

ADDENDUM



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NEW WOOD RESOURCES LLC,)
)
 Plaintiff,) C.A. No. N20C-10-231 AML CCLD
)
 v.)
)
 RICHARD BALDWIN,)
)
 Defendant.)

Submitted: May 26, 2021
Decided: August 23, 2021

Upon Plaintiff's Motion for Judgment on the Pleadings – GRANTED

ORDER

The defendant in this case served as a manager of the plaintiff limited liability company from 2013 until his resignation in 2016. While he was a manager, some of the company's members sued the defendant for, among other things, breach of contract, breach of fiduciary duty, and negligence. To cover the costs of defending this suit, the defendant sought advancement and indemnification from the plaintiff company. After the plaintiff refused to advance the defendant's attorneys' fees and costs, the defendant filed an action in the Delaware Court of Chancery to enforce his advancement rights. In connection with that advancement action, the defendant signed a written undertaking promising to repay the advanced funds if it was later determined he was not entitled to indemnification under the plaintiff's governing agreement. The Court of Chancery ultimately determined the defendant was entitled

to advancement for the costs of defending the underlying lawsuit, and the plaintiff paid the amount ordered by the court. Thereafter, through the process prescribed in the LLC agreement, a majority of the plaintiff company's unitholders determined the defendant's conduct in the underlying lawsuit did not meet the contractually specified standard for indemnification.

The plaintiff then sought to claw back its payments, citing the defendant's written undertaking to repay. To that end, the plaintiff filed a breach of contract claim in this Court, alleging the defendant breached the LLC agreement and written undertaking by refusing to reimburse the advancement funds. The defendant counterclaimed, alleging the plaintiff breached the implied covenant of good faith and fair dealing by acting in bad faith when it determined he was not entitled to indemnification. The defendant later orally argued that this Court should imply a term into the LLC agreement requiring any indemnification decision to be made in good faith. The plaintiff now moves for judgment on the pleadings as to both its breach of contract claim and the defendant's counterclaim. Because (i) the LLC agreement and the defendant's undertaking unambiguously require the defendant to repay the advancement funds, (ii) the plaintiff did not make the indemnification determination, and (iii) the determination was made in accordance with the LLC agreement's express terms, the plaintiff's motion for judgment on the pleadings is granted.

FACTUAL & PROCEDURAL BACKGROUND

1. Plaintiff/Counterclaim Defendant New Wood Resources LLC (“New Wood”) is a Delaware limited liability company that operates a plywood and veneer manufacturing facility in Mississippi known as Winston Plywood & Veneer LLC (“WPV”).¹ Defendant/Counterclaim Plaintiff Richard F. Baldwin served as one of New Wood’s managers from 2013 until his resignation in 2016.² New Wood’s Second Amended and Restated Limited Liability Company Agreement (the “LLC Agreement”) provides New Wood’s managers with certain indemnification and advancement rights. Section 8.2 of the LLC Agreement states, in pertinent part:

Notwithstanding anything to the contrary in this Section 8.2, no Person shall be entitled to indemnification hereunder unless it is found (in the manner described below in this Section 8.2) that, with respect to the matter for which such Person seeks indemnification, such Person acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interests of the Company³

Section 8.2 goes on to establish the process for determining that a manager acted with the requisite good faith and in the company’s best interests:

The finding of the standard of conduct required above shall be made (a) by a majority vote of all of the Managers who are not parties to such Proceeding even though less than a quorum or (b) if there are no such Managers, or if such Managers so direct, by independent legal counsel in a written opinion or (c) *by holders of a Majority of the then-*

¹ Pl.’s Mot. at 2.

² *Id.*

³ *Id.* at 4.

outstanding Units (determined without regard to any Members that are parties to such Proceeding).⁴

Further, Section 8.3 provides that a manager shall be advanced the costs of litigation “without any determination as to the Person’s ultimate entitlement of indemnification.”⁵ Section 8.3 expressly conditions such right to advancement on the manager executing “a written undertaking . . . to repay all amounts so advanced if it shall ultimately be determined that such indemnified Person is not entitled to be indemnified.”⁶

2. On February 9, 2018, a member of New Wood that Baldwin managed, Oak Creek Investments, LLC (“OCI”), filed a complaint in the United States District Court for the Northern District of Mississippi against New Wood, WPV, and other third parties, alleging breach of contract, fraud, and breach of fiduciary duty among other things.⁷ On May 17, 2018, the defendants in the Mississippi federal action moved to dismiss for lack of subject matter jurisdiction and filed a lawsuit against OCI and Baldwin in the Delaware Court of Chancery (the “Delaware Plenary Action”). The Delaware Plenary Action asserted claims against OCI and Baldwin for, among other things, breach of fiduciary duty, breach of contract, and negligence.⁸ On May 25, 2018, OCI dismissed the Mississippi federal action and

⁴ *Id.* (emphasis added).

⁵ *Id.* at 4-5.

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *Id.* at 6.

re-filed its claims in Mississippi state court (the “Mississippi State Court Action”).⁹ The Mississippi State Court Action ultimately was dismissed in favor of the Delaware Plenary Action. On March 27, 2020, the Court of Chancery granted judgment in OCI and Baldwin’s favor in the Delaware Plenary Action.¹⁰

3. Beginning in 2018, Baldwin sought advancement under the LLC Agreement, but New Wood denied his advancement claim. Baldwin and OCI then filed a separate action in the Delaware Court of Chancery seeking advancement in connection with the lawsuits (the “Advancement Action”).¹¹ As required under Section 8.3, Baldwin signed a written undertaking promising to repay advanced funds if it was later determined he was not entitled to indemnification.¹² On October 14, 2019, the Court of Chancery ruled that Baldwin and OCI were entitled to advancement and ordered New Wood to pay \$269,881.61 in advancement, \$17,726.97 in prejudgment interest, and \$214,459.49 as indemnification or “fees on fees” for the fees and expenses incurred in enforcing Baldwin’s advancement right.¹³ The Court of Chancery later entered an order under Court of Chancery Rule 88 on August 26, 2020, ordering New Wood to pay an additional \$223,373.70 in

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.* at 6.

¹² *Id.* at 6-7.

¹³ Def.’s Suppl. Br., Ex. A.; *Richard F. Baldwin and Oak Creek Investments, LLC v. New Wood Resources, LLC*, Case No. 2019-0019-JRS (Del. Ch. Oct. 14, 2019).

advancement, \$30,682.71 in interest, and \$111,086.55 in indemnification.¹⁴ The total advancement amount ordered was \$541,664.99, and the total indemnification ordered was \$325,546.04. Neither party disputes these sums.¹⁵

4. On April 23, 2020, in accordance with Section 8.2, a majority of New Wood's unitholders issued a written consent (the "Written Consent") that determined Baldwin failed to act in good faith and therefore was not entitled to indemnification for fees or expenses incurred in the Mississippi State Court Action and the Delaware Plenary Action.¹⁶ Baldwin alleges this determination was made by New Wood's majority member, ACR Winston Preferred Holdings, LLC ("ACR"), acting on New Wood's behalf.¹⁷ Citing the written undertaking and the LLC Agreement, New Wood requested that Baldwin repay the advanced amounts, and Baldwin refused.¹⁸

5. On October 26, 2020, New Wood initiated this action, alleging Baldwin breached the LLC Agreement and written undertaking by failing to reimburse New Wood the advanced funds.¹⁹ On January 20, 2021, Baldwin filed his Answer, including three affirmative defenses and a counterclaim (the "Counterclaim"). The

¹⁴ *Id.*, Ex. B.; *Richard F. Baldwin and Oak Creek Investments, LLC v. New Wood Resources, LLC*, Case No. 2019-0019-JRS (Del. Ch. Aug. 26, 2020).

¹⁵ Pl.'s Supp. Br. at 2; Def.'s Supp. Br. at 2.

¹⁶ Pl.'s Mot. at 7.

¹⁷ Def.'s Resp. at 12.

¹⁸ Pl.'s Mot. at 7-8.

¹⁹ Pl.'s Compl. at 8-9.

Counterclaim seeks a declaratory judgment that: (i) New Wood is required to pay the attorneys' fees and costs Baldwin incurred in domesticating the judgment in the Mississippi State Action, (ii) Section 8.2 of the LLC Agreement contains an implicit term that any determination of the right of indemnification must be made in good faith, and (iii) the Written Consent by ACR was entered into in a bad faith attempt to avoid New Wood's indemnification obligation under the LLC Agreement.²⁰ On March 16, 2021, New Wood filed this Motion for Judgment on the Pleadings as to its breach of contract claim and Baldwin's Counterclaim.

6. After briefing was complete, the Court heard oral argument. At the conclusion of the hearing, the Court asked the parties to supplement the record regarding the specific amounts New Wood paid as advancement and indemnification. The Court also asked the parties to provide any relevant authority relating to Baldwin's assertion during oral argument that his counterclaim was both an implied covenant claim and an independent claim seeking to imply a term in the LLC Agreement. The Court took the Motion under advisement after the parties submitted their supplemental briefing on May 26, 2021.

PARTIES' CONTENTIONS

7. New Wood asserts it is entitled to judgment on the pleadings because the pleadings demonstrate Baldwin breached a valid agreement and there are no

²⁰ Def.'s Answer at 26.

material facts in dispute.²¹ New Wood argues Baldwin's Answer does not dispute the essential elements of New Woods' breach of contract claim.²² New Wood also maintains judgment on the pleadings is warranted because Baldwin has not asserted a valid defense or counterclaim.²³ New Wood contends Baldwin's implied covenant counterclaim fails because Baldwin lacks any support for the allegation that the Written Consent was issued in bad faith.²⁴ Further, the LLC Agreement expressly dictates how the indemnification is made and therefore there is no contractual gap for the implied covenant to fill.²⁵ Finally, in its supplemental briefing, New Wood contends that implying new terms into the LLC Agreement outside the scope of the implied covenant would be contrary to Delaware law because doing so effectively would re-write the parties' agreement.²⁶

8. Baldwin contends New Wood's motion must be denied because the allegations in the Counterclaim sufficiently put New Wood on notice of the claims against it.²⁷ Baldwin argues the Counterclaim and Affirmative Defenses contain well-pleaded allegations that New Wood: (i) purposefully delayed any payments to him, (ii) forced him to incur needless attorneys' fees and expenses, and (iii) induced

²¹ Pl.'s Mot. at 9.

²² *Id.* at 9-10.

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *Id.* at 11.

²⁶ Pl.'s Suppl. Br. at 5-6.

²⁷ Def.'s Resp. at 18.

ACR to enter into the Written Consent in bad faith so that it could improperly claw-back the advanced funds.²⁸ Baldwin maintains the implied covenant of good faith and fair dealing properly is invoked in this case because (i) there is a gap in Section 8.2 as to whether the indemnification decision must be made in good faith, and (ii) New Wood's refusal to indemnify Baldwin was unreasonable conduct that prevented him from receiving the fruits of his bargain.²⁹ In his supplemental briefing, Baldwin also argues the Court should invoke the doctrine of necessary implication to imply a good faith requirement into Section 8.2 of the LLC Agreement.³⁰ Without this implied term, Baldwin asserts New Wood unilaterally could defeat the indemnification rights for which Baldwin bargained.³¹ According to Baldwin, the parties would have included an explicit term requiring good faith had it not been so obvious that the parties intended for Section 8.2 to have such a limitation.³²

ANALYSIS

9. A party may move for judgment on the pleadings under Superior Court Civil Rule 12(c).³³ In resolving such a motion, the Court accepts the truth of all well-pleaded facts and draws all reasonable factual inferences in favor of the non-

²⁸ *Id.* at 15.

²⁹ *Id.* at 19.

³⁰ Def.'s Suppl. Br. at 4.

³¹ *Id.* at 4-5.

³² *Id.* at 4.

³³ *See* Del. Super. Ct. Civ. R. 12(c).