DOCKET NO.: FST CF 15-5014808-S	)	SUPERIOR COURT
	)	
WILLIAM A. LOMAS,	)	JUDICIAL DISTRICT OF
	)	STAMFORD/NORWALK
Plaintiffs,	)	
	)	AT STAMFORD
versus	)	
	)	
PARTNER WEALTH MANAGEMENT, LLC	)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,	)	JULY 13, 2016
AND WILLIAM P. LOFTUS	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' APPLICATION TO VACATE THE PREJUDGMENT REMEDY

PRELIMINARY STATEMENT

Defendants' deferred payment rights are superior to and preempt any right that Plaintiff may think he has under the so-ordered stipulation imposing a prejudgment remedy (the "PJR Order"). Regardless of which operating agreement is ultimately found to control the valuation of Plaintiff's interest in Partner Wealth Management, LLC ("PWM"), the Defendants have the contractual right to defer any and all payments to a withdrawing member in the event of a "Compensation Shortfall." (*See* § 7.7(a) of PWM LLC Agreement eff. Jan. 1, 2015 (the "2015 PWM Agreement"); § 8.12(a) of the PWM LLC Agreement eff. Nov. 30, 2009 (the "2009 PWM Agreement")) (collectively, the "Operating Agreements") (*see* Exs. A and B, respectively).

Lomas cannot deny the validity of these contractual deferment rights since the entire basis of his claim against the Defendants rests upon there being a valid operating agreement between the parties.

Moreover, even if Lomas were to obtain a jury verdict determining that the 2009 PWM Agreement is the controlling agreement and even if he successfully defends that verdict on appeal all the way up to the Connecticut Supreme Court – the Defendants nevertheless have the right to defer payments under the 2009 PWM Agreement in the event of a Compensation Shortfall. **This is because the deferred payment provision prescribes that, notwithstanding whatever amount of money a withdrawing member may be justly owed, PWM and the remaining members nevertheless have the right to avoid incurring substantial financial harm as a result of the obligation to repurchase a withdrawing member's equity.**

Finally, although Lomas contends that the Defendants failed to bargain for such deferral rights in the stipulation, the converse is true: having failed to secure an express waiver of these deferral rights, Lomas has no basis upon which to complain when those deferral rights are duly

invoked. This is because these deferral rights can only be waived by an express and particularized writing. Both Operating Agreements prescribe that: "No provision of this Agreement shall be deemed to have been waived **unless such waiver is contained in a written notice given to the party claiming such waiver occurred.**" (*See* 2015 PWM Agreement § 12.6; *accord* 2009 PWM Agreement § 11.6) (emphasis added) (*see* Exs. A and B, respectively). Whatever else is the case, at no point – and certainly not in the on-the-record stipulation – did any of the Defendants expressly (or even impliedly) waive their deferral rights.

For the reasons previously stated and now set forth below, Defendants respectfully request that the Court grant their request to vacate the PJR Order.

II. Defendants' Deferral Rights Are Superior to and Override Any Provision to the Contrary in the Stipulation.

Defendants moved under the PJR statute, Conn. Gen. Stat. 52-278 *et seq.*, to vacate the PJR Order. Two provisions of the PJR statute expressly permit Defendants to bring this motion. First, Conn. Gen. Stat. § 52-278k provides that the:

> court may upon motion and after hearing, at any time modify or vacate the any prejudgment remedy granted or issued under this chapter upon the presentation of evidence which would have justified such court in modifying or denying such prejudgment remedy under the standards applicable at the initial hearing.

Defendants' application satisfies this standard. Plaintiff's PJR application was filed on June 26, 2015 and the PJR Order was formally entered on October 5, 2015, after a hearing on September 21, 2015. The Defendants determined in 2016, that based on expected revenue and expenses in 2016, they would experience a Compensation Shortfall as defined by the Operating Agreements, if they made the Direct Payment (as defined in Defendants' Vacatur Application) to Lomas on October 15, 2016 and the Escrow Payments (as defined in Defendants' Vacatur Application) in 2016. On May 27, 2016, Defendants duly sent notice to the Plaintiff that they

were exercising these deferral rights, as they are entitled to do in "their sole discretion," and provided to the Plaintiff an analysis demonstrating that there will be a Compensation Shortfall in 2016. Had Defendants determined that a Compensation Shortfall would arise in 2016 and invoked their deferral rights in September 2015, a PJR could not have issued or been granted.

Second, Conn. Gen. Stat. § 52-278c(g) provides in pertinent part:

> A defendant may request a hearing to [1] contest the application for a prejudgment remedy, [2] **assert any exemption** or [3] make a request concerning the posting or substitution of a bond. The hearing may be requested by any proper motion * * *, whether the claim is an assertion of a defense, counterclaim, set-off **or exemption**, an assertion that any judgment that may be rendered is adequately secured by insurance, an assertion that the amount sought in the application for the prejudgment remedy is unreasonably high, a request that the plaintiff be required to post a bond to secure the defendant against any damages that may result from the prejudgment remedy or a request that the defendant be allowed to substitute a bond for the prejudgment remedy.

(emphasis added).

Defendants' deferral rights constitute an exemption.

The first sentence of this provision is phrased in the disjunctive and, therefore, permits a defendant to request a hearing – at any time – to "assert any exemption" to a PJR. The PJR statutory scheme uses the word "exemption" or "exempt" four times in 52-278c, and twice 52-278d, and twice in 52-278e. But nowhere is the word "exemption" defined. Black's Law Dictionary defines the word "exemption" as: "Freedom from a duty, liability, or other requirement." Some statutory exemptions to the PJR statute are found in Conn. Gen. Stat. § 52-279, which, without using the word "exemption," exempts certain kinds of property from the reach of a PJR. Similarly, but again without using the word "exemption," Conn. Gen. Stat. 52-278b(2) statutorily prohibits – or exempts – "the garnishment of earnings as defined in subdivision (5) of section 52-350a."

But the PJR statutory scheme ***never*** **qualifies or limits the word "exemption"** with the modifier "statutory" or any other delimiter. As is well known, because the PJR statute is "in derogation of both common right and common law," it must be "strictly interpreted and pursued." *See Feldman v. Sebastion*, 261 Conn. 721, 724 (2002). This statement from *Feldman* expresses two distinct commands. First, a plaintiff must "pay strict observance" to the strictures of the statute in making an application for a PJR. *Id.* (quoting *Chapel-High Corp. v. Cavallaro*, 141 Conn. 407, 410 (1954)). Second, where interpretation of the statute is required, the statute must be construed against the plaintiff, who seeks to exercise a statutory right in derogation of "common right and common law." *Id.* Had the Connecticut legislature intended the word "exemption" to be limited to statutorily created exemptions, it could have very easily said so by simply including the word "statutory" before the word "exemption." *Cf. Rafferty v. Noto Brothers Constr., LLC*, 68 Conn. App. 685, 690 (2002) ("absence of any qualifying language" in 52-278d(a) concerning requirement to consider counterclaims, means that no filing is required before they are considered). The General Assembly chose not to qualify the word "exemption" despite repeated amendments over the years to the PJR statute. Thus, the word "exemption" must be construed as encompassing exemptions founded upon other bases, including upon contract.

No provision of the PJR statute precludes the parties to a contract from creating contractual exemptions limiting the operation or application of the PJR statute to a defendant. The deferral rights under both Operating Agreements – when invoked – operate as an exemption to a PJR. And the deferral provisions expressly permit both the corporate entity, PWM, and the individual remaining members of PWM to defer payments – in "their sole discretion" – to a

withdrawing member if either PWM or the remaining members determine that a Compensation Shortfall will occur as a result of repurchase payments.

Because there is a contractual exemption, because it was duly invoked, and because it was never expressly waived, the Defendants' rights should be enforced and the PJR Order vacated.

II. Plaintiff's Arguments in Opposition Lack Merit.

Plaintiff raises five points in support of his position that the PJR Order should not be vacated: (1) the Direct Payments were a "partial settlement" and "not a prejudgment remedy" (Opp. at 3-4); (2) a stipulated *judgment* may only be vacated upon a showing of fraud, accident, or mistake (*id.* at 4-5); (3) the facts on which Defendants' counterclaims are based were known to them at the time of the PJR Order (*id.* at 6-8); (4) the Compensation Shortfall analysis is irrelevant to the PJR Order (*id.* at 8-9); and (5) if there is a Compensation Shortfall, then that is all the more reason to keep the PJR in place (*id.* at 9).

None of Plaintiff's arguments have merit.

A. The Direct Payments to Lomas Are Not a Partial Settlement of the Merits.

Even if the Direct Payments to Lomas were a "partial settlement" – which they are not – that is irrelevant because no matter what Lomas may be justly owed, if payments to him would result in a Compensation Shortfall, those payments may be deferred.

But in any event, the parties did not partially settle anything. It is well established that "prejudgment remedy proceedings … are not involved with the adjudication of the merits of the action brought by [a] plaintiff or with the progress or result of that adjudication." *See Koslik v. Sponzo*, 2007 WL 1827160, at *3 (Sup. Ct. June 22, 2007). This is because a prejudgment remedy is merely a provisional or an interim remedy. And the parties entered into a stipulation

to resolve only Plaintiff's then-pending PJR application. The evidence demonstrates that none of the parties understood the so-ordered stipulation to be addressing or relating to anything other than the then-pending PJR application – and certainly not as settling any issue on the merits.

Defendants' prior counsel, David Lagasse, made the following unequivocal statement on the record:

> The agreement and order will be **[1] without prejudice and [2] will not impair** any of the parties' rights to argue that a party is entitled to pay a different repurchase price than the amounts **[A] paid and [B] escrowed** under the settlement agreement.

(Tr. at 5:18-22, emphasis added; *accord* Ex. A to Plaintiff's Opp. ¶ 5[1]). The parties clearly understood that the Defendants were expressly reserving all of their rights to challenge (i) the Direct Payments, as indicated by the word "paid," and (ii) the Escrow Payments, as indicated by the word "escrowed." Of course, no such reservation of rights was necessary because, as demonstrated above, no right held under the Operating Agreements can be waived except by an express and particularized waiver. (*See* 2015 PWM Agreement § 12.6).

Moreover, none of the parties made any mention or reference to a "partial settlement" on the merits. At the outset of the hearing, Lagasse framed the scope of the stipulation – without objection – as resolving "**plaintiff's application for PJR**." (Tr. at 1:25-2:5) (emphasis added).[2] When each of the individual Defendants spoke on the record, they said nothing that would indicate or even suggest that any of them understood themselves to be settling any issue on the merits. (Tr. at 7:11-23). And neither Lomas nor his attorney said anything on-the-record to

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[1] *See* Ex. A to Plaintiff's Opp. (email from D. Lagasse to T. Rechen, September 20, 2015) ("This settlement would be [1] without prejudice and [2] would not impair any of the parties' rights to argue that a party is entitled to pay a different repurchase right than the amounts [A] paid and [B] escrowed under the settlement agreement.")

[2] *See* Lagasse Email, which states – before any of the terms of the proposed stipulation are set forth – that: "We make the following proposal to resolve the PJR application".

indicate that they thought they had obtained a partial settlement on the merits. (Tr. at 8:19-27)[3]; (*see also* Tr. at 9:2-5).

No one – not the Defendants, not their counsel, not the Plaintiff, nor his counsel – understood the on-the-record stipulation as addressing anything other than Plaintiff's application for a provisional remedy.

B. <u>Plaintiff's Authorities Discussing Stipulated Judgments Are Inapposite.</u>

Lomas contends that, absent consent, a stipulation may only be set aside upon a showing of fraud, accident, or mistake. But Lomas' authorities provide no support for such an assertion. All of his authorities[4] involved efforts by a party to open <u>stipulated</u> ***final judgments*** that resolved the entire controversy. Lomas' authorities do not stand for the proposition that a *stipulation* can only be challenged if it was the result of fraud, mistake, or accident – these authorities stand for the proposition that "a ***judgment by consent*** is just as conclusive as one rendered upon controverted facts." *Gillis*, 214 Conn. at 340 (emphasis added). Because the parties did not enter into a consent judgment, Plaintiff's authorities have no relevance here.

C. Defendants Counterclaims and Set Off Rights <u>Further Justify Defendants' Request to Vacate.</u>

Defendants' counterclaims and set off rights are entitled to consideration regardless of whether they have been filed. *See, e.g., Rafferty, supra*, 68 Conn. App. at 689-90. Defendants' soon-to-be filed counterclaims set forth a series of counterclaims, some of which are based on

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[3] ATTY RECHEN: Mr. Lomas, you've heard the settlement pertaining to the settlement of the prejudgment remedy application as those terms were just read to the Court by Attorney Lagasse?"
MR. LOMAS: Yes.
ATTY RECHEN: And you agree that that those are the terms to which you have agreed in settlement of the prejudgment remedy application?
MR. LOMAS: Yes, I have.

[4] *See Gillis v. Gillis*, 214 Conn. 336 (1990), *Housing Authority of City of New Haven v. Goodwin*, 108 Conn.App. 500 (2008), and *Fidelity & Cas. Co. of N.Y. v. Jacob Ruppert, Inc.*, 135 Conn. 307 (1949).

Defendants' broad and sweeping set off rights under the Operating Agreements. Importantly, Defendants are "entitled to set off against any installment payments" "an amount equal to **all costs, expenses (including attorneys' fees) and damages incurred**" for (i) any breach of any provision of the Operating Agreements; (ii) any "negligence, gross negligence or willful misconduct" by the withdrawing Member; and (iii) for a breach of "any non-competition, confidentiality and/or non-solicitation agreement to which the Member is a party." (*See* 2015 PWM Agreement § 7.8(d) (emphasis added); *accord* 2009 PWM Agreement § 8.9(d)).

If Defendants' prevail on any of their counterclaims – **even if they are only awarded nominal damages** – Defendants' will be deemed by Connecticut law to be the prevailing party and entitled to recover all of their costs and expenses, including reasonable attorneys' fees. Connecticut's courts have stated that a prevailing party is "a party in whose favor judgment has been rendered, *regardless of the amount of damages awarded*." *See Russell v. Russell*, 91 Conn.App. 619 (2005) ("A party need not need not prevail on all issues to justify a full award of costs, and it has been held that if the prevailing party obtains judgment on even a fraction of the claims advanced, **or is awarded only nominal damages**, the party may nevertheless be regarded as the 'prevailing' party and thus entitled to an award of costs.") (emphasis added). Defendants' set off rights are broad and it is likely that Defendants will prevail on at least some of their expected counterclaims. And the longer the litigation continues, the greater Defendants' costs and expenses that they will be entitled to set off.

Relying exclusively on a lone federal case, *Roberts v. Triplanet Partners, LLC*, 2014 WL 1831022 (D. Conn. 2014), Plaintiff asks the Court to ignore Defendants' counterclaims and set off rights. But *Triplanet* is readily distinguishable. There, defendants' motion to vacate the PJR rested on a dubious financial analysis purporting to show that the value of the company, and

hence the dollar value of the equity that plaintiff claimed entitlement, (which was the basis for the amount of the prejudgment remedy), was substantially less than plaintiff claimed. *Id. id.* at *2, *3, & n.2. But the *Triplanet* defendants did not purport to invoke a contractual right or exemption to defer payments; they attempted to make a factual showing that the PJR was too high. Here, Defendants have demonstrated that there will be Compensation Shortfall in 2016 and have duly invoked their rights to defer payments in 2016. Therefore, the PJR Order should be vacated. Finally, as the *Triplanet* court recognized, a challenge to a PJR order will be permitted where there are "new or overriding circumstances." *Id.* at *3. Here, as the Compensation Shortfall analysis for 2016 demonstrates, there are indeed new and overriding circumstances that justify the vacatur of the PJR Order.

D. Even If the Defendants' Deferral Rights Do Not Trump Anything to the Contrary in the Stipulation, They May Not Be Ignored.

Plaintiff next argues that the terms of the stipulation "were not conditioned upon any rights or protections afforded by either the 2009 or 2015 Agreements" and therefore, the Operating Agreements "do not govern the Order." (Opp. at 8). Moreover, says Plaintiff, the stipulation states that: "[t]he escrow will remain in place until the earlier of the date of final judgment is entered in this case, or the parties settle the case and the case is dismissed with prejudice." (*Id.* at 9)(quoting, but not citing to, the record; *see* Tr. at 5:4-7).

Plaintiff's argument is spurious. The entire basis for Plaintiff's PJR application is his assertion of the validity of the 2009 PWM Agreement – which contains a materially identical deferred payment and non-waiver provision as the 2015 PWM Agreement. Except by an exercise in Orwellian double-think, Plaintiff cannot simultaneously insist that the 2009 PWM Agreement is valid and controlling in one breadth, but deny its validity when the Defendants invoke their rights under that same agreement.

Furthermore, Plaintiff's argument treats the stipulation as though it were an integrated agreement, which it is not. There is no integration clause in the stipulation, nor does the stipulation purport to be an integrated agreement because it only addressed Lomas' request for an interim or provisional remedy. Therefore, the parol evidence rule does not apply. *See Falcigno v. Falcigno*, 2014 WL 929482, at *3 (Sup. Ct. 2014). The parol evidence rule is a substantive rule of contract law. *Id.* It does not prohibit evidence outside of the four corners of an agreement; it prohibits evidence "to vary or contradict the terms of a writing." *Id.* But where, as here, the stipulation is not integrated, not only may evidence outside the four corners of the writing be considered, but such evidence may vary and contradict the terms of the stipulation. *Id.* Thus, notwithstanding the on-the-record statement regarding the escrow remaining in place, Defendants nonetheless retain and have duly invoked their deferral rights.

But even if the Court were inclined to find that Defendants' duly invoked deferral rights do not trump anything to the contrary in the stipulation, Defendants deferral rights cannot simply be ignored. Rather, under the familiar canon of construction requiring that that all terms of the parties' agreement be given meaning, an interpretation must be constructed that reconciles the deferred payment and non-waiver provisions under the Operating Agreements and the on-the-record provision regarding how long the escrow is to remain in place.

If the Court is inclined towards this approach, since each provision of the Operating Agreements and the stipulation must be given meaning and effect, the only plausible reconciliation is as follows: The Defendants, having duly invoked their rights to defer all payments in 2016 on May 27, 2016, are entitled to: (a) defer the Direct Payment to Lomas scheduled for October 15, 2016; (b) cease funding the escrow as of May 27, 2016; but (c) the moneys previously escrowed must remain until the earlier of final judgment or settlement. To

see why this construction gives meaning to all terms, consider the relevant provisions.

First, it must be recalled that the stipulation expressly provides that:

> The agreement and order will be without prejudice and will not impair any of the parties' rights to argue that that a party is entitled to pay a different repurchase price than the amounts paid and escrowed under the settlement agreement.

Thus, the parties were only stipulating to an interim or provisional remedy and did not intend that their substantive rights under the Operating Agreements would be prejudiced or impaired.

Second, the provision in the stipulation that Plaintiff points to states that: "[t]he escrow will remain in place until the earlier of" final judgment or settlement. Two things follow from a parsing of this language. First, this provision of the stipulation *applies only to the escrow* – it does not touch or concern the Direct Payments to be made to Lomas. As the Defendants expressly reserved their rights to challenge the moneys "paid" to Lomas and as there is no comparable provision in the stipulation requiring the Direct Payments to remain in place, the Defendants have the right to defer the payment due Lomas on October 15, 2016. Second, the provision relied upon by Plaintiff says that the "escrow will remain in place until …" – it does not state that "funding of the escrow will continue until the earlier of…" The word "escrow," as used in the provision, is not a verb – it is a noun, as indicated by the definite article "the," which precedes it. Thus, the provision cannot be read as requiring Defendant "to escrow." Therefore, if the Court were disinclined to treat Defendants' deferral rights as superior and peremptory, and were inclined to give effect to both the deferred payment provisions of the Operating Agreements and the provision of the stipulation that Plaintiff points to, then Defendants are: (i) entitled to defer the Direct Payment scheduled for October 2016, (ii) entitled to stop funding the escrow as of May 27, 2016, but (iii) the funds already in escrow must remain in escrow.

E. As Demonstrated Above, Defendants' Deferral Rights Preempt the Operation of the PJR Statute.

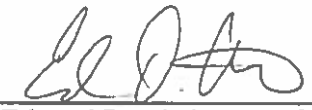
Lastly, Plaintiff asserts that if Defendants' Compensation Shortfall analysis is accepted, that would "turn the purpose of the prejudgment remedy on its ear." (Opp. at 9). This misconceives the nature of the contractual right at issue. As previously demonstrated, the deferred payment provision expressly permits PWM and the remaining Members to defer repurchase payments to a withdrawing Member, notwithstanding the merits or justness of the withdrawing member's claim. The deferred payment provision recognizes PWM's and the remaining Members' obligation to pay a withdrawing Member, but declares that **despite that obligation, they may nevertheless defer fulfillment of the obligation in the event of a Compensation Shortfall**. The duly invoked deferred payment rights have a preemptory and peremptory character and force that not even an adverse final judgment that declared the 2009 PWM Agreement controlling and validated the sums Lomas claims he is owed can override. As such, the PJR Order should be vacated.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the PJR Order be vacated in its entirety and the moneys previously put in escrow returned to the Defendants. Alternatively, Defendants' request that the PJR Order be vacated on a going-forward basis, with the money previously escrowed to remain in escrow until the earlier of final judgment or settlement.

Dated: July 13, 2016

THE DEFENDANTS AND SOON-TO-BE COUNTERCLAIM PLAINTIFFS,

By: 

Edward D. Altabet (*pro hac vice*)

Gerard Fox Law P.C.
12 East 49th Street
26th Floor
New York, NY 10017
Tel. 646.690.4980
Juris # 437662
ealtabet@gerardfoxlaw.com

-and-

Richard C. Buturla
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460
Tel. 203.783.1200
Juris # 022801

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, via certified mail, return receipt requested to the following counsel of record on this 13th day of July, 2016.

Thomas J. Rechen
McCarter & English, LLP
City Place I, 185 Asylum Street
Hartford, CT 06103
trechen@mccarter.com

Richard C. Buturla

EXHIBIT A

[SELECT PROVISIONS OF THE 2015 PWM AGREEMENT]

foregoing, the purchase price of a deceased Member's Performance Interest shall not be recalculated and reduced under Section 7.5(b)(ii) following the eighteen month anniversary of the original Valuation Period.

Section 7.7 *Deferral of Installment Payments.*

(a) All parties hereto acknowledge that the Company or the remaining Members may become obligated pursuant hereto to make one or more purchases of Interests held by the Members. It is further acknowledged that such purchases by the Company or the remaining Members may be effected in all or part by means of installment payments pursuant to the terms hereof and promissory note(s) of the Company or the remaining Members. Therefore, it is specifically agreed that, notwithstanding any such obligation(s) of the Company or the remaining Members, however evidenced, the Company or the remaining Members may, upon their sole discretion, defer (or reduce the amount of) any such installment payments during a period of "Compensation Shortfall" (herein defined). If more than one promissory note is outstanding, any deferral or reduction shall be in proportion to the outstanding principal balance of the outstanding promissory notes. For purposes hereof, a "Compensation Shortfall" shall mean a decline in the Company's financial performance for any fiscal year(s), such that the amount of compensation from the Company paid to non-selling Members is more than twenty-five percent (25%) less than the average compensation paid by the Company (or its predecessor) to the non-selling Members during the three (3) fiscal year period (hereinafter, "Base Period") immediately preceding the occurrence of the event which resulted in the Company's obligation to make such installment payments. Interest shall continue to accrue during any such deferral or reduction of installment payments.

(b) Installment payments shall be promptly resumed at such time as the compensation of the non-selling Members from the Company for any fiscal year again exceeds seventy-five percent (75%) of the average of such compensation during the Base Period.

(c) Upon resumption of installment payments in the full amounts called for herein, (i) the due dates of any such promissory notes shall be deemed automatically extended by a period equal to the period during which installment payments were deferred or reduced, and (ii) the Company or the remaining Members may, at their sole discretion, make additional payments of principal and/or interest to make up for any payments of principal and/or interest that was deferred or reduced. The parties intend that any promissory note(s) executed by the Company or the remaining Members pursuant hereto shall include language to carry forth the intent of this section and in the event, through inadvertence, such language is not included in any such notes, it shall be deemed to have been included.

Section 7.8 *Continuing Obligations.*

(a) Commencing on the date a Member gives notice of his or her withdrawal from the Company, such Member shall employ any and all good faith efforts to assist the remaining Members and the Company in retaining for the Company his or her assigned clients and business contacts for which he or she was responsible while a Member of the Company.

(b) Upon the closing of any purchase of Interests pursuant to this Agreement, the selling Member shall provide reasonable assistance and services to the Company and assist the

Company in retaining such selling Member's client base for up to one (1) year after the closing date. Such services may include up to ten (10) hours of office work per week for which the selling Members shall be compensated at the rate of one hundred dollars ($100.00) per hour.

(c) For two years after the Member's withdrawal, the Member shall not in any function or capacity, whether for his or her own account or the account of any other person or entity (other than the Company), directly or indirectly, solicit the sale of, market or sell products or services similar to those sold or provided by the Company to any person or entity who is a customer or client of the Company at any time during the term of this Agreement (the "Clients"). As used in this Agreement, "solicit" means the initiation, whether directly or indirectly, of any contact or communication of any kind whatsoever, for the express or implicit purpose of inviting, encouraging or requesting a Client to:

(i) transfer assets to any person or entity other than the Company;

(ii) obtain investment advisory or similar related services from any person or entity other than the Company; or

(iii) otherwise discontinue, change, or reduce such Client's existing business relationship with the Company.

The term "solicit" as used in this Agreement also includes any mailing, e-mail message, or other verbal or written communication that is sent directly or indirectly to one or more Clients informing them: (i) that the Company is no longer providing any or all services, (ii) that the Company plans to no longer provide any or all services, (iii) that the Member is or will be no longer associated with the Company, or (iv) how to contact the Member in the event that the Member is no longer associated with the Company.

(d) The Company or the remaining Members shall be entitled to set off against any installment payments pursuant to its purchase of Interests under this Agreement an amount equal to all costs, expenses (including attorneys' fees) and damages incurred as a result of (i) a breach by the Member of this Section 7.8 or any other section of this Agreement, (ii) the negligence, gross negligence or willful misconduct of the Member, or (iii) any provision of any non-competition, confidentiality and/or non-solicitation agreement to which the Member is a party. All Members shall, not later than the date of execution and delivery hereof, execute the Company's Non-Competition Agreement or equivalent thereof. The rights of set off as set forth herein shall be in addition to any and all remedies available to the Company or the remaining Members under law or resulting from the Member's violation of any agreement with the Company.

Section 7.9 *Certificate Endorsement.* The certificates for all Interests of the Company subject to this Agreement shall be endorsed substantially as follows: "The sale or transfer of this certificate is subject to transfer restrictions set forth in the Company's Limited Liability Company Agreement dated as of January __, 2015, as amended from time to time, a copy of which is available for inspection at the principal office of the Company."

Section 7.10 *Tag Along Rights.*

Company's Interests, this Agreement shall supersede the Prior Agreement in its entirety and the Prior Agreement shall be of no further force or effect.

ARTICLE XII
MISCELLANEOUS

Section 12.1 *Counterparts.* This Agreement may be executed in more than one counterpart with the same effect as if the parties executing the several counterparts had all executed one agreement; provided, however, that the several counterparts, in the aggregate, shall have been executed by all of the Members. Any Person agreeing in writing to be bound by the provisions of this Agreement shall be deemed to have executed a counterpart of this Agreement for all purposes hereof.

Section 12.2 *Notices.* Any notice, demand or other communication given to a Member or the Company under this Agreement shall be deemed to be given if given in writing addressed (or to the addressee at such other address as the addressee shall have specified by notice actually received by the addressor), and if either (a) actually delivered in fully legible form to such address, in the case of delivery by same day or overnight courier, by confirmation of delivery from the overnight courier service making such delivery), or (b) in the case of a letter, five days shall have elapsed after the same shall have been deposited in the United States mails, with first-class postage prepaid:

If to the Company, to:

Partners Wealth Management LLC
33 Riverside Avenue, Fifth Floor, Westport, CT 06880

and if to any Member, to it at its address or facsimile number, if any, set forth on Schedule A.

Section 12.3 *Waiver of Partition.* Each Member hereby waives any rights to partition the property of the Company.

Section 12.4 *Successors.* This Agreement is not assignable by any party without the prior written consent of the other parties. This Agreement shall be binding on the executors, administrators, estates, heirs, legal representatives, successors and, subject to the above limitation, assigns of the Members.

Section 12.5 *Member Votes and Consents.* Any and all consents, agreements or approvals provided for or permitted by this Agreement shall be in writing, and a signed copy thereof shall be filed and kept with the books of the Company.

Section 12.6 *Non-Waiver.* No provision of this Agreement shall be deemed to have been waived unless such waiver is contained in a written notice given to the party claiming such waiver occurred; provided, however, that no such waiver shall be deemed to be a waiver of any other or further obligation or liability of the party or parties in whose favor the waiver is given.

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EXHIBIT B

[SELECT PROVISIONS OF THE 2009 PWM AGREEMENT]

The term "solicit" as used in this Agreement also includes any mailing, e-mail message, or other verbal or written communication that is sent directly or indirectly to one or more Clients informing them: (i) that the Company is no longer providing any or all services, (ii) that the Company plans to no longer provide any or all services, (iii) that the Member is or will be no longer associated with the Company, or (iv) how to contact the Member in the event that the Member is no longer associated with the Company.

(d) The Company or the remaining Members shall be entitled to set off against any installment payments pursuant to its purchase of Interests under this Agreement an amount equal to all costs, expenses (including attorneys' fees) and damages incurred as a result of (a) a breach by the Member of this Section 8.9 or any other section of this Agreement, (b) the negligence, gross negligence or willful misconduct of the Member, or (c) any provision of any non-competition, confidentiality and/or non-solicitation agreement to which the Member is a party. All Members shall, not later than the date of execution and delivery hereof, execute the Company's Non-Competition Agreement or equivalent thereof. The rights of set off as set forth herein shall be in addition to any and all remedies available to the Company or the remaining Members under law or resulting from the Member's violation of any agreement with the Company,

8.10 Removal for Cause.

(a) In the event a Member is removed from the Company for cause (as hereinafter defined), the Company or the remaining Members shall have the right, to be evidenced by written notice of its election to purchase sent to such Member, to purchase the Interests of such Member for an amount determined pursuant to the provisions of Section 8.7(b) as reduced by an amount equal to the amount of any and all damages, loss, costs (including attorney fees) and any other expenses or measurable damages resulting directly or indirectly from the circumstances of such Member's removal for cause. In any such event, the Member shall be obligated to sell his/her Interests to the Company or the remaining Members for the purchase price as described herein. The Company Value to be utilized to determine the purchase price for the Interests under this Section 8.10 shall be the Company Value as of December 31 of the year prior to the year in which removal occurs. The Company or the remaining Members shall, subject to the provisions of Section 8.12 hereof, pay the purchase price pursuant to the provisions of Section 8.7(c).

(b) For purposes hereof, "cause" shall mean (a) indictment for or conviction of, or the entering of a plea of nolo contendere by a Member with respect to, a felony, (b) abuse of controlled substances or alcohol or acts of dishonesty or moral turpitude by a Member that are detrimental to the assets, including reputation, of the Company; (c) intentional acts or omissions that materially damage or were intended to materially damage the business of a Company; (d) negligence in the performance of, or disregard by a Member of material obligations relating to his/her engagement, which negligence or disregard continue unremedied for a period of fifteen (15) days after written notice thereof; (e) breach by the Member of any non-competition, confidentiality and/or non-solicitation agreement to which the Member is a party, (f) failure of a Member to dediciate his full time and efforts to the business and affairs of the Company, or (g) with respect to any Member who is a member of the Management Committee, through October 31, 2015, his failure to maintain Connecticut as his primary residence.

8.11 Certificate Endorsement. The certificates for all Interests of the Company subject to this Agreement shall be endorsed substantially as follows: "The sale or transfer of this certificate is subject to transfer restrictions set forth in the Company's Limited Liability Company Agreement dated November 30, 2009, as amended from time to time, a copy of which is available for inspection at the principal office of the Company."

8.12 Deferral of Installment Payments.

(a) All parties hereto acknowledge that the Company or the remaining Members may become obligated pursuant hereto to make one or more purchases of Interests held by the Members. It is further acknowledged that such purchases by the Company or the remaining Members may be effected in all or part by means of installment payments pursuant to the terms hereof and promissory note(s) of the Company or the remaining Members. Therefore, it is specifically agreed that notwithstanding any such obligation(s) of the Company or the remaining Members, however evidenced, the Company or the remaining Members may, upon their sole discretion, defer (or reduce the amount of) any such installment payments during a period of "Compensation Shortfall" (herein defined). If more than one promissory note is outstanding, any deferral or reduction shall be in proportion to the outstanding principal balance of the outstanding promissory notes, For purposes hereof, a Compensation Shortfall shall mean a decline in the Company's financial performance for any fiscal year(s), such that the amount of compensation from the Company paid to non-selling Members is more than twenty-five percent (25%) less than the average compensation paid by the Company (or its predecessor) to the non-selling Members during the three (3) fiscal year period (hereinafter, "Base Period") immediately preceding the occurrence of the event which resulted in the Company's or the remaining Members' obligation to make such installment payments. Interest shall continue to accrue during any such deferral or reduction of installment payments.

(b) Installment payments shall be promptly resumed at such time as the compensation of the non-selling Members from the Company for any fiscal year again exceeds seventy-five percent (75%) of the average of such compensation during the Base Period.

(c) Upon resumption of installment payments in the full amounts called for herein, (1) the due dates of any such promissory notes shall be deemed automatically extended by a period equal to the period during which installment payments were deferred or reduced, and (2) the Company or the remaining Members may, at their sole discretion, make additional payments of principal and/or interest to make up for any payments of principal and/or interest that was deferred or reduced. The parties intend that any promissory note(s) executed by the Company or the remaining Members pursuant hereto shall include language to carry forth the intent of this section and in the event, through inadvertence, such language is not included in any such notes, it shall be deemed to have been included.

8.13 Right of First Refusal.

(a) If a Member (individually, a "Transferor") receives a bona fide written offer (the "Transferee Offer") from any other person (a "Transferee") to purchase all but not less than all of or any interest or rights in the Transferor's Membership Interest (the "Transferor Interest") for a purchase price denominated and payable in United States dollars, then, prior to

11.3 Waiver of Partition. Each Member hereby waives any rights to partition the property of the Company.

11.4 Successors. This Agreement is not assignable by any party without the prior written consent of the other parties. This Agreement shall be binding on the executors, administrators, estates, heirs, legal representatives, successors and, subject to the above limitation, assigns of the Members.

11.5 Member Votes and Consents. Any and all consents, agreements or approvals provided for or permitted by this Agreement shall be in writing, and a signed copy thereof shall be filed and kept with the books of the Company.

11.6 Non-Waiver. No provision of this Agreement shall be deemed to have been waived unless such waiver is contained in a written notice given to the party claiming such waiver occurred; provided, however, that no such waiver shall be deemed to be a waiver of any other or further obligation or liability of the party or parties in whose favor the waiver is given.

11.7 Entire Agreement. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto. No modification, waiver or amendment of any of the provisions of this Agreement shall be effective unless in writing and signed by all parties to this Agreement.

11.8 Entity Classification. It is the intention of the Members that, the Company be treated as a partnership for federal income tax purposes.

11.9 Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws of Connecticut without giving effect to any conflict or choice of law provisions that would make applicable the domestic substantive law of any other jurisdiction.

11.10 Severability. If any provision or portion of this Agreement or the application thereof to any person or party or circumstances shall be invalid or unenforceable under applicable law, such event shall not affect, impair, or render invalid or unenforceable the remainder of this Agreement.

11.11 Section Headings. Section headings are for the guidance of the reader only and shall be of no effect in construing the contents of the respective Sections.

11.12 Further Acts. Each of the parties hereto shall cooperate and take such actions, and execute such other documents, at the execution hereof or subsequently, as may be reasonably requested by the others in order to carry out the provisions and purposes of this Agreement.

11.13 Sophistication of Parties. Each of the parties (i) is sophisticated in negotiating business transactions, (ii) is, or has had the opportunity to be and has elected not to be, represented by counsel, (iii) has reviewed each of the provisions in this Agreement carefully and (iv) has negotiated or has had full opportunity to negotiate the terms of this Agreement, specifically including, but not limited to, Section 11.7 above.

UNREPORTED CASES

2014 WL 929482
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

David V. FALCIGNO
v.
Stephen FALCIGNO.

No. NNHCV126033535S.
|
Feb. 6, 2014.

Opinion

NAZZARO, J.

*1 The defendant has moved to strike counts one, two, three, and seven of the plaintiff's revised complaint on the ground that the claims are legally insufficient to allege a breach of contract, promissory estoppel, fraudulent concealment, and breach of the duty of good faith and fair dealing. For the reasons that follow, the motion to strike is denied.

FACTS

The plaintiff, David Falcigno, filed a ten-count revised complaint in this action on June 14, 2013, against the defendant, Stephen Falcigno. In the revised complaint, the plaintiff alleges the following facts. The defendant, the plaintiff, and Richard Falcigno owned all 100 shares in Statewide Meats and Poultry, Inc. (the company), a closely-held corporation. In 2009, the defendant and the plaintiff had a family dispute and began discussions for the defendant's purchase of the plaintiff's 20 percent share of the company. In negotiating the purchase of the plaintiff's share, the defendant represented to the plaintiff that $250,000 was the fair value of his share of the company. Also during the discussions, the defendant orally promised the plaintiff that if the company became profitable, did not go bankrupt, and were to sell in the future, then the defendant would "cut [the plaintiff] back in" and the plaintiff would receive full compensation for his 20 percent share of the company from the proceeds of any future sale of the company, less the payment of $250,000.

On October 9, 2009, the defendant provided the plaintiff with a certificate of purchase of shares of stock (certificate of purchase) for the purchase of the plaintiff's 20 percent share of the company for $200,000. In addition, the defendant also paid the plaintiff $50,000 cash. The defendant paid the plaintiff a combined total of $250,000 for his 20 percent share of the company. Based on the defendant's statements to "cut [the plaintiff] back in" on the proceeds from any sale of the company, the plaintiff agreed to sign the certificate of purchase and sell his 20 percent share of the company to the defendant for $250,000.

On August 12, 2011, the defendant sold the company for $8,000,000. After learning of the sale of the company, the plaintiff contacted the defendant to confirm that he would receive his 20 percent share of the proceeds from the sale of the company, less the payment of $250,000. The defendant acknowledged that the

plaintiff was entitled to his share of the proceeds from the company sale, but the defendant stated that he needed to wait until after "the taxes" were determined after April 15, 2012, before the plaintiff could receive his share of the funds. The defendant subsequently acknowledged again that the plaintiff was entitled to the proceeds on April 27, 2012, and on June 1, 2012.

On June 1, 2012, the defendant stated to the plaintiff that $100,000 was what he was willing to allow the plaintiff to receive from the company sale even though he had promised to "cut [the plaintiff] back in." The defendant then provided the plaintiff with a settlement agreement in which the defendant offered the plaintiff $100,000 to be paid in three installments for the defendant's "love and affection" of the plaintiff. The settlement agreement and the defendant stated that the $100,000 was a "gift" to the plaintiff. The defendant further told the plaintiff that he had a $39,000 check in his pocket and that he would give it to the plaintiff for the first of the three installments but only if the plaintiff signed the settlement agreement which released the defendant from any and all actions, including claims concerning shares of the company. The plaintiff informed the defendant that $350,000 (the $250,000 payment plus the $100,000 "gift") did not reflect the plaintiff's 20 percent share of the proceeds from the company sale. The defendant then stated "it is what it is" and that if he did not accept the $100,000 and sign the settlement agreement then the defendant "could have amnesia and say he never said anything" about his promise to cut the plaintiff back in. The plaintiff refused to sign the defendant's settlement agreement. The plaintiff alleges that as of August 12, 2012, he was entitled to his 20 percent share from the proceeds of the company sale. The defendant wrongfully disguised the $100,000 for his "love and affection" of the plaintiff as a "gift" in breach of the October 9, 2009 agreement. As a proximate result of the defendant's breach, the plaintiff has suffered substantial financial damages.

*2 In count one of the revised complaint, the plaintiff alleges a breach of contract in that pursuant to the defendant's October 9, 2009 promise, the plaintiff was entitled to a 20 percent share of the proceeds from the company sale. In count two, the plaintiff alleges promissory estoppel in that the plaintiff relied on the defendant's promise that if the company were to sell in the future, then the defendant would "cut [the plaintiff] back in" and the plaintiff would receive a portion of the proceeds. In count three, the plaintiff alleges fraudulent concealment in that the defendant intentionally concealed the ability of the company selling in the near future at a price significantly higher than that reflected by the defendant's representations. In count seven, the plaintiff alleges that the defendant breached the implied covenant of good faith in that the defendant's acts were committed in bad faith and adversely affected the plaintiff's ability to receive his share of the proceeds from the sale of the company.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Simms v. Seaman*, 308 Conn. 523, 529, 69 A.3d 880 (2013). "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997).

"[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Citation omitted; internal quotation marks omitted.) *Coe v. Board of Education*, 301 Conn. 112, 116–17, 19 A.3d 640 (2011). "[P]leadings are to be construed broadly and realistically, rather than narrowly and technically ..." (Internal quotation marks omitted.) *Downs v. Trias*, 306 Conn. 81, 92, 49 A.3d 180 (2012). Nevertheless, a motion to strike "does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Emphasis omitted; internal quotation marks omitted.) *Faulkner v. United*

Technologies Corp., supra, 240 Conn. at 588.

The defendant argues that counts one, two, three, and seven are legally insufficient. Specifically, the defendant moves to strike count one on the ground that it is barred by the parol evidence rule, count two on the ground that promissory estoppel is not available when there is an enforceable written agreement and Connecticut does not recognize an independent cause of action for promissory estoppel, count three on the ground that Connecticut does not recognize an independent action for fraudulent concealment, and count seven on the ground that breach of the duty of good faith and fair dealing may not be used to contradict the terms of a written contract. The plaintiff counters that the contract does not contain a merger integration clause and did not represent the full intent of the parties.

I.

*3 The defendant moves to strike counts one and seven on the ground that there was a complete agreement between the parties. The threshold question is whether the October 9, 2013 contract was fully integrated, thereby barring extrinsic evidence of the alleged oral agreement pursuant to the parol evidence rule. The defendant argues that counts one and seven should be stricken in that the October 9, 2013 contract was clear, complete, and unequivocal and, therefore, the parol evidence rule bars extrinsic evidence. The plaintiff counters that there was no integration clause in the contract and that the parol evidence rule does not apply until after a court has considered extrinsic evidence of the parties' intent and the surrounding circumstances to determine if the contract is integrated.

"[T]he parol evidence rule is not a rule of evidence, but a substantive rule of contract law." (Citations omitted; internal quotation marks omitted.) *Loiselle v. Browning and Browning Real Estate,* 147 Conn.App. 246, 253 (2013). "The parol evidence rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme ... The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract." (Citation omitted; internal quotation marks omitted.) *Brett Stone Painting and Maintenance, LLC v. New England Bank,* 143 Conn.App. 671, 687, 72 A.3d 1121 (2013).

"The parol evidence rule does not apply ... if the written contract is not completely integrated ... As a threshold matter, therefore, a court *must conduct* an inquiry and take evidence as to whether there is an integrated agreement. If the evidence ... does not indicate that the writing is intended as an integration, i.e., a final expression of one or more terms of an agreement ... then the agreement is said to be unintegrated, and the parol evidence rule does not apply. Whether the parties intended to integrate their negotiations in a writing is a question of fact for the court." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conn. Acoustics, Inc. v. Xhema Construction, Inc.,* 88 Conn.App. 741, 745–46, 870 A.2d 1178 (2005).

"The intent of the parties determines whether the written agreement was the final repository of any oral agreements. If the court determines that the parties intended the writing to be an integrated agreement, the oral agreements are not considered when determining the contractual obligations of the parties. Whether a writing is a complete integration of an agreement, the final repository of the oral agreements and dealings between the parties depends on their intention, evidence as to which is sought in the conduct and language of the parties and the surrounding circumstances. If the evidence leads to the conclusion that the parties intended the [writing] to contain the whole agreement, evidence of oral agreements is excluded, that is, excluded from consideration in the determination of the rights and obligations of the litigants, even though

it is admitted on the issue of their intention ... Whether there is a complete integrated agreement is to be determined by the court as a question preliminary ... to application of the parol evidence rule." (Citation omitted; internal quotation marks omitted.) *Conn Acoustics, Inc. v. Xhema Construction, Inc., supra,* 88 Conn.App. at 746.

*4 In the present case, the defendant argues that the October 9, 2009 contract was clear, complete, and unequivocal. The plaintiff's revised complaint alleges that "during the discussions and negotiations for the defendant's purchase of the plaintiff's 20 percent share of [the company], the defendant orally promised the plaintiff that if [the company] became profitable, did not go bankrupt, and were to sell in the future, then the defendant would 'cut [the plaintiff] back in' and the plaintiff would receive full compensation for his 20 percent share of [the company] from the proceeds of any future sale of [the company] ..." These allegations indicate that the contract was not a completely integrated agreement based on the circumstances surrounding the execution of the October 9, 2009 contract. Specifically, the plaintiff's allegation that there was an oral agreement that was not included in the written contract is sufficient to allege that the contract did not represent the full intentions of the parties. Accordingly, the defendant's motion to strike counts one and seven is denied.[3]

II.

The defendant further moves to strike count two on the ground that Connecticut does not recognize an independent cause of action for promissory estoppel and that promissory estoppel is not available when there is an enforceable written agreement. The plaintiff counters that Connecticut does recognize an independent action for promissory estoppel and that a party is allowed to plead in the alternative.

"Under the law of contract, a promise is generally not enforceable unless it is supported by consideration ... [Our Supreme Court] has recognized, however, the development of liability in contract for action induced by reliance upon a promise, despite the absence of common-law consideration normally required to bind a promisor ... Section 90 of the Restatement [(Second) of Contracts] states that under the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." (Internal quotation marks omitted.) *Desrosiers v. Diageo North America, Inc .,* 137 Conn.App. 446, 460–61, 49 A.3d 233, cert. granted on other grounds, 307 Conn. 916, 54 A.3d 180 (2012). Additionally, under the General Statutes and our rules of practice, a "plaintiff may claim alternative relief, based upon an alternative construction of the cause of action." Practice Book § 10–25. "Connecticut does allow plaintiffs to plead inconsistent yet otherwise valid causes of actions together in the same complaint, thereby allowing plaintiffs to pursue alternative remedies or theories of relief." *Campbell v.. Plymouth,* 74 Conn.App. 67, 76, 811 A.2d 243 (2002). In the present case, count two of the revised complaint is a legally sufficient claim for promissory estoppel in that count two does not allege that a contract exists and the plaintiff is pleading in the alternative. Specifically, count two does not incorporate the paragraphs of count one alleging that a contract existed between the parties.[3] Accordingly, the motion to strike count two is denied.

III.

*5 Lastly, the defendant moves to strike count three on the ground that there is no independent cause of action for fraudulent concealment. The plaintiff's revised complaint labels count three as "Fraudulent Concealment," but the plaintiff's objection to the defendant's motion to strike counters that count three is legally sufficient in that it alleges a common-law cause of action for fraudulent nondisclosure.

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the

failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak."[4] Carr v. Fleet Bank, 73 Conn.App. 593, 595, 812 A.2d 14 (2002). Furthermore, in *Duart v. Department of Correction*, the Supreme Court stated that "fraudulent nondisclosure ... arises from a failure to disclose known facts, and, as well, a request or an occasion or circumstance which imposes a duty to speak ... It follows that when the plaintiff alleges that the defendant knowingly and deliberately concealed documents in the face of a duty to disclose the same, she in effect alleges the elements of fraudulent nondisclosure ..." (Citations omitted; internal quotation marks omitted.) Duart v. Department of Correction, 303 Conn. 479, 498 n. 17, 34 A.3d 343 (2012).

In the present case, the plaintiff's revised complaint alleges that "[t]he defendant, as president and majority shareholder in control of [the company], was under a duty to maintain complete and reliable books and records of his fiduciary activities and make the same available to the plaintiff" and that "the defendant knowingly and intentionally concealed true and accurate records ... of [the company] and himself by preventing the plaintiff from gaining access to true and accurate records and accountings of [the company] ." The defendant owed a duty to the plaintiff, a minority shareholder, to disclose accurate records of the company and allegedly failed to do so. Although the title to count three states that it is a claim for fraudulent concealment, the count alleges the elements of fraudulent nondisclsoure. "[I]n determining whether the facts would support a cause of action, the facts, and not the label, or title, affixed to them by the parties, are dispositive ..." (Internal quotation marks omitted.) *Meleny–Distassio v. Weinstein*, Superior Court, Judicial District of Stamford–Norwalk at Stamford, Docket No. CV–12–6015461–S (February 1, 2013, Adams, J.T.R.). Accordingly, the defendant's motion to strike count three is denied.

CONCLUSION

For the foregoing reasons, the defendant's motion to strike is denied in its entirety.

It is so Ordered.

All Citations

Not Reported in A.3d, 2014 WL 929482

Footnotes

1 Because the defendant moves to strike counts one, two, three, and seven of the plaintiff's revised complaint, this memorandum addresses only those counts.

2 The defendant further argues that count one should be stricken due to General Statutes § 42a–8–108(a)(3) and (6) and General Statutes § 42a–8–302(a). Section 42a–8–108 provides in relevant part that "[a] person who transfers a certificated security to a purchaser for value warrants to the purchaser ... that ... [t]here is no adverse claim to the security." § 42a–8–102(1) defines an "adverse claim" as "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer or deal with the financial asset." The comments to this section provides in relevant part that if "A holds securities and is induced by B's fraud to transfer them to B. Under the law of contract or restitution, A may have a right to rescind the transfer, which gives A a property claim to the securities. If so, A has an adverse claim to the securities in B's hands. By contrast, if B had committed no fraud, but had merely committed a breach of contract in connection with the transfer from A to B, A may have only a right to damages for breach, not a right to rescind. In that case, A would not have an adverse claim to the securities in B's hands." § 42a–8–102(1), comment (1). In the present case, count one alleges a breach of contract. The plaintiff is seeking compensatory damages for the defendant's alleged breach of contract and not a rescission of the contract. Accordingly, the plaintiff's breach of contract claim is not an "adverse claim" for purposes of § 42a–8–108(a).

Furthermore, § 42a–8–302(a) provides in relevant part that "a purchaser of a certificated ... security acquires all rights in the security that the transferor had or had power to transfer." "This statement of the familiar 'shelter' principle is qualified by the [exception] that ... a person who does not qualify as a protected purchaser cannot improve its position by taking from a subsequent protected purchaser ..." § 42a–8–302, comment (1). "Protected purchaser means a purchaser of a certificated ... security ... who: (1) Gives value; (2) Does not have notice of any adverse claim to the security; and (3) Obtains control of the certificated ... security." (Internal quotation marks omitted.) § 42a–8–303. "A person has notice of an adverse claim if ... [t]he person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim ..." § 42a–8–105. In the present case, the plaintiff's allegations indicate that the defendant had notice of the possible existence of an adverse claim. Specifically, the defendant's alleged misrepresentations about the value of the company and the value of the plaintiff's share in the discussions to purchase the plaintiff's share of the company gave him notice of a possible adverse claim. Accordingly, the defendant is not a protected purchaser pursuant to the statute.

3 The second count of the plaintiff's revised complaint incorporates paragraphs 1–51, 58–62, and 65–83 of the first count into the second count. These paragraphs do not allege the existence of the October 9, 2009 contract.

4 "The four essential elements of fraud are (1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the other party; and (4) that the other party did so act to her detriment ..." *Carr v. Fleet Bank*, 73 Conn.App. 593, 595, 812 A.2d 14 (2002).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Richard KOSLIK
v.
Frank SPONZO.

No. CVH 7040.
|
June 22, 2007.

MEMORANDUM OF DECISION APPLICATION FOR PREJUDGMENT REMEDY

BENTIVEGNA, J.

I

STATEMENT OF THE CASE

*1 This action in damages is predicated upon the eviction of the plaintiff, Richard Koslik, from a leased property located in Bloomfield, Connecticut, owned by the defendant, Frank Sponzo. The controlling complaint was filed on July 22, 2005. The operative answer/special defenses/counterclaim(s) was filed on October 26, 2005. The plaintiff has applied for a prejudgment remedy in the amount of $1 million. The defendant has contested the application and asserts the following: the application is unreasonable high and is subject to a defense and counterclaim; and the plaintiff should be required to post a bond to secure himself against any damage that may result from the granting of the prejudgment remedy.

II

FINDINGS OF FACT

The court has weighed all the evidence and assessed the credibility of the witnesses.[1]

The plaintiff and defendant entered into a written lease whereby the plaintiff leased from defendant a

building located in Bloomfield for a five-year term, commencing on July 15, 1999. On or about December 23, 2002, the defendant obtained judgment for the possession of the leased premises. Thereafter, on January 10, 2003, Abraham Glassman, a state marshal, served the execution which led to the plaintiff's eviction. On January 17, 2003, Glassman was present at the leased premises when the plaintiff was evicted.

The plaintiff offered evidence that he was not allowed to remove his trade fixtures, displays, business and personal property from the leased premises, that the defendant damaged or discarded the plaintiff's personal property, and that, consequently, the plaintiff was unable to conduct his business to his detriment.

During the course of the hearing, the defendant extensively cross-examined the plaintiff's witnesses.

III

DISCUSSION

A

Prejudgment Remedy

" 'Prejudgment remedy' means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order." General Statutes § 52-278a (d).

Prejudgment remedies are statutory devices designed to bring the defendant's assets into custody as security for the satisfaction of the judgment the plaintiff may recover. They are limited by definition to attachments, foreign attachments, garnishments, replevin, or a combination thereof. *Feldmann v. Sebastian*, 261 Conn. 721, 728, 805 A.2d 713 (2002).

(1)

Statutory Requirements

An application for prejudgment remedy must comply with all the statutory requirements. General Statutes § 52-278c provides in relevant part: "(a) Except as provided in sections 52-278e and 52-278f, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents: (1) An application, directed to the Superior Court to which the action is made returnable, for the prejudgment remedy requested; (2) An affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any known defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff; (3) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that

notice of such hearing complying with subsection (e) of this section be given to the defendant; (4) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing;...." If the plaintiff fails to attach an affidavit, the application must be denied. Lauf v. James, 33 Conn.App. 223, 229, 635 A.2d 300 (1993).

(2)

Defendant's Claim and Request for Hearing

*2 "A defendant may request a hearing to contest the application for a prejudgment remedy, assert any exemption or make a request concerning the posting or substitution of a bond .... whether the claim is an assertion of a defense, counterclaim, set-off or exemption, an assertion that any judgment that may be rendered is adequately secured by insurance, an assertion that the amount sought in the application for the prejudgment remedy is unreasonably high, a request that the plaintiff be required to post a bond to secure the defendant against any damages that may result from the prejudgment remedy or a request that the defendant be allowed to substitute a bond for the prejudgment remedy." General Statutes § 52-278c (g).

(3)

Hearing

"The purpose of a prejudgment remedy probable cause hearing is to satisfy the constitutional due process right of parties whose property rights are to be affected, to be heard at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Plasil v. Tableman*, 223 Conn. 68, 76, 612 A.2d 763 (1992).

Pursuant to General Statutes § 52-278d (a), the prejudgment remedy hearing is limited to a determination of: "(1) whether or not there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff, (2) whether payment of any judgment that may be rendered against the defendant is adequately secured by insurance, (3) whether the property sought to be subjected to the prejudgment remedy is exempt from execution, and (4) if the court finds that the application for the prejudgment remedy should be granted, whether the plaintiff should be required to post a bond to secure the defendant against damages that may result from the prejudgment remedy or whether the defendant should be allowed to substitute a bond for the prejudgment remedy."

(4)

Probable Cause

"The role of the court in considering an award of a prejudgment remedy is well established. Pursuant to our prejudgment remedy statutes ... the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits.... The hearing in probable cause for the issuance of a prejudgment remedy is not contemplated to be a full scale trial on the merits of the plaintiff's claim. The plaintiff does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim.... The court's role in such a hearing is to determine probable success by weighing probabilities....

"The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it.... Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false." (Citations omitted; internal quotation marks omitted.) *J.K. Scanlan Co. v. Construction Group, Inc.*, 80 Conn.App. 345, 349-350, 835 A.2d 79 (2003).

*3 "If the court, upon consideration of the facts before it and taking into account any defenses, counterclaims or set-offs, claims of exemption and claims of adequate insurance, finds that the plaintiff has shown probable cause that such a judgment will be rendered in the matter in the plaintiff's favor in the amount of the prejudgment remedy sought and finds that a prejudgment remedy securing the judgment should be granted, the prejudgment remedy applied for shall be granted as requested or as modified by the court." § 52-278d (a).

(5)

Purpose

"[P]rejudgment remedy proceedings pursuant to the provisions of [§ 52-278d] are not involved with the adjudication of the merits of the action brought by [a] plaintiff or with the progress or result of that adjudication. They are only concerned with whether and to what extent [that] plaintiff is entitled to have property of the defendant held in the custody of the law pending adjudication of the merits of that action." *Hartford Accident & Indemnity Co. v. Ace American Reinsurance Co.*, 279 Conn. 220, 230, 901 A.2d 1164 (2006).

"The purpose of the prejudgment remedy of attachment is security for the satisfaction of the plaintiff's judgment, should he obtain one.... It is primarily designed to forestall any dissipation of assets by the defendant and to bring [those assets] into the custody of the law to be held as security for the satisfaction of such judgment as the plaintiff may recover.... The adjudication made by the court on [an] application for a prejudgment remedy is not part of the proceedings ultimately to decide the validity and merits of the plaintiff's cause of action. It is independent of and collateral thereto...." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Morris v. Cee Dee, LLC*, 90 Conn.App. 403, 412, 877 A.2d 899 (2005).

"The purpose of the prejudgment remedy statute is to secure the defendants' assets, forestalling the dissipation thereof, while awaiting a final judgment.... The purpose of the statute is to allow a plaintiff who can show probable cause that he will eventually succeed on the merits to encumber property of the defendant to protect himself from obtaining a judgment which cannot be satisfied. At the same time the statute seeks to protect the defendant from unreasonable encumbrances. It is as necessary to protect a plaintiff who has won at the trial level, when the final disposition of the case awaits appellate proceedings,

as it is to protect that same plaintiff before trial .... a prejudgment remedy is [also] available to a plaintiff who has won at the trial level and whose case is on appeal...." (Citations omitted; internal quotation marks omitted.) *Gagne v. Vaccaro*, 80 Conn.App. 436, 452-53, 835 A.2d 491 (2003).

(6)

Motion to Disclose

A motion to disclose may be granted as to any appearing defendant after the court has found probable cause. General Statutes § 52-278n;[3] Practice Book § 13-13.

B

Analysis

*4 Based on the evidence presented, the court finds there is not probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff. The plaintiff has not met his burden of proof.

IV

CONCLUSION AND ORDER

For the above-stated reasons, the application for prejudgment remedy is denied.

All Citations

Not Reported in A.2d, 2007 WL 1827160

Footnotes

1 "The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties...." (Internal quotation marks omitted.) *Cavolcki v. DeSimone*, 88 Conn.App. 638, 646, 870 A.2d 1147 (2003), cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005).

"It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony....It is the quintessential function of the fact finder to reject or accept certain evidence...." (Citations omitted; internal quotation marks omitted.)" *In re Antonio M.*, 56 Conn.App. 534, 540, 744 A.2d 915 (2000). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact]." *Smith v. Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981). "[N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony." (Citation omitted; internal quotation marks omitted.) *Toffolon v. Avon*, 173 Conn. 525, 530, 378 A.2d 580 (1977). "The trier is free to accept or reject, in whole or in part, the testimony offered by either party." *Smith v. Smith*, supra, 183 Conn. at 123. "That determination of credibility is a function of the trial court." *Heritage Square, LLC v. Eoanou*, 61 Conn.App. 329, 333, 764 A.2d 199 (2001).

"The trier is free to juxtapose conflicting versions of events and determine which is more credible.... It is the trier's exclusive province to weigh the conflicting evidence and determine the credibility of witnesses.... The trier of fact may accept or reject the testimony of any witness.... The trier can, as well, decide what-all, none, or some-of a witness' testimony to accept or reject ." (Citations omitted; internal quotation marks omitted.) *State v. Osborn*, 41 Conn.App. 287, 291, 676 A.2d 399 (1996).

The trial court's function as the fact finder "is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *In re Christine F.*, 6 Conn.App. 360, 366, 505 A.2d 734, cert. denied, 199 Conn. 808, 508 A.2d 769 (1986).

2 General Statutes Sec. 52-278n: "Motion to disclose property. Order for disclosure. Substitution of surety.

(a) The court may, on motion of a party, order an appearing defendant to disclose property in which he has an interest or debts owing to him sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts shall be subject to disclosure. The form and terms of disclosure shall be determined by the court.

(b) A motion to disclose pursuant to this section may be made by attaching it to the application for a prejudgment remedy or may be made at any time after the filing of the application.

(c) The court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has, pursuant to section 52-278d, 52-278e or 52-278i, probable cause sufficient for the granting of a prejudgment remedy.

(d) A defendant, in lieu of disclosing assets pursuant to subsection (a) of this section, may move the court for substitution either of a bond with surety substantially in compliance with sections 52-307 and 52-308, or of other sufficient security.

(e) Rules of court shall be enacted to carry out the foregoing provisions and may provide for reasonable sanctions to enforce orders issued pursuant to this section."

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