EFiled: Dec 15 2022 02:50PM EST
Filing ID 68626308
Case Number 350,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re: Dissolution of DOEHLER DRY INGREDIENT SOLUTIONS, LLC, a Delaware limited liability company,	:	No. 350, 2022
	:	Court below: Court of Chancery of the State of Delaware
	:	C.A. No. 2022-0354-LWW

APPELLEE GARRY BECKETT'S CORRECTED ANSWERING BRIEF

BERGER HARRIS LLP
David B. Anthony (I.D. No. 5452)
Zachary J. Schnapp (I.D. No 6914)
1105 N. Market Street, 11th Floor
Wilmington, Delaware 19801
(302) 655-1140 telephone
(302) 655-1131 facsimile
danthony@bergerharris.com
zschnapp@bergerharris.com

Attorneys for Appellee Garry Beckett

Dated: December 15, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

NATURE OF PROCEEDING

This appeal concerns Petitioner/Appellant Russell Davis's attempt to judicially dissolve Doehler Dry Ingredient Solutions, LLC pursuant to 6 *Del. C.* § 18-802. The Court of Chancery dismissed Davis's dissolution petition under Court of Chancery Rule 12(b)(6), holding that it "comes nowhere close to stating a reasonably conceivable claim for judicial dissolution." OP. at 17 n.73.

The trial court's ruling is grounded on established and settled Delaware law. Davis's Petition did *not* allege (i) existing voting deadlock, (ii) that the Company is insolvent or financially distressed, nor (iii) that the Company's defined business purpose became impossible to fulfill. The trial court also correctly observed that the Company's LLC Agreement contains contractual mechanisms to break any deadlock that could arise, but that, even if deadlock was alleged, Davis did not avail himself to those mechanisms.

On appeal, Davis makes three main arguments. First, Davis contends the trial court misapplied the pleading standard under Rule 12(b)(6). Second, Davis argues the trial court misapplied 6 *Del. C.* § 18-802 and imposed a good faith standard that is not required. Third, Davis asserts the trial court misconstrued the Company's LLC Agreement because he now claims that the mechanism to break any deadlock is inequitable. Each of Davis's arguments are without merit.

First, the trial court did not misapply Court of Chancery Rule 12(b)(6)'s reasonable conceivability standard. The trial court faithfully examined the four corners of the Petition. When co-Appellee Doehler North America, Inc. moved to dismiss the Petition, Davis could have amended his pleading in accordance with Court of Chancery Rule 15(aaa). Instead, Davis elected to move for summary judgment. Davis's allegations do not state a reasonably conceivable basis for dissolution because he did not allege voting deadlock, that the Company is financially distressed such that there is no business to operate, or that there was no contractual mechanism to resolve deadlock. The trial court correctly held that the Petition lacked any of the prerequisite factors for judicial dissolution.

Second, the trial court did not misapply 6 *Del. C*. § 18-802. Davis argues that the trial court imposed a "saintly deadlock requirement" on him and then concluded he did not satisfy the requirement because his allegations of deadlock were not genuine. Opening Brief at 30-31. Davis misstates Delaware law and the trial court's holding. The trial court did not require him to be "saintly." Rather, the trial court correctly held that Davis could not manufacture a prospective voting deadlock by affirmatively stating that he will vote against all future proposals regardless of their merit. Such a contrived, prospective deadlock, the trial court correctly held, cannot serve as the basis for judicial dissolution.

Third, the Company's LLC Agreement expressly provides for a mechanism to break voting deadlock. The trial court correctly held that in such circumstance, Davis must avail himself of that mechanism instead of seeking judicial dissolution. Davis argues that the contractual mechanism is unfair to him and does not guaranty his exit from the Company on terms he now considers acceptable to him. But Davis voluntarily entered the LLC Agreement and agreed to be bound by its terms. Thus, Appellant's *post hoc* argument that the LLC Agreement is unfair is nothing more than an effort to have this Court provide him a better bargain than the bargain he secured for himself. Moreover, the mechanism is fair because it applies equally to all members. Whether Davis can exit the Company on terms favorable to him is irrelevant. The relevant inquiry is whether the LLC Agreement provides a mechanism to break actual voting deadlock, which the trial court correctly held that it does. Davis's arguments, therefore, are without merit and trial court's ruling should be affirmed in its entirety.

SUMMARY OF ARGUMENT[1]

1. Denied. The Court of Chancery correctly applied the standard of review when considering a motion to dismiss under Court of Chancery Rule 12(b)(6).

2. Denied. The Court of Chancery correctly applied 6 *Del. C.* § 18-802 in holding that Davis did not plead facts sufficient to show that the Company cannot carry out its business in conformity with its LLC Agreement.

3. Denied. The Court of Chancery correctly interpreted the Company's LLC Agreement in holding that, even if there were an existing voting deadlock, there is a contractual mechanism to break the deadlock to which Davis did not avail himself.

[1] Appellee Beckett joins the arguments made by co-Appellee Doehler North America, Inc. in its Answering Brief in support of affirming the Court of Chancery.

STATEMENT OF FACTS

Doehler Dry Ingredient Solutions ("DDIS" or the "Company") was formed in 2017 for the purpose of "buying, sourcing, manufacturing, producing, distribution, packaging, marketing, and selling" dry foods, such as "air and freeze dried fruits and vegetables," for "business-to-business and direct consumer sales." OP. at 2.[2] The Company's affairs are governed by the Operating Agreement of Doehler Dry Ingredient Solutions, LLC (the "LLC Agreement"). A-0032-62.[3]

The Company is comprised of the following three members owning the following amounts: Russell Davis ("Davis"), by and through his controlled entity Crosskeys Associates Limited ("CKAL"), holds 25% of DDIS; Garry Beckett ("Beckett") holds 25% of DDIS; and Doehler North America, Inc. ("DNA") holds the remaining 50% of DDIS. OP. at 2-3. The Company is "manager managed" by a Board of Managers pursuant to Section 7(a) of the LLC Agreement. A-0043. Until March 24, 2022, the Board of Managers contained three managers: Davis, Beckett, and Stuart McCarroll ("McCarroll"). OP. at 2-3.

Beckett and DNA, representing a majority of the DDIS membership interests, voted by written consent on March 24, 2022 to adopt resolutions removing Davis as

[2] References to the Opinion are cited as "OP. at __."

[3] References to the Appendix to Opening Brief of Appellants Russell Davis and Crosskeys Associates, Ltd. are cited as "A-___."

a manager of the Company and limiting his ability to invoice the Company for compensation for future services. OP. at 3; A-0063-65.

On April 20, 2022, DNA filed an action against Davis and CKAL in the United States District Court for the District of Delaware asserting that Davis and CKAL breached the LLC Agreement by refusing to sell CKAL's units in DDIS to DNA. OP. at 4.

The next day, April 21, 2022, Davis responded by filing a petition in the Court of Chancery (the "Petition") seeking the judicial dissolution and winding up of DDIS under 6 *Del. C.* §§ 18-102 at 18-803, respectively. OP. at 5. The Petition asserted allegations under the heading "Irreconcilable Differences," asserting the existence of disagreements among the member and managers of the Company. A0071-73 (¶¶ 16-24). With respect to Beckett, Davis makes the following allegations:

- Beckett and DNA prohibited Davis from being paid for his services outlined in the LLC Agreement. *Id.* (¶ 19);
- Beckett hacked Davis's corporate email account and shared information with Andreas Klein ("Klein"), the chair of DNA's parent company. *Id.* (¶ 20); and
- Beckett formed one or more competitive companies. *Id*.

On May 20, 2022, DNA, McCarroll, and Klein moved to dismiss the Court of Chancery action under 12(b)(1)-(3) and (6). A-0076-77. In their brief in support, which was filed on May 27, 2022, movants explained that no deadlock exists

warranting dissolution and that, even if a deadlock did exist, the LLC Agreement contains a mechanism to break such a deadlock. A-0091, 104.

Importantly, the LLC Agreement provides in pertinent part at Section 12: "Upon the occurrence of an event of dissolution described in Section 1, or in the event that a deadlock cannot be duly resolved under the provision of Section 10(b), the Company shall terminate and be dissolved." A-0056. With respect to events of dissolution, Sections 1(h)-(j) of the LLC Agreement provide:

> (h) Term. . . . The Company's existence shall continue in full force and effect until the Company is dissolved upon the first to occur of the following events:
>
> (i) the unanimous determination of the Members to dissolve the Company; or
>
> (j) any event that makes the continued existence of the Company unlawful, including the entry of judicial dissolution.

A-0037. Section 10(b), in turn, provides: "In the event that the Members become deadlocked with respect to any decision that materially and adversely affects the Corporation's business as a result of their dispute, then such dispute shall be shall be [*sic*] resolved as [provided for in subsections 10(b)(i)-(vi)]." A-0054-55.

On June 1, 2022, Davis filed a motion for partial summary judgment. OP. at 5. Beckett filed an Answer to the Petition on June 10, 2022. A-0054-55. The Court

of Chancery heard oral argument on the motion to dismiss and motion for partial summary judgment on July 8, 2022. C001-67.[4]

On September 15, 2022, the Court of Chancery issued a Memorandum Opinion explaining the bases for its decision to grant the motion to dismiss the Petition under Court of Chancery Rule 12(b)(6). Opening Brief at Exhibit A. The following day, September 16, 2022, the Court of Chancery entered an Order dismissing the Petition with prejudice. *Id*. at Exhibit B.

Davis timely appealed by filing a Notice of Appeal in this Court on September 20, 2022. Davis's Amended Notice of Appeal states that the appeal is taken against DDIS, DNA, and Beckett.

[4] References to the Appendix to Appellee Garry Beckett's Answering Brief are cited as "C___."

ARGUMENT

I. THE CHANCERY COURT PROPERLY APPLIED THE PLEADING STANDAND UNDER RULE 12(b)(6).

A. Question Presented.

Whether the trial court properly applied the pleading standard in considering a motion to dismiss under Court of Chancery Rule 12(b)(6). OP. at 15-21; C042-43.

B. Standard of Review.

The Supreme Court reviews a trial court's ruling on a motion to dismiss *de novo*. *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits of Argument.

The Court of Chancery has observed:

> The text of § 18-802 does not specify what a court must consider in evaluating the 'reasonably practicable' standard, but several convincing factual circumstances have pervaded the case law: (1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate.

OP. at 17 n.72 (quoting *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009)).

Here, the trial court held that Davis "does not allege facts supporting an inference that the Company is deadlocked at the member or manager level." OP. at

17. Notably, Davis does not challenge this holding, nor could he credibly do so. The Petition does not allege that any member or manager vote resulted in a deadlock or that any issue could not be resolved due to an existing deadlock. Likewise, although the Petition did not reference the deadlock breaking mechanisms in the LLC Agreement, the Petition also did not allege the absence of a deadlock breaking mechanism. Finally, the Petition did not allege that Company was insolvent or that its financial position was so poor that it effectively made it impossible for the Company to carry out its business.

In the absence of an existing voting deadlock and in the face of a contractual deadlock breaking mechanism, Davis grasps at insignificant disagreements among the members. But Delaware law is consistent that mere disagreements among members and allegations of contractual or fiduciary breaches are not sufficient to warrant the drastic result of dissolving an operating going concern. The cases upon which Davis relies are materially distinguishable and cannot be squared with the facts here. *See* Opening Brief at 20-22.

In *In re: GR BURGR, LLC*, there was an actual deadlock between two co-equal members, the business purpose was no longer achievable, and the putative LLC agreement was without a deadlock breaking mechanism. 2017 WL 3669511, at *1, *7-*8 (Del. Ch. Aug. 25, 2017). In *Fisk Ventures*, the board had an existing voting deadlock, had been "perpetually deadlocked," the company had no

operations, and the exit mechanism drafted into the putative LLC agreement was not sufficient to break the existing deadlock. 2009 WL 73957, at *4-7. In *Haley v. Talcott*, there was an actual deadlock between two co-equal members concerning the disposition of the company's sole real property asset, the company's business operations were "a residual inertial status quo," and the LLC agreement did not contain a mechanism for equitably breaking that deadlock. 864 A.2d 86, 88-95, 97-98 (Del. Ch. 2004). And in *In re Silver Leaf, LLC*, the two co-equal members were actually deadlocked, the company's business purpose was moot, and there was no deadlock breaking mechanism in the LLC agreement. 2005 WL 2045641, at *1, *11 (Del. Ch. Aug. 18, 2005). Thus, in each case, there was at minimum an existing voting deadlock, no functioning business operations, and no contractual way to equitably break the deadlock. Not so here.

Despite the trial court's well-reasoned decision here and the principle woven through *GR Burger*, *Fisk Ventures*, *Haley*, and *Silver Leaf*, Davis argues that the trial court overlooked "the core thrust" of his argument that the Company must be dissolved. Opening Brief at 24. Davis's core thrust argument is that the LLC Agreement required him to work full time for the Company, but DNA and Beckett removed him as a manager of the Company and restricted his ability to be paid for future services so he cannot dedicate his full-time efforts managing the Company. *Id*. Davis never explains why his removal as manager and the limitation on his

ability to be paid for future services renders the Company incapable of carrying out its business in conformity with the LLC Agreement. Simply because Davis was no longer a manager and no longer had to devote his full-time efforts to managing the Company does not mean that the Company could no longer continue buying, sourcing, manufacturing, producing, distribution, packaging, marketing, and selling dried fruits and vegetables. Davis did not allege that his absence would render the Company unable to function. Nor could he so allege because the Company continues to operate in his absence as manager.

Davis's grievance that he was removed as manager and will not get paid anymore for managerial services he is not providing is nothing more than "an insignificant business decision" that is not "qualitatively significant." *Mehra v. Teller*, 2021 WL 300352, at *19 (Del. Ch. Jan. 29, 2021). Likewise, Davis's allegations that Beckett breached his fiduciary duties and that Beckett and DNA breached the LLC Agreement are not enough to make it no longer reasonably practicable to carry out the Company's business. Even if Davis's alleged breaches of contract and fiduciary duty were true, Davis's Petition never explained *why* those breaches warrant judicial dissolution in the absence of voting deadlock or extreme financial hardship. Thus, the Court of Chancery's holding that Davis's "Petition falls well short of satisfying [the] arduous standard" for judicial dissolution was the

only correct conclusion based on the allegations within the four corners of the Petition and the documents incorporated therein. OP. at 17.

II. THE COURT OF CHANCERY DID NOT CREATE A 'PURE HEART' STANDARD FOR DISSOLUTION UNDER 6 *DEL. C.* § 18-802

A. Question Presented.

Whether the trial court added a requirement to 6 *Del. C*. § 18-802 mandating that only petitioners with a 'pure heart' can obtain judicial dissolution. OP. at 16-20; C043-44.

B. Standard of Review.

The Supreme Court reviews a trial court's ruling on a motion to dismiss *de novo*. *Central Mortg. Co.*, 27 A.3d, at 535.

C. Merits of Argument.

The Court of Chancery observed that Davis attempted to create a prospective deadlock by withholding his future consent to any action requiring a unanimous vote of the members. OP. at 18. The Court held that Davis's "contrived attempt to manufacture deadlock cannot support a claim for judicial dissolution." *Id*. Both in his briefing in opposition to the motion to dismiss and at oral argument, Davis asserted that while there is not currently a voting deadlock, there would be one in the future because he would refuse to vote with DNA and Beckett on any and all issues. At oral argument, Davis summed up his position this way:

> Second, there is a genuine deadlock, despite respondents' contentions to the contrary, because a member of the LLC has affirmatively stated in the petition that he will not assent to any of the nine enumerated items that require unanimous vote, including distribution of profits.

C025 (25:8-13).

Delaware law provides that members cannot simply manufacture a deadlock by stating affirmatively that they will not assent to any action requiring unanimous consent regardless of the merits of the contemplated action. "A genuine deadlock does not exist where it is 'based upon a specious premise' or 'one side sought to manufacture it 'by refusing to consider any issue.'" OP. at 18 n.77 (quoting *Mehra*, 2021 WL 300352, at *18). Although Davis criticizes this principle as a judicial construct not included within 6 *Del. C.* § 18-802, there are multiple good reasons it exists.

Members should not be able to create a deadlock warranting judicial dissolution of a going concern by simply being obstructionist. If a member could just withhold their consent by voting against all proposed actions regardless of the merits or business justification, any member could obtain judicial dissolution at any time. That would make judicial dissolution no longer a sparingly granted remedy and innocent members who invest in Delaware limited liability companies (as well as employees who work for them) could be held hostage to the whims of their co-members.

Davis's argument that the Court of Chancery should not look to whether an alleged deadlock was the genuine byproduct of legitimate disputes would work to disincentive investors from forming Delaware limited liability companies. Investors

would shy away from joining enterprises that could be torn apart by an obstructionist member. There is no public policy justification for courts not to look to whether petitioners seeking judicial dissolution created actual deadlock in bad faith, as Davis attempted to do here. Conversely, the public policy which Davis asks this Court to create would upend decades of precedent that stand for the reasonable proposition that judicial dissolutions are extreme, rare, and sparingly granted. Davis's argument that courts should not consider whether deadlocks are manufactured or genuine should be summarily rejected.

III. THE COURT OF CHANCERY CORRECTLY INTERPRETED THE COMPANY'S LLC AGREEMENT.

A. Question Presented.

Whether the trial court correctly interpreted the LLC Agreement when it held that it contains a contractual mechanism to break voting deadlock, if such deadlock actually existed. OP. at 18-19.

B. Standard of Review.

The Supreme Court reviews a trial court's ruling on a motion to dismiss *de novo*. *Central Mortg. Co.*, 27 A.3d, at 535.

C. Merits of Argument.

Although a voting deadlock does not exist here and was not pled in the Petition, the Court of Chancery correctly held that even if there were a voting deadlock, the LLC Agreement contains a mechanism to break it. OP. at 18. Section 10(b) of the LLC Agreement provides that in the event of a voting deadlock, any member may deliver a Buy-Sell Notice to the other members to either sell his interest to the other members or buy the other members' interests at the same price. A-0054-55. In this way, the Company would survive and continue its business purpose even if the members could not agree on issues requiring unanimous consent.

LLC agreements are interpreted by the same principles as are used when construing and interpreting contracts. *Godden v. Franco*, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018). And absent ambiguity, the court "will give priority to the

parties' intentions as reflected in the four corners of the agreement." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (citing *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014)). Section 10(b) of the LLC Agreement, as the Court of Chancery properly found, plainly and expressly provides a mechanism for breaking deadlock within the "four corners" of the document. Op. at 18-19.

Davis argues that Section 10(b) does not "guarantee an exit from the Company" and, therefore, the provision could yield an unacceptable and inequitable result. Opening Brief at 40-42. But Davis misstates the appropriate legal inquiry. The issue is not whether the LLC Agreement provides for a mechanism to be bought out; rather, the inquiry is whether the LLC Agreement contains a mechanism to break the deadlock. *See, e.g., Silver Leaf*, 2005 WL 2045641, at *11 ("Silver Leaf is no longer able to carry on its business in a reasonably practicable manner. The vote of the members is deadlocked and the [LLC] Agreement provides no means around the deadlock . . . . Therefore, . . . the court dissolves Silver Leaf."); *Fisk Ventures,* 2009 WL 73957, at *7 (when the management board of an LLC was deadlocked, "if that deadlock cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law.").

Davis argues that Section 10(b) is not an acceptable mechanism to break the deadlock because it could result in him having to buy out Beckett and DNA. But in

that way, Section 10(b) is equitable because it applies to all members equally. Davis's argument is nothing more than speculation and a *post hoc* attempt to rewrite the provisions of the LLC Agreement. If Davis thought that Section 10(b) did not provide him an adequate exit mechanism, he could have negotiated for a different provision. But even if he had, as the Court of Chancery correctly observed, Davis still did not try to avail himself of the protections in buy-sell provisions of Section 10(b) of the LLC Agreement. OP. at 19. Thus, Davis's contention that Section 10(b) could yield an unacceptable result is based merely on conclusory allegations and speculation. The trial court is not required to accept such conclusory and speculative allegations as true.

The Court of Chancery's holding that Section 10(b) is adequate because it does not require further negotiations regarding the price was correct. OP. at 12 n.80. Davis could have established the price terms under the buy-sell provisions of Section 10(b). He choose not to. Instead, Davis sought judicial dissolution in the absence of any existing voting deadlock or extreme financial hardship facing the Company.

CONCLUSION

The Court of Chancery correctly held that Davis's "Petition comes nowhere close to stating a reasonably conceivable claim for judicial dissolution." OP at 17, n. 73. Davis's alleged breaches of fiduciary duty and contract do not make it reasonably impracticable to carry out the Company's business. Likewise, simply because Davis was removed as manager and his ability to get paid for future services was curtailed, does not mean that the only remedy is judicial dissolution because the Company cannot go on without him serving as manager. Finally, Davis's failure to avail himself of the deadlock breaking mechanism in the LLC Agreement is fatal to his claim. Davis could have either exited the Company or bought out Beckett and DNA as the LLC Agreement contemplates. He elected to do neither. The Court of Chancery correctly held that Davis's failure does not result in the judicial dissolution of the Company. Accordingly, the Court of Chancery's well-reasoned September 15, 2022 Memorandum Opinion should be affirmed in its entirety.

Dated: December 15, 2022

BERGER HARRIS LLP

/s/ David B. Anthony

David B. Anthony (I.D. No. 5452)
Zachary J. Schnapp (I.D. No 6914)
1105 N. Market Street, 11th Floor
Wilmington, Delaware 19801
(302) 655-1140 telephone
(302) 655-1131 facsimile
danthony@bergerharris.com
zschnapp@bergerharris.com

Attorneys for Appellee Garry Beckett