

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-002385

09/06/2013

HON. JOHN REA

CLERK OF THE COURT
C. Keller
Deputy

S W S, L L C

AARON T LLOYD

v.

TOWN & COUNTRY CORE L L C, et al.

DAVID E SHEIN

UNDER ADVISEMENT RULING

Under advisement are the parties' Cross-Motions for Partial Summary Judgment. After consideration of the written and oral arguments of the parties,

IT IS ORDERED Plaintiffs' Motion for Partial Summary Judgment is denied.

IT IS ORDERED Defendants' Motion for Partial Summary Judgment on Plaintiffs' claims is granted.

IT IS ORDERED Defendants' Motion for Partial Summary Judgment on the Counterclaims is denied.

Discussion

This case arises from the restructuring of beneficial ownership interests in the Town & Country shopping center. The Plaintiffs contend that the restructuring violated the Operating Agreement and related duties. The Defendants argue that the Plaintiffs' refusal to execute documents in connection with the restructuring violated the Operating Agreement and related duties.

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Town & Country Camelback, LLC (“Camelback”) owns the shopping center. Camelback’s managing member is Town & Country Core, LLC (“Core”). At the time Plaintiff SWS became an investor, Defendant Jamel, LLC, and other non-party entities were members of Camelback.

SWS acquired a 10% membership interest in Camelback for \$2 million in 2011. Shortly after SWS became a member of Camelback, Core, as managing member of Camelback, commenced a redevelopment project for the shopping center. A key feature of the redevelopment was to bring in RED Town & Country, LLC, as a joint venture partner. RED desired that only itself and Core be members of Camelback. RED would own 35% of Camelback and Core would own 65%.

To accomplish this, Core transferred the beneficial interests of SWS and the other minority members of Camelback to Core. SWS’s 10% interest in Camelback became a 15.38% interest in Core. Calculating 15.38% of 65%, it becomes quickly clear that SWS’s beneficial ownership of the shopping center remained the same, albeit in a different form.

The restructuring of Camelback and Core to accommodate RED’s joint venture plan appears to have highly distressed SWS, which refused to execute documents connected to the restructuring and then filed this lawsuit with claims for declaratory judgment, breach of contract, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing.

Camelback alleges that SWS’s refusal to execute transition documents has caused it to be in danger of defaulting on tenant obligations and required it to obtain financing at higher interest rates, among other things.

The Operating Agreement gives Core, the manager, a wide range of authority, including the ability to secure financing, conduct the business affairs of the shopping center with tenants, issue additional membership interests in Camelback, among other things. According to section 3.2 of the Operating Agreement, the manager, without the approval of all the members, cannot amend the Operating Agreement except for “ministerial amendments required, from time to time, to manage, entitle, develop or finance the Project, which do not have a material adverse impact on any Member.”

SWS argues that the documents accomplishing the restructuring are not “ministerial amendments” and that the restructuring had a material adverse impact on SWS. SWS cites *Craig v. Craig* and *Smith v. Ariz. Citizens* for the proposition that a ministerial act is one that can be done without discretion. In *Craig* and *Smith*, the courts held that an appeal was not premature if taken after the Court made a final decision but before it entered a formal judgment so long as the

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entry of formal judgment was “merely ministerial” and no decision by the Court could change the judgment.

The courts’ use of the term “ministerial” in the context of a premature notice of appeal is unhelpful in construing the language of the Operating Agreement. Given the wide scope of the manager’s discretion under the Operating Agreement, drafting documents to accomplish permissible decisions is hardly something that is done without discretion. More appropriate here is the definition of “ministerial” in *The Oxford Dictionary and Thesaurus, American Edition* (1996): “instrumental or subsidiary in achieving a purpose.”

The transition documents prepared by Core in connection with the RED joint venture were certainly instrumental in achieving a permitted purpose.

SWS also argues that the change in the nature of its beneficial interest in the shopping center had a material adverse impact on it because, even if the restructuring made no financial difference to it, SWS had an emotional attachment to being a member of Camelback rather than Core. The Court rejects SWS’s “Diamondback” argument. In the context of the Operating Agreement, the phrase “material adverse impact” has to mean something that adversely affects a member’s financial interests in the shopping center. SWS had the same beneficial interest in the shopping after the restructuring as it had before, just in a different form. SWS has presented no evidence that it suffered a material, negative financial impact in any way.

Because SWS’s breach of contract claim fails as a matter of law, the declaratory judgment, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing claims fail as well.

The Court finds disputed questions of material fact in the Defendants’ Counterclaims. The Defendants’ evidence at this point is insufficient to establish that SWS’s actions has caused damage, or were undertaken in bad faith.

In connection with the bad faith counterclaim, SWS objects to consideration of the \$3.4 million “settlement offer” under Evidence Rule 408. It is premature at this time to rule definitively on the admission of the offer, but the letter may be admissible in the bad faith counterclaim. Rule 408 is intended to allow defendants to offer some payment without being accused of admitting liability and to encourage plaintiffs to offer to accept less than the demand without being later impeached on the worth of the claim.

If the foundation appears that the restructuring had no adverse or a positive financial impact on SWS, yet SWS refused to cooperate, and that the \$3.4 million demand was significantly in excess of a reasonable appraisal of the fair market value of SWS’s 10% interest

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in Camelback, a reasonable inference might be that SWS's actions have not been in good faith and the exclusionary rule for offers of settlement would not apply to SWS's letter.

However, the Court is not in a position to rule one way or the other on the letter at this time and the Court has not relied on the letter in ruling on the Cross-motions for Partial Summary Judgment.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.