SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 3

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AMIR KORANGY

Plaintiff

- against - Ind. No. 655211/16

GEORGIA MALONE, GEORGIA MALONE & CO., INC., DEFINED BENEFIT PENSION PLAN, DANIEL SHIMKO and SALEM & SHIMKO ESQ., LLC.,

Defendant

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60 Centre Street
New York, New York
May 22, 2017

B E F O R E :

HONORABLE EILEEN BRANSTEN

Justice

A P P E A R A N C E S :

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Kathy Y. Jones
Official Court Reporter

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THE COURT: Please set up on Amir Korangy.

MR. CASTRO: Good morning, your Honor.

MR. STOLPER: Good morning, your Honor.

THE COURT: Good morning.

So, Amir Korangy as the plaintiff. I have from the Stolper Group. Is that an LLP?

MR. STOLPER: LLP.

THE COURT: Okay. I have Mr. Michael Stolper here.

For Georgia Malone, Georgia Malone & Company Incorporated, Defined Benefit Pension Plan, Daniel Shimko and Salem & Shimko, Esqs., LLC, I have from the Claude Castro & Associates PLLC Claude Castro.

How are you?

MR. CASTRO: That's correct. Good morning.

THE COURT: Good morning.

First question, what is the status of the settlement agreement that you were supposedly entering into the last time I saw you?

MR. STOLPER: Your Honor, we had reached out to counsel and counsel chose not to respond. So, we're nowhere. We never got a response whatsoever.

MR. CASTRO: Unfortunately, Judge, we've been unable to settle the case. There are issues that we just can't overcome.

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MR. STOLPER: Well, we have not been presented with those issues.

THE COURT: What was that?

MR. STOLPER: We haven't been presented with those issues because the last time we were together we were -- I think we were $20,000 apart, I'm embarrassed to say, but we never were given the opportunity to try to bridge any gap because, I don't know, I assume that counsel was instructed by his client but phone calls and emails I mean went unresponded to other than the motion.

MR. CASTRO: Well, your Honor, in the interim, what Mr. Korangy the plaintiff did was what he did the last time. He reached out to other parties to settle, gave them additional documents which violates the confidentiality provision that we have and basically did the same thing.

I wrote a letter to counsel telling him that what his client is doing is just making this situation worse but doing exactly what we objected to the last time around. So, it's not like we ignored him. We put him on notice that he's continuing the same things that he's been doing up until now.

So, how do we make a deal, Judge, when somebody keeps breaching the agreement?

THE COURT: Okay. So, we have sequence number

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two, a motion to dismiss and/or confirm the arbitration award.

So, you can sit down. I'm going to give you my decision.

This is a breach of contract action between plaintiff Amir Korangy and defendant Georgia Malone who in 2013 formed a limited liability company named Thirty West Main LLC. Thirty West was created to purchase and own real property at 30 West Main Street, Riverhead, New York. That comes from the amended complaint at paragraph one.

Korangy and Malone through Malone's company the Defined Benefit Pension Plan entered into an Operating Agreement which was executed on December 9, 2013. Korangy and the Pension Plan each own 50 percent of Thirty West Main LLC otherwise known as 30 West and are the only two members. Malone has served as Managing Member. Again the amended complaint at paragraph two.

Plaintiff alleges that defendant Malone compensated herself with Thirty West's refinancing proceeds for services rendered to the company. Plaintiff alleges this is a breach of defendant's fiduciary duty as the Operating Agreement does not make reference to Malone being entitled to any compensation whatsoever for services provided to the company without approval by all the members. Again, amended complaint at paragraph three.

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Further, plaintiff alleges defendant Malone breached a fiduciary duty to Thirty West by continuing to act as Managing Member after purchasing the building directly adjacent to 30 West Main Street, Riverhead, New York, which competes with the company for tenants. Same citation.

Once a breakdown in the relationship occurred between plaintiff and defendant Malone, and Malone Inc. Which one is it, Malone or Malone?

MR. CASTRO: It's Malone, Inc., actually.

THE COURT: I'm sorry. Malone or Malone?

MR. CASTRO: Oh, Malone, your Honor, Malone.

THE COURT: Plaintiff attempted to sell his share to the company. Defendant allegedly sent threatening letters to both plaintiff and potential third-party buyers effectively thwarting the sell. For this, plaintiff also alleges tortious interference of the contract. Again amended complaint at paragraph four and five. As such, plaintiff commenced this action on September 30, 2016, alleging, one, breach of contract; two, tortious interference with business relationship; three, breach of covenant of good faith and fair dealing; and four, breach of fiduciary duty.

Procedural history. Parties met with a mediator Michael D. Sullivan in an attempt to resolve this matter

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of May 27, 2016. Following pre-mediation submissions by each party, a mediation was conducted and an award was issued in the amount of $150,000 to be paid to defendant Malone out of the $700,000 (actual number is $683,927.71) refinancing proceeds, less all refinancing expenses. See Exhibit F to plaintiff's order to show cause.

Out of the $683,927.71, the following disbursements was issued by Mr. Sullivan: Repayment to the plan of additional capital contribution loan. That was $35,000.

Ten percent interest on default capital contribution. One half times $35,000 for eight months comes to $1,166.66.

Reimbursement of additional expenses incurred by the plan, $15,530.

Compensation for work performed by defendant Malone as trustee, $99,407.

Sub total before the 50 percent split is $532,761.05.

Mr. Korangy's 50 percent share is $266,380.52.

Entire disbursements of refinance proceeds to plaintiff Korangy was in the amount of $250,000.

Reconciliation amount disbursed to plaintiff Korangy $16,380.52.

The $250,000 owed to plaintiff Korangy was

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allegedly deposited into one of Thirty West's bank accounts and never withdrawn.

The $16,380.52 reimbursement was issued to Plaintiff Korangy via a check which was allegedly never cashed.

Motion sequence number two, defendant's motion to dismiss and/or to compel mediation award.

Now, deficiencies in motion papers.

The defendant's motion papers, I have to ask you, any one of you ever read the commercial division rules?

No is the answer.

MR. CASTRO: Yes, I did.

THE COURT: Let me tell you something. You had to think about it too long to say yes.

Has anybody read part three rules? No and no. Right.

Neither plaintiff nor defendant submitted proper memorandum of law insomuch as there are neither tables of contents nor table of authorities. That's a deficiency.

Plaintiff failed to deliver to the Court work copies of its memo in opposition as required pursuant to part rules.

Had you read part three rules, you would be able to tell that.

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It does not appear plaintiff submitted any affirmation or affidavit in opposition to this Court wherein allegations or rebuttals would be sworn to under the penalty of perjury. Only a memo of law was "submitted".

Defendant's memo of law in support impermissibly exceeds the page limit of 25 pages.

Now, we get to the merits of the motion.

Defendants seek an order dismissing plaintiff's complaint on two primary grounds. Plaintiff is estopped from making these allegations because the parties entered into a binding mediation prior to the filing of this lawsuit. And two defendant abided by the governing Operating Agreement and exercised the rights afforded therein.

Plaintiffs opposed the motion.

One of the key provisions in the Operating Agreement which was negotiated and agreed to upon by both plaintiff and the Pension Plan provides a remedy when a deadlock is reached concerning the issue of disbursements. Section 3.3.3 of the Agreement states "In the event of a "deadlock, 'the deadlock shall be mediated'" before a single mediator and "the decision of the mediator shall be final and binding on the members." See Exhibit C to defendant's affirmation in support.

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Deadlock occurs when "At two successive meetings of the members, the members are unable to reach a decision by the required vote regarding a matter submitted for consideration by the members at such meetings."

Breach of contract. The first cause of action against all defendants.

The crux of plaintiff's first cause of action is defendant Malone breached the Operating Agreement by paying himself $450,000 out of the refinancing proceeds.

Notably, plaintiff neglects to advice when this money was paid to defendant Malone.

In response and in support of her motion to dismiss, defendant argues plaintiff is estopped from making this argument as it was addressed at a binding mediation and a resolution was issued on the issue.

Defendant also offers an affidavit from Mr. Sullivan the mediator confirming this mediation and resolution outcome.

Plaintiff contends that while he agreed to go to mediation, he did not "have to" and therefore the mediation is not controlling.

He also argues the $450,000 was disbursed prior to the mediation and therefore should not be affected by the mediators' decision.

Finally, plaintiff states a "deadlock" was not

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reached because plaintiff asserted a breach of contract.

Defendants argue a deadlock was indeed reached when plaintiff claimed defendant improperly distributed $450,000 and defendant contended the distribution was proper.

Prior to the plaintiff's allegation, a review of the emails exchanged between the parties reveal that it was plaintiff who first raised the issue of deadlock and invoking the mediation provision. The email clearly states that there is a disagreement between the amount of money each party is entitled to receive from the refinancing proceeds. Such distribution is the very issue underlying the first cause of action. (Exhibit A to defendant's affirmation in support)

Under the above definition of "deadlock," this Court finds sufficient showing that it has made that a deadlock was indeed reached on this issue.

Moreover, this Court is not convinced by plaintiff's argument that despite the fact that he did not have to go to mediation, he decided to go anyway (in conformance with Section 3.3.3 of the Agreement) but now should not be bound by it. See pages 4, 9 and 10 of plaintiff's memo in opposition.

The parties attended mediation to discuss all issues in dispute, a mediation which parties contractually

agreed would be binding. Among the discussion was a distribution of the proceeds from the refinancing.

As such, the Court finds plaintiff knowingly submitted to the binding mediation and the claim of breach of contract based on defendant's alleged improper self dealing from the refinancing proceeds is estopped and foreclosed having been considered and resolved by the mediator both parties selected.

Therefore, plaintiff's first cause of action is dismissed. There have been no arguments presented to the Court that the mediation award was insufficient or otherwise should not be confirmed. As such, the parties are to abide by the mediation award.

The second issue tortious interference with contract, the second cause of action as against all defendants.

Defendant seeks dismissal over this second cause of action arguing plaintiff has failed to demonstrate or allege that there was a valid contract which could have been entered into between plaintiff and any potential third-party buyer. Thus, defendants argue that there is no contract with which defendants could have interfered or caused to be breached by a third party.

The claim of tortious interference in contract requires, one, the existence of a valid contract between

plaintiff and a third party; two, defendant's knowledge of the contract; three, defendant's intentional procurement of a breach of contract without justification; four, actual breach of the contract; and five, resulting damages. Citing to Israel versus Wood Dolson Company, 1 New York 2d 116 at page 120, A 1956 case.

Defendants correctly contend where there has been no breach of an existing contract (which here plaintiff admits there was never a contract of sale in existence) but only interferes with perspective contract rights, plaintiff must show more culpable conduct on the part of the defendant. NBT Bancorp Incorporated versus Fleet/Norstar Fin, Group incorporated, 87 New York 2d 614 at page 621, 1996 case.

To establish such a claim, the plaintiff must demonstrate the defendant's interference with perspective business relations accomplished by "wrongful means". Citing to Synder versus Sony Music, 252 AD 2d 249 at pages 299 through 300 First Department 1999 case.

Wrongful means includes physical violence, fraud, misrepresentation, unfounded civil suits, criminal prosecutions and some degree of economic pressure but more than simple persuasion is required. Again same citation at page 300.

A review of the amended complaint confirms

plaintiff did not allege any culpable conduct between the procurement of plaintiff's perspective buyer's withdrawal from negotiations. It does not allege defendants acted for the sole purpose of hurting plaintiff and that perhaps more importantly, and I underlined more importantly, it is not contested defendants had a right to withhold consent of sale of any membership interest by the plaintiff pursuant to the Operating Agreement. (See paragraph 6.1 of the Agreement)

The Pension Plan, as a second member of the company, expressly has an absolute right to withhold consent for plaintiff's sale of his membership interest, a fact not disputed by plaintiff.

While the Court acknowledges sending the letter to the third-party perspective buyer may not have been in the best form, it does not amount to fraud or misrepresentation. The specific language in the letter to which plaintiff refers reads "Please be advised that Amir Korangy's share of the company is not for sale. Without going into too many specifics of the company's Operating Agreement, Mr. Korangy may not sell his share to a third party without Ms. Malone's consent. Any transfer of Mr. Korangy's share absent my client's prior written consent is void ab initio and have (sic) no effect whatsoever. My client has no intention of providing such

consent at this time or at any time in the near future."

This language merely identically tracks the language which is contained in Section 6.1 of the Operating Agreement.

Plaintiff argues the letter contains misrepresentations about plaintiff's right to sell his membership (see plaintiff's memo in opposition at page 11) but fails to state what these misrepresentations are.

Notably, this letter was not sent by Ms. Malone or the Pension Plan themselves but rather by counsel. Nevertheless, the Court agrees with defendant that both plaintiff and defendants bargained for and agreed that withholding consent for sale of the membership interest is legal under the Operating Agreement and thus not culpable or wrongful.

Therefore, the second cause of action is dismissed.

Now, we get to the third cause of action, the breach of covenant of good faith and fair dealing.

Breach of covenant of good faith and fair dealing, the third cause of action as against Pension Plan.

Stemming from the discussions above, this claim is also based on defendant's refusal to consent to plaintiff's sale of his share of the company to a third

party. Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Citing to Dalton versus Education Testing Services, 87 New York 2nd 384 page 389, 1995 case.

"The duty of good faith and fairly dealing, however, is not without limits and no obligation can be implied that would be inconsistent with other terms of the contract relationship. Same citation at page 389.

The Operating Agreement clearly confers each party with the right to refuse consent to the sale of the other member's rights and there is nothing contained within the Operating Agreement designed to limit or restrict these rights to withhold.

Notably, there is not even a statement in the Agreement that consent should not be unreasonably withheld or that an explanation must accompany such refusal. Rather, plaintiff has asked this Court to declare defendants have acted "in bad faith" by refusing to consent to this one referenced sale. The Court declines to do so.

Defendants it seems have the ability to decline to agree to one sale to another third party, a right which was expressly discussed and bestowed pursuant to the Agreement both parties negotiated. To declare otherwise would be inconsistent with the express intent of the

Agreement.

As such, the third cause of action is dismissed.

Breach of fiduciary duty, the fourth cause of action against the Pension Plan.

Plaintiff alleges in its complaint that defendant Pension Plan breached its fiduciary duty in two ways. One, by improperly taking $450,000 from the refinancing proceeds; and two, by, through defendant Malone, purchasing the adjoining building.

In order to maintain claim for breach of fiduciary duty, a plaintiff must show the existence of a fiduciary relationship, misconduct by the other party and damages directly caused by that misconduct. Citing to Pokoik v Pokoik 115 A.D. 3d 428 at page 429, First Department 2014 case. Plaintiff's memo in opposition at page 14.

Assuming all allegations as stated in the amended complaint are true, plaintiff has properly alleged defendant has a fiduciary duty with it and the company and that the defendant conducted misconduct.

What plaintiff has failed to allege, however, is that it suffered damage as a result of these actions, a key element in the breach of fiduciary duty.

One of the key elements is damages directly caused by that misconduct and nowhere is there anything

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about any damages as a result of defendant's conduct.

While defendants attempt to present evidence of rent rolls demonstrating the company's building is fully leased and therefore any damage is subjective, the Court need not only rely on any such presentation. Rather, a simple review of the complaint which only contains four substantive paragraphs to this cause of action does not so much as allege it has been damaged as a result of defendant's action as is required. Rather, it states defendant has created a conflict of interest.

Moreover, as discussed earlier, the Court finds the issue of the $450,000 distribution has already been discussed and decided at the previous binding mediation, and, therefore, plaintiff is estopped from rearguing that issue.

In sum, plaintiff's fourth cause of action is also dismissed. However, in this case, it's without prejudice.

Plaintiff may attempt to replead the element of breach of fiduciary duty as to defendant's purchase of the adjoining building only and it must do so by alleging proper damages in establishing it.

Now, defendant also seeks sanctions against plaintiff for commencing a frivolous action. Plaintiff did not submit opposition to this request. Defendant

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argues plaintiff's counsel Mr. Stoper contacted defendant's attorney Mr. Shimko and threatened to name him in this instant lawsuit if Ms. Malone did not settle her claim. (Defendant's memo in support at page 27), two pages beyond the limit.

Plaintiff did ultimately name Mr. Shimko in the lawsuit but has since discontinued the action against him.

Nevertheless, the Court does not find these claims asserted by plaintiff were done so in bad faith and for the sole purpose of harassing defendants such that it would warrant the imposition of sanctions.

Defendant's motion for attorneys' fees and/or sanctions is therefore denied.

In sum, defendant's motion to dismiss plaintiff's complaint is granted. However, the branch of the motion seeking sanctions against plaintiff is denied and as to the fourth cause of action for breach of fiduciary duty as against the Pension Plan is denied without prejudice with permission to replead that cause of action.

That constitutes the decision and order of the Court.

MR. CASTRO: Your Honor, may I address one point if I may?

THE COURT: Yes.

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MR. CASTRO: We had also sought an order confirming the mediation award, your Honor, to the extent that you may deem it necessary.

THE COURT: It was so maligned inside everything else, if you want to do it, do a separate motion to conform.

What I suggests you do is you now know my decision on your motion. I suggests you settle the case. All right. You have the mediation.

MR. CASTRO: We'll try.

THE COURT: You have the decision as it concerns the $450,000 refinancing which was the only issue really before the Court and you also have the Court's statement that indeed the mediation was binding -- was entered into freely by the parties and was binding on the parties. So, therefore, go forward and get this thing resolved.

MR. CASTRO: Thank you, your Honor. I'll try.

MR. STOLPER: Your Honor, I know you made your decision but I just want to briefly be heard on that last issue or the first issue addressed about the breach of contract issue. I know having been here before it's highly unlikely that you will reconsider but I do want to point something out particularly with a transcript in place. That is, you relied on an email that was selected by counsel as to what the intent of that mediation was or

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whether plaintiff intended to have a binding mediation.

THE COURT: I found that indeed you entered into an agreement, all right, freely and voluntarily and your signature, your client's signature is on that agreement. That's number one.

Number two, that agreement had in it a process to resolve --

MR. CASTRO: Deadlock.

THE COURT: -- deadlock.

Number three, I found that there had been a deadlock because it had been a serious disagreement as to the distribution of the $450,000.

Number four, I found a mediation had taken place and that the mediator had spoken.

And number five, I found the argument that plaintiff made that I didn't have to enter into this mediation to be ridiculous and as to that, I still find it to be ridiculous. Of course, he had to. There was a deadlock as to the distribution of the $450,000. Didn't have to have two subsequent meetings. That was a deadlock. That was a deadlock.

So, what happened, the parties met. They decided on Mr. Sullivan the great mediator. They went to Mr. Sullivan and they showed their respective documents. They made their arguments to Mr. Sullivan. Mr. Sullivan

in fact put in an affirmation in support of his decision and a decision was made. You may not have liked the decision but that is what your contract called for. You may say to yourself, oh, that decision wasn't good. It wasn't in my favor or not what I expected. That is not the basis to undue the agreement.

So, yes, as to that statement, that is finished.

MR. STOLPER: What you ultimately just said may be what ultimately is determined but right now we're at the allegation stage.

THE COURT: No, sir, not as it concerns because you're the one alleging, oh, I didn't make an agreement. I found you made an agreement. I found that already.

I said in my decision as it deals with the breach of contract, all right, this is what I said. Plaintiff contends that while he agreed to go to mediation, he did not "have to" and therefore the mediation is not controlling. He also argues the $450,000 was disbursed prior to the mediation and therefore should not be affected by the mediator's decision. Finally, plaintiff states a "deadlock" was not reached because plaintiff asserted a breach of contract.

Defendants argue a deadlock was indeed reached when plaintiff claimed that defendant improperly distributed the $450,000 and defendants contend that the

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distribution was proper.

Then I go on to say contrary to plaintiff's allegation, a review of the emails exchanged -- oh, by the way, all right, that was in plaintiff's papers, not in his reply, in his papers which was not answered by plaintiff.

A review of the emails exchanged between the parties reveal that it was plaintiff who first raised the issue of deadlock and invoking the mediation provision. The email clearly states that there is a disagreement between the amount of money each party is entitled to receive from the refinancing proceeds. Such distribution is the very issue underlying the first cause of action for breach of contract. (See Exhibit A to defendant's affirmation in support)

MR. STOLPER: Exactly. That's a fact that they selected an email.

THE COURT: But you didn't answer it, sir. You didn't argue it. You didn't show me anything in opposition.

MR. STOLPER: Because this isn't summary judgment. It's a motion to dismiss. It's based on a complaint.

THE COURT: Guess what, you lose.

Go to the Appellate Division.

MR. CASTRO: Thank you, Judge.

KATHY Y. JONES, OFFICIAL COURT REPORTER

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MR. STOLPER: Thank you, Judge.

THE COURT: Make sure I get a copy of the minutes.

C E R T I F I C A T E

Certified to be a true and accurate transcript of the proceedings.

Kathy Y. Jones
Official Court Reporter