IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

786 CHALLENGER ST. LLC,

Plaintiff,

v.

No. 1:20-cv-919-SB

BOMBARDIER AEROSPACE CORPORATION,

Defendant.

David Myre, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York; Thomas W. Briggs, Jr., Zi-Xiang Shen, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware.

Counsel for Plaintiff.

Travis Steven Hunter, Nicole Kathleen Pedi, RICHARDS, LAYTON & FINGER, PA, Wilmington, Delaware.

Counsel for Defendant.

MEMORANDUM OPINION

January 27, 2021

BIBAS, *Circuit Judge*, sitting by designation:

Typically, a cancelled company cannot sue, for it does not exist. Challenger filed this breach-of-contract suit after it filed its cancellation paperwork. Bombardier, in its motion to dismiss, questions Challenger's capacity to bring this suit. But California law makes an exception for cancelled LLCs that sue to wind up their business. And Challenger sued to get its deposit back and end its affairs. So it can bring this suit.

I. BACKGROUND

A. The Failed Sale

I take Challenger's well-pleaded facts as true: Challenger, a California LLC, offered to buy an airplane from Bombardier and gave a $500,000 deposit to an escrow agent. Compl. ¶11, D.I. 1. If the parties did not reach a contract, Challenger would get this deposit back. *Id.* For months, Challenger and Bombardier haggled. *Id.* ¶¶12, 18–20, 27. Still, they could not agree on a delivery location, so the plane never changed hands. *Id.* ¶¶19, 26, 32. Challenger asked for its deposit back. *Id.* ¶34. Bombardier also asked for the deposit. *Id.* ¶35. The escrow agent refused to give it to either party. *Id.*

B. The Cancellation

Two months later, Challenger filed a certificate of cancellation. Def.'s Br. Ex. A, D.I. 11-1. At that point, Challenger's registration was "cancelled." *Id.* "[I]ts powers, rights and privileges … cease[d] in California." *Id.* Then, a month later, Challenger brought this suit to get its deposit back.

C. The Motion to Dismiss

Bombardier filed a motion to dismiss, claiming that Challenger, as a cancelled LLC, cannot sue. Bombardier questions Challenger's capacity in three ways.

Two are mistaken: Bombardier claims that I lack subject matter jurisdiction over Challenger and that Challenger lacks standing. Def.'s Br. 5, D.I. 11; Def.'s Letter 1, D.I. 20; Oral Arg. Tr. 5:3, 5:25, D.I. 19. But those concepts are distinct from capacity. Even if Challenger does not have the capacity to sue, I have diversity jurisdiction over this suit. 28 U.S.C. § 1332(a)(1); 5A Charles A. Wright, Arthur R. Miller, & A. Benjamin Spencer, *Federal Practice & Procedure* §§ 1292–93 (4th ed. 2018). And Challenger has standing. It has suffered a real injury (the loss of its deposit) that can be traced to a certain defendant (Bombardier). *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In contrast, capacity deals with Challenger's "personal right to come into court," no matter "the particular claim or defense being asserted." 6A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1559 (2010).

But Bombardier's third challenge, for failure to state a claim, hits the mark. Fed. R. Civ. P. 12(b)(6). If an LLC cannot sue, it cannot state a claim. Bombardier can challenge Challenger's capacity to sue in a 12(b)(6) motion "if the lack of capacity … appears on the face of the pleadings or is discernable therefrom." 6A Wright, Miller, & Kane § 1294. It does. In its complaint, Challenger stated that it "was" an LLC that "was" formed in California and "had" an office in California. Compl. ¶6. The past tense shows that Challenger no longer exists, which suggests that it lacks capacity to sue.

Beyond the complaint, I take judicial notice of Challenger's certificate of cancellation and other relevant documents. *See* Def.'s Br. Ex. A (Certificate); *id.* Ex. B (Registration); Def.'s Letter Ex. 1 (California Secretary of State's LLC Cancellation Requirements). These are trustworthy public records. Fed. R. Evid. 201(b)(2); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014). So I can consider them in weighing Bombardier's 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

II. CALIFORNIA LAW GOVERNS WHETHER CHALLENGER CAN SUE

To decide if Challenger has the capacity to sue, we look to Delaware's law, or "the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). So far, no Delaware court has decided the capacity of a cancelled, out-of-state LLC to sue. Thus, I must "predict how the Delaware Supreme Court would rule if it were deciding this case." *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 91–92 (3d Cir. 2008). I predict that Delaware would look to California law to decide Challenger's capacity to sue.

A. Delaware does not let a domestic LLC sue after cancellation

Delaware's Limited Liability Company Act lets "a" LLC prosecute lawsuits only "until" it files its certificate of cancellation. 6 Del. C. §18-803. After that, the cancelled LLC must appoint a receiver to carry on any suits. §18-805. Bombardier claims that this bar forecloses Challenger's suit. Def.'s Br. 6–7. It does not. The Act defines "a" LLC as a "domestic" LLC, or one "formed under the laws of the State of Delaware." §18-101(8). In contrast, Challenger is a California LLC, or a "foreign" LLC "formed under the laws of [another] state." §18-101(6); Compl. ¶6. So §18-803 does not apply to it.

B. A foreign LLC can sue after cancellation if its home-state's law permits it

In Delaware, foreign law governs a foreign LLC's "organization and internal affairs and the liability of its members and managers." § 18-901(a)(1). Challenger says this list includes a foreign LLC's capacity to sue. Pl.'s Br. 4–5, D.I. 12. I am not so sure. An LLC's organization is its structure or hierarchy. *Organization* (def. 3), *Black's Law Dictionary* (11th ed. 2019). A member's liability is different from the LLC's. After all, that is the entire purpose of a *limited liability* company. An LLC's internal affairs involves its internal "relationships," not its ability to interact with outside parties. *McDermott Inc. v. Lewis*, 531 A.2d 206, 214–15 (Del. 1987).

Still, courts uniformly read identical "internal affairs" statutes to include capacity to sue. *See, e.g.*, *Ass'n of Merger Dealers, LLC v. Tosco Corp.*, 167 F. Supp. 2d 65, 71 n.12 (D.D.C. 2001). I predict the Delaware Supreme Court would join them. *C.f. Sisson v. State*, 903 A.2d 288, 310 & n.107 (Del. 2006) (looking to "other courts" that "[i]nterpret[ ] similar statutes"). At oral argument, Bombardier did not contest this reading of § 18-901(a)(1). In fact, given the scope and structure of the Limited Liability Company Act, this is the only reading that makes sense.

Almost the entire Act deals with the creation, activities, and dissolution of domestic LLCs. Only one subchapter discusses foreign LLCs. *See* Limited Liability Act, 6 Del. C., ch. 18, sub. IX. And that subchapter simply sets out that the foreign LLC must register to do business in Delaware. *E.g.*, §§ 18-902, 18-907. So the Act shows no interest in regulating a foreign LLC's inner workings.

In fact, Delaware *has* no interest in regulating a foreign LLC's inner workings—including its capacity to sue. *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982). After all, capacity to sue "is really not procedural or controlled by the rules of the court in which the litigation pends." *Okla. Nat. Gas Co. v. Oklahoma*, 273 U.S. 257, 259–60 (1927). Instead, capacity goes to the core of the LLC's existence: it looks to "the fundamental law of the [LLC] enacted by the state which brought [it] into being." *Id.* at 260. Only one state, the state that created the LLC, can determine its capacity to sue. Here, that state is California.

Notably, this reading of § 18-901(a)(1) aligns LLCs with corporations. Foreign law governs a foreign corporation's capacity to sue. *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001). And Delaware courts often look to corporate law when dealing with LLCs. *E.g., Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, No. 3658-VCS, 2009 WL 1124451, at *8 n.33 (Del. Ch. Apr. 20, 2009).

In sum, I predict the Delaware Supreme Court would read § 18-901(a)(1) to require that California law decide Challenger's capacity to sue.

III. CHALLENGER CAN BRING THIS SUIT

A. California lets Challenger sue after its cancellation

In California, a cancelled LLC can sue as part of its winding up. If a California LLC files a certificate of cancellation, it "shall be canceled and its powers, rights, and privileges shall cease." Cal. Corp. Code § 17707.08(c). Still, the cancelled LLC "continues to exist for the purpose of winding up its affairs [and] prosecuting … actions by … it in order to collect … obligations." § 17707.06(a); *accord DD Hair Lounge, LLC v. State Farm Gen. Ins. Co.*, 230 Cal. Rptr. 3d 136, 139 (Cal. Ct. App. 2018).

According to Bombardier, Challenger is limited to suits it started *before* it filed the certificate of cancellation. Def. Reply 7, D.I. 13. But I see no such limit in the text. The statute refers simply to "actions," not *existing* actions. § 17707.06(a). The text does not differentiate between suits initiated before or after the certificate was filed; neither will I.

Of course, a cancelled LLC cannot start just any lawsuit. The LLC can bring suits only "to collect and discharge obligations" as it wraps up its affairs. § 17707.06(a); *accord Force v. Advanced Structural Techs., Inc.*, No. CV 20-2219-DMG, 2020 WL 4539026, at *5 (C.D. Cal. Aug. 6, 2020). Besides these suits, the LLC can "dispos[e] of … its property" and "collect[] and divid[e] its assets"—in other words, close up shop. § 17707.06(a). Otherwise, the LLC has no "powers, rights, [or] privileges." § 17707.08(c). Thus, a cancelled LLC has a limited capacity to sue as part of its windup.

In its complaint, Challenger did not allege that it brought this suit to wind up its affairs. That is no problem: it did not have to plead capacity to sue. Fed. R. Civ. P. 9(a)(1).

Since Challenger brought this suit solely to "collect … obligations" and wind up, it has the capacity to sue. Challenger was formed to buy this aircraft: it was registered the same day that it put down its deposit. Def.'s Br. Ex. B; Compl. ¶11. Once the sale fell through, Challenger broke up. Def.'s Br. Ex. A. Now, Challenger simply asks for its deposit back. Compl. ¶¶36, 43, 48. It does not seek specific performance. *See* Compl. ¶¶A–D. In fact, Bombardier concedes that Challenger brought this suit to wind up its affairs. Oral Arg. Tr. 26:9–27:3.

B. Challenger's certificate does not overcome the statute

Still, Bombardier asks me, in effect, to find that Challenger is estopped from bringing this suit. Bombardier rests on a misstatement in Challenger's certificate of cancellation. California gives an LLC two options to cancel: It can file a "Short Form Cancellation Certificate," which requires the LLC to state that it has acquired no known assets. Def.'s Letter Ex. 1, at 1. Or it can file a "Certificate of Cancellation," which requires no such representation. *Id.* Challenger filed a short-form certificate. So it represented that either its "known assets," minus debts, had "been distributed" or it had "acquired no known assets." Def.'s Br. Ex. A.

Yet Challenger did have a known asset: this suit. Challenger asked for the return of its deposit in April. Compl. ¶34. The escrow agent refused, citing Bombardier's own request for the deposit. *Id.* ¶35. At that point, Challenger had a claim for legal relief. That counts as an asset: "A cause of action to recover money in damages … is … property." *Parker v. Walker*, 6 Cal. Rptr. 2d 908, 912 (Cal. Ct. App. 1992).

According to Bombardier, Challenger's certificate bans it from now claiming that this suit is part of its wind up. It does not. True, Challenger certified that the information in its certificate was "correct." Def.'s Br. Ex. A. And LLCs should avoid errors in their certificates of cancellation. But California law permits Challenger to sue even after it "filed a certificate of cancellation" §17707.06(a). The statute does not distinguish short-form certificates or exclude suits from those who filed them. Plus, Bombardier has not claimed that Challenger's incorrect certificate hurt it in any way. It did not detrimentally rely on the statement, as required for estoppel.

* * * * *

In essence, Bombardier objects that it is unfair to let Challenger proceed in this suit after it mistakenly said it had no assets. Oral Arg. Tr. 21:9–24. That is not unfair. The California Limited Liability Company Act lets Challenger bring this suit. That Act, not Challenger's certificate, decides Challenger's capacity to sue. Plus, Bombardier need not worry about the counterclaims that it said it might bring. Challenger has promised it will not dispute venue or jurisdiction as it relates to its status as a cancelled LLC. Pl.'s Letter, D.I. 21. So I will deny Bombardier's motion to dismiss.