PFT Tech. LLC v Wieser
2016 NY Slip Op 32978(U)
November 24, 2016
Supreme Court, Nassau County
Docket Number: 8679/12
Judge: Stephen A. Bucaria
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ORIGINAL

MEMORANDUM DECISION

Supreme Court, Nassau County, IAS Part 1

PFT TECHNOLOGY LLC,

HON. STEPHEN A. BUCARIA, J.S.C.

INDEX NO. 8679/12

Plaintiff Counterclaim-Defendant,

-against-

ROBERT WIESER,

Defendant Counterclaim-Plaintiff,

-and-

PATRICK KEELAN, THOMAS SMITH and FRANK CASTELLANO,

Counterclaim-Defendants.

DECISION AFTER TRIAL

This action arises from a dispute between members of a limited liability company. The matter was tried before the undersigned on September 13, 14, 27, 28, and 29, 2016. The following are the court's findings of fact and conclusions of law.

Plaintiff PFT Technology, LLC is engaged in the business of detecting gas and coolfluid leaks in power networks for public utilities. The company was formed in the fall of 2005. Defendant Robert Wieser is a 25% member of PFT. PFT uses highly specialized instruments to detect the gas and fluid leads, at least one of which was fabricated by Wieser. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano each hold a 25% interest in the company.

Section 6.09 of PFT's amended operating agreement provides that expenditures over $100,000, distributions of profits, dissolution of the company, and other major decisions require

the consent of a "supermajority-in-interest" of the members, defined as more than 75% of the total interest in the company. The practical effect of this provision is that major decisions require the unanimous consent of the members of the company.

Section 7.02(b) of the operating agreement provides that, "The company shall, from time to time, reimburse or advance ...the funds necessary for payment of reasonable expenses, including attorney fees, incurred in connection with any action or proceeding, upon receipt of a written undertaking... to repay such amounts if a judgment... adverse to the indemnified person establishes that his acts or omissions were in bad faith or involved willful misconduct...."

Article VIII of PFT's amended operating agreement provides that, "Until the time that the Company is terminated and dissolved pursuant to the terms of this agreement, the members shall not, directly or indirectly, engage in any business activity directly or indirectly in competition with the business of the company...."

During 2011, a dispute arose between Wieser and the other members of PFT concerning his salary and equity distributions as compared to those of the other members. On July 10, 2012, PFT commenced this action against Wieser. In the first and second causes of action, PFT asserts various breach of fiduciary duty claims against Weiser based upon his alleged abandonment of PFT, misappropriation of $50,000 worth of company parts and equipment, and competition with the company. In the third cause of action, PFT seeks dissolution of the company on the ground that it is not reasonably practicable to carry on the business with Wieser as a member (complaint ¶ 59).

In his answer, Wieser asserts a counterclaim for an accounting with respect to the affairs of PFT Technology. Wieser also asserts counterclaims against the other members for breach of the operating agreement by paying themselves unauthorized salaries and distributions and failing to pay Wieser his corresponding share. Additionally, Wieser asserts counterclaims for contractual indemnification of legal fees and damages for breach of fiduciary duty.

By order dated May 21, 2014, the court determined that the valuation date was July 9, 2012, the day prior to the commencement of the dissolution proceeding. The Limited Liability Company Law does not provide a statutory provision for determining the valuation date upon dissolution of the company. In the absence of such a provision, or a buyout formula in the operating agreement, the court has "great discretion" to fashion an equitable method in winding up the LLC or in crafting a payment arrangement between disputing members (McKinney's practice commentary 8.5). The court may look to either partnership or corporate concepts for guidance in determining the appropriate equitable remedy (Id). In setting the day prior to the filing of the complaint seeking dissolution as the valuation date, the court looked to BCL § 1118[b].

In setting this valuation date, the court was cognizant that, to the extent that value is based upon capitalized earnings, Wieser could not be bought out as of July 9, 2012, and still receive his share of income in subsequent years. In 2012, including the six month period after the action was filed, PFT earned $2,018,503. In 2013, PFT earned $2,829,050, and in 2014 PFT earned $3,044,244. To grant Wieser a buy out as of July 2012, and his share of income distributions for subsequent years, would result in "double dipping." Thus, Wieser cannot receive both a buyout and distributions for subsequent years, regardless of whether he abandoned PFT or was forced out by the other members in 2011.

By order dated April 28, 2016, the court, upon reargument, denied defendant's motion for partial summary judgment dismissing plaintiff's cause of action for dissolution of PFT Technology. In view of the super-majority requirement and the dissension among the members, it did not appear to be reasonably practicable to carry on the business in conformity with the operating agreement (Limited Liability Company Law § 702). However, dissolution is a drastic remedy, which is not to be granted unless management is unwilling or unable to promote the company's stated purpose or continuing the company is financially unfeasible (***1545 Ocean Ave v Crown Royal Ventures***, 72 AD3d 121, 131 [2d Dept. 2010]). Moreover, while the Limited Liability Company Law does not expressly authorize a buy-out in a dissolution proceeding, buy-out may be an appropriate equitable remedy (***Mizrahi v Cohen***, 104 AD3d 917, 920 [2d Dept. 2013]). Defendant Wieser represented to the court that "the other managing members will buy out his share." The court deemed defendant Wieser's representation that the majority members would buy out his interest as an irrevocable offer to sell his 25% interest at fair value (Cf Business Corporation Law § 1118[a][offer to purchase at fair value is irrevocable]). Thus, the court proceeded to a dissolution/valuation hearing, including any necessary adjustments based upon salaries, personal expenses charged to the company, defendant Wieser's retention of PFT's equipment, and reimbursement of attorney's fees.

One method of estimating the value of PFT would be capitalizing the actual earnings of the company for a period both before and after the valuation date and calculating the present discounted value of the income stream as of July 9, 2012 (**Friedman v Beway Realty**, 87 NY2d 161, 169 [1995]). While there should be no discount based upon Wieser's minority status, the court may consider the "economic impact," on both value and the actual income stream, of Wieser's departure from the company (Id at 167). In this regard, the court notes that PFT's earnings after taxes were $1,096,372 for the year ended December 31, 2009, $850,280 for the year ended December 31, 2010, and $487,686 for the year ended December 31, 2011.

Both plaintiff's expert and defendant's expert estimated value based upon capitalized earnings, albeit applying different discounts for risk and lack of marketability. PFT's expert, Ian Ratner, arrived at a value estimate for the whole company as of July 9, 2012 of $4,072,000.

Ratner focused on customer revenue during the period 2010-2013. However, because a large proportion of the revenue came from a small number of customers, Ratner deducted a "risk premium" of 10%. Additionally, because PFT is a closely held company, Ratner applied a discount for lack of marketability of 25%. Wieser's expert, David Benick, did not apply a lack of marketability discount and accounted for the risk factor through size and industry premiums. Thus, Wieser's expert found a value for the company of $5,956,000.

Because PFT Technology has now been in business for over eleven years, despite its limited customer base, business seems likely to continue and the risk factor is relatively slight. Based upon all of the factors, including the decreased profitability of the company after dissension ensued and Wieser left the business, the court concludes that the value of PFT Technology was $5 million as of July 9, 2012. Defendant Wieser's 25% interest was therefore worth $1,250,000. This amount takes into consideration all of the parties' various claims, including unpaid distributions and reimbursement for attorney fees. In this regard, the court notes that on February 20, 2014 Wieser was granted legal fees of $100,000, and Wieser was granted an additional $150,000 in legal fees on April 28, 2016. The total attorney fee award of $250,000 was generally in proportion to plaintiff's legal fees, given the members' respective equity interests in the company. However, in view of the delay in prosecuting this case, the court grants defendant Wieser interest on the $1,250,000 awarded at the rate of 5% from July 10, 2012 to the date of payment (See Business Corporation Law § 1118[b]). Defendant Wieser shall settle a judgment on notice to plaintiff.

This constitutes the decision of the court.

Dated 24 November 16

Stephen A. Bucaria
J.S.C.

ENTERED

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