11-1-2007

Order on Motion to Dismiss (JESSEE MAHOE, LLC)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSEE MAHONE, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action File No. 2007CV138625**
	)	
PAUL E. VIERA, JR., individually and as Managing Member of Earnest Holdings, LLC, and **EARNEST HOLDINGS, LLC,**	)	
	)	
Defendants,	)	

ORDER ON MOTION TO DISMISS

On October 18, 2007, the parties in the above-styled case appeared before the Court to argue Defendants' Motions to Dismiss. After reviewing the record of the case, the briefs submitted in support of the motions, and the arguments presented by counsel, the Court finds as follows:

FACTS:

Defendant Paul Viera, Jr. is the majority member and Managing Member of Earnest Holdings, LLC ("Earnest Holdings"), a Delaware limited liability company and Defendant in this action. Plaintiff Jessee Mahone, LLC ("Mahone"), is a minority member in Earnest Holdings, and is wholly owned by Wendell Starke.

Plaintiff alleges that Defendants denied him access to Earnest Holdings' books and records, and that Defendant Viera amended the Operating Agreement in a manner that violated its original terms, wrongfully diluted Mahone's ownership interest in Earnest Holdings, and breached his fiduciary duties owed to Mahone.

Plaintiff filed an eight-count complaint on August 17, 2007, seeking a declaratory judgment, specific performance, and the appointment of a receiver, as well as asserting claims

for breach of contract, breach of fiduciary duties, unjust enrichment and the expenses of litigation. Defendants filed individual motions to dismiss on September 17, 2007.

STANDARD:

A party seeking a motion to dismiss brought under O.C.G.A. § 9-11-12(b)(6) for failure to state a claim upon which relief can be granted must demonstrate that Plaintiff's allegations in the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof. Common Cause/Georgia v. City of Atlanta, 279 Ga. 480, 481 (2005). The internal affairs of a corporation, such as actions involving officers and directors, shall be regulated by the law of the state of incorporation. Diedrich v. Miller & Meier & Assoc., Architects & Planners, Inc., 254 Ga. 734, 735 (1985).

SUBJECT MATTER JURISDICTION:

Defendants Viera and Earnest Holdings assert that all counts of Plaintiff's complaint which seek, among other remedies, access to the books and records of Earnest Holdings, should be dismissed for lack of subject matter jurisdiction pursuant to § 18-305 of the Delaware Limited Liability Company Act. Section 18-305 describes a limited liability company member's right to access company books and records and requires that such action be brought in the Court of Chancery. 6 DEL.CODE ANN. tit. 6 § 18-305, 305(f) (2007) ("Any action to enforce any right arising under this section shall be brought in the Court of Chancery."). "The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought." Id. (emphasis added). Defendants assert that Section 18-305 grants the Delaware Court of Chancery exclusive jurisdiction over any count requesting access to the books, thus denying this Court subject matter jurisdiction to hear such claims.

Whether or not a Georgia court has subject matter jurisdiction to hear an access to the books and records claim of a Delaware corporation brought under Section 18-305 is a question of first impression in this state. Defendants direct the Court to a 2000 Florida Court of Appeals opinion where that Court dismissed a trial court's order granting access to the books under Section 18-305 of a Delaware limited liability company with its principal place of business in Florida. Synchron, Inc., v. Ilya Kogan, Consol., 757 So. 2d 564 (Fla. Dist. Ct. App. 2000).

In the Synchron case, the only issue before the Florida court was access. Additionally, the defendant company was not registered to do business in Florida, and it did not receive service of notice of the September 10th hearing until September 17th. Thus, based upon the service question, the Florida Court of Appeals reversed the trial court's order requiring access to the books for lack of personal jurisdiction. In dicta, the Court stated that "[Delaware] law does not purport to confer any authority on Florida's courts". Id. at 565. The Court further explained, in a footnote, that if "the Delaware statute were the only possible basis upon which Kogan could seek relief, the September 10 order would be void for lack of subject matter jurisdiction..." Id. at n.1 (emphasis added). Thus, this case is inapposite on the question before this Court because service was perfected on all parties prior to the hearing and because there are questions of law, such as breach of contract, arising under Georgia law.

Plaintiff, on the other hand, urges this Court to hold, as did a New York Court, that the Delaware code does not divest it of jurisdiction to hear the access issues in this case. In Sachs v. Adeli, 804 N.Y.S.2d 731, 733 (N.Y. App.Div. 2005), the New York Court held that incorporation in Delaware did not divest New York "of its interest in adjudicating this matter," thus the Court had subject matter jurisdiction to hear the access question. Id. ("If an action concerns a commercial transaction in New York, and it is a matter on which New York Courts would otherwise have proper jurisdiction, comity does not prevent the New York courts from

exercising that jurisdiction."); see also, Havlicek v. Coast-to-Coast Analytical Servs., 39 Cal. App. 4th 1844 (Cal. Ct. App. 1995) (reversing a trial court dismissal for lack of subject matter jurisdiction of an action to inspect the books of a Delaware corporation doing business in California and applying California law). In 2006, however, a Federal District Court in New York held that the Delaware Corporate Code, which was the source of the right to inspect the books and records claim in the case, granted exclusive jurisdiction to the Delaware Court of Chancery, thus depriving the New York Court from exercising subject matter jurisdiction over the claim. Reserve Solutions Inc., v. Vernaglia, 438 F.Supp. 2d 280 (S.D.N.Y. 2006). Sachs v. Adeli, therefore, in light of the 2006 opinion in Reserve Solutions, provides little instruction in the matter presently before this court.

Plaintiff also directs the Court to Section 13.13 the Earnest Holdings Operating Agreement which states that "[a]ll parties hereto consent to personal jurisdiction and venue in the county where the principal office of the Company is located, and any action in law or in equity shall be brought in any court having competent jurisdiction located in such county." Additionally, Plaintiff relies upon Section 13.22 which states, "[i]f any particular provision herein is construed to be in conflict with the provisions of the Act, the provisions of this Agreement shall control to the fullest extent permitted by applicable law." Plaintiff argues that freedom of contract, as supported in the Delaware Limited Liability Company Act, permits the parties to agree to bring claims, including those involving access, in whatever jurisdiction they choose. See e.g., Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co., LLC, 853 A.2d 124, 127 (Del. Ch. 2004) ("[S]ection 18-1101 of the LLCA states that it is 'the policy of [the LLCA] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.'"). Defendants, however, counter that subject matter jurisdiction is not conferrable upon a court by mere agreement of the parties.

Because the Court is presented with a question of first impression with little guidance from other jurisdictions or applicable law, it must engage in its own analysis of its subject matter jurisdiction over an access claim brought under Delaware Section 18-305. This Section governing a limited liability company member's right of inspection states that "[a]ny action to enforce any right arising under this section shall be brought in the Court of Chancery." DEL. CODE ANN. tit. 6 § 18-305 (2007). O.C.G.A. § 14-11-313, the parallel Georgia statue on inspection rights, reads "if the limited liability company refuses to permit the inspection authorized by paragraph (2) of this Code section, the member demanding inspection may apply to the superior court for the county in which the registered office of the limited liability company is located..." (emphasis added). Under the Georgia court system, the superior court, like the Chancery Court, has exclusive equity jurisdiction.

Subject matter jurisdiction is defined as "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY 856 (7th ed. 1999). A review of Delaware's statutes governing business organizations, reveals that Delaware's Chancery Court is only granted "exclusive jurisdiction" in statutes addressing inspection of books and records in various business organizations. In reading the Delaware statute at issue, the critical element seems to be equity jurisdiction to order specific performance, which is the appropriate remedy for a breach of inspection rights. The grant of exclusive jurisdiction seems to be to an equity court, not to the Delaware Chancery Court versus another court in equity.

The only argument for why a Delaware Chancery Court would be better suited to hear the inspection issue over other equity courts would be location of the books. The argument would be that a Delaware limited liability company would likely have its books stored in Delaware and thus the Delaware Chancery Court would be best suited to not only appraise the rights in

question, but also to enforce access to those books located within its geographic jurisdiction. An analogy could be drawn to *in rem* or *quasi- in-rem* jurisdiction where the location of the property in question determines the jurisdiction of the court. See generally, Brown v. Rock, 184 Ga. App. 699, 700 (1987) ("Where ... the action is *in rem* or *quasi-in-rem,* 'a judgment ... is limited to the property that supports jurisdiction'").

As stated above, the Fulton County Superior Court is vested with equity jurisdiction, and has jurisdiction over inspection claims brought under Georgia's limited liability company code. Additionally, in this action, Defendant Earnest Holdings is incorporated in Delaware, but Georgia houses its principal place of business and its books. In addition, this action raises claims properly brought under Georgia law (*i.e.*, breach of contract) and is not exclusively a contest of inspection rights.

Finally, the parties in this action contracted for Georgia, as Earnest Holdings' principal place of business, to be the forum in which claims arising under the Operating Agreement (*e.g.* inspection rights) are brought. The parties also stated that when the term of the Operating Agreement and the Delaware Limited Liability Company Act conflict, the Operating Agreement governs. Giving full import to the contractual provisions of the Operating Agreement and the principle of freedom of contract, as required under Delaware law, Georgia appears to be the appropriate forum in which to bring this action, including Plaintiff's inspection claims.

While this Court agrees with the general argument upon which Defendants rely that parties cannot contract to give an otherwise unqualified court subject matter jurisdiction, that argument does not necessarily apply to the facts of this case. The Fulton County Superior Court is an equity jurisdiction court vested with the authority to hear claims such as declaratory judgment and specific performance relating to inspection rights. The question is not whether the Fulton County Superior Court has jurisdiction to hear inspection claims; the question is whether

the Delaware Legislature acting through Section 18-305(f) of the Delaware Limited Liability Company Act can strip an otherwise competent court in another state of its jurisdiction to hear such claims. The Court answers that question in the negative. That action is the province and right of federal law alone.

Therefore, the Court finds that an equity court of this state has jurisdiction to hear claims brought under Delaware Section 18-305 where (1) there are other claims arising under the law of this state, (2) the books of the company are located in this state, and/or (3) the parties have contracted to bring such claims in this state. Defendants' Motions to Dismiss for lack of subject matter jurisdiction are hereby **DENIED**.

DIRECT VS. DERIVATIVE CLAIMS:

Defendant Earnest Holdings requests that the Court dismiss Plaintiff's counts against it on the basis that Plaintiff brings derivative claims without having first satisfied the pre-suit demand requirement. See, Kamen v. Kemper Fin. Servs., 500 U.S. 90, 96-97 (1991). To determine whether a claim is direct or derivative in nature, the proper inquiry asks (1) who suffered the alleged harm and (2) who would receive the benefit of any recovery. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004).

Plaintiff's complaint alleges that Mahone, as a minority member of Earnest Holdings, was denied access to the books, was denied notice of an opportunity to vote on Operating Agreement Amendments, and had its ownership interest wrongfully diluted. In each of these alleged actions, Plaintiff Mahone suffered the harm and would receive the benefit of recovery, not Earnest Holdings. Plaintiff brings direct claims and therefore is outside of the demand requirement in derivative suits.

For the foregoing reasons, Defendant Earnest Holdings' Motion to Dismiss is hereby **DENIED**.

FORUM NON CONVENIENS:

Because Defendants' request to dismiss have been denied as stated above, Defendant Viera's request to dismiss under the theory of forum non conveniens, pursuant to O.C.G.A. § 9-10-31.1, is without justification. Therefore, Defendant Viera's motion to dismiss for forum non conveniens is hereby **DENIED**.

SO ORDERED this 1st day of November, 2007.

ELIZABETH E. LONG, SENIOR JUDGE
for
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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