6-2-2023

Anders Asset Management LLC v. PPR Financial Holdings LLC

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2396

ANDERS ASSET MANAGEMENT LLC,

Appellant

v.

PPR FINANCIAL HOLDINGS LLC; PENTEX HOLDINGS LLC;
DAVID VAN HORN; JOHN SWEENEY

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-21-cv-01638)
District Judge: Honorable Paul S. Diamond

Submitted Under Third Circuit LAR 34.1(a)
on April 14, 2023.

Before: CHAGARES, SCIRICA and AMBRO, Circuit Judges

(Opinion Filed June 2, 2023)

OPINION*

AMBRO, Circuit Judge

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* This disposition is not an opinion of the full Court and under I.O.P. 5.7 does not constitute binding precedent.

I.

Appellant Anders Asset Management, LLC ("Anders") and Appellee PPR Financial Holdings, LLC ("PPR") are each in the business of investing in real estate loans. They teamed up to form a joint venture, PenTex Holdings, LLC ("PenTex"), a manager-managed Delaware limited liability company with the purpose of "purchas[ing] . . . real estate notes at a discount with the goal of [selling at a profit]." App. at 44. Under PenTex's Operating Agreement, PPR was entitled to 60% of profits and controlled two of three manager seats, with Anders receiving the remaining 40% of profits and controlling the third manager seat. Generally, PPR was responsible for raising capital and executing "workout" renegotiations, while Anders performed physical due diligence and asset management.[1]

Things went smoothly for PenTex at first. It successfully acquired, through a Department of Housing and Urban Development ("HUD") auction, three home equity conversion mortgage pool offerings, which included notes and non-performing loans (the "HECM 1 Assets"). After this, the PenTex parties evaluated dozens of similar deals, creating financial models and conducting other due diligence.

Then came a second HUD auction for home equity conversion mortgage pools. Consistent with past practice, Anders evaluated the assets in collaboration with PPR. But there were doubts as to whether PenTex could raise the funds necessary to bid on all the

[1] Reviewing a grant of summary judgment, we "view the facts in the light most favorable to the non-moving party and must make all reasonable inferences in that party's favor." *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005). The facts here are recounted consistent with this standard.

desired assets, so Anders asked PPR whether it could independently bid on some. But PPR discouraged Anders from doing so and indicated it was likely to raise enough capital.

Ultimately, a PPR affiliate bid successfully on five mortgage pools at the auction (the "HECM 2 Assets"). After that entity acquired the assets, it assigned them to a different PPR affiliate rather than attributing them to PenTex. And PPR directed and approved all this without a meeting or vote of the PenTex managers. To Anders, this was a "unilateral[] and intentional[] seiz[ure]" of the HECM 2 Assets from PenTex and Anders. In short, Anders believes PPR violated the Operating Agreement by treating the HECM 2 Assets as its own and failing to hold a vote of PenTex's managers before doing so.

Accordingly, Anders filed a complaint against PPR and PenTex. The complaint alleged, among other things, that PPR breached the Operating Agreement and its implied covenant of good faith and fair dealing. After a motion by PPR, the District Court dismissed all the claims without prejudice. Anders then amended its complaint, again bringing several claims, including for breach of contract and breach of the implied covenant of good faith and fair dealing. The Court dismissed all of them with prejudice except the breach-of-contract claim. Discovery proceeded on that claim and PPR moved for summary judgment, which the Court granted. Anders appeals the summary judgment order to us.[2]

[2] The District Court had jurisdiction under 28 U.S.C. § 1332(a)(1). We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the grant of summary judgment. *Thomas v. Tice*, 948 F.3d 133, 137 (3d Cir. 2020). "Summary judgment is appropriate when, drawing all reasonable inferences in favor of the nonmoving party, the movant shows that there is no genuine dispute as to any material fact, and thus the movant is entitled to judgment as a matter of law." *Id.* at 137-38 (internal quotation omitted).

II.

A. Breach of Contract

To repeat, the District Court granted summary judgment against Anders on its breach-of-contract claim. Delaware law governs. Under it, Anders must prove a contractual obligation, a breach of that obligation, and resulting damages. *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 883 (Del. Ch. 2009).

Specifically, Anders claims PPR—by treating as its own the HECM 2 Assets acquired in the second HUD auction—breached § 4.1 of the Operating Agreement. It reads, "the Managers, with a majority vote of the Managers, shall have the sole discretion and authority," among other things, "[t]o purchase Real Estate Assets[3] on behalf of [PenTex]." Operating Agreement § 4.1 (App. at 52). Anders suggests this provision required a vote of the PenTex managers before PPR could acquire the HECM 2 Assets for its own account. But, as the District Court noted, § 4.1 merely dictates the vote that must be satisfied when PenTex purchases Real Estate Assets. It does not require that "the Managers vote to *reject* a potential asset." D.C. Op. at 5 (App. at 7) (emphasis in text). Nor does it give Anders a vote, in its capacity as a PenTex manager, to veto PPR's decision to acquire Real Estate Assets for itself. Thus, PPR could not have breached § 4.1's requirements even if it purchased the HECM 2 Assets for its own benefit without a vote.

Anders also suggests it raised a genuine issue of material fact on whether the bid for the HECM 2 Assets belonged to PenTex. If it did, Anders says, then PPR's acquisition of

[3] "Real Estate Assets" means "any notes secured by a deed of trust or mortgage on real property or real property. . . ." Operating Agreement § 2 (App. at 50).

the fruits of that bid—the real estate assets—was a breach of § 1.3 of the Operating Agreement. But that provision simply sets out PenTex's purpose: "to purchase . . . real estate notes at a discount with the goal of [selling at a profit] . . . [and to] carry on any other lawful business . . . ." Operating Agreement § 1.3 (App. at 44). As a general description of what the parties intended for PenTex, it does not create the specific minority-owner protections that Anders seeks to read in.

B. Implied Covenant of Good Faith and Fair Dealing

Anders seeks also to revive its implied covenant of good-faith and fair-dealing claim, which centers again on PPR's alleged seizure. It its briefing, Anders continues the arguments made in its opposition to PPR's motion for summary judgment, where it pressed the implied-covenant claim despite the District Court already having dismissed it with prejudice. At that post-discovery stage, the Court acted well within its discretion in refusing Anders' attempts to reassert the claim. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")

Even assuming Anders can in this appeal contest not just the summary-judgment order but also the motion-to-dismiss order,[4] it still would not prevail. In the latter, the

[4] On the one hand, at no point in Anders' Notice of Appeal does it mention this order—it refers only to the summary-judgment order. App. at 1-8. Still, we can exercise jurisdiction over orders not specified in the Notice of Appeal if: "(1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 184 (3d Cir. 2010). Given that Anders' brief names only the summary judgment order as being presented for review, never mentions the standard of review for a motion to dismiss, and suggests the Court erred

District Court dismissed Anders' implied-covenant claim, which was pled as a direct claim, because it viewed it as a derivative claim belonging to PenTex. D.C. Dkt. 27 at 5. Yet Anders, in its briefing here, ignores completely that basis for dismissal, leaving it unchallenged. It did so even after PPR pressed the issue in its opposition brief, and despite Anders bearing the burden to demonstrate the trial court erred. Thus, it has forfeited the opportunity to contest its procedural default, and we see no exceptional circumstances requiring us to examine the soundness of the underlying dismissal.[5] *See Griswold v. Coventry First LLC*, 762 F.3d 264, 274 n.8 (3d Cir. 2014) (noting that a failure to brief an issue on appeal forfeits the argument).

* * *

In sum, while Anders may believe reasonably that its partner acted unlike one, it brings no claims under which it can prevail. For the reasons stated, we affirm.

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as a "matter of fact and law," Anders Br. at 22, the plainest read of the record suggests Anders focused only on the Court's rejection of the claim at summary judgment.

[5] Based on the allegations in the pleadings, the District Court treated Anders' implied covenant of good-faith and fair-dealing claim as essentially two distinct claims: one arising from PPR's alleged seizure of the HECM 2 Assets, and the other from PPR's alleged failure, as the majority owner of PenTex, to make distributions to Anders for work it provided to PenTex. D.C. Dkt. 27 at 4. The Court provided a different basis for the dismissal of each, but Anders focuses only on the former in its appeal, so we address only that claim and the reasons given for its dismissal.