IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GEORGE C. BRANCA,	:	FEBRUARY TERM, 2001
	:	
Plaintiff	:	No. 2277
	:	
v.	:	COMMERCE PROGRAM
	:	
JOHN E. CONLEY, ET AL.,	:	
	:	
Defendants	:	Control No. 070899

OPINION

This matter arises over a dispute regarding the value of the purchase by a limited liability company of a resigning member/manager's interest in the company and the alleged concealment by the company of negotiations and contemplated sale of the company's assets to another company.

Presently before this court are the Preliminary Objections of defendants, John E. Conley ("Conley"), Arthur L. Augugliaro ("Augugliaro"), Daniel T. Driscoll ("Driscoll"), John Gebhardt ("Gebhardt"), Carey O'Donnell ("Donnell") and Cactus Integration Group, LLC ("Cactus"), asserting a demurrer to the Complaint of plaintiff, George C. Branca ("Branca").

For the reasons set forth, the Preliminary Objections are **Sustained** and the Complaint is **Dismissed** with prejudice. .

BACKGROUND

The operative facts as pleaded in the Complaint are as follows. Branca, a Pennsylvania resident, became a member of Cactus by virtue of the First Amendment to Cactus's Operating Agreement. Compl., ¶¶ 1, 12. See also, Compl., Exhibit B. Pursuant to the First Amendment, Branca, in exchange for his capital contribution of sixty-four thousand dollars ($64,000.00), was to receive a twenty and one-half

(20.5%) profit percentage interest and was liable for twelve and nine twentieths percent (12.45%) of the loss percentage. Id. at ¶ 12. Branca was appointed the executive vice president of Cactus, was given responsibility for the daily operations of Cactus and was employed as its chief operating officer. Id. at ¶ 14. Cactus, a Colorado Limited Liability Company, was formed pursuant to its Operating Agreement for the stated purpose of "providing integrated project management and completion for customers seeking back-up power sources for telecommunication sources." Id. at ¶ 9. See also, Compl., Exhibit A. All of the named individual defendants were both managers and members of Cactus.[1] Compl., ¶ 9.

Branca performed his duties from approximately June 1, 1998 until he resigned on September 31, 1999 on account of disagreements with other members regarding the day-to-day operations of Cactus. Id. at ¶ 16. Branca's resignation, which was tendered in Pennsylvania, was voluntary and not for cause. Id. at ¶ 17. On or about November 30, 1999, Conley, on behalf of Cactus and its members, notified Branca of its intent to exercise an option to purchase Branca's membership interest in Cactus pursuant to § 9.2 of the Operating Agreement. Id. at ¶ 18. See also, Compl., Exhibit C. Section 9.2(a) of the Operating Agreement reads as follows:

> In the event that a manager who is also a member of the company terminates his employment relationship, contractual relationship or managerial relationship with the company, then the company or its members (in proportion to their profit percentage interest), shall have the option but not the obligation to purchase the

[1] Specifically, pursuant to the Operating Agreement, Conley was to receive a fifty-one percent (51%) profit percentage interest and was liable for sixty-nine percent (69%) of the percentage loss interest. Compl., ¶ 10. Gebhardt was to receive twenty-five percent (25%) profit percentage interest and was liable for thirty-one percent (31%) of the loss. Id. Driscoll and O'Donnell were each to receive a twelve percent (12%) profit percentage interest but had no liability for any loss percentage. Id. Augugliaro is the Chief Financial Officer, Driscoll is the Vice President of Engineering, Gebhardt is a Vice President and O'Donnell is the Vice President of Sales and Marketing. Id. at ¶ 15.

> membership interest of such terminated member for the price and on the terms set forth in § 9.1 hereof.

Compl., Exhibit A at § 9.2(a). Section 9.1 of the Operating Agreement provides, in pertinent part, that:

> . . . the remaining members shall have the right, but not the obligation, to either purchase . . . or cause the company to purchase, 100% of the [resigning] member's membership interest in the company. The purchase price for such interest shall be agreed upon annually, in writing, by the members, or if no such agreement has been made, such value shall be the fair market value as determined by the company's accountants. . . .

Id. at § 9.1. At the time that Branca resigned, there was no purchase price of his interest in Cactus which had been agreed upon in writing. Compl., ¶ 21.

On January 27, 2000, defendants sent Branca an analysis of his interest in Cactus which was performed by Joseph A. Babich, CPA. Id. at ¶ 24. According to Babich's analysis, "fair market value" was defined as "the cash or cash equivalent price at which property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of relevant facts." Id. at ¶ 25. Babich's analysis purported to include a history of the company and all significant facts which would affect value; a review of the ownership of the company; and a detailed explanation of the method of valuation used which was the capitalized earning method. Id. at ¶ 26. See also, Compl., Exhibit D. Babich opined that the fair market value of Branca's 20.5% membership interest was only $131,817.00. Id. at ¶ 27. This was the only valuation that Branca received from the defendants or company's accountants regarding his interest in Cactus. Id. at ¶ 28.

During this same time period, defendants allegedly failed to disclose certain facts to Branca regarding the actual fair market value of Branca's interest in Cactus thereby allowing Branca to believe that

Cactus was experiencing financial difficulties. Id. at ¶ 22. Further, Conley met Branca in Pennsylvania and told him that Cactus was having severe financial problems, and that if Branca persisted in a battle regarding his ownership interest, Cactus might not survive. Id. at ¶ 29. Both Branca and Cactus purportedly hired attorneys to conduct negotiations about the matter. Id. at ¶¶ 31-32. Specifically, on February 14, 2000, Branca's counsel wrote a letter to Augugliaro requesting information about whether the Company had engaged in any discussions with respect to the potential sale of the company or its assets. Id. at ¶ 34. See also, Compl., Exhibit E. Augugliaro's response failed to include the name of any companies with whom Cactus was in discussions regarding its potential sale. Id. at ¶ 35. However, on March 15, 2000, defendants allegedly were in discussions with Invensys regarding the sale of all or a portion of the assets of Cactus, but defendants intentionally withheld this information from Branca in order to obtain his interest for less than its fair market value. Id. at ¶¶ 36-37. The discussions with Invensys and Cactus continued and Invensys and Cactus entered into a non-binding letter of intent on May 3, 2000. Id. at ¶¶ 38-39. See also, Compl., Exhibit G. Branca was intentionally not informed about the letter of intent. Compl. at ¶ 40.

In May, 2000, Conley again contacted Branca and met with him to discuss the value of his interest in Cactus. Id. at ¶ 41. Conley informed Branca, that despite the significant financial problems or Babich's valuation, the company was willing to pay Branca $425.000.00 for his membership interest and reimburse Branca for any federal and state income taxes paid by Branca on any earning of Cactus attributable for the period from January 1, 1999 until he was no longer a member of Cactus. Id. at ¶ 42. Pursuant to that conversation, on June 6, 2000, Cactus and Branca entered into a Settlement Agreement and Mutual General Release which effectively transferred Branca's 20.5% interest in exchange for $425,000.00 ("Settlement Agreement"). Id. at ¶ 43. See also, Compl., Exhibit H. Pursuant to the Settlement

Agreement, the parties agreed to release one another from all actions, causes of action, claims, debts and liabilities including any claims relating to the value of Branca's membership interest. Compl., Exhibit H at ¶¶ 3-5.

At no time prior to the signing of the Settlement Agreement was Branca ever informed of the negotiations or the agreement between Cactus and Invensys. Compl., ¶ 44. On July 11, 2000, Invensys purchased the assets of Cactus for thirty million dollars ($30,000,000.00). Id. at ¶ 45. At the same time, Invensys announced that for the twelve-month period, ending in March 31, 2000, Cactus had sales of $45.5 million and operating profits of $2.1 million. Id. at ¶ 46.

With this background, Branca filed his Complaint against Cactus and the individual defendants, asserting counts for breach of fiduciary duty, fraud, and civil conspiracy. Defendants filed Preliminary Objections, asserting that each of plaintiff's claims are barred by the release in the Settlement Agreement, as well as setting forth a demurrer to each count.

DISCUSSION

As a threshold issue, this court must resolve whether to apply Pennsylvania or Colorado law. Since the primary issue involves the applicability of the release in the Settlement Agreement, the court will first look to that agreement. Paragraph 10 of the Settlement Agreement states that it "shall be governed by the laws of the State of Colorado."[2] Compl., Exhibit H at ¶ 10. Further, the parties tacitly agree that Colorado law applies. See Defs. Mem. of Law, at 7; Pl. Mem. of Law, at 6. Additionally, Pennsylvania courts give

[2]Additionally, the Operating Agreement, along with the First Amendment which incorporates the Operating Agreement, direct that these agreements are to be construed pursuant to Colorado law. See Compl., Exhibit A at ¶ 18.8.

effect to choice of law provisions of a contract. Miller v. Allstate Ins. Co., 763 A.2d 401, 403 (Pa. Super. Ct. 2001). See also, Restatement (Second) of Conflict of Laws § 187(1)("[t]he law of the state chosen by the parties to govern their contractual rights will be applied, even if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."). Under these circumstances, this court will apply Colorado's substantive law. However, Pennsylvania's conflict of law rules direct that a Pennsylvania court apply Pennsylvania's procedural laws when it is serving as the forum state regardless of which state's substantive law applies. Larrison v. Larrison, 750 A.2d 895, 898 (Pa. Super. Ct. 2000). Therefore, the Pennsylvania standard for preliminary objections applies to the present motion.

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa. Super. Ct. 2000)(citation omitted). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa. Commw. Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000). In addition, "a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it." Baravordeh

v. Borough Council of Prospect Park, 699 A.2d 789, 791 (Pa. Commw. Ct. 1997)(citations omitted).

In support of their Preliminary Objections, defendants argue that the release in the Settlement Agreement effectively bars all of plaintiff's claims and that the exception to the parol evidence rule does not apply to vary or contradict the terms of the release. Defs. Mem. of Law, at 13-17. Plaintiff, in response, argues that the release is ineffective because it was induced by fraud and neither party intended the release to include fraud since the final draft of the release omitted all references to fraud while the original draft had included a release from fraudulent inducement. Pl. Mem. of Law, at 16-19. See also, Exhibit B, attached to Pl. Mem. of Law.

This court now holds that the release does in fact bar plaintiff's claims and the fraud exception to the parol evidence rule does not apply in the present instance.[3]

First, contrary to plaintiff's procedural argument that defendants are precluded from raising the Settlement Agreement in Preliminary Objections but must raise it as an affirmative defense as New Matter, this court may consider the Settlement Agreement which was properly attached to the Complaint at Exhibit H and is not bound to accept the allegations in the Complaint. Baravordeh, 699 A.2d at 791.

The Settlement Agreement, which explicitly addressed the dispute between Branca and defendants over the value of Branca's membership interest, includes the following language:

> Branca hereby releases Cactus and its members, managers, employees agents, successors and assigns from **all** actions, causes of actions, claims, debts and liabilities of **any kind** arising out of or relating to his association with Cactus or the termination of that association**, whether known or unknown, including, but not limited to, any claims relating to the value**

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[3]In concluding that the release bars all of plaintiff's claims, this court need not now address the other objections to those claims.

of his membership interest.

Compl, Exhibit H at ¶ 4. It also states that "it is the mutual intention of the parties to hereby fully and forever release one another and their respective successors and assigns from any claims related in any way to Branca's association with Cactus, whether as member, manager or otherwise, or as to the termination of that association." Id. at ¶ 6. Pursuant to that Agreement, the parties stipulated to the dismissal of an arbitration proceeding. Id. at ¶ 3. Further, paragraph 7 of the Agreement includes representations and warranties that each party has received independent legal advice; that each party has made all desired changes prior to executing the agreement; that neither party has made any statement or representation which was relied upon by the other party in executing the agreement; that each party and their attorneys and advisors have made an investigation of the facts as deemed necessary for the settlement; and that each party will indemnify the other and hold them harmless. Id. at ¶ 7. Additionally, the Settlement Agreement states that:

> This agreement is the final written expression and the complete and exclusive statement of all of the agreements, conditions, promises and covenants among the parties with respect to Branca's association with Cactus and the termination of that association, and this agreement supersedes all prior or contemporaneous agreements, negotiations, representations, understandings and discussions between the parties hereto and/or their respective counsel with respect to the subject matter covered hereby and shall take precedence over any such agreement.

Id. at ¶ 11.

Now, Plaintiff seeks to avoid this release, on the premise that it was induced by fraud. However, the clear and unambiguous language of the release and principles of Colorado law prohibit such tactics.

Under Colorado law, integration clauses generally allow contracting parties to limit future contractual disputes to issues relating to the express provisions of the contract. Nelson v. Elway, 908 P.2d

102, 107 (Colo. 1996)(citing Keller v. A.O. Smith Harvestore Prods., 819 P.2d 69, 72 (Colo. 1991)). Therefore, the terms of a contract intended to represent a final and complete integration of the agreement between the parties are enforceable and extrinsic or parol evidence offered to prove the existence of prior or contemporaneous agreements is inadmissible. Id. An exception to the parol evidence rule is when there are claims for fraudulent misrepresentation and/or negligent misrepresentation in the inducement of a contract. See, e.g., Keller, 819 P.2d at 73; Ficor, Inc. v. McHugh, 639 P.2d 385, 396 (Colo. 1982); Bill Dreiling Motor Co. v. Schultz 168 Colo. 59, 66, 450 P.2d 70, 73 (1969); Smith v. Kalavity, 515 P.2d 473, 475 (Colo. Ct. App. 1973).

However, this exception to the parol evidence rule is applied only in limited circumstances when the tort claims are not specifically prohibited by the terms of an agreement. Keller, 819 P.2d at 73. In Keller, the Colorado Supreme Court found that the particular circumstances of that case did not bar the plaintiffs-purchasers' claim for negligent misrepresentation because the integration clause and non-reliance provisions did not clearly and specifically disclaim reliance by the buyers on all representations made by the manufacture. Id. at 74. Rather, the court found that the non-reliance provisions simply state that the buyers recognize that certain oral and written statements were not "guarantees" and that the buyers did not rely upon those statements "as such". Id.

Here, unlike Keller, the language of the Settlement Agreement is clear, unambiguous and sufficiently specific in releasing both Branca and Cactus from all claims, whether known or unknown, including any relating to the value of his membership interest. Compl., Exhibit H at ¶¶ 3-4. Further, the representations and warranties clearly indicate that both parties were represented by counsel, both had made a sufficient investigation prior to executing the agreement and both are not relying on any statement, representation or promise of the other party in executing the agreement. Id. at ¶ 7. Contrary to plaintiff's argument, the fact that the executed Settlement Agreement did not specifically release any claim for fraudulent inducement, mistake, or concealment while a draft settlement agreement did specifically include these terms does not mean that the fraud exception to the parol evidence rule applies or that plaintiff can go forward with his claims. See Pl. Mem. of Law, at 18-19; Exhibit B attached to Pl. Mem. of Law. To hold otherwise would do violence to the clear and unambiguous language of the Settlement Agreement and its specific release of both parties.

This court is also persuaded by the language in Goff v. Boma Inv. Co., 116 Colo. 359, 366, 181 P.2d 459, 462 (1947), in which the court upheld a release as a bar to plaintiff's action. As the Colorado Supreme Court stated:

> '[i]t is not possible to believe that plaintiffs misunderstood the force, effect and import of the releases which they signed, or that they did not know that they thereby released, relinquished, satisfied, and discharged, for the consideration therein named, all claims and demands whatsoever which they had against defendant growing out of any and all contracts and transactions previous to the date of the releases.' If plaintiff in the present case had any doubt about the fullness of the release as expressly stated therein, he should have refused to sign it or had it limited to cover known claims.

Id. at 366, 181 P.2d at 462. The release in that case contained similar, all-inclusive language as the one in the present case. As in that case, this court finds the release and Settlement Agreement to bar all of plaintiff's claims.

Moreover, plaintiff seeks to base his claims on events which occurred after he resigned as a member and manager of Cactus, i.e., the purported failure to disclose the negotiations with and subsequent sale of assets to Invensys and defendants' alleged duty to make such disclosures and their active concealment. See Compl., Counts I-III. Though plaintiff contends that he remained a member after he resigned as a manager of Cactus and should be entitled to a higher value for his interest as a consequence of that sale, the clear and unambiguous language of the Settlement Agreement indicates that his "status as member and manager terminated on October 1, 1999." Compl., Exhibit H - Second "Whereas" Clause. Defendants argue that plaintiff should not be entitled to use a different date for the valuation of his interest as it would not be logical since, in the inverse, if the company were to fall apart, plaintiff would then have to take less money for his interest. This court is persuaded by this argument and finds that the proper date for valuing plaintiff's interest was October, 1999 and that plaintiff should not now be able to recover for events occurring after that date which could have affected the value of his interest. See Bromberg and Ribstein on Partnership, § 7.13(b)(1) (commenting that the value of a departing partner's interest should be "computed as of the date of dissolution rather than the later time of settlement, which means the outgoing interest is protected, as against the other partners, from post-dissolution loses and does not get the benefit of post-dissolution appreciation."). Therefore, the clear language of the Settlement Agreement also negates the merit of plaintiff's claims since it unambiguously sets the date for which the plaintiff's status as both member and manager terminated.

CONCLUSION

For the reasons set forth, the court is issuing a contemporaneous Order, sustaining the Preliminary Objections and dismissing the Complaint with prejudice.

BY THE COURT,

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JOHN W. HERRON, J.

Dated: October 30, 2001

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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CIVIL TRIAL DIVISION

GEORGE C. BRANCA,	:	FEBRUARY TERM, 2001
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Plaintiff	:	No. 2277
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v.	:	COMMERCE PROGRAM
	:	
JOHN E. CONLEY, ET AL.,	:	
	:	
Defendants	:	Control No. 070899

ORDER

AND NOW, this 30th day of October, 2001, upon consideration of defendants' Preliminary Objections to the Complaint, plaintiff's opposition thereto, all respective memoranda, having heard oral argument on the issue, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Preliminary Objections are **Sustained** and plaintiff's Complaint is **Dismissed** with prejudice.

BY THE COURT,

JOHN W. HERRON, J.