

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 020852

COUNTY OF WAKE

MOORING CAPITAL FUND, LLC,)
Individually and derivatively as minority)
Member of COMSTOCK NORTH)
CAROLINA, LLC, a North Carolina Limited)
Liability Company,)

Plaintiff,)

v.)

COMSTOCK NORTH CAROLINA, LLC,)
a North Carolina Limited Liability Company,)
COMSTOCK SERVICE CORP, INC.,)
a Virginia Corporation, and COMSTOCK)
HOMEBUILDING COMPANIES INC.,)
a Delaware corporation,)

Defendants.)

BRIEF IN SUPPORT OF MOTION TO
STAY PROCEEDINGS PURSUANT
TO N.C. GEN. STAT. § 57C-8-01(b)

NOW COMES Defendant Comstock North Carolina, LLC (“CNC”), by and through counsel, to file this brief as required by Rule 15.2 of the Business Court Rules in support of its Motion to Stay Proceedings Pursuant To N.C. Gen. Stat. § 57C-8-01(b).

FACTS

CNC is a North Carolina limited liability company with its principal place of business in Wake County, North Carolina. Its members’ rights and responsibilities are set forth in its Second Amended and Restated Operating Agreement (the “Operating Agreement”), which was attached to the Amended Complaint as Exhibit A. CNC’s members are now only Comstock Homebuilding Companies, Inc. (“CHCI”), owning approximately 97% of the membership interests of CNC, and Plaintiff, which owns approximately 3% of CNC. (See Affidavit of Bruce Labovitz, ¶¶7-8, attached hereto as Exhibit A) CNC is an active, solvent business. (Aff. Labovitz, ¶15)

ARGUMENT

Pursuant to North Carolina Gen. Stat. § 57C-8-01(b), a limited liability company may commence an investigation of the charges made in the complaint of a members' derivative action and the Court may stay the action until the investigation is completed. N.C. Gen. Stat. § 57C-8-01(b); *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 396, 537 S.E.2d 248, 254 (2000). A trial court's denial of a motion to stay is subject to an abuse of discretion standard of review. *Park East Sales, LLC v. Clark-Langley, Inc.*, ___ N.C. App. ___, 651 S.E.2d 235, 238 (2007)

This case involves derivative claims plead pursuant to N.C. Gen. Stat. § 57C-8-01. Plaintiff has made charges in its Complaint, *inter alia*, that CNC failed to distribute profits, made unauthorized distributions to CHCI and Comstock Service Corp., Inc. ("CSCI"), and has been mismanaged by CHCI and/or CSCI. (See Compl.) Plaintiff's claims all involve the bookkeeping for CNC. Necessary analysis of the accounting issues is best completed through a qualified accounting firm's review of CNC's books.

To this end, CNC has engaged the services of PriceWaterhouseCoopers LLP ("PWC") to investigate the charges made in the Complaint. PWC is an independent accounting firm. A copy of the accounting firm's engagement letter is attached hereto as Exhibit B and incorporated by reference. All costs associated with PWC's work will be born by CNC.

A stay should be issued in this matter because PWC's investigation will: (1) determine if Plaintiff's allegations have any basis in fact and (2) be in the interests of judicial economy.

I. PWC's Investigation Will Determine if Plaintiff's Allegations Have Any Basis In Fact.

Defendants have generally denied Plaintiff's material allegations. (See Answer) Defendants have also demonstrated how Plaintiffs allegations are incorrect and unsubstantiated. (See Ex. A) However, should there be any basis for Plaintiff's claims, which Defendants deny, PWC's investigation will reveal it. The investigation by PWC will also reveal whether any unauthorized distributions have been made. Thus, the investigation will resolve many of the issues in this matter.

II. An Investigation By PWC Will Serve the Interests of Judicial Economy.

This case involves complex accounting issues surrounding CNC's books. For example, in his affidavit in support of a motion for appointment of a receiver, Dipesh Bhise relies on his (disputed) interpretation of "internal" financial statements, IRS forms, capital accounts and tax documents. (See Affidavit of Dipesh Bhise attached to Plaintiff's Motion for Appointment of Receiver and further attached hereto as Exhibit C for convenient reference, ¶¶4-6) Similarly, Mr. Labovitz's affidavit references Plaintiff's informal audit of CNC's books, financial statements and inter-company transfers. (Ex. A, ¶¶10-13) By staying the proceedings to allow PWC the opportunity to investigate Plaintiff's allegations, the Court and the parties will be saved from litigation time and expense. Discovery has not begun in this matter so it will not be delayed by the stay.

A stay of the proceedings will not prejudice Plaintiff. Instead, Plaintiff will benefit from the stay because the investigation will save Plaintiff the time and money it would have to expend for discovery and litigation. PWC is conducting the investigation at the expense of CNC. If the investigation reveals any merit to Plaintiff's allegations, then Plaintiff will not have had to expend the time and money on discovery and experts.

CONCLUSION

WHEREFORE, CNC respectfully prays upon the Court that its motion for a stay of the proceedings pursuant to N.C. Gen. Stat. § 57C-8-01(b) be granted.

This the 15th day of May, 2008.

RAGSDALE LIGGETT PLLC

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Schedule of Exhibits:

Exhibit A: Affidavit of Bruce Labovitz
Exhibit B: PWC Engagement Letter
Exhibit C: Affidavit of Dipesh Bhise

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS PURSUANT TO N.C. GEN. STAT. § 57C-8-01(b), was served on all counsel of record by the Business Court's electronic filing system and by mailing a copy, first-class, postage prepaid, this the 15th day of May, 2008.

This the 15th day of May, 2008.

RAGSDALE LIGGETT PLLC

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