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Concord Dev. Co. LLC v Amedore Concord, LLC
2016 NY Slip Op 50152(U)
Decided on January 21, 2016
Supreme Court, Albany County
Platkin, J.
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Decided on January 21, 2016

Supreme Court, Albany County

Concord Development Co. LLC, Plaintiff,

against

Amedore Concord, LLC; AMEDORE LAND DEVELOPERS LLC; and GEORGE AMEDORE, SR., in his official and individual capacity, Defendants.

5402-15

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Richard M. Platkin, J.

Defendant Amedore Concord, LLC ("Amedore Concord") was formed as joint venture of plaintiff Concord Development Co. LLC ("Concord") and defendant Amedore Land Developers LLC ("Amedore"). Concord commenced this action by Order to Show Cause ("OTSC") dated November 13, 2015, alleging, in essence, that its co-member, Amedore, improperly has excluded it from the management and affairs of the joint venture, Amedore Concord. By the same OTSC, Concord seeks a preliminary

injunction, an order of attachment and an order disqualifying defendants' counsel. Defendants oppose the motion in all respects.

BACKGROUND

In an agreement dated October 28, 2005 ("Agreement"),[FN1] Concord and Amedore agreed to jointly develop and market a certain 15-acre parcel of land on Maple Avenue in Glenville, Schenectady County (the "Parcel"). At the time, Concord was under contract to purchase the Parcel. In furtherance of the joint venture, Concord and Amedore formed Amedore Concord in or about June 2008. Pursuant to an Operating Agreement dated July 30, 2008, Concord and Amedore were named as members of the joint venture, and their respective principals, Christopher J. Myers and defendant George Amedore, Sr., were named as managers.

Concord's complaint ("Complaint") alleges that Amedore has taken unauthorized actions to exclude it from the joint venture. Specifically, Concord complains that Amedore has breached the Agreement and violated the terms of the Operating Agreement by unilaterally removing Myers as a manager and by reducing the number of managers from two to one. The effect of these changes has been to leave Amedore Concord managed solely by Amedore's representative. Concord contends that Amedore lacked the requisite membership interests to approve the foregoing changes.

By this action, Concord seeks a declaratory judgment "invalidating [Amedore Development's] unilateral corporate resolutions and determining the Membership Interests of [plaintiff]" (Complaint ¶ 29). Concord also seeks to recover money damages under causes of action sounding in breach of contract, quantum meruit, unjust enrichment and breach of the implied covenant of good faith and fair dealing.

Concord now moves for: (1) a preliminary injunction restraining defendants from selling, transferring, developing or altering the Parcel; (2) an order of attachment restraining defendants from removing, transferring, dismantling, selling, disposing or depleting any property of Amedore Concord without the consent of Concord; and (3) an

order disqualifying the law firm of

O'Connell and Aronowitz ("Firm") as counsel for the defendants.

ANALYSIS

A.Preliminary Injunction

"The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Waldron v Hoffman*, 130 AD3d 1239, 1239 [3d Dept 2015] [internal quotation marks and citation omitted]; *see* CPLR 6301). To obtain a preliminary injunction, the moving party has the burden of demonstrating: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable harm in the absence of the requested injunctive relief; and (3) a balance of the equities tipping in favor of the movant (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Confidential Brokerage Servs., Inc. v Confidential Planning Corp.*, 85 AD3d 1268, 1269 [3d Dept 2011]).

The Court begins with the issue of likelihood of success. Concord's principal contention is that Amedore lacks the membership interests required under the Operating Agreement to remove Myers as a manager of Amedore Concord and to reduce the number of managers. Concord further contends that Amedore has breached the Agreement by, *inter alia*, failing to properly account for the members' respective capital contributions.

Under the Operating Agreement, the membership interest of a member is determined by the proportion of capital contributed by the member to the aggregate value of all capital contributions by members (§ 1.1 [h]). Capital contributions are defined as "any contribution by a member to the capital of the Company in cash, property or services rendered or a promissory note or other obligation to contribute cash

or property or to render services" (§ 1.1 [c]). A manager may be removed or replaced without cause by the vote or written consent of at least a majority of the membership interests (§ 4.9), and a change in the number of managers requires the vote or written consent of at least two-thirds of the membership interests (§ 4.2).

In its Complaint, Concord alleges that it has contributed at least $211,257.46 in capital to the joint venture (¶¶ 13-14), with Amedore having contributed no more than $229,617 (¶ 15). However, Concord has failed to support its motion with competent proof of its claimed capital contribution. The Complaint is verified only by Concord's counsel, and there has been no showing that the miscellaneous, unauthenticated financial records annexed to the Complaint represent capital contributions by Concord to the joint venture. Apart the Complaint, the branch of the motion seeking a preliminary injunction is supported only by an attorney affirmation that is not made on personal knowledge. Under the circumstances, Concord has failed to make a prima facie showing of its capital contribution to Amedore Concord. In the absence of such a showing, Concord has failed to demonstrate a likelihood of success in establishing that its capital contribution to the joint venture has been misstated or miscalculated by Amedore.[FN2]

In contrast, defendants' opposition to the motion includes 2014 tax documents (K-1 forms) for the joint venture prepared by the company's outside accountant showing that Amedore's capital account was valued at $229,617 at the end of 2014, with Concord's account valued at only $1,000. While Concord maintains in reply that these figures are "incorrect" (Reply Affidavit of Christopher J. Meyers, ¶ 2), it has failed to come forward with evidentiary proof to establish its claim of error, resting instead on conclusory, speculative and unsupported assertions.

And even if Concord had substantiated the capital contributions alleged in its Complaint, Amedore nonetheless would hold a majority of the membership interests, thereby implicating the provisions of the Operating Agreement that permit a majority holder to remove a manager and fill the resulting vacancy (§§ 4.9, 4.10). Thus, even by Concord's own calculations, Amedore would be entitled to manage the joint venture.

In light of Concord's failure to establish a likelihood of success on the merits, it is unnecessary to consider whether Concord also has shown that the requested preliminary injunction restraining Amedore Concord from developing the Parcel during the pendency of this action is necessary to prevent imminent and irreparable harm that could not be remedied by an eventual award of monetary damages.

B.Disqualification of Counsel

Concord seeks an order disqualifying the Firm from continued representation of defendants. This branch of the motion is based upon Attorney Siegel's representation of

Quantum Development Group ("QDG") from 2006 to 2008 while a principal of another law firm. During this representation, Myers was a one-third owner of QDG.

The disqualification of an attorney is a matter that rests within the "[s]ound discretion of the court" (*Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2d Dept 2013] [internal quotation marks and citation omitted]), and the party seeking disqualification "bears a heavy burden" of depriving a party of its right to the counsel of its choosing (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5 [1st Dept 2015]). Specifically, "a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v Meyer & Landis*, 89 NY2d 123, 131 [1996]; *see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]). In this connection, settled law holds that attorney for a business entity represents only the entity, not the owners or employees of the entity, unless such representation is specifically requested and agreed upon (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]; *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747 [1st Dept 2013]; *see also* rule 1.13).

Myers avers that Attorney Siegel "successfully represented QDG in its bid to remove deed restrictions on a [certain] property parcel" and in the subsequent sale of that parcel to Amedore. Myers also avers that he discussed ongoing land-development matters with Attorney Siegel during his representation of QDG and is "concerned that any confidential financial, business, and proprietary information revealed to Mr. Siegel . . . may be used in this current action" (Affidavit of Christopher J. Myers [Nov. 13, 2015], ¶ 8). Further, Myers complains that "several attorneys from [Siegel's] old practice came with him" to the Firm, and he expresses concern that the "cross-over of personnel" from one firm to the other will give the Firm "insight to otherwise confidential information about [his] business dealings" (*id.*, ¶¶ 13-14).

For his part, Attorney Siegel explains that he was retained by QDG to represent it in litigation seeking to remove certain deed restrictions on a parcel of real property entirely unrelated to this action. Attorney Siegel further avers that he did not represent Concord or Myers in any capacity, much less with respect to Amedore Concord, the Parcel or the instant dispute concerning capital contributions. Attorney Siegel does acknowledge that he "cover[ed]" for another attorney at the 2008 closing on the sale of QDG's property to Amedore, but maintains that this appearance, which was subsequent to execution of the Agreement and the formation of Amedore Concord, was his only involvement in the transaction with Amedore. Finally, Attorney Siegel denies that Myers disclosed to him any confidential information regarding Concord or his other business endeavors, averring that he "was not even privy to information about the general business affairs of QDG" (Affidavit of Jeffrey A. Siegel, Esq. [Dec. 1, 2015], ¶12). The foregoing averments are supported by the affidavit of Paul Harding, who also was a one-third owner of QDG at pertinent times.

Concord's disqualification motion is entirely lacking in merit. There has been no showing that Attorney Siegel's representation of QDG gave rise to an attorney-client relationship with Myers or Concord. Nor has there been any showing that Attorney Siegel's legal work for QDG — litigation concerning the removal of deed restrictions attached to an unrelated parcel and his attendance at the closing on the sale — is substantially related to this litigation, the joint venture, [*2]the Parcel or the members' capital contributions. And notwithstanding Myers' concerns regarding the protection of

his confidential financial, business and proprietary information, there has been no persuasive showing that any such confidential information was imparted to Attorney Siegel during his representation of QDG or that any such confidential information has any bearing on the instant controversy (*see Sessa v Parrotta*, 116 AD3d 1029, 1029-1030 [2d Dept 2014]; *Gabel v Gabel*, 101 AD3d 676, 677 [2d Dept 2012]). Finally, the Court rejects Concord's contention that disqualification is necessary to avoid the appearance of impropriety (*compare Tekni-Plex*, 89 NY2d at 136).

CONCLUSION

Based on the foregoing,[FN3]

it is

ORDERED that plaintiff's motion is denied in all respects; and it is further

ORDERED that the parties to this action shall confer regarding a schedule for discovery and the filing of a note of issue and, within thirty (30) days, either: (i) stipulate to a scheduling order, which shall be submitted to the Court for approval; or (ii) request a preliminary conference with the Court; and finally it is

ORDERED that prior to the holding of a preliminary conference, counsel shall consult and confer in accordance with Rule 8 of the Commercial Division.

This constitutes the Decision & Order of the Court. The original Decision & Order is being transmitted to counsel for defendants for filing and service. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

January 21, 2016

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

Order to Show Cause, dated November 13, 2015;

Affirmation of Michael L. Boyle, Esq., dated November 13, 2015;

Affidavit of Christopher J. Myers, sworn to November 13, 2015;

Verified Complaint, dated November 12, 2015, with attached Exhibits A- F;

Affidavit of Paul A. Feigenbaum, Esq. in Opposition to Motion, sworn to December 1, 2015;

Affidavit of Paul Harding, Esq. in Opposition to Motion, sworn to November 23, 2015;

Affidavit of Jeffrey A. Siegel, Esq. in Opposition to Motion, sworn to December 1, 2015;

Affidavit of Paul Amedore in Opposition to Motion, sworn to December 1, 2015;

Defendants' Exhibits A-I;

Defendants' Memorandum of Law, dated December 2, 2015;

Affirmation in Reply of Michael L. Boyle, Esq., sworn to December 8, 2015;

Affidavit in Reply of Christopher J. Myers, sworn to November 8, 2015;

Memorandum of Law in Reply, dated December 8, 2015.

Footnotes

Footnote 1: The Agreement was amended by the parties in February 2009, but the amendments are not germane to the instant motion practice.

Footnote 2: The same deficiencies foreclose Concord from establishing a likelihood of success on its breach of contract claim.

Footnote 3: Concord has not put forward any evidence or argument to support the branch of its motion seeking an order of attachment under CPLR article 62.

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