SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2689-20

JEANNE QIN LAMME,

Plaintiff-Appellant/
Cross-Respondent,

v.

CLIENT INSTANT ACCESS, LLC, a New Jersey limited liability company, OMNIGAGE, LLC, a Nevada limited liability company, and JOSEPH VACCARELLA, individually,

Defendants-Respondents/
Cross-Appellants.

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Submitted April 5, 2022 – Decided April 29, 2022

Before Judges Fisher and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-000092-20.

Walsh & Walsh, LLC, attorneys for appellant/cross-respondent (John K. Walsh, Jr., of counsel and on the briefs).

Bratti Greenan LLC, attorneys for respondents/cross-appellants (Dominick Bratti, of counsel and on the brief; Annemarie T. Greenan and Stephanie P. Terzano, on the brief).

PER CURIAM

In 1997, Richard Lamme and defendant Joseph Vaccarella formed Client Instant Access, LLC (the LLC); in 2000, they entered into an operating agreement. Richard died testate in 2013. Joseph was appointed executor of his estate, and litigation ensued, with Richard's widow – plaintiff Jeanne Qin Lamme – seeking the LLC's dissolution and the imposition of a constructive trust. That litigation was resolved by execution of a settlement agreement that made Jeanne a passive half owner of the LLC, with Joseph remaining the other half owner and sole managing member.

Disputes soon followed, culminating in the LLC's commencement of an action against Jeanne. Jeanne responded with this separate action against Joseph, the LLC, and Omnigage, LLC; Joseph filed counterclaims in this action against Jeanne that incorporate the claims asserted by the LLC in the other action. All these claims were dismissed through application of either Rule 4:6-2 or Rule 4:46. Because the operating agreement and the settlement agreement are

enforceable and unambiguously permitted the conduct of which the parties complain, we affirm.

The LLC's operating agreement states that, except as otherwise provided, the members' rights are governed by the New Jersey Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 to -94. The operating agreement contains an affirmative waiver of the members' duty of loyalty:

> Nothing in this Agreement shall be deemed to restrict in any way the freedom of any Member to conduct any business or activity of whatever nature including, without limitation, the acquisition, development, exploitation or sale of real property even if such activity is in conflict with the [LLC's] activities . . . without any accountability to [the LLC] or to the other Members, and no Member shall have any interest in any such other business or activity by virtue of this Agreement.

As permitted by this provision, Joseph owned and operated several other companies. One of them, Conference Calling of America (CCA), existed from 2004 until 2006 and was in direct competition with the LLC. In fact, during his lifetime, Richard gave Joseph explicit permission to operate CCA and even allowed him to use the LLC's resources to service CCA's clients. When CCA was dissolved in 2006, Joseph transferred all its clients to the LLC. Currently, Joseph owns and operates at least two other companies: Omnigage, which is a defendant in this matter, and Caxiam. Joseph and LLC employee Donna Gannon

formed Omnigage in 2015 to provide services ancillary to those already provided by the LLC. At his deposition, Joseph testified that all Omnigage's profits go directly to the LLC. Jeanne admitted at her deposition that the LLC and Omnigage operate "like one business."

In 2018 and 2019, the LLC made capital contributions to both Omnigage and Caxiam in the amounts of $150,000 and $564,544 respectively. Those transactions are noted in the LLC's financial statements for the 2018 and 2019 fiscal years.

After Richard's death and after execution of the settlement agreement with Jeanne, Joseph sought to sell the LLC. As part of that endeavor, Joseph loaned Donna Gannon $370,000 out of the LLC's funds in the hope she would use it as a down payment on a purchase of the LLC.[1] Joseph described the loan as "an advance on bonuses and goodwill [Gannon] accumulated . . . through [twenty] years of service" to the LLC, and the two purportedly agreed that if they could not strike a deal for the sale of the LLC, Gannon would repay the $370,000. Gannon, however, did not use the loan to purchase the LLC and refused to return the money. After several unsuccessful informal attempts to recoup the money,

[1] Gannon had already received a $20,000 loan that had not been repaid. That amount was added to the $350,000, creating this $370,000 indebtedness.

the LLC sued Gannon. That matter was later resolved by way of a confidential settlement agreement.

In April 2020, the LLC applied for a loan under the federal Paycheck Protection Program through Valley National Bank. The process required identification from all LLC members owning more than twenty percent of the company. Joseph sought Jeanne's identification to complete the process but she refused. At her deposition, Jeanne explained that she refused because she did not trust Joseph and was concerned about whether he would utilize the loan proceeds properly. That refusal prompted the LLC's suit against Jeanne that was later pursued as a counterclaim here. Jeanne responded by commencing this lawsuit, claiming Joseph breached his fiduciary duty and the implied covenant of good faith and fair dealing by owning and operating Omnigage and Caxiam and by extending the loan to Gannon.

The chancery judge initially dismissed the tortious interference counterclaim under Rule 4:6-2(e) for failure to state a claim upon which relief could be granted. The judge later granted summary judgment, dismissing all the parties' other claims.

The parties cross-appeal.

We turn first to Jeanne's argument that her claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing were erroneously dismissed. She argues the affirmative waiver of the duty of loyalty contained in the operating agreement is unenforceable under RULLCA because it is manifestly unreasonable. She also argues that because that term is unenforceable, Joseph breached his duty of loyalty through his ownership and operation of Omnigage and Caxiam, and by failing to adequately secure and collect the Gannon loan.

The trial judge recognized, and neither party disputes, that the waiver in the operating agreement "is clear and unambiguous and permits all members . . . to engage in any businesses outside [the LLC], even if such enterprise is in competition with [the LLC]." Jeanne argues, however, that even if unambiguous the waiver is unenforceable because it is manifestly unreasonable.

RULLCA imposes a duty of loyalty on such members "to refrain from competing with the company in the conduct of the company's activities before the dissolution of the company." N.J.S.A. 42:2C-39(b)(3). Members are also required "to account to the company and to hold as trustee for it any . . . profit" the member derives "from a use by the member of the company's property" or "from the appropriation of a company opportunity." N.J.S.A. 42:2C-39(b)(1)(b)-

(c). An operating agreement's terms, however, may restrict or eliminate this duty if the term is not manifestly unreasonable. N.J.S.A. 42:2C-11(d)(1)(c).

When determining whether a term is manifestly unreasonable, a court must first consider only the "circumstances existing at th[e] time" the operating agreement was formed, N.J.S.A. 42:2C-11(h)(1), and

> may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:
>
> (a) the objective of the term is unreasonable; or
>
> (b) the term is an unreasonable means to achieve the provision's objective.
>
> [N.J.S.A. 42:2C-11(h)(2).]

The judge found the fiduciary waiver was not manifestly unreasonable. We agree. RULLCA contemplates such waivers, which are commonplace and widely accepted.[2] Moreover, courts are required to liberally construe RULLCA

[2] See Gabriel Rauterberg & Eric Talley, Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers, 117 Colum. L. Rev. 1075, 1147 (2017) (finding that over 1,000 public corporations have adopted fiduciary duty waivers and noting empirical data "suggests that public companies have shown a significant appetite for enacting waivers and that their newfound contractual freedom has not been received negatively among investors"); Elizabeth S. Fenton, et al., Representing Minority Members of an LLC in Negotiating an LLC Agreement, Business Law Today, Aug. 14, 2018 (acknowledging that "[m]any operating agreements include provisions that

"to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." N.J.S.A. 42:2C-11(i).

In addition, as noted earlier, such waivers are illuminated by the circumstances existing when it was incorporated into the company's operating agreement. N.J.S.A. 42:2C-11(h)(1). The LLC's operating agreement was created when Richard was alive and acting as a managing member. Joseph, in fact, openly operated CCA for two years before Richard's death. And there is undisputed evidence in the record that Richard encouraged Joseph's ownership and operation of competing businesses, even allowing him to use the LLC's resources to service CCA's clients. Having canvassed the factual record in light of the parties' arguments, we are satisfied Joseph's operation of Omnigage and Caxiam is consistent with the original intent underlying the operating agreement and is not manifestly unreasonable.

Jeanne next argues that, even if the fiduciary waiver is enforceable, Joseph nonetheless breached his duty of loyalty both by using the LLC's funds to operate Omnigage and Caxiam and by lending LLC funds to Gannon without properly securing the loan and without disclosing the contents of the settlement

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allow members and managers to undertake other activities, including competing activities").

with her. Through those actions, Jeanne contends Joseph failed to account for his conduct in the LLC's activities and for his use of its property in violation of subsections (b) and (c) of N.J.S.A. 42:2C-39(b)(1).

The first part of Jeanne's argument is contradicted by her admission that Omnigage only services the LLC's customers and "100% of the revenue derived from Omnigage goes to" the LLC. Joseph testified, without contradiction, that Omnigage only provides services complimentary to, not competitive with, the LLC's services. And he has accounted for all such transactions and the payment of Omnigage's profits into the LLC in the LLC's financial statements.

Similarly, the record does not establish that Caxiam was in competition with the LLC. The record instead reveals Caxiam provided different services than those provided by the LLC, namely "development work and computer programming." The $564,544 paid by the LLC to Caxiam for services rendered is properly accounted for in the LLC's 2019 financial statement.

As for Jeanne's arguments about the Gannon loan, the response correctly recognized that the business judgment rule insulates defendants from liability. The business judgment rule protects members of an LLC "from being questioned or second-guessed on conduct of corporate affairs except in instances of fraud, self-dealing, or unconscionable conduct." In re PSE&G S'holder Litig., 173 N.J.

258, 276-77 (2002). "Under the rule, when business judgments are made in good faith based on reasonable business knowledge, the decision makers are immune from liability from actions brought by others who have an interest in the business entity." Green Party of N.J. v. Hartz Mountain Indus., Inc., 164 N.J. 127, 147 (2000). Even if a loan is unwise from a business standpoint, it is not the place for courts to question the efficacy of such decisions. Courts may only question whether the decision was made in good faith and based on reasonable business knowledge. We have been provided with no principled reason to contradict the judge's application of the business judgment rule here.

Joseph described the loan as "an advance on bonuses and goodwill [Gannon] accumulated . . . through [twenty] years of service" to the LLC. Although the terms of repayment were not definitively established, that does not override the business judgment rule or, for that matter, call into question Joseph's duty of loyalty to the LLC and its members. And, while Jeanne argues Joseph made insufficient efforts to recoup the money from Gannon, the record reveals that Joseph reached out to Gannon several times to obtain the money, and when those informal efforts failed, the LLC sued Gannon.

In short, it seems highly unlikely that Joseph would resort to acting in bad faith to wreck a company in which he holds a fifty percent stake. See Sarner v.

Sarner, 62 N.J. Super. 41, 60 (App. Div. 1960). Even if the loan was ill-advised, that alone is insufficient to defeat the business judgment rule. Because of the absence of proof of bad faith, fraud, self-dealing, or unconscionability, the chancery judge correctly declined the invitation to second-guess Joseph's business decisions. In re PSE&G, 173 N.J. at 276-77.

By the same token, we agree with the judge's rejection of Jeanne's claim that Joseph breached the implied covenant of good faith and fair dealing, which exists in every contract. The implied covenant prohibits the contracting parties from "do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997) (internal quotation marks omitted). "Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wade v. Kessler Inst., 172 N.J. 327, 341 (2002). "Bad motive or intention is essential" to finding a breach of the covenant. Wilson v. Amerada Hess Corp., 168 N.J. 236, 251-52 (2001). But "an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent an improper motive." Wade, 172 N.J. at 341.

For the same reasons already discussed, we agree that Jeanne failed to establish that Joseph's ownership of outside businesses or his decision to extend the loan to Gannon breached this covenant. Jeanne did not show that either Omnigage or Caxiam usurped the LLC's business opportunities and all business conducted between the LLC and Joseph's other companies was properly accounted for in the relevant financial statements. Jeanne failed to establish that the loan to Gannon was the product of a bad motive or intent. She may have demonstrated that the LLC sustained a substantial loss as a result of Joseph's business decisions, but her argument confuses legitimate business decisions, made in good faith, that lead to a loss in profit, with actions, undertaken with bad motive or intent, that "destroy[] or injur[e] the right of the other party to receive the fruits of the contract." Sons of Thunder, 148 N.J. at 420.

For similar reasons we reject the argument that the judge erred by dismissing the counterclaims for tortious interference, breach of contract, and breach of the implied covenant of good faith and fair dealing.

To establish a cause of action for tortious interference with a prospective economic advantage, a claimant must show the existence of "a reasonable expectation of advantage from a prospective contractual or economic relationship, that defendant interfered with this advantage intentionally and

without justification or excuse, that the interference caused the loss of the expected advantage, and that the injury caused damage." Patel v. Soriano, 369 N.J. Super. 192, 242 (App. Div. 2004). The claimant need only demonstrate that without the interference, there was "a reasonable probability" the anticipated economic benefit would have been received. Ibid. (citing Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306 (2001)).

At issue is whether Jeanne interfered with the LLC's prospective advantage intentionally and without justification or excuse by refusing to cooperate in the pursuit of the PPP application. A party "claiming a business-related excuse must justify not only its motive and purpose, but also the means used." Lamorte Burns, 167 N.J. at 307. "Conduct admittedly spurred by spite and ill-will is not necessarily sufficient to sustain an action for tortious interference with an economic advantage." Ibid. Ultimately, "[m]alice is determined on an individualized basis, and the standard used by the court must be flexible, viewing the defendant['s] actions in the context of the case presented." Singer v. Beach Trading Co., Inc., 379 N.J. Super. 63, 81-82 (App. Div. 2005). The conduct must be "transgressive of generally accepted standards of common morality or of law." Lamorte Burns, 167 N.J. at 306-07. No such breach can be found here.

Jeanne was a dissociated LLC member with no legal right to take part in management decisions. In short, she was a passive investor. As such, she had no affirmative legal duty to assist in the managerial interests from which she was foreclosed by contract. It is well-settled that "[t]hat which one has a right to do cannot become a tort when it is done." Rothermel v. Int'l Paper Co., 163 N.J. Super. 235, 244 (App. Div. 1978). Similarly, that one has a right not to do something also cannot become a tort when not done. Joseph and the LLC acknowledge Jeanne had no right to "exert operational control over" the LLC. In insisting Jeanne had no right to participate in the LLC's management, defendants cannot now complain that she did not do something she preferred not to and had a right to refrain from doing. See Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 200-01 (App. Div. 1995) (holding the defendant's actions, driven in part by animosity towards the plaintiff, did not constitute tortious interference when the defendant had a valid business justification).

Joseph and the LLC also argue that the judge erred by dismissing their claims for breach of contract and breach of the implied covenant of good faith and fair dealing. We disagree for essentially the same reasons that have led us

to conclude that defendants do not have an actionable tortious interference claim.

To the extent we have not specifically addressed any other arguments asserted in either the appeal or cross-appeal it is because we find those arguments to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.