

IN THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LOUIS J. CAPANO, III,)
)
 Plaintiff,)
)
 v.) Civil Action No. N10C-11-228 WCC
)
DARIN A. LOCKWOOD and)
DON A. LOCKWOOD, jointly)
and severally,)
)
 Defendants.)

Submitted: September 9, 2011
Decided: December 28, 2011

On Defendants’ Amended Motions to Dismiss – DENIED

ORDER

Jeffrey M. Weiner, Esquire, 1332 King Street, Wilmington, DE 19801. Attorney for Plaintiff Louis J. Capano, III.

John W. Paradee, Esquire, Stephen E. Smith, Esquire, and Nicole M. Faries, Esquire, Prickett, Jones & Elliott, PA, 11 North State Street, Dover, DE 19901. Attorneys for Defendant Darin A. Lockwood.

John E. O’Brien, Esquire, Brown, Shiels & O’Brien, 108 E. Water Street, PO Drawer F, Dover, DE 19903. Attorney for Defendant Don A. Lockwood.

CARPENTER, J.

On this 28th day of December, 2011, upon consideration of Defendants Darin A. Lockwood and Don A. Lockwood's Amended Motions to Dismiss, it appears to the Court that:

1. Plaintiff Louis J. Capano, III ("Plaintiff") and Louis J. Capano, Jr., are the sole members of Milton Investments, LLC ("Investments"). Defendants Darin and Don Lockwood are the sole members of Lockwood Brothers II, LLC ("Lockwood"). In December of 2004, the two LLCs owned by the parties formed a new LLC, North Milton Development Group, LLC ("NMDG") and negotiated and executed a series of agreements in connection with the purchase of land known as the "Rust property" located just outside of Milton, Delaware. The parties intended to use the land for both commercial and residential real estate development. The agreement forming NMDG was signed by Darin Lockwood and Louis J. Capano, III as authorized by members of their LLCs.
2. In order to purchase the land, Investments and Lockwood entered into a loan agreement with Wilmington Trust Company. This acquisition loan obtained for the purchase was guaranteed by the principals of Investments and Lockwood. The day prior to NMDG'S formation,

the principals of Investments and Lockwood allegedly executed a Contribution Agreement related to the loan that was being acquired to purchase the land.¹ Under the Contribution Agreement the four principals of Investments and Lockwood guaranteed the loan from Wilmington Trust and gave each other a right of contribution in the event that Wilmington Trust made a demand on some but not all of the guarantors. The Contribution Agreement gave each guarantor a right of contribution for payments demanded by the bank that exceeded that principal's share of liability as set forth in NMDG LLC Agreement.

3. Subsequently, Wilmington Trust loaned over \$7 million to NMDG, but due to the downturn in the housing market, the development project did not proceed as originally planned. Instead of being used to build homes the land has largely remained farmland that has been rented out for agricultural purposes. The land's rental income is insufficient to pay the monthly interest on the loan, and as a result, Wilmington Trust billed NMDG in August and September of 2010

¹ The Court uses the term "allegedly" since the document provided to the Court has not been signed by all of the parties who guaranteed the loan.

for monthly interest on the loans. The Plaintiff paid the bills from the bank and filed a Complaint in this Court to enforce the Contribution Agreement, claiming that he has paid more than his share of liability for the loan. Defendants moved to dismiss Plaintiff's Complaint, asserting that this Court lacks jurisdiction to hear Plaintiff's claim because of an arbitration clause in the NMDG Agreement.

4. The LLC Agreement forming NMDG has an arbitration provision requiring NMDG's members to submit to an agreed arbitrator "all disputes among or between members involving or relating to" four specific areas: (1) interpretation of the LLC agreement; (2) a member's breach of the terms of the LLC Agreement; (3) the duties, rights & obligations of Members and Managers under the Agreement; and (4) any deadlock between Managers or Members or enforcement of the provisions [of the agreement].² The Court also notes that while this is the first dispute in this Court regarding the relationship of these parties and the application of the arbitration clause, it is not the first time the matter has been litigated. Vice Chancellor Parsons has issued an exhaustive opinion on the subject which this Court adopts and finds consistent with the ruling that is being made in this

² LLC Agreement, Article XIV.

litigation.³ Vice Chancellor Parsons, agrees that while the arbitration provision is “expansive” and “captures a wide swatch of issues” it is specific and narrow in scope. In other words, while the provisions are broad, the parties still have to fit the dispute into one of the four categories set forth in the Agreement. As a result, the sole issue before the Court is whether Plaintiff’s claims are within the scope of the arbitration clause and whether the arbitration clause binds the parties now before the Court, none of whom signed the LLC agreement in their individual capacities.

5. To determine whether Plaintiff’s claims are within the scope of the arbitration clause, the Defendants assert that the Court must simply find that the documents are so interrelated that the Contribution Agreement “depend[s] on the existence” of the LLC Agreement.⁴ Plaintiff alleges that he has been required to pay the Bank more than his liability share of the loan. The Contribution Agreement defines “liability share” as the share of the parties’ obligations and liabilities

³ This Court’s decision is in harmony with the Court of Chancery’s decision in *Milton Investments, LLC v. Lockwood Brothers, II, LLC*, 2010 WL 2836404 (Del. Ch. Jul. 20, 2010), in which the Court of Chancery found the same arbitration clause at issue here to be narrow but expansive, such that it encompassed claims under another contract that was executed at the same time as the LLC and Contribution Agreements.

⁴ See *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. Nov. 4, 2002) (analyzing whether fiduciary duty claims implicated contractual obligations by asking whether the claims depended on the existence of the contract).

for the loan, “being limited to the LLC Interest (*as defined in the LLC Agreement*)” (emphasis added).⁵ Thus, the Defendants argue that Plaintiff cannot establish that he paid more than his liability share of the loan, nor can he establish the amount owed him by the Defendants, without referencing the LLC Agreement’s definition of “LLC Interest”. The Defendants argue that because Plaintiff’s claims depend on the existence and interpretation of the LLC Agreement, they fall within the scope of its arbitration clause.

6. While it is true that Plaintiff’s claims refer to a term defined in the LLC Agreement, there is nothing in the record to suggest that the parties — either individually or as LLC members — dispute what is meant by the term “LLC Interest” or its application. A quick review of the LLC Agreement would seem to suggest that “LLC Interest” is not a term subject to multiple interpretations. Until the parties further develop the nature of this dispute and are able to clearly establish it is covered by the arbitration provision, the Court simply is unable to categorize the issues presented by the parties’ submissions into one of

⁵ Contribution Agreement, Covenants § 1.

the four areas subject to arbitration under the LLC Agreement. As such, there is no basis at the moment to dismiss this litigation.

7. The next question is whether the individual parties to this litigation are bound by the arbitration clause. The parties signed the Contribution Agreement individually but executed the LLC Agreement on behalf of their respective LLCs. Thus the issue is whether the Defendants can enforce the arbitration clause of an agreement they did not sign in their individual capacities. First, it is important to note that the LLC members of NMDG are not large corporations with thousands of stockholders. At the heart of this operation are two families who appear to have formed two LLCs for the sole purpose of developing a piece of real estate. While the LLC organization provides liability protection and a distinct vehicle for operating this particular enterprise, the controlling actions here are being made by four individuals who are acting in their own individual interests under the guise of their LLC. In addition, it appears the Court of Chancery of Delaware addressed this issue in *Ashall Homes Limited v. ROK Entertainment Group, Inc.*⁶ The Court of Chancery

⁶ *Ashall Homes Limited v. ROK Entertainment Group Inc.*, 992 A.2d 1239 (Del. Ch. Apr. 23, 2010).

held that the directors of a defendant corporation had standing to invoke a forum selection provision in an agreement even though the agreement was executed by the defendant corporation and the plaintiffs.⁷ The Court reasoned that the directors were closely related to the signatory corporation such that their enforcement of the clause was foreseeable by virtue of the relationship between the corporation and its directors.⁸ An even closer relationship between the individual and signatory-entity exists in this case: Plaintiff and the Defendants are each members of their respective two-member LLCs. Furthermore, the Contribution Agreement and the LLC Agreement “effectuated separate steps of a single integrated scheme,”⁹ that of creating and funding an LLC to handle a development project. The documents were contemporaneously executed and each was critical and interrelated to the parties’ ability to finance the development project. Therefore it was foreseeable that either party to the Contribution Agreement would invoke a clause in the LLC

⁷ *Id.* at 1249.

⁸ *Id.*

⁹ *See Id.* at 1251 (citing the rule that related contemporaneous documents be read together to hold that the forum selection provision of one agreement should apply to another agreement executed at the same time and in the same transaction).

Agreement if a covered event was in dispute. As such, the Court will enforce when appropriate the provision of the LLC Agreement in disputes between NMDG Members and between the individual partners who control the Member LLCs.

8. For the foregoing reasons, Defendants' Amended Motions to Dismiss are hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.