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Good faith concept overrides contract

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A recent New York trial court decision illustrates the role that good faith can play in an limited liability corporation dispute.

In 2005, Remco Maintenance LLC in Long Island City, N.Y., hired Raymond Saleeby to be its president and CEO. As part of his compensation package, Saleeby received a 7.5 percent Class B membership interest in Remco. That membership interest was fully vested when, around February 2012, Remco terminated Saleeby's employment without cause.

Remco's limited liability company agreement gave Remco the option to buy Saleeby's membership interest if his employment terminated. The applicable option price was fair market value, a term the LLC agreement defined as: "the value determined by the board in good faith, based on all factors which the board, in its sole discretion, determines to be relevant and appropriate, including, without limitation, type of asset, marketability (or absence thereof), restrictions on disposition, purchases of the same or similar securities by other investors, pending mergers or acquisitions and current and prospective financial position and operating results."

Remco and Saleeby could not agree on the terms of his separation, and during their prolonged negotiations, Remco informed Saleeby that it had redeemed his membership interest for a fair market value of zero.

Saleeby filed suit, claiming that Remco had breached its contract with him, because it had acted in bad faith in setting the option price. Remco moved to dismiss Saleeby's breach-of-contract claim. In essence, it argued that the LLC agreement gave Remco's board "sole discretion" to decide the fair market value of Saleeby's membership interest and, as a result, Saleeby could not state a valid claim for breach of contract. *Saleeby v. Remco Maintenance LLC*, No. 650371/2016, 2016 WL 4000631 (July 25, 2016).

The trial court noted that, under New York law, "good faith" is the "exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" and that acting in good faith included behaving "honestly and frankly, without any intent to defraud or to seek an unconscionable advantage." (Citing *AG Capital Funding Partners L.P. v. State Street Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005)).

The court ruled that the board's sole discretion to set the option price could not run afoul of the contractual requirement that the board act in good faith when doing so. Applying the familiar standard that

the allegations of the complaint must be accepted as true and that the plaintiff must be given the benefit of all favorable inferences from them, the trial court denied Remco's motion.

In *Remco*, the court was faced with a contractual provision that gave the board sole discretion to set the fair market value of the price for Saleeby's membership interest but which required the board to do so in good faith.

The court was prepared to give Remco the discretion afforded in the parties' contract, but Remco had to exercise that discretion honestly and without taking advantage of Saleeby. When it set the value of Saleeby's interest at zero, Remco put its own credibility into question and practically assured itself of being in a lawsuit that would withstand a motion to dismiss.

The result probably would have been the same even if Remco's agreement did not require it to act in good faith, because New York, like Illinois, reads good faith into every contract. *1-10 Industry Associates LLC v. Trim Corporation of America*, 747 N.Y.S.2d 29, 31 (2002).

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