UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Michael R. Nelson, Plaintiff v. David L. Brown, et al., Defendants	Civil Action No. 2:17-cv-03232-JP

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO RULE 12(b)
FILED BY DEFENDANTS KENNETH LEVINE AND DANIEL de LUCA

Defendants, Kenneth Levine and Daniel de Luca, jointly file this Motion to Dismiss, and in support thereof aver as follows:

1. In the Amended Complaint filed by Plaintiff Michael Nelson, he continues to seek to compel arbitration of claims or disputes he claims that he possesses, as compared to the former law firm of Nelson, Levine, de Luca & Hamilton, LLC ("the Firm").

2. Despite the abundance of legal issues raised to Plaintiff's original Complaint (e.g. waiver, standing, the Firm being a possible necessary party, failure to meet the conditions precedent to seeking the relief sought, and asserting claims upon which relief cannot be granted), Plaintiff merely changed one single paragraph – paragraph 18 – in the Complaint.

3. In amending paragraph 18, instead of improving his Complaint, Plaintiff actually supported the legal arguments asserted by the many defendants (e.g. by identifying claims previously litigated; by identifying claims Plaintiff has no standing to raise but are possessed (if valid) by the Firm only; by not identifying any new efforts with the PBA to seek arbitration

personally; and seeking claims that have been previously released and upon which no legal relief could ever be granted)

4. The Amended Complaint was again filed solely by "Michael Nelson" in his individual capacity, and the Firm is not the Plaintiff, nor a party, in the action.[1]

5. While Plaintiff claims to be a citizen of the State of Florida, Am. Complaint para. 4, the Firm is/was a Pennsylvania limited liability company, Am. Complaint, para. 16.

6. Hence, as many of the Defendants (members of the Firm at times) are Pennsylvania residents themselves, and the Firm (as the equivalent of a partnership for citizenship purposes) itself is/was too, there would be no diversity jurisdiction in this Court if the suit had been filed by the Firm or included the Firm as a Plaintiff.

7. It is admitted that, prior to their resignations over three years ago (i.e. August 1, 2014), Moving Defendants were members of the Firm, and that the Operating Agreement controlled the Firm and its Members during that time.

8. It is also admitted that, pursuant to Section 9.13 of the then-prevailing Operating Agreement – though subject to other provisions in that Agreement – all claims, controversies and disputes arising under or relating to the Operating Agreement would be subject to mediation and possible arbitration in accordance with the Pennsylvania Bar Association Lawyer Dispute Resolution Program (the "PBA Program"). See Am. Complaint, para. 20.

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[1] As indicated in the Firm's Operating Agreement, Complaint Exhibit "A," in Section 5.1.2, the Firm's Chairman at the time the Agreement was executed was Plaintiff Michael Nelson. Plaintiff was also Chairman of the Firm on August 1, 2014, when Moving Defendants resigned. If indeed the Firm has not actually dissolved, Moving Defendants assume that he maintains that position to this day.

9. Nonetheless, as noted above, Plaintiff asserts in paragraph 18 of the Amended Complaint only defective claims, any and all of which are claims that – even if valid, which is contested – only the Firm would have standing to assert.

10. Paragraph 18 sets forth 3 subparagraphs with the defined claims.

11. Paragraph 18(a) reads: "Nelson's underlying claims, and the underlying controversies and disputes, arise out of:

(a) the repayment of a $4 million line of credit with First Niagara Bank. Plaintiff Nelson has had to contribute more than his proportionate share to repay that line of credit, and he has also had to pay income taxes on certain sources of income used for the repayment. This implicates the Defendants' duty, pursuant to Section III of the Operating Agreement and paragraph 3.1.1 of the Buy-Sell Agreement, to contribute capital. Plaintiff Nelson further seeks indemnification from the Defendants for the amounts he has paid beyond his proportionate share of liability."

12. While the assertion that former members of the Firm should have to contribute capital after their resignations or involuntary terminations from the firm is questionable, clearly it is only the Firm that would have a claim to seek capital contributions from its members, and not Plaintiff in his individual capacity.

13. Paragraph 18(b) reads: "Nelson's underlying claims, and the underlying controversies and disputes, arise out of: …

(b) Defendants taking advance draws that exceeded their entitlement to distributions for 2014, in violation of Section IV of the Operating Agreement. Despite demand, Defendants have refused to repay the excess advance draws that they received and, instead, Defendants have tried to characterize those advance draws as guaranteed payments. This has diluted Nelson's interest. In addition to constituting breaches of the Operating Agreement, this conduct by Defendants also constitutes breaches of the fiduciary duties that the Defendants owe to Plaintiff Nelson. This conduct, and the fact that all of the Defendants left the firm without giving proper notice, also implicates the winding-up process set forth at Section VII of the Operating Agreement, by placing undue burdens on Nelson.

14. While it should be easy to thwart the assertion that former members of the Firm owe monies back to the Firm for payments of draws in excess of the fraudulent allocations of profit solely determined by Plaintiff, again it is clearly only the Firm that would ever have a

claim to seek monies back from its members, and not Plaintiff in his individual capacity. Further, there is no such cognizable fiduciary duty that Defendants have or had to Plaintiff under the law. Finally, any alleged improper notice (which is disputed) would be a duty owed to the Firm and not any other individual remaining member. In fact, the Operating Agreement in place at the time had specific explicit penalties for any resignation with less than 90-days' written notice. See Operating Agreement, Section 6.6 (attached as Exhibit A to Plaintiff's complaints). All such penalties ran to the Firm and not individual members, and certainly preclude Plaintiff from now asserting a separate personal claim not afforded under the Operating Agreement.

15. Paragraph 18(c) reads: "Nelson's underlying claims, and the underlying controversies and disputes, arise out of: …

(c) While all Defendants took advance draws to which they were not entitled, Defendants Clark, de Luca, and Levine took advance draws in 2014 simultaneously with planning and preparing the launch of their (respective) new, competing law firms, at a time when they were supposed to be devoting all of their professional time and efforts to the law firm they shared with Plaintiff Nelson. This conduct violates paragraph 5.3 of the Operating Agreement, and also constitutes additional breaches of fiduciary duty by these Defendants.

16. Plaintiff (and all parties) are fully aware that in 2014, defendants Clark, de Luca and Levine sought and received permission openly to explore starting their own law firms due to their dissatisfaction with the manner by which Plaintiff was managing the firm financially and administratively. This awareness included the fact that such members were exploring financing and various departure options. There were no objections to such conduct and actions, and such open efforts certainly did not violate any provisions of the Operating Agreement – nor any duties the parties may have had. Indeed, if such activities did constitute violations, Plaintiff and all parties waived objection thereto.

17. While these facts in defense of the allegations of paragraph 18(c) would be borne out, the legal impropriety of these claims is the focus of this motion. First, to the extent any

violations of paragraph 5.3 of the Operating Agreement would have occurred, it would have been a claim by the Firm would have arisen, and not any by individual members like Plaintiff. Further, there is no cognizable fiduciary duty that Defendants have or had to Plaintiff under the law.

18. Moreover, pertinent to this litigation and all of the claims in all of the subparagraphs of paragraph 18 quoted above, is the fact that the Firm has previously filed suit seeking to penalize defendants de Luca and Levine for their departure from the firm – in litigation filed immediately after their resignation. This litigation, filed in August 2014, as *Nelson, Levine, de Luca & Hamilton v. Kenneth Levine, et al.*, Civil Action No. 2014- 22824, in the Court of Common Pleas, Montgomery County, Pennsylvania, was subsequently resolved with a confidential settlement agreement. See Amended Complaint filed in that action by the Firm, attached hereto as Exhibit "A."

19. Such Amended Complaint asserted claims for monies owed to the Firm arising from the departure of Defendants de Luca and Levine, as well as others, and included the allegations that: (a) they had surreptitiously taken steps to establish their new firm while still shareholders of the Firm; (b) they had resigned from the firm without providing the Firm with ninety (90) days' notice of their withdrawal; and (c) they were failing to agree to abide by the Operating Agreement, including sections suggesting that there would be monies owed following their departure. Such action did not simply seek equitable relief, but also sought monetary relief in Counts III and IV of the Amended Complaint (Exhibit "A").

20. Clearly, this prior action that was filed and resolved long ago, acted as a waiver as to any arbitration requirement for the claims asserted therein, or tangentially related claims.

21. As noted above, such prior litigation was eventually resolved with a confidential settlement agreement between the parties.[2] While the substantive provisions are confidential, such agreement included a standard release whereby the Firm:

"on behalf of itself and its shareholders, directors, officers, … successors, … covenants not to sue, releases, acquits and forever discharges the Defendants, … of and from any and all past, present or future claims, actions, causes of action, rights, damages, costs, losses, expenses, judgments, demands, obligations, interest and compensation, of every kind and nature whatsoever, known or unknown, foreseen or unforeseen, accrued or unaccrued, whether expressed in tort, contract or equity, relating to claims set forth in and/or arising from the allegations of the Complaint and Amended Complaint filed by Plaintiff in the Lawsuit."

22. Plaintiff was a shareholder, a director, and an officer of the Firm at the time of the lawsuit and at the time of the confidential settlement agreement.

23. In turn, it is clear from the Amended Complaint in that action (Exhibit "A") that Plaintiff and the Firm have waived any assertion that such post-resignation claims must be arbitrated. It is also clear from the language of the confidential settlement agreement that Plaintiff and the Firm have additionally released Moving Defendants de Luca and Levine from any such claims asserted in the present Amended Complaint under paragraph 18.

24. Plaintiff asserts that he attempted to initiate a PBA Program mediation or arbitration on January 23, 2017, by way of a Notice to the program's administrator. Complaint, para. 24.

25. Plaintiff purports to attach the PBA Notice as an exhibit to the Amended Complaint, but it is in fact no notice at all. Instead, it is a copy of a series of emails between Plaintiff and the PBA Program's Committee Relations Coordinator, Louann Bell.

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[2] Moving defendants have sought Plaintiff's counsel's permission to attach a copy of the confidential settlement agreement with any and all monetary terms and provisions redacted, but have not heard back from counsel before filing this motion. If such reasonable permission is not granted, then moving defendants will file a motion under Local Rule 5.1 for an Order of Confidentiality so that such agreement can be filed under seal.

26. In the earliest email exchange provided in this exhibit (dated January 23, 2017, at 8:12 p.m.), Plaintiff explicitly advises Ms. Bell of two important things:

a. that the subject email "follows my notice to the Pennsylvania Bar Association." Clearly, this email was not in fact a Notice to the PBA, but instead simply an email that Plaintiff sent some time later after allegedly sending a proper notice. Moving Defendants have never seen any such actual Notice, and the Complaint did not supply it.

b. Plaintiff mentions in the same initial paragraph of the subject email that "the above named firm [Nelson Levine de Luca & Hamilton / Nelson Brown & Co., and not Plaintiff Michael Nelson] seeks to mediate and if necessary arbitrate a resolution of all disputes between the shareholders" (emphases added). This clearly demonstrates that Plaintiff did not himself ever request that any claims or disputes be referred to the PBA Program, but instead the Firm seems to have attempted to obtain such relief. Further, as with the Complaint here, neither Plaintiff nor the Firm provided any guidance whatsoever as to the nature of any purported disputes that the Firm might have with the former Members generally, or with Moving Defendants in particular.

27. Based upon the full description of the pre-litigation steps that had actually been undertaken by Plaintiff (or by the Firm through Plaintiff), it is clear that any requisite steps that *Plaintiff* would be required to take to compel mediation or arbitration have not even been initiated, let alone pursued.

28. Plaintiff never sought mediation or arbitration on his own behalf, but clearly only on behalf of the Firm – an entity that is not a party to this action, an entity that has not asked this Court to compel mediation / arbitration, and an entity that if included here would destroy the requisite diversity jurisdiction.

29. At a recent conference with the court it seemed that Plaintiff might be sending PBA a notice on his personal behalf to cure this aspect of the arguments made by many Defendants, but no known such effort was undertaken before the filing of the Amended Complaint, and no such requisite steps are mentioned in the Amended Complaint

30. For all of the reasons set forth above, as well as the arguments set forth in the Memorandum of Law attached hereto and in support hereof, this Motion to Dismiss should be granted.

WHEREFORE, this Honorable Court is compelled to grant the instant Motion to Dismiss Plaintiff's Complaint.

Respectfully submitted,

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Dated: November 20, 2017