 21, 2015." Bakergem brief at 18. Bakergem seeks leave to renew based upon his submission of affidavits, purportedly demonstrating his financial ability to purchase Grossberg's membership interest in *LLC*.

Grossberg counters that Bakergem's motion improperly seeks relief under CPLR 2221 rather than CPLR 5015, and that, in any event, consistent with the Court's previous holding and the express terms of the Operating Agreement, Bakergem's purchase option expired after 90 days.

Grossberg argues that, because the 8/5/15 Order was reduced to judgment on October 9, 2015 and entered on October 15, 2015, Bakergem's only recourse was to appeal or move to vacate the judgment pursuant to CPLR 5015. CPLR 5015 permits "[t]he court which rendered a judgment or order" to "relieve a party from it upon such terms as may be just ..." As argued by Grossberg, this provision applies to judgments that have been "entered." *Fernandez v Moskowitz*, 113 AD3d 574, 575 (1st Dept 2014) (plaintiff's recourse after "judgment was entered" was to seek vacatur under CPLR 5015).

Under CPLR 5016, "[a] judgment is entered when, after it has been signed by the clerk, it [*2]is filed by him." Here, Grossberg relies upon the 10/9/15 Judgment, which was marked "received" by the New York State Courts Electronic Filing (NYSCEF) system on October 15, 2015. *Id.* However, neither the parties' submissions on the instant motions, nor the Court's independent review of the NYSCEF files, evidences the existence of an "entered" judgment, "signed by the clerk" and "filed by him." CPLR 5016.

As judgment has not been entered, Grossberg's argument that Bakergem cannot properly move to reargue and/or renew under CPLR 2221 is without merit. *See Matter of Unterman (Kaufman)*, 57 AD2d 745, 746 (1st Dept 1977) ("[s]ignificantly, there was no final judgment entered at the time that the motion to renew was made and respondents, therefore, properly utilized CPLR 2221").

Reargument/Clarification

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221 (d) (2). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992). "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court." *Id.* If granted, a "motion for clarification" is "essentially a motion to reargue that was granted" pursuant to CPLR 2221 (d) (2). *Arbor Realty Funding LLC v East 51st St. Dev. Co., LLC*, 67 AD3d 559, 559 (1st Dept 2009).

Bakergem's motion for reargument is granted to the extent of clarifying the 7/21/15 Decision and the 8/5/15 Order. In ruling on Grossberg's summary judgment motion, the parties referred to, and this Court relied upon, section 7.3 of the Operating Agreement.

LLC is a Delaware entity, and the Operating Agreement provided that Delaware law applies to "all questions with respect to the construction of this Agreement and the rights and liabilities of the parties hereto ..." Davis affirmation, exhibit 1, §§ 2.1, 11.11. Therefore, Delaware law applies to the Operating Agreement. *Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 (1st Dept 2005) ("[i]t is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation"), *affd* 6 NY3d 242 (2006); *Katz v Emmett*, 226 AD2d 588, 589 (2d Dept 1996) ("Delaware, the state of incorporation, determines the applicable law").

Under Delaware law, "[w]here ... the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation," the contract is construed "in accordance with that plain meaning and [the court] will not resort to extrinsic evidence to determine the parties' intentions." *BLGH Holdings LLC v Enxco LFG Holding, LLC*, 41 A3d 410, 414 (Del 2012). The Court "will read a contract as a whole and ... give each provision and term effect, so as not to render any part of the contract mere surplusage." *The Estate of Lucille Osborn v Kemp*, 991 A2d 1153, 1159 (Del 2010). New York law is the same. *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002).

Section 7.3 of the Operating Agreement provided, in pertinent part, as follows:

"(a) . . . in the event that a dispute shall arise over any matter requiring the Unanimous Consent [*3]of the Members . . . , and the Members are unable to resolve such dispute within thirty (30) days after written notice from either Member that such dispute exists, then any Member (Tendering Member') may, at his option, cause a sale of its Interest in accordance with, and subject to, the following terms and conditions:

(I) The Tendering Member shall submit a written proposal (Buy-Sell Offer') to the other Members (Non-Tendering Members') for a sale of the Tendering Member's Percentage Interest based on the purchase price to be determined in accordance with the provisions of this paragraph below and set forth in the Buy-Sell Offer. The Non-Tendering Members shall have the right to elect, by written notice to the Tendering Member given no later than thirty (30) days following the receipt of such Buy-Sell Offer, to either (a) purchase the

Percentage Interest of the Tendering Member on the terms of the Buy-Sell Offer, or (b) sell each of their respective Percentage Interests to the Tendering Member for a price equal to the purchase price provided in the Buy-Sell Offer adjusted for each of the Non-Tendering Member's Percentage Interest in the Company."

Davis affirmation, exhibit 1 at 20.

The remaining seven sentences of section 7.3 (a) (I) dealt with establishing the "purchase price for the Offered Interest," and provided for the appointment of independent appraisers to determine the "fair market value of the Company's Property" in the event that "there is no agreement between the Tendering Member and the Non-Tendering Members." *Id.* at 20-21.

Sections 7.3 (a) (ii), 7.3 (b), and 7.3 (c) (I) provided, in pertinent part, as follows:

"(ii) If a sale of a Percentage Interest by a Member *pursuant to the foregoing sentence* does not occur *on or before the date which is one hundred eighty (180) days after the date of the Buy-Sell Offer*, then, absent, willful and intentional efforts to hinder, delay or impede such sale, the rights and obligations of the Members with respect to the Buy-Sell Offer shall expire and any such subsequent sale of Percentage Interest by the Members under this Section 7.3 shall require the submission of a new Buy-Sell Offer and be subject to the procedures set forth in this Section 7.3. If any of the Non-Tendering Members fails to notify the Tendering Member of its election under this Section 7.3 within a thirty (30) day period required herein, then this Non-Tendering Member shall be conclusively deemed to have elected to sell its Percentage Interest to the Tendering Member pursuant to the foregoing Section 7.2.

"(b) *Buyout settlement shall be held either (I) within ninety (90) days following the receipt of the Non-Tendering Member's notice to either purchase or sell as set forth herein, respectively, by the Tendering Member, or (ii) within sixty (60) days following the expiration of the thirty (30) day period commencing on the date the Non-Tendering Member received the Tendering Member's notice of sale, as the case may be.*

"(c) Unless waived by the withdrawing Member, the following provisions shall also apply:

"(I) All loans between the Company and the withdrawing Member or any Affiliate thereof, together with all accrued interest thereon, must be repaid at settlement."

[*4]*Id.* at 21 (emphasis added).

When the Court heard arguments on the underlying summary judgment motion on July 21, 2015, the parties focused on the requirement in section 7.3 that a sale of an interest in *LLC* occur within 180 days. The 180-day requirement applied where the sale took place "pursuant to the foregoing sentence." *Id.* The immediately preceding sentence did not refer to a sale, but rather, to the process of appointing an independent appraiser to determine the fair market value of the membership interest in the event that the parties could not agree on a purchase price. Therefore, under the plain language of the Operating Agreement, the 180-day requirement refers to a sale that takes place upon the appointment of an independent appraiser.

Any other buyout settlement must occur within 90-days, as provided in section 7.3 (b). This interpretation is consistent with the overall purpose of section 7.3 as an "Optional Buy-Out" provision, as the nomination and approval of appraisers, and the appraisal process itself, would cause the sale to take significantly more time than a sale where the parties agreed upon the price without the need for independent appraisers. *Id.* at 20.

Here, it is undisputed that the parties agreed upon the price. By letter dated March 9, 2015, Grossberg notified Bakergem and Carder "that a dispute had arisen with respect to matters requiring the Unanimous Consent of the Members pursuant to sections 5.1, 5.2 or 5.3" of the Operating Agreement, and that 30 days had passed since written notice of the dispute. Mahler affirmation, exhibit 3. In the letter, Grossberg, as the Tendering Member, submitted his Buy-Sell Offer to Bakergem and Carder, offering to sell his membership interest in *LLC* for \$10,000. *Id.* By letter dated April 6, 2015, Bakergem accepted Grossberg's Buy-Sell Offer, expressly stating: "I hereby accept your offer and exercise my right to purchase all your membership interests in the Company for \$10,000, pursuant to the terms of the Operating Agreement." *Id.*, exhibit 3.

Thus, there was no dispute concerning the purchase price of Grossberg's membership interest that would trigger the appointment of independent appraisers and the related 180-day closing period. Rather, as is argued by Grossberg, the parties' agreement on purchase price triggered the shorter, 90-day period for the "[b]uyout settlement." Davis affirmation, exhibit 1 at 21. Moreover, under section 7.3 (c), all loans between *LLC* and Grossberg, as the "withdrawing Member," were required to be "repaid at settlement"

which, under section 7.3 (b), was 90 days "following the receipt of [Bakergem's] notice to ... purchase." *Id.*

Bakergem's "notice to ... purchase" was dated April 6, 2015. Davis affirmation, exhibit 1 at 21; Mahler affirmation, exhibit 3. Therefore, Bakergem had 90 days from April 6, 2015, or until July 5, 2015, to complete the "[b]uyout settlement." Davis affirmation, exhibit 1 at 21. By the time that this Court heard arguments on the underlying summary judgment motion, on July 21, 2015, the 90 days had already expired.

As the Court acknowledged during oral arguments, Bakergem stated in his verified answer, dated June 2, 2015, that "Grossberg knew that the Company could not immediately repay his loan and that even if Bakergem elected to purchase his shares, the deal would never be completed due to the Company's inability to immediately repay the full amount of his loan at that time." Davis affirmation, exhibit 4, ¶ 48. Bakergem repeatedly conceded that he was unable to pay the purchase price and cause the Company to repay Grossberg's loans. 7/21/15 tr at 10-11, 15, 17, 20, 22, 25.

Bakergem's failure to purchase Grossberg's membership interest triggered Grossberg's right to purchase Bakergem's interest "for a price equal to the purchase price provided in the Buy-Sell Offer," or \$10,000. Davis affirmation, exhibit 1, §§ 7.3 (a) (i) (b) and (a) (ii). This result is consistent with the 10/9/15 Judgment.

For the foregoing reasons, reargument is granted to the extent of clarifying that Grossberg is entitled to summary judgment based upon the plain language of the Operating Agreement. Upon reargument, the Court adheres to its award of summary judgment in favor of Grossberg, as provided in the 7/21/15 Decision and 8/5/15 Order.

Bakergem also seeks leave to reargue the Court's dismissal of his counterclaims. As Bakergem fails to identify any fact or law "overlooked or misapprehended by the court" with respect to the dismissal of his counterclaims, this portion of Bakergem's motion for leave to reargue is denied. CPLR 2221 (d) (2).

Bakergem next argues that leave to renew should be granted based upon "new facts" purportedly demonstrating that Bakergem had sufficient funds to close on the purchase of Grossberg's membership interest in *LLC*. Bakergem brief at 17. At the heart of the parties' dispute in this litigation is *LLC*'s ability to repay loans totaling \$505,578 to Grossberg "at settlement," pursuant to section 7.3 (c) (i) of the Operating Agreement. Davis affirmation, exhibit 1 at 21. In support of renewal, the purported "new facts" offered by Bakergem are the affidavits of four individuals who claim that "Bakergem had the funds necessary to purchase Grossberg's and Carder's membership interests in *LLC*, and retire Erik Grossberg's Promissory Notes on behalf of *LLC*, at the end of the 180 day Option Closing Period provided for in the Operating Agreement." Bakergem opening brief at 17; Hsia aff, ¶ 3; Fontanier aff, ¶ 3; Birkhold aff, ¶ 5; Jan Frans van Bakergem aff, ¶ 3. Bakergem offers no "justification for the failure to present such facts on the prior motion," and nothing contained in these affidavits would change the Court's prior determination. CPLR 2221 (e) (2) and (3). Accordingly, Bakergem's motion for leave to renew is denied.

Attorneys' Fees (motion sequence number 002)

In motion sequence number 002, Grossberg moves for attorneys' fees and costs incurred in the parties' dispute. When the Court heard arguments on Bakergem's motion for leave to reargue and renew, Grossberg's attorney represented that he would withdraw the motion for attorneys' fees, without prejudice, if the Court denied reargument, in order to incorporate new attorneys' fees in a single application to the Court. 11/19/15 tr at 26.

Although technically, the Court granted reargument, Grossberg clearly sought to amend his motion for attorneys' fees in the event that he successfully defended the reargument motion. Accordingly, Grossberg's motion for attorneys' fees (in motion sequence number 002) is deemed withdrawn without prejudice.

Accordingly, it is hereby

ORDERED that plaintiff Erik Weller Grossberg's motion (motion sequence number 002) for attorneys' fees and costs is withdrawn without prejudice; and it is further

ORDERED that defendant Derek van Bakergem's motion (motion sequence number 003) [*5] is decided as follows:

(a) the portion of the motion seeking leave to reargue plaintiff's motion for summary judgment is granted and, upon reargument, the Court adheres to its Order and Interlocutory Judgment dated October 9, 2015, and its Decision and Order dated July 21, 2015 (so ordered on September 15, 2015), granting said motion for summary judgment in its entirety;

(b) the portion of the motion seeking leave to renew plaintiff's motion for summary judgment is denied; and

(c) the motion is otherwise denied; and it is further

ORDERED that the stay issued by this court on November 5, 2015 terminated by its own terms as a result of this decision and, for the avoidance of doubt, it is hereby vacated.

Dated: January 15, 2016

ENTER:

J.S.C.

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