

STATE OF MICHIGAN



NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

GREGORY A. DEHAAN,

Plaintiff,

HON. PAMELA L. LIGHTVOET P47677

FILE NO. 2016-0176-CB

v

JAMES E. SANDERSON, SCOTT E. SANDERSON,
NANCY A. SANDERSON, TRENTON R. HAYWARD,
JAMES R. BURNS III, THOMAS LARABEL,
MICHAEL MCGIVNEY, GREEN HOLDINGS, LLC,
BENCHMARK ASSET MANAGEMENT, LTD,
CATENARY PARTNERS, LLC,

Defendants.

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**OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION,
TO COMPEL ARBITRATION, AND TO STAY PROCEEDINGS**

At a session of said Court held in the
City and County of Kalamazoo, Michigan
on this 2nd day of August, 2016;

HON. PAMELA L. LIGHTVOET, CIRCUIT COURT JUDGE

Pending before the Court is Defendants' Motion for Summary Disposition, to Compel Arbitration, and to Stay Proceedings.

FACTS

Plaintiff and Defendant Scott Sanderson founded Allen Edwin Homes in September 1994. Defendant Jim Sanderson formed Catenary Partners, LLC (Catenary) in September 1995. Plaintiff and Defendant Scott Sanderson incorporated Benchmark Asset Management, LTD (Benchmark) in January 1998. Defendant Trenton Hayward formed Green Holdings, LLC (Green Holdings) in December 2006.

On January 1, 2009, an Operating Agreement for Green Holdings went in to effect. The Operating Agreement was signed by Plaintiff, Scott Sanderson for Benchmark, James Sanderson for Catenary, James Sanderson, Scott Sanderson, Trenton Hayward, Michael McGivney, James Burns, III, and other members of Green Holdings. The Operating Agreement contained Article 4.12 which states:

Action by Written Consent. Any action which is required to be taken or which may be taken at any annual or special meeting of Members may be taken without a meeting, without prior notice and without a vote if all of the Members entitled to vote thereon consent in writing.

On November 24, 2015, a special meeting was held for Green Holdings members where an amendment to Article 4.12 of the Operating Agreement was proposed. The proposed amendment to Article 4.12 states:

Action by Written Consent of Majority of Members. All matters requiring a vote may be taken without a vote if consents in writing, setting forth the action so taken, are signed by the holders of Sharing Ratios having not less than the minimum amount of Sharing Ratios that would be necessary to authorize or take the action submitted. The written consents shall bear the date of signature of each member who signs the consent and must be delivered to a manager. Prompt notice of the taking of the action without a meeting by less than unanimous written consent shall be given to all Members who would have been entitled to a vote on such action.

Plaintiff abstained and Benchmark did not vote on the approval of this amendment. The proposal was passed with the affirmative vote of 62.64%. On April 14, 2016, another proposal was made to amend the Operating Agreement to add an arbitration provision in Article 14. Plaintiff voted against this amendment

on April 20, 2016, and Benchmark abstained from voting. This proposal was also passed with an effective date being April 14, 2016.

On April 20, 2016, Plaintiff filed a Complaint alleging:

- Count I – Breach of Fiduciary Duties – MCL 450.4404
- Count II – Breach of Fiduciary Duties
- Count III – Minority Oppression – Green Holdings
- Count IV – Breach of Fiduciary Duty – Benchmark
- Count V – Minority Oppression – Benchmark
- Count VI – Unjust Enrichment
- Count VII – Promissory Estoppel

Defendants filed this Motion for Summary Disposition, to Compel Arbitration, and to Stay Proceedings pursuant to MCR 2.116(C)(7), MCR 3.602, and the Michigan Revised Uniform Arbitration Act, MCL 691.1681, *et seq.* The Court heard oral arguments from the parties on June 13, 2016.

STANDARD OF REVIEW

Summary disposition is available under MCR 2.116(C)(7) when a “claim is barred by a release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). A defendant who files a motion for summary disposition under (C)(7) may file supportive material such as affidavits, depositions, admissions, or other documentary evidence. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995). When reviewing these motions, the court will accept the plaintiff’s well-pleaded factual allegations as true unless contradicted by the parties’ supporting affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). “If no facts are in dispute, whether the claim is statutorily barred is a question for the court as a matter of law.” *Adams v Adams*, 276 Mich App 704, 720; 742 NW2d 399 (2007).

ANALYSIS

Pursuant to MCL 691.1686(2) “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” Michigan courts have consistently reasoned that “our Legislature and our courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation.” *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118,133; 596 NW2d 208 (1999). As a result, “any doubts about the arbitrability of an issue should be resolved in favor of arbitration.” *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 499; 591 NW2d 364 (1998).

It must first be determined whether an agreement to arbitrate exists. Counts IV and V involve a breach of fiduciary duty and minority oppression involving Benchmark and Scott Sanderson. Although Defendants argue that Benchmark and Scott Sanderson have consented to arbitration, there has been no evidence presented to show that an arbitration agreement between Benchmark and Plaintiff exists. Therefore, Plaintiff’s claims against Benchmark are not subject to arbitration and Defendants’ Motion as to these claims is denied.

Plaintiff’s remaining claims arise out of Plaintiff’s Operating Agreement with Green Holdings. Thus, it must be determined whether a valid arbitration agreement exists with regard to the remaining claims. Plaintiff argues that he did not consent to arbitration because he did not sign and approve of the amendment adding in the arbitration provision. Defendants argue that Plaintiff is bound by Amended Operating Agreement and its arbitration provision because the Amended Operating agreement was approved in writing by a majority vote of the members pursuant to Article 4.12 of the Operating Agreement.

Article 13.1 of the original Operating Agreement states:

This Agreement...except as provided in Article 7, may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by the party sought to be charged with such amendment or waiver.

Defendants argue that it is clear that the reference in Article 13.1 to “Article 7” was intended to reference Article 9. Article 9 of the Operating Agreement states:

Amendments to this Agreement and to the Articles of Organization shall be adopted and become effective only if approved in writing by the Members holding a majority of the voting power allocable to the voting interests as set forth on the Capital Contribution Schedule; provided, however, no such amendment shall be adopted without the affirmative vote of a majority of the Sharing Ratios allocable to the nonvoting interests if the amendment (i) affects the distributions or allocations to the Members holding nonvoting interests or (ii) affects the limited liability of the Members holding nonvoting interests or (iii) the status of the Company as a partnership for federal income tax purposes.

Even if Article 13.1 stated “except as provided in Article 9,” this directly contradicts Article 4.12, which prior to the proposed amendment, stated that:

Action by Written Consent. Any action which is required to be taken or which may be taken at any annual or special meeting of Members may be taken without a meeting, without prior notice and without a vote if all of the Members entitled to vote thereon consent in writing.

This Article requiring unanimous written consent was in effect for almost seven years before the proposed amendment. The proposed amendment to Article 4.12 was addressed at a special meeting on November 24, 2015, and Plaintiff did not consent to the amendment of Article 4.12.

The Amended Operating Agreement does contain an arbitration provision. However, Plaintiff did not sign the Amended Operating Agreement that contains the arbitration provision. In fact, Plaintiff specifically objected to adding the arbitration provision. Plaintiff only signed and consented to the prior Operating Agreement that did not contain an arbitration provision. In addition, Plaintiff did not consent in writing to the November 24, 2015, amendment of Article 4.12. Thus, the Arbitration Provision is not binding on Plaintiff as he never agreed to the amendment in writing.

OPINION

An arbitration agreement does not exist between Benchmark and Plaintiff. Therefore, Plaintiff's claims against Defendant Benchmark are not subject to arbitration. As to Plaintiff's remaining claims, the Green Holding's Operating Agreement was not properly amended to bind Plaintiff to the arbitration

provision. Therefore, the Court finds that Plaintiff's remaining claims are also not subject to arbitration. Thus, Defendants' Motion for Summary Disposition, to Compel Arbitration, and to Stay Proceedings is DENIED.

IT IS SO ORDERED.

Date: August 2nd, 2016



HON. PAMELA L. LIGHTVOET (P47677)
Circuit Court Judge