NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0896

WALTER BRUMFIELD AND SHANDER COSTON

VERSUS

ALFRED DYSON AND AWS COUNTRY DOLLAR LLC

DATE OF JUDGMENT: DEC 21 2018

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 2017-0001679, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE ROBERT H. MORRISON, III, JUDGE

* * * * * *

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* * * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

CHUTZ, J.

This appeal is taken from a summary judgment finding defendants, Alfred Dyson and AWS Country Dollar, L.L.C. (AWS), liable to plaintiffs, Walter Brumfield and Shander Coston, for damages resulting from a business dispute. For the following reasons, we reverse the summary judgment and remand this matter.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2017, plaintiffs filed a "Petition for Declaratory Judgment and Damages for Breach of Fiduciary Duty" naming Dyson and AWS as defendants. Plaintiffs made the following allegations in the petition. Brumfield, Coston, and Dyson formed AWS with the intention of operating a dollar store in Roseland, Louisiana. The parties agreed to evenly divide the profits from the joint venture. Dyson and Coston made over $100,000 in capital contributions by purchasing merchandise and materials necessary to complete the store's build-out. Subsequently, Dyson "violated his fiduciary duties by not sharing the profits from sales of merchandise owned by [plaintiffs] and by unilaterally removing [plaintiffs] without following the proper procedure of a plurality vote." Plaintiffs prayed for declaratory relief enforcing their ownership rights, an accounting of all sales and profits received, and judgment enforcing Brumfield's and Coston's right to each receive one-third of all proceeds from the joint venture. Alternatively, plaintiffs requested judgment in the amount of their capital contributions.

Defendants filed an answer denying the allegations of plaintiffs' petition, with the exception of admitting their legal status. Thereafter, plaintiffs filed a motion for summary judgment seeking monetary damages.[1] Plaintiffs asserted they were entitled to summary judgment, as a matter of law, because defendants "failed to allege or raise any facts or produce any evidence establishing a defense or disproving

[1] In the motion, plaintiffs did not seek any of the declaratory or other relief they had requested in their petition.

any of the Plaintiffs' claims." In support of the motion, plaintiffs filed an affidavit executed by Brumfield in which he deposed: (1) that plaintiffs and Dyson formed AWS with the intention of operating a store in Roseland, Louisiana; (2) plaintiffs expended $108,502.41 in furtherance of the joint venture; and (3) Dyson unilaterally removed plaintiffs from AWS without complying with La. R.S. 12:1313 and refused to either reimburse plaintiffs or share any profits with them. Plaintiffs also filed a "Statement of Uncontested Facts," which tracked the statements made in Brumfield's affidavit.

At the time that the motion for summary judgment was filed, defendants were not represented by counsel, their attorney having previously withdrawn. They failed to file any opposition to the motion for summary judgment. At the hearing on the motion, Dyson appeared in proper person, and the district court granted summary judgment in favor of plaintiffs and against defendants. In a written judgment, the district court awarded plaintiffs $108,502.41, with legal interests and costs. Dyson now appeals, raising four assignments of error.

SUMMARY JUDGMENT STANDARD

Appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's determination of whether summary judgment is appropriate. ***Schultz v. Guoth***, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment shall be granted only if the pleadings, depositions, answers to interrogatories, written stipulations, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) & (4). A genuine issue is one as to which reasonable persons could disagree. Moreover, all doubts should be resolved in the non-moving party's favor. ***Hines v. Garrett***, 04-0806 (La. 6/25/04), 876 So.2d 764, 765-66 (*per curiam*);

Neighbors Federal Credit Union v. Anderson, 15-1020 (La. App. 1st Cir. 6/3/16), 196 So.3d 727, 735.

The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). When the mover will bear the burden of proof at trial, it must be determined that his supporting documents are sufficient to resolve all material issues of fact. Only if they are sufficient does the burden shift to the opposing party to present evidence showing that an issue of material fact exists, because he can no longer rest on the allegations or denials in his pleadings at that point. ***Neighbors Federal Credit Union***, 196 So.3d at 734. Thus, regardless of whether the opposing party files an opposition or counter-affidavits, the moving party must first show that all critical elements of the opposing party's case have been put to rest. This is because the burden of proof is on the mover to present a *prima facie* case. If the mover does not make a *prima facie* case, the burden never shifts to the opposing party and he has nothing to prove in response to the motion for summary judgment. ***Hat's Equipment, Inc. v. WHM, L.L.C.***, 11-1982 (La. App. 1st Cir. 5/4/12), 92 So.3d 1072, 1076; ***Richardson v. Geico Indemnity Company***, 10-0208 (La. App. 1st Cir. 9/10/10), 48 So.3d 307, 312, writ denied, 10-2473 (La. 12/17/10), 51 So.3d 7.

DISCUSSION

Defendants argue the district court erred in concluding that there were no genuine issues of material fact and that plaintiffs were entitled to judgment as a matter of law. Specifically, defendants contend that although plaintiffs asserted Dyson violated his fiduciary duties by failing to share AWS' profits with them, plaintiffs failed to establish AWS ever made any profits. Defendants contend plaintiffs also failed to establish Dyson was "grossly negligent in his conduct with respect to [AWS]," which is generally a minimum requirement to impose personal

liability on a member of a limited liability company.[2] According to defendants, plaintiffs failed to establish any statutory or legal authority supporting their claim for reimbursement of their capital contributions, even if their names were removed from the Secretary of State's records without compliance with La. R.S. 12:1313. Finally, defendants assert that Brumfield's affidavit, which included no attached documentation, was insufficient to establish that there were no genuine issues of material fact.

In response, plaintiffs argue summary judgment was properly granted in their favor since Dyson refused to share any profits with them and wrongfully removed them from AWS. Plaintiffs contend Dyson was grossly negligent, breached his fiduciary duty to them, and divested them "of any interest in [AWS]," thereby completely ridding them of "any ownership or interest in the contribution, the business, or the proceeds." Plaintiffs argue Dyson's actions essentially dissolved AWS with respect to them.

Based on our *de novo* review, we conclude the trial court erred in granting summary judgment in plaintiffs' favor. The supporting affidavit submitted by plaintiffs failed to establish either that no genuine issues of material fact existed or that plaintiffs were entitled to judgment as a matter of law.

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[2] Louisiana Revised Statutes 12:1314 provides, in pertinent part:

> B. ... **a member or manager shall not be personally liable to the limited liability company or the members thereof for monetary damages unless the member or manager acted in a grossly negligent manner** as defined in Subsection C of this Section, or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence, including but not limited to intentional tortious conduct or intentional breach of his duty of loyalty.
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> C. As used in this Section, "gross negligence" shall be defined as a reckless disregard of or a carelessness amounting to indifference to the best interests of the limited liability company or the members thereof.

(Emphasis added.)

As pointed out by defendants, a number of genuine issues of material fact remain unresolved in this matter. As plaintiffs, Brumfield and Coston would bear the burden on proving each element of their claims at trial. Nevertheless, the affidavit they offered as the sole support for their motion for summary judgment provided few facts regarding the dispute between the parties. For instance, the statements contained in the Brumfield affidavit fail to establish that any revenues were ever generated by a store operated by AWS, much less that AWS realized any profits from such operations. Nor did the affidavit establish the respective ownership interests of each of the three members of AWS[3] or whether an operating agreement existed between the parties that may have regulated some of the matters in dispute. Another unresolved issue of fact exists as to the relative expenditures of Brumfield and Coston, which affects the amount each would be entitled to recover if successful on their claims. The affidavit merely states that "[p]laintiffs have expenditures in [the] amount of $108,502.41," without either delineating how much Brumfield and Coston each expended or indicating that they expended equal amounts. In view of the issues of material fact it failed to resolve, the Brumfield affidavit was insufficient to establish that Dyson breached his fiduciary duty to plaintiffs or acted in a "grossly negligent" manner in failing to share any profits with plaintiffs from the joint venture.

Plaintiffs also failed to establish they were entitled to judgment as a matter of law. In his affidavit, Brumfield deposed that "Alfred Dyson has unilaterally removed Plaintiffs from [AWS] without following the procedure required by [La.] R.S. 12:1313."

Louisiana Revised Statutes 12:1313 provides, in part, as follows:

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[3] In the absence of an operating agreement providing otherwise, the profits and losses of a limited liability company should be shared equally by its members. La. R.S. 12:1323.

> If management is vested in one or more managers pursuant to R.S. 12:1312, then, unless otherwise provided in the articles of organization or an operating agreement:
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> ***
>
> (2) Any or all managers may be removed by a vote of a majority of the members, with or without cause, at a meeting called expressly for that purpose.

The Brumfield affidavit does not specify how Dyson violated this provision. Nor did plaintiffs provide any other evidence to support their claim of improper removal. In their petition, plaintiffs allege that they and Dyson were initially all co-managers of AWS, but that Dyson unilaterally removed them as managers "without following the proper procedure of a plurality vote."

Since plaintiffs would bear the burden of proof at trial and defendants denied their allegations, plaintiffs could not rest on the mere allegations of their petition. In their appellate brief, plaintiffs contend Dyson unilaterally and without notice removed them from AWS without a majority vote of the members at a meeting expressly called for that purpose, as required by La. R.S. 12:1313. Nevertheless, genuine issues of material fact surround plaintiffs' contentions. In the Brumfield affidavit, plaintiffs merely make the conclusory statement that the purported removal violated La. R.S. 12:1313 without providing any facts to support that conclusion. Nor did plaintiffs present any other evidence to establish an actual violation of La. R.S. 12:1313.

Additionally, defendants argue on appeal that even if plaintiffs' names were removed as members and/or managers in the Secretary of State's records without complying with La. R.S. 12:1313, there is no statutory or legal authority automatically entitling plaintiffs to reimbursement of their capital contributions as a result of such a violation. We agree, observing that if the complained of removal of plaintiffs was carried out in violation of La. R.S. 12:1313, the purported removal would be without legal effect. See ***David Mortuary, LLC v. David***, 2015-974 (La.

App. 3d Cir. 6/15/16), 194 So.3d 826, 830-31, writ denied, 2016-1687 (La. 11/29/16), 210 So.3d 804 (there was no error in the trial court's finding that the co-manager was never removed as a co-manager of a limited liability company since the removal did not take place "at a meeting called expressly for that purpose" as required by La. R.S. 12:1313(2)). Since a removal in violation of this provision would be legally ineffective, Dyson's alleged actions would not, as alleged by plaintiffs, have divested plaintiffs of their ownership interests in AWS nor had the effect of dissolving AWS. The Louisiana law on limited liability companies provides specific procedures for the dissolution of such entities, none of which have occurred in this case.[4] See La. R.S. 12:1334 - 2341. Moreover, we are unaware of any statutory or legal authority entitling plaintiffs to reimbursement of their capital contributions based on the evidence they presented in support of their motion for summary judgment.

Even in the absence of a formal opposition, the moving party must show that he is entitled to summary judgment. ***Poydras Square Associates v. Suzette's Artique, Inc.***, 614 So.2d 131, 132 (La. App. 4th Cir. 1993). In this case, because plaintiffs failed to present sufficient evidence to establish that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law, they did not sustain their initial burden of proof. Accordingly, the burden of proof never shifted to defendants to show that an issue of material fact existed. Given the insufficient evidence presented by plaintiffs, defendants had nothing to prove in response to plaintiffs' motion for summary judgment and were entitled to rest on the

[4] Absent a contrary provision in its articles of organization or a written operating agreement, a limited liability company (LLC) dissolves upon: (1) the occurrence of events specified in the LLC's articles of organization or operating agreement; (2) the consent of a majority of the members; (3) the entry of a decree of judicial dissolution; and (4) the filing of an affidavit with the Secretary of State by the members or by the organizer if a LLC is "no longer doing business," owes no debts, and owns no immovable property. See La. R.S. 12:1334, 1335, and 12:1335.1(A); see also Susan Kalinka, 9 *La. Civ. L. Treatise, Limited Liability Companies and Partnerships* § 1:50 (4th ed.)

denials contained in their answer. See ***Neighbors Federal Credit Union***, 196 So.3d at 734; ***Hat's Equipment, Inc.***, 92 So.3d at 1076. In view of the plaintiffs' insufficient showing, the district court erred in granting summary judgment in favor of plaintiffs.

CONCLUSION

For the reasons assigned, the March 5, 2018 summary judgment granted in favor of plaintiffs, Walter Brumfield and Shander Coston, is hereby reversed, and this matter is remanded to the district court for further proceedings. All costs of this appeal are to be paid by Walter Brumfield and Shander Coston.

REVERSED AND REMANDED.