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Case No. 4780-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WIMBLEDON FUND LP – ABSOLUTE RETURN FUND SERIES, a Delaware Limited Partnership, Plaintiff,	)	
v.	)	C.A. No. 4780-VCS
SV SPECIAL SITUATIONS FUND LP, a Delaware Limited Partnership, Defendant.	)	

MEMORANDUM OPINION

Date Submitted: March 30, 2010
Date Decided: June 14, 2010

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STRINE, Vice Chancellor.

I. Introduction

This matter involves a dispute between an investment fund, SV Special Situations Fund LP ("SV Fund"), and one of its limited partners, Wimbledon Fund LP-Absolute Return Fund Series ("Wimbledon"). Shortly after investing in SV Fund in October 2007, Wimbledon decided that it wanted to withdraw, and sent SV Fund a request to pull out its capital as of the next biannual withdrawal date, which was June 30, 2008. The problem for Wimbledon is that the limited partnership agreement, to which Wimbledon bound itself upon subscribing to SV Fund, prevents members from withdrawing from SV Fund before twelve months have passed since their initial investment. Therefore, Wimbledon's request to withdraw — which came in February 2008, a mere four months after it joined SV Fund — was premature.

For months, there was radio silence from SV Fund on the status of Wimbledon's request. There is no evidence in the record that SV Fund responded in any way to Wimbledon's request before the June 30, 2008 withdrawal date. There is also no record evidence indicating that Wimbledon ever followed up with SV Fund about the status of its request to withdraw.

It was not until September 2008 that SV Fund responded in the form of a brief letter acknowledging Wimbledon's request. Shortly after sending that letter in September, SV Fund wrote a letter in October 2008 to all of its members indicating that it was suspending all pending and future withdrawal requests. But Wimbledon claims that the suspension does not apply to its withdrawal, because

its requested withdrawal was effective on June 30, 2008, before SV Fund announced the suspension. Despite the fact that its request was premature, Wimbledon argues that its request was effective because SV Fund consented to its early withdrawal.

As evidence of SV Fund's consent, Wimbledon points to only one piece of evidence in the record before me, namely the letter SV Fund sent Wimbledon in September 2008 acknowledging its February 2008 request to withdraw. But, that letter came three months *after* the June 30 withdrawal date, and includes no language clearly indicating that SV Fund consented to the withdrawal. Based on this meager evidence, it is implausible to infer that SV Fund consented to Wimbledon's request. Therefore, I conclude that the withdrawal suspension applied to Wimbledon, as it did to all of SV Fund's members.

II. Factual Background

Discussed below are the undisputed facts — as they emerge from the summary judgment record — that are relevant to the issues I must decide.

A. On October 1, 2007, Wimbledon Invests $2 Million With SV Fund

On October 1, 2007, Wimbledon invested $2 million in SV Fund, a Connecticut-based investment fund that typically took illiquid positions in the investments it made.[1] In return for its contribution, Wimbledon became a partner

[1] Enerio Aff. Ex. D (letter from SV Funds to Weston Capital Management (October 31, 2008)) ("[S]egments of the markets in which we have historically invested, particularly segments of the debt market, often typically have less liquidity than, say, listed equity securities. At the present time, the SV Funds' portfolio liquidity is very limited.").

in SV Fund. By signing a subscription agreement, Wimbledon bound itself to the terms of SV Fund's limited partnership agreement (the "LP Agreement").

Under the terms of the LP Agreement, Wimbledon's ability to withdraw from SV Fund was circumscribed as follows:

> Subject to the provisions of Section 1.7 hereof and the other provisions of this Section 6.1, any Limited Partner, without the consent of the General Partner, may withdraw the whole or any part of the amount in his Capital Account, as of the last business day of June or December of any Fiscal Year, *commencing with the first such date at least twelve (12) full months following the date of the Limited Partner's Original Capital Contribution* (each, a "Semi-Annual Withdrawal Date"). The General Partner, *in its sole discretion, may consent to withdrawals as of other dates.* Any Limited Partner seeking a withdrawal pursuant to this Section 6.1 must give written notice to the General Partner at least 45 days prior to the date as of which the withdrawal is to be made, stating his intention to withdraw and the amount to be withdrawn.[2]

Thus, the LP Agreement provided: (1) that a member could withdraw its contribution only after twelve months had passed since its initial contribution to SV Fund; (2) that withdrawals would only occur twice per year — on June 30 or December 31; and (3) that written notice of the request to withdraw had to be provided 45 days before the June 30 or December 30 withdrawal date.

The LP Agreement further provided in relevant part that the general partner[3] could in its discretion further limit members' withdrawals as follows:

> Notwithstanding Section 6.1(a) hereof, the General Partner *shall have the right, in its sole discretion, to suspend all withdrawals* to Partners during one or more of the following circumstances: . . . (vii) *when in the opinion of the General Partner, it is in the best interests*

[2] Enerio Aff. Ex. B (the "LP Agreement") § 6.1(a) (emphasis added).
[3] SV Fund's general partner is Stagg Capital Partners LLC. Compl. ¶ 5.

> *of the Partnership or the Limited Partners so to do* (including but not limited to in the event that Limited Partners, in the aggregate, request withdrawals of 25% or more of the value of the Partnership's Capital Accounts as of any date of the withdrawal).[4]

Therefore, the general partner could suspend withdrawals as to *all* members if it determined that such a suspension was in the best interests of SV Fund's members, particularly if a large number of withdrawals were requested in the same general time period. And, the LP Agreement further provided that "[s]ubject to applicable law, the General Partner may, in its sole discretion, waive or modify any of the terms relating to withdrawals *pursuant to written agreement* with a Limited Partner, or otherwise."[5]

Finally, the LP Agreement contained an integration clause, which provided that "[t]his Agreement constitutes the entire agreement of the General Partner and the Limited Partners with respect to the subject matter hereof. *No modification or waiver of this Agreement, or any part hereof, shall be valid or effective unless in writing and signed by the party sought to be charged herewith*."[6]

B. On February 21, 2008, Wimbledon Requests To Withdraw Its Entire Investment In SV Fund

Approximately four months after its initial investment, on February 21, 2008, Wimbledon submitted a written request to withdraw its entire investment in SV Fund as of June 30, 2008 (the "Redemption Request"). As of June 30, 2008, the date when Wimbledon's Redemption Request was to take effect, Wimbledon

[4] LP Agreement § 6.1(e) (emphasis added).
[5] *Id*. at § 6.1(f) (emphasis added).
[6] *Id*. at § 11.5 (emphasis added).

had received no indication that SV Fund either consented to or rejected Wimbledon's submission. In fact, the only acknowledgement of Wimbledon's submission came in a brief September 30, 2008 letter (the "September 2008 Letter") that noted that SV Fund was "in receipt of [Wimbledon's] request to withdraw 100% of [its] capital account in SV Special Situations Fund, LP, as of June 30, 2008."[7] Importantly, that letter did not contain language expressly consenting to the withdrawal, but rather only noted that "it is in the best interests of the Limited Partners and [SV Fund] that the aforementioned withdrawal be made on an in-kind basis," and that it would provide "more detailed notice as to

[7] Pl.'s Reply Br. Ex. 1 (the "September 2008 Letter"). In its entirety, the September 2008 Letter reads as follows:

> Dear Sir or Madam:
>
> We are in receipt of your request to withdraw 100% of your capital account in SV Special Situations Fund, LP, as of June 30, 2008.
>
> As provided in the Limited Partnership Agreement, the General Partner has determined that it is in the best interests of the Limited Partners and the Partnership that the aforementioned withdrawal be made on an in-kind basis, by delivery of portfolio securities selected by the General Partner, as provided in the Partnership Agreement. We will provide you more detailed notice as to the time of delivery and the securities to be delivered.
>
> The Partnership is also willing to accept the withdrawal of pending capital withdrawal requests at this point in time.
>
> The General Partner shall endeavor to keep you advised on these matters. Kindly address all questions to Scott A. Stagg or myself.
>
> Sincerely,
>
> /s/ Mark Focht

Id.

the time of delivery and the securities to be delivered."[8] Therefore, the September 2008 Letter does not address the issue of whether Wimbledon could pull out of SV Fund before twelve months had passed since its initial capital contribution.

The only other communication came on October 31, 2008, when SV Fund sent a letter to *all* of its members notifying them that SV Fund was suspending all pending and future redemption requests (the "Suspension Letter").[9]

On August 5, 2009, Wimbledon filed its one-count complaint requesting a declaratory judgment from this court that it had withdrawn from its participation in SV Fund, and that it was now a creditor of SV Fund. That claim presents two straightforward issues. The first is whether SV Fund consented in the September 2008 Letter to Wimbledon's premature Redemption Request. The second issue is whether SV Fund's decision to suspend withdrawals, as communicated in its Suspension Letter, applies to Wimbledon's Redemption Request. On those issues, Wimbledon has also moved for summary judgment. In reply, SV Fund has filed a cross-motion for summary judgment, requesting that this court declare that Wimbledon has not withdrawn from SV Fund, and is not a creditor of SV Fund. For the reasons set forth below, I find that Wimbledon did not withdraw from SV Fund, and therefore grant SV Fund's motion.

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[8] *Id*.

[9] Enerio Aff. Ex. D (letter from SV Fund to Weston Capital Management (October 31, 2008)) (the "Suspension Letter").

III. Legal Analysis

A. Standard Of Review

Under Rule 56, summary judgment "shall be rendered forthwith if the pleadings . . . and admission on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[10] "Where the plain, common and ordinary meaning of the words [of the contract] lends itself to only one reasonable interpretation, that interpretation controls the litigation."[11] Therefore, where the contract is clear on its face, the court may interpret the contract as a matter of law and grant summary judgment, because there are no genuine issues of material fact.[12]

B. Wimbledon Has Not Presented Record Evidence Suggesting That SV Fund Consented In The September 2008 Letter To Wimbledon Withdrawing

Under the Delaware Uniform Limited Partnership Act, "[a] limited partner may withdraw from a limited partnership only at the time or upon the happening of events specified in the partnership agreement and in accordance with the partnership agreement."[13] The LP Agreement here provides that the only way that Wimbledon could withdraw from SV Fund on June 30, 2008 was by SV Fund's express consent, which was required for a member to exit during the one year

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[10] Ct. Ch. R. 56(c).
[11] *Id*.
[12] *See, e.g.*, *MHM/LLC, Inc. v. Horizon Mental Health Mgmt*., 1996 WL 592719, at *2, 5 (Del. Ch. Oct. 3, 1996).
[13] 6 *Del. C.* § 17-603.

lock-in period.[14] Here, Wimbledon made its initial investment in October 2007, only four months before it requested withdrawal. Therefore, the issue is whether SV Fund consented to that early request to withdraw.

Of course, "parties to a contract who are to benefit from its terms and conditions may, by their mutual agreement, waive those conditions and terms."[15] But waivers of contractual rights are not lightly found.[16] Under Delaware law, a waiver is "the voluntary and intentional relinquishment of a known right . . . and implies knowledge of all material facts, and intent to waive."[17] "A waiver may be express or implied, but either way, it must be unequivocal."[18] That doctrine, coupled with the LP Agreement's integration clause, which provides that the provisions of the contract could not be modified or waived "unless in writing and

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[14] *See* LP Agreement § 6.1(a) (stating that the "General Partner, in its sole discretion, may consent to withdrawals as of other dates").

[15] 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39.23, at 597 (4th ed. 2000).

[16] *See id*. § 39.28, at 625-26 (noting that, for a waiver to be found, "the intent to waive must be clearly manifested or the conduct must be such that intent to waive may be reasonably inferred. Intent to waive will not be inferred from doubtful or equivocal acts or language").

[17] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982); *see also George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975) ("Intention forms the foundation of the doctrine of waiver, and it must clearly appear from the evidence."); *Klein v. American Luggage Works, Inc.*, 58 A.2d 814, 818 (Del. 1960) ("Waiver is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights.").

[18] *DiRienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009). An express waiver exists "where it is clear from the language used that the party is intentionally renouncing a right that it is aware of," and, an implied waiver is found "only if there is 'a clear, unequivocal, and decisive act of the party demonstrating relinquishment of the right.'" *Id*. at *4-5 (citations omitted); *see also* WILLISTON ON CONTRACTS § 39:27, at 621 ("[T]he well-known rule regarding waiver of contractual requirements [is that a] party to a contract may by express agreement or by his own course of conduct waive his legal right to insist on strict performance of the covenants of the contract." (internal quotation omitted)).

signed by the party sought to be charged" with the modification,[19] creates a high hurdle for Wimbledon to overcome.

There is no evidence in the record that SV Fund responded to Wimbledon's Redemption Request before June 30, 2008. Indeed, the only evidence in the record that SV Fund responded is the September 2008 Letter, which was sent three months *after* the June 30 deadline had passed. Wimbledon has not identified any contractual language requiring SV Fund to respond to Wimbledon's Redemption Request, nor has it produced any evidence indicating that it even followed-up once with SV Fund after it made its Redemption Request in February 2008. Because "a party's silence is never sufficient to establish a waiver where the party has no duty to speak,"[20] the obvious inference is that SV Fund did not consent to Wimbledon's request that it be permitted to withdraw as of June 30, 2008.

Nevertheless, Wimbledon argues that SV Fund *retroactively* assented to Wimbledon's Redemption Request. As evidence of that backward-looking consent, Wimbledon points to the September 2008 Letter, which acknowledged Wimbledon's Redemption Request, and stated that the redemption would be made on an in-kind basis.[21] Wimbledon points to no other facts — including any indication that it relied on the representations SV Fund made in the September 2008 Letter — to support its position.

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[19] LP Agreement § 11.5.
[20] *DiRienzo*, 2009 WL 4652944, at *5.
[21] *See supra* note 7.

But, that argument fails because the September 2008 Letter does not include a clear representation that SV Fund consented to the early withdrawal. Simply acknowledging that the Redemption Request was made and then indicating how the Redemption Request would be fulfilled is not an unequivocal indication that SV Fund was voluntarily and intentionally waiving Wimbledon's duty to remain a member in SV Fund for at least one year.[22] And, there is absolutely no language in the September 2008 Letter addressing the reality that SV Fund was responding three months after the date by which Wimbledon requested to withdraw, and indicating that SV Fund was somehow consenting after-the-fact. For example, the September 2008 Letter does not include language making clear that SV Fund was going to lock in Wimbledon's net cash position as of June 30, 2008. At best, the language is ambiguous, and ambiguous acts cannot form the basis for a waiver.[23]

Rather, the only plausible interpretation of the September 2008 Letter is that SV Fund was acknowledging Wimbledon's Redemption Request and preparing to effect the withdrawal as of the December 31, 2008, not the June 30, 2008, withdrawal date. December 31, 2008 was the first withdrawal date for which Wimbledon qualified to withdraw under the terms of Section 6.1(a) of the

[22] *See DiRienzo*, 2009 WL 4652944 at *5 (finding that mere acknowledgement of a receipt of a request for appraisal did not demonstrate the requisite unequivocal intent to waive an objection to the appraisal demand).
[23] *See Vechery v. Hartford Accident & Indem. Ins. Co.*, 121 A.2d 681, 685 (Del. 1956) (stating that the burden of proof is on the party asserting the waiver, and that "intention [to waive] will not be implied from slight circumstances").

LP Agreement. And, not only was the September 2008 Letter well after the June 30, 2008 date, but it was also written on the eve of Wimbledon's one-year anniversary of participation in SV Fund, further suggesting that the September 2008 Letter was looking forward to December, rather than backward to June.

Thus, Wimbledon has not presented a triable issue of fact as to whether the September 2008 Letter constituted SV Fund's retroactive consent to Wimbledon's Redemption Request to withdraw on June 30, 2008.

C. There Is No Triable Issue Of Fact As To Whether Wimbledon's Request To Withdraw Was Suspended

Because Wimbledon's effort to withdraw from SV Fund prematurely was not effective on the June 30, 2008 withdrawal date, the next issue is whether its request, which could only be effective as of December 31, 2008, was subject to the Suspension Letter that SV Fund issued on October 31, 2008.[24] Issuing that Suspension Letter was squarely within SV Fund's authority,[25] which Wimbledon does not dispute. And, Wimbledon does not argue that it was treated any differently from SV Fund's other members by the suspension.[26] Rather, Wimbledon contends that the suspension only applied prospectively, and not to any requests that were already pending.

[24] *See supra* page 6.
[25] *See supra* pages 3-4.
[26] *See Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. 4780-VCS, at 7 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT) (Wimbledon's counsel stating that Wimbledon was not treated any differently than other SV Fund members).

But, Wimbledon's argument is not supported by the plain language of the LP Agreement. Section 6.1(e) of the LP Agreement provides that "the General Partner shall have the right, in its sole discretion, to suspend all capital withdrawals to Partners" in certain enumerated circumstances.[27] There is nothing in that language that even obliquely, much less plainly, suggests that SV Fund's authority to suspend is limited to prospective withdrawals.[28] Therefore, when Wimbledon argues that "[b]y its plain terms, section 6.1(e) operates prospectively,"[29] I can only wonder whether we are reading the same contract.

Indeed, reading Section 6.1(e) of the LP Agreement as providing SV Fund with only prospective suspension authority simply makes no sense at all. Under Delaware law, "contracts must be interpreted in a manner that does not render any provision illusory or meaningless."[30] If SV Fund cannot suspend pending withdrawal requests, then Section 6.1(e) is meaningless. The obvious purpose of a provision like Section 6.1(e) is to protect the members from a run on SV Fund. For that reason, Section 6.1(e) provides particularly for suspension "in the event that Limited Partners, in the aggregate, request withdrawals of 25% or more of the

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[27] LP Agreement § 6.1(e).

[28] *See supra* pages 3-4. Wimbledon argues that Section 6.1(e) limits SV Fund's suspension authority because it gives SV Fund the right only to suspend withdrawals to "Partners," as opposed to members who have already withdrawn and are no longer "Partners" but creditors of the fund. Pl.'s Reply Br. 6-7. But this argument is unpersuasive because, per the discussion above, there is no record evidence suggesting that SV Fund consented to Wimbledon's request to withdraw. And, in any event, use of the word "Partners" in this context is hardly a clear indication that the parties intended to circumscribe SV Fund's authority to suspend to only future withdrawal requests.

[29] Pl.'s Op. Br. 8-9.

[30] *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) (citing *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001)).

value of the Partnership's Capital Accounts as of any date of withdrawal."[31] That protection is critical for a fund like SV Fund, whose portfolio is invested largely in illiquid positions.[32] Because of its illiquid portfolio, a large withdrawal of investors could force SV Fund to suffer severe discounts or incur other high costs in attempting to raise the capital necessary to make withdrawal distributions either by selling some of the investments or even by attempting to distribute out the investments in kind.[33] Section 6.1(e)'s protection is not possible if SV Fund can only stop future withdrawal requests and cannot suspend any pending withdrawal requests which have already created an immediate danger to SV Fund. Indeed, Wimbledon's reading of the contract would magnify the risk of a run on SV Fund because — by giving preference to those who withdraw early and prejudicing those who request to withdraw later — it would create a greater incentive for members to run for the door as soon as there was a hint of potential trouble.

In that respect, by making the argument that SV Fund could not suspend its pending Redemption Request, Wimbledon is trying to avoid the costs that it agreed to bear in order to have the benefits it sought to obtain under its contract to invest with SV Fund. That is, when Wimbledon invested, it knew it was locking itself in for twelve months, and that Section 6.1(e) allowed the general partner to protect all of SV Fund's investors by stopping redemption requests on a non-

[31] LP Agreement § 6.1(e)(vii).
[32] *See supra* note 1.
[33] For example, depending upon the nature of the investment, some of the assets which SV Fund holds may not be freely transferrable, limiting SV Fund's ability to make in-kind distributions, and thereby further raising the costs of a large distribution.

discriminatory basis if a run on SV Fund that could endanger its solvency, and therefore all of the members' capital, occurred. By holding that Wimbledon was properly subjected to the same restrictions as applied to all of SV Fund's members, I simply require Wimbledon to honor the clear bargain it made when it invested.

In sum, the only plausible reading of the LP Agreement is that SV Fund could suspend pending withdrawal requests. Accordingly, SV Fund's suspension of withdrawals was effective as to Wimbledon when the Suspension Letter was issued in October 2008.

IV. Conclusion

Wimbledon's motion for summary judgment is DENIED, and SV Fund's motion for summary judgment is GRANTED. The parties will submit a conforming final order within five days.