SUPERIOR COURT OF NEW JERSEY

ROBERT P. CONTILLO, P.J.Ch.
CHANCERY DIVISION

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Re: Good Anchorage Ltd. V. Dmitry Meleshko-Petrakov, et al.
Docket No. C-87-15

Letter Decision on Motions for Summary Judgment

Dear Counsel:

Presently before the Court is a Motion for Summary Judgment filed by the plaintiff Good Anchorage Limited ("Plaintiff") and a Motion for Summary Judgment filed by the defendant Dimitry Meleshko ("Defendant"). On February 8, 2016, Plaintiff filed opposition. On February 9, 2016, Defendant filed opposition. The court heard oral argument on February 19, 2016. Trial is scheduled for March 21, 2016. For the reasons that follow, summary judgment will be entered in favor of Defendant and Plaintiff's motion for summary judgment will be denied.

The court will first consider Plaintiff's Motion for Summary Judgment. The Court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is

no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c). In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In this case, Plaintiff argues that the plain language of Plaintiff's Operating Agreement entitles Plaintiff to the source code developed by Defendant. The Operating Agreement states that "[a]ll content elements collected, transcribed, recorded, communicated, displayed and/or downloadable for the Company or on the Company site ... is the exclusive property of the Company." (Operating Agreement at Ex. B). Plaintiff further contends that Defendant exchanged any rights he may otherwise hold in products developed on behalf of Plaintiff for shares of stock in the Plaintiff company and that Defendant got what he bargained for. However, Defendant has raised questions of material fact that necessitate denying Plaintiff's motion. First, the Operating Agreement is ambiguous over whether Class A stock has equity and is silent as to how many shares of Class A and B stock Plaintiff has authorized and issued. Further, the notes from the October conference call between Defendant, Dietmar Petutsching, and Todd Rapley reflect neither which classes of stock have equity nor how many shares each party is to receive. Further, Petutsching provided contradictory deposition testimony, agreeing that Class A stock has equity at one point, then agreeing that only Class B stock has equity later in the same deposition. These facts are material because the equity of Class A stock

and the total number of shares could significantly impact the value of the partnership interests for each partner. These issues also raise a material issue of fact over whether the parties ever had a meeting of the minds over essential terms of the Operating Agreement necessary to create an enforceable agreement.

Next, the court will consider Defendant's Motion for Summary Judgment. A contract may be rescinded due to mistake or equitable fraud. A contract may be rescinded on the ground of mistake if: (1) the mistake is of so great consequence that to enforce the contract as actually made would be unconscionable; (2) the subject of the mistake relates to a material feature of the contract; (3) the mistake occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) relief by rescission would not cause serious prejudice to the other party, except for loss of his bargain. Dugan Constr. Co., Inc. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 242 (App. Div. 2008). Equitable fraud requires proof of: (1) a material breach of a presently existing or past fact; (2) the maker's intent that the other party rely on it, and (3) detrimental reliance by the other party." First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 137 (2003).

The court finds mistakes sufficient to grant summary judgment in favor of Defendant and rescind the Operating Agreement. Here, several mistakes have occurred. First, the Operating Agreement does not specify which classes of stock have equity. In fact, the Operating Agreement is completely silent on equity and does not state whether any partner holds equity in the company. Instead, it only provides percentages of "partnership interest," a term defined as "the ownership interest of a Partner in the Company, which may be expressed as a percentage equal to such Partner's Capital

Account divided by the aggregate Capital Accounts of all Partners." (Ex. C to Certification of Petutschnig at Art. 1.01(j)). However, there is no evidence before the court that such capital accounts exist. Second, the Operating Agreement does not specify the number of shares authorized or issued by Plaintiff. Third, Plaintiff has not met several requirements under Vanuatu law, which governs the Memorandum of Association. Plaintiff has never issued Defendant a share certificate, though such issuance is required by Vanuatu Companies Code § 88.1, nor registered Defendant's name on a Vanuatu registry as required under Vanuatu Companies Code § 114, nor properly filed an annual report with the Vanuatu Ministry of Finance listing all members of the company as required under Vanuatu Companies Code § 127.

These mistakes are of great consequence and relate to a material features of the contract. These mistakes greatly affect the potential value of each partner's interest in Plaintiff. The Operating Agreement does not specify the number of shares issued as Class A and Class B stock to each partner and does not confirm whether Class A stock has equity, nor even identify what number of shares are Class A versus Class B, nor what percentage of issued shares are Class A versus Class B. There is no viable way for the court to 'fix' the mistakes, nor a request from either party that it do so. These mistakes have the effect of rendering Defendant's ownership interest in Plaintiff illusory and unenforceable. Defendant has no way to enforce his shares in Plaintiff because the Operating Agreement does not state how many shares of equity Defendant holds, Plaintiff never issued Defendant share certificates, and Plaintiff never registered Defendant's interest in Plaintiff with government of Vanuatu. Instead, Plaintiff re-affirmed to Vanuatu that Defendant has not taken any shares and that the only shares

taken are those taken by the purported nominees of members Petutschnig and Rapley (see Annual Return of Good Anchorage Limited filed October 20, 2014). In addition, the Memorandum of Association, the governing document of Plaintiff, does not list Defendant as an owner of shares in the company, though this is likely because the integration of Defendant into the company was being attempted at the same time the document was created and filed. Next, there is no evidence that Defendant did not exercise reasonable care in failing to discover that Plaintiff had not provided Defendant with ascertainable or quantifiable equity in the company. Finally, the only prejudice to Plaintiff caused by rescission will be loss of its bargain; namely ownership of any product made by Defendant on behalf of the Plaintiff, as the source code was created solely by Defendant, on his own uncompensated time. Therefore, the court holds that Defendant is entitled to rescission based on mistake.

The court also finds equitable fraud, which necessitates granting summary judgment in favor of Defendant. It is undisputed on this record that Petutsching and Rapley communicated to Defendant, both through negotiations and the Operating Agreement, that Defendant would receive an ownership interest in Plaintiff after agreeing to the terms in the Operating Agreement. Further, as discussed above, Defendant never actually received an enforceable ownership interest in Plaintiff. There is also no dispute that Petutsching and Rapley intended for Defendant to believe he had an ownership interest. In addition, Defendant detrimentally relied upon this incorrect representation by quitting his previous employment and dedicating significant amounts of time and energy towards developing the source code for Plaintiff. In making these findings, the court is not holding that Petutsching or Rapley committed fraudulent conduct in this case. A

claim of equitable fraud does not require proof of actual fraud. Instead, the court holds that Petutsching and Rapley made incorrect statements, intended for Defendant to believe those misstatements, and induced Defendant to rely upon these misstatements. He did, to his detriment. Therefore, Defendant has also established a claim for equitable fraud necessitating rescission of the Operating Agreement.

Upon rescission, the court must fashion an equitable remedy which places the parties in a position near where they would have been without the contract. See generally Thompson v. City of Atlantic City, 190 N.J. 359, 383-384 (2007). Before the contract was entered, Defendant held no interest in Plaintiff and was free to own the fruits of his labor. The court therefore deems the Operating Agreement void ab initio and holds that Defendant has the right to maintain ownership over the source code. Defendant also hereby loses any and all partnership interest and/or stock in Plaintiff.

The court declines to award expenses in favor of Defendant.

I. Conclusion

For the foregoing reasons, the court denies Plaintiff's Motion for Summary Judgment and grants Defendant's Motion for Summary Judgment.

Orders accompany this decision.

Sincerely yours,

Robert P. Contillo, P.J.Ch.

RPC:mgm
Enclosure