SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department P

20SMCV01367
ALEXANDER J. DAVIS, AN INDIVIDUAL vs KENNETH D. RICKEL, AN INDIVIDUAL

September 23, 2021
10:00 AM

Judge: Honorable Elaine W. Mandel
Judicial Assistant: P. Anyankor
Courtroom Assistant: R. Juarez

CSR: Janet Murphy, #9650 (Appearing Remotely)
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Michael J. Kump , David A. Fleissig, and Matthew S. Dontzin are appearing via video for the Plaintiff

For Defendant(s): Alex Weingarten and Logan Elliot are appearing via video for the Defendant

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NATURE OF PROCEEDINGS: Hearing - Other on the issue of the Contract Interpretation; Hearing on Motion to Seal Exhibits to the Declaration of David A. Fleissig in Support of Plaintiff Alexander J. Davis's Memorandum of Points and Authorities on Contract Interpretattion; Hearing on Motion to Seal Exhibit 23 to Declaration of David A. Fleissig's ISO Reply RE Contract Interpretation

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Janet Murphy, CSR #9650 , certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Counsel/parties are provided with the Court's tentative ruling, that is available on the Court's website for review.

The matters are called for hearing.

The above-captioned motion is held and argued. Parties rest.

The Court having fully considered the arguments of all parties, both written and oral, now rules as follows:

The Court adopts its tentative ruling as the final order of the Court.

The final order is written as follows:

Plaintiff Davis and his stepfather defendant Rickel formed a technology investment firm, Disruptive Technology Advisers ("DTA"), in 2012. That year, the parties also created Disruptive Technology Solutions ("DTS") and related entity DTA II LLC ("DTA II") to invest in the tech company Palantir. A dispute arose between Davis and Rickel, culminating in Rickel's removal from the business.

Davis and Rickel entered into a handwritten settlement agreement in 2014 under which Rickel gave up his interest in DTA in exchange for a share of profits from one or all affiliated entities. Rickel alleges the agreement entitles him to profits from all deals with all DTA-affiliated entities; Davis argues it applies only to DTS profits. The dispute hinges on the interpretation of the term "the Fund." The parties requested an early determination of the contractual interpretation. Plaintiff moves to seal one exhibit.

Motion to Seal- Exh. 23 to Fleissig Declaration

Under California Rule of Court 2.550, a court may order evidence be filed under seal if "(1) there exists an overriding interest that overcomes the right of public access to the record, (2) the overriding interest supports sealing the record, (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, (4) the proposed sealing is narrowly tailored and (5) no less restrictive means exists to achieve the overriding interest."

Confidential financial information is protected by the right to privacy and may be sealed subject to a motion under rule 2.550. Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 656.

Plaintiff moves to seal exhibit 23 to the Fleissig declaration which includes confidential investment information, including the identities of investors in DTS and the extent of Davis' investment. Plaintiff argues his financial interests and those of third parties may be compromised if this information is public. There is no strong public interest in this information, and the request is narrowly tailored. The motion is unopposed. GRANTED.

Evidentiary Objections

Davis' objections: Steiner Declaration—Cal. Evid. Code §1121 provides "neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that

is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118." Case law establishes that "once the mediation is concluded, the mediator may not offer clarification concerning the mediation or a disputed settlement unless the parties agree otherwise." Radford v. Shehorn (2010) 187 Cal. App.4th 852, 853.

Steiner mediated the agreement between the parties. His declaration includes testimony regarding the settlement negotiations. The declaration is inadmissible under §1118 and Radford. SUSTAINED.

Other objections—Objections 1-6 SUSTAINED except as to the trade meaning of the term "Fund" (improper legal opinion from an expert witness, improper expert witness on contract interpretation, speculation.) Objections 7-9 OVERRULED.

Rickel Objections: OVERRULED. Documents are properly authenticated.

Contract Interpretation

The interpretation of a written instrument, even if it involves extrinsic evidence, is a judicial function unless the interpretation turns on the credibility of extrinsic evidence. American Alternative Ins. Corp. v. Superior Court (2006) 135 Cal.App.4th 1239, 1245. The goal of contractual interpretation is to give effect to the parties' mutual intention. Bank of the W. v. Super. Ct. (1992) 2 Cal.4th 1254, 1264. To accomplish this, courts should first seek to define the meaning of a contract based on the words used. Cedars-Sinai Med. Ctr. v. Shewry (2006) 137 Cal.App.4th 964, 979. This includes writings in the margins of an agreement. Est. of MacLeod (1988) 206 Cal.App.3d 1235, 1238. A court should, if possible, avoid contract interpretations that render "part of the writing superfluous, useless, or inexplicable." Carson v. Mercury Ins. Co. (2012) 210 Cal.App.4th 409, 420; Hemphill v. Wright Family, LLC (2015) 234 Cal. App. 4th 911, 915.

When an agreement's language is ambiguous, courts may consider extrinsic evidence, including expert testimony regarding industry usage and custom. See Brown v. Goldstein (2019) 34 Cal.App.5th 418, 436. Expert testimony is not permitted as to contracting parties' intentions or to provide legal opinions regarding the meaning of a contract. Id., fn. 7. Courts may consider evidence of the circumstances surrounding the contract's execution. Cal. Nat'l. Bank v. Woodbridge Plaza LLC (2008) 164 Cal.App.4th 137, 144.

The handwritten "Agreement between Alex Davis and Ken Rickel," dated 4/29/2014 (Rickel decl, exh. 24) reads in part (contract language in bold, court commentary in normal type):

1. The purpose of this agreement is to resolve all claims between Alex Davis and Ken Rickel pertaining to their ownership and operation of Disruptive Technology Solutions, DTA II and Disruptive Technology Advisers and related business operations ("the Fund"). The words "the Fund" are written in the left margin, after the words "related business operations."

Davis argues "the Fund" refers only to DTS; Rickel argues "the Fund" refers to all three entities. The court will evaluate the evidence presented on this issue.

Davis refers to DTS as the "Palantir Fund," and argues it was the only "fund" in existence when the agreement was formed. Additionally, he notes Rickel's cross-complaint and sworn declaration used the term "Fund" to refer only to DTS. Cross-Complaint ¶19, exh. B.

Davis argues Rickel's interpretation is contrary to submissions in Rickel v. Enright, wherein Rickel argued the settlement agreement gave him only an interest in the "Palantir Fund," i.e. DTS. See Davis exh. 2, pg. 21.

The "formal written agreement" contemplated in paragraph 4 of the handwritten agreement was never created. As the handwritten agreement is ambiguous as to the meaning of "the Fund," the court must consider extrinsic evidence in its interpretation.

The fact that "the Fund" is singular, not plural, suggests it refers to only one entity (DTS).

Rickel's strongest evidence is that the parties were negotiating his exit from all DTA-related businesses, not just from DTS. He argues the agreement entitled him to an interest in all three entities to reflect his role as founder of each. Rickel decl. ¶¶6-16.

Rickel's arguments about Davis' SEC filings from March and April 2021 that refer to DTA and DTA II as Davis' "firm" (KR decl., exhs. 20-21) are unpersuasive because those filings refer to the "firm," not the "fund."

The typed version of the agreement attached to Rickel's cross-complaint removes the words "the Fund" from the margins, and "the Fund" is in the first paragraph after the words "Disruptive

Technology Solutions." Rickel Cross-complaint Exhibit B, ¶1. Under the typed agreement "the Fund" refers to DTS only. Rickel's inclusion of this document suggests when the cross-complaint was filed, Rickel understood "the Fund" to refer to DTS only, not all three entities. Rickel argues inclusion of this version was a mistake, and he always understood "the Fund" to mean all three entities. Though the court granted Rickel's motion for leave to amend his cross complaint, the prior pleadings constitute evidence that Rickel is taking a position now that is contrary to his prior position.

Rickel admitted at deposition that he received a long-form draft of the agreement from Davis, which identified "the Fund" as DTS only. Davis exhibit 1 at 69:4-18. There is no evidence Rickel objected to this draft language, which is strong evidence that at the time, Rickel understood "the Fund" to refer to DTS alone. Additionally, in Enright Rickel argued the settlement agreement only granted him an interest in the Palantir fund (i.e. DTS).

Rickel presents a declaration from mediator Steiner, which is inadmissible as violative of the mediation privilege. Declarations from professors Garner and Wertlieb are largely inadmissible because "expert opinion is generally not admissible on the legal interpretation of contracts," unless "the words or phrases as used in a writing which is the subject of controversy are terms of art, science or trade, or there is something to show they were not used in their ordinary and plain meaning. Kasem v. Dion-Kindem (2014) 230 Cal.App.4th 1395, 1401, 31A Am. Jr. 2d, Expert and Opinion Evidence §294. Wertlieb did not provide evidence that use of "the Fund" should be understood within its trade meaning. These declarations attempt to usurp the court's role as fact-finder and interpreter of the contract.

Ultimately, the court is not convinced that Rickel's previous references to "the Fund" were mistaken, and the prior pleadings constitute evidence of his understanding of the agreement.

Throughout this litigation, Rickel repeatedly treated "the Fund" and "DTS" as interchangeable terms, and he has not provided a meaningful explanation as to why he failed to notice the alleged error earlier. A private placement memorandum from DTS repeatedly refers to DTS as "the fund." Davis exhibit 6 pg. 2. Although this document was created before the settlement agreement was formed, it is evidence of the parties' usage of the term "the Fund" at the time the agreement was formed. This is evidence the parties understood it to refer to DTS alone.

The court notes Davis' lawyers sent Rickel multiple copies of a proposed formal typed agreement to replace the handwritten agreement. In these typed versions, "the fund" was defined

as DTS only. There is no evidence Rickel (or counsel) object to these drafts. Davis decl., exhs. 7-8. The court finds this exchange of note; if Rickel always understood "the Fund" to refer to all three entities, it would be expected that he or his counsel would have raised this objection.

The preponderance of the evidence is that "the Fund" refers only to DTS, so Rickel is entitled only to profits from DTS.

DUE TO THE ONGOING COVID-19 PANDEMIC, PARTIES AND COUNSEL ARE ENCOURAGED TO APPEAR BY MICROSOFT OFFICE TEAMS.

**************END OF RULING

Case Management Conference is scheduled for 11/10/2021 at 08:30 AM in Department P at Santa Monica Courthouse.

In lieu of case management conference statement forms, parties are to file a joint status conference report, five (5) court days prior to the next status conference date. The joint status report is not to exceed seven (7) pages, and is to be filed with input from all parties. Said report is to be e-filed by Plaintiff's Counsel.

Notice is waived.