STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: August 5, 2014]

DONALD PAGE, Individually and Derivatively on behalf of ADS INVESTMENTS, LLC, Plaintiff,	:	
VS.	:	**C.A. No. NM-2006-0334**
ADS INVESTMENTS, LLC; AARON G. POLSELLI; DUANE POLSELLI; SCOTT POLSELLI, Defendants.	:	

DECISION

CLIFTON, J. This matter is before the Court following a non-jury trial on Plaintiff Donald Page's (Plaintiff or Page) Verified Complaint, alleging that Aaron, Duane, and Scott Polselli (together, the Polselli Brothers or Defendants) breached their fiduciary duties to ADS Investments, LLC (ADS). The Verified Complaint, asserted by Page individually and derivatively on behalf of ADS, also sets forth counts requesting an inspection of books and records, an accounting, an appointment of a receiver, and various other injunctive remedies.

Also before the Court for decision is the Defendants' counterclaim which requests two declaratory judgments: the first, defining what interest, if any, Page has in ADS; and, the second, declaring any interest identified void. Defendants also request, in the event that the Court finds Page has an interest in ADS and said interest is not void, that the Court allow the Defendants the opportunity to purchase Page's interest at fair market value pursuant to G.L. 1956 §§ 7-1.2-1315

and 7-16-73. Defendants' counterclaim also alleges negligence, breach of fiduciary duty, and breach of contract against Page. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14.

I

Facts and Travel

The parties to this litigation have known each other for many years. They grew up together in Portsmouth, Rhode Island and have a long history as friends and co-venturers in various business endeavors. The admitted allegations of the claim and counterclaim also show that the parties enjoyed a long standing attorney-client relationship: Page advised the Polselli Brothers on the formation of a company in the 1980s; Page represented one of the brothers in a criminal matter that same decade; Page represented Foodworks Restaurant, a Polselli Brothers business, during a tax audit in 1991; Page represented the Polselli Brothers before the Portsmouth Town Council in their attempt to secure a liquor license, also in 1991; Page represented the Polselli Brothers in their purchase of commercial real property located at 2461 East Main Road, Portsmouth, Rhode Island from 1993 through 1995; Page assisted in the paperwork for the purchase of another piece of commercial property, located at 2451 East Main Road, Portsmouth, Rhode Island; Page was ADS's company attorney until 1999 or 2001; and, Page was ADS's registered agent from 1994 until 1996.

Page's Verified Complaint asserts, and Defendants admit, that ADS, a Rhode Island limited liability company, was formed in 1994 under the name ADS Realty, LLC. In 2002, ADS Realty changed its name to ADS Investments, LLC. In 1994, Page prepared and filed the company's Articles of Organization and was named therein as ADS's registered agent. At that time, Page was an active, licensed attorney in Rhode Island and was working for a firm, practicing land use and general litigation. Page conceded at trial that, as the attorney for ADS, it

would have been his duty to prepare an operating agreement. The purpose of such an agreement, as testified to by Page, is to define the business operations of ADS and to identify the interests of the members. There is no dispute that Page failed to prepare such an agreement. Even in the absence of an operating agreement, all the parties agree, and so testified, that at ADS's inception the plan was that Page and all three brothers would be equal owners of ADS, each with a twenty-five percent interest in the company. In addition to capital contributions, each owner was to contribute his own expertise to the venture: Page was to provide legal services to the company, Duane was to handle the accounting, and Scott and Aaron would be responsible for renovations and maintenance of ADS's properties.

The parties are in agreement that in 1995, ADS purchased commercial real property located at 2461 East Main Road, Portsmouth, Rhode Island. Because Foodworks Restaurant, along with other commercial entities, operates out of this location, it has come to be known in this litigation as the "Foodworks Property." Insofar as the Foodworks Property is relevant, the Plaintiff bases his contention that the Defendants breached their fiduciary duties on the following allegations: that the Foodworks Restaurant—operated by the Polselli Brothers and located within the Foodworks Property—paid below-market rent to ADS from 1996 until 2003; that the Foodworks Restaurant has not paid any rent to ADS since May 2003; and, that ADS has never distributed any income or made any other payments to Page.[1]

The Defendants admit that they never made any distributions to Page, alleging that he has no interest in the Foodworks Property. At trial, the Polselli Brothers presented a copy of the purchase and sales agreement for the purchase of the Foodworks Property; Page admitted at trial

[1] Though Page's Verified Complaint originally contained other allegations of wrongdoings pertaining to the Foodworks Property, those paragraphs were stricken from the complaint upon motion of the Defendants early on in this litigation.

that he had a hand in preparing the first draft of that agreement. (Defs.' Ex. A.) The agreement lists the three Polselli Brothers as the purchasers of the Foodworks Property. Page's name, however, does not appear on that agreement. The Polselli Brothers' counterclaim asserts that although Page initially did want to invest in the Foodworks Property, he failed to contribute the necessary funds by the closing date. Instead, the Polselli Brothers argue, Page merely loaned Duane $30,000 to help purchase the Foodworks Property. The checks totaling $30,000—which Page claims was a contribution and the Polselli Brothers claim was a loan—all identify themselves, on the memo line, as a "loan."

Page's claim that Foodworks Restaurant paid less than market-value rent is based on the uncontroverted evidence that Foodworks Restaurant paid a monthly rent of $2500 to ADS. The second page of the commercial lease agreement fixes the monthly rent to be paid by Foodworks Restaurant to ADS at $6000 per month.[2] The last page of the lease was a point of contention at trial, however. The last page—which is the only page of the lease agreement seen and signed by the Polselli Brothers prior to the closing—does not state the amount of rent to be paid. Page conceded at trial that the last page is of a "different quality" than the rest of the document: the lettering is darker, and the last page does not look the same as the rest of the document. When shown the document at trial, Duane Polselli testified that he recognized the last page. Duane further testified that the last page of the lease agreement had been faxed to Foodworks Restaurant from Page, signed by the Polselli Brothers, and then faxed back to Page. Duane stated that the first time he saw the $6000 figure, which is located on the second page of the lease, was at the closing. He claimed that as he understood the plan, there needed to be a certain

[2] The lease was not entered as a full exhibit, but was marked for identification and shown to the parties during their testimony. Thus, the Court has not considered the lease itself for the purposes of this Decision but relies on trial testimony to ascertain its contents.

amount of rent identified for financing purposes, but maintained that Foodworks Restaurant had paid $2500 per month since its inception.

Duane also testified that Page knew of, and approved, the $2500 rent arrangement. In support of this assertion, the Defendants submitted at trial a piece of paper covered in two different styles of handwriting. (Defs.' Ex. H.) Defendants assert that this document memorialized discussions all three brothers and Page had concerning the numbers for mortgages, taxes, and insurance in 1995. Duane stated that Page's handwriting is on the right side of the page, but that Page agreed to the numbers written on the left side of the page: the left hand side of the page shows "$2500 (FW rent)."

Another piece of commercial property, located at 2451 East Main Road, Portsmouth, Rhode Island, was also central to Page's Complaint. This property came to be known in this litigation as the "Fitness House." Though Page's Complaint did contain allegations pertaining to this property, this Court, Thunberg, J., determined in 2006 that Kristen Polselli and David Comfort owned the Fitness House property in fee simple and dismissed those parties from the litigation. In that decision, this Court examined the pertinent land records and found that the Fitness House property transferred directly from the previous owners to Kristen Polselli and David Comfort. The Court further found that Page had proffered no evidence that indicates that ADS ever owned the Fitness House property. See Decision Nov. 17, 2006, Thunberg, J., granting Kristen Polselli and David Comfort's Motion to Dismiss. The only allegation in the Plaintiff's Verified Complaint that pertains to the Defendants' alleged breach of their fiduciary duties as they involve the Fitness House property is that the Polselli Brothers "have each breached these duties by . . . usurping the corporate business opportunity of purchasing the Fitness House property." Because this Court's prior decision determined that the Defendant

Brothers did not, in fact, purchase the Fitness House property, Page cannot successfully state a claim for loss of corporate opportunity. See Takian v. Rafaelian, 53 A.3d 964, 973 (R.I. 2012) ("To successfully state a claim [for loss of corporate opportunity] a plaintiff must demonstrate that the defendant was a corporate fiduciary and that he or she diverted a corporate opportunity.")

Page maintains that he is an equal member of ADS and claims capital contributions totaling $44,600. Page further claims he performed $75,000 worth of legal services for ADS, for which he was never paid. The Polselli Brothers, however, deny that Page is now a member of ADS. Duane and Aaron Polselli testified that early on, ADS would have frequent meetings, of which Page was a part, to discuss finances and numbers. Both brothers testified that on some occasions, Page would make cash contributions, but on others he would not.

In support of his claim that he performed $75,000 worth of legal services for ADS, Page presented attorney Thomas DiPrete as a witness at trial. Mr. DiPrete was admitted to practice law in Rhode Island in 1993. The focus of his practice has been real estate. He testified that—based on his experience and a two-page document prepared by Page that itemizes the work Page claims to have performed—$17,193.75 was a reasonable fee for the legal work performed by Page for the Foodworks Property.[3] On cross-examination, however, Mr. DiPrete admitted that he was not given any time slips. He maintained, though, that it is clear that Page was "substantially involved" with ADS, despite the lack of documentation that Page actually did the work alleged.

[3] Mr. DiPrete testified that Page, inter alia, assisted in the purchase of the Foodworks Property by handling negotiations, drafting a Purchase and Sales Agreement, drafting a lease, performing title searches and handling tax lien issues, and attending numerous meetings. Page also handled two commercial evictions for ADS.

The Defendants contend that Page, to Defendants' detriment, violated Rule 1.8 of the Rhode Island Supreme Court Rules of Professional Conduct.[4] More specifically, they allege that Page failed to advise the Polselli Brothers of any potential conflicts of interest that may arise from Page's serving simultaneously as ADS's attorney and a part owner of ADS. Defendants also claim that Page failed to advise the Polselli Brothers to seek the advice of independent counsel concerning Page's dual roles in the business.

Defendants further allege that Page did not file the LLC's 1998 or 1999 annual reports, as required by § 7-16-66, which resulted in ADS's loss of its corporate status for approximately one year. Page is also charged with the failure, as ADS's registered agent, to notify the Secretary of State when he moved his office in 1996. At trial, Page testified that he "believed" he had filed ADS's annual reports for 1995 and 1996. Page conceded that he did not file the annual report for 1998 or 1999, and claimed this was because he had left his prior firm in 1996 and had not taken any files with him. In 2002, Duane Polselli took the necessary steps to reinstate ADS's charter. However, the name ADS Realty was no longer available, and that is the reason that the

[4] Rule 1.8 provides, in pertinent part:

> "(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
> "(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> "(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> "(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

LLC is now called ADS Investments.[5] Page admitted at trial that when he moved his offices in 1996, he was the registered agent of ADS but failed to notify the Secretary of State of his change of address, as is required by § 7-16-11(c)(1).

Defendants' first breach of contract claim arises from an undisputed lease arrangement between the parties in 1998. Page admitted that in 1998, he leased a store from ADS in the Foodworks Property to run a business called "Best Wishes." Page denies the Defendants' allegations that there is still outstanding rent due in the amount of $13,450. The Defendants' second breach of contract claim is disputed in full by the Plaintiff. Therein, the Defendants allege that they loaned Page $6000 in 1993, and despite numerous demands, the loan was never repaid.

After two days of hearings in early 2009, this Court appointed a Special Master, pursuant to Rule 53 of the Superior Court Rules of Civil Procedure, for the purpose of assisting and advising the Court in its consideration of Page's individual interest in ADS. That report was submitted to the Court in September of 2010. Following two more days of hearings that same

[5] Section 7-16-43(b) provides:

> "If, as permitted by the provisions of this chapter or chapters 1.2, 6, or 12, or 13 of this title, another limited liability company, business or nonprofit corporation, registered limited liability partnership or a limited partnership, or in each case domestic or foreign, authorized and qualified to transact business in this state, bears or has filed a fictitious business name statement as to or reserved or registered a name which is the same as, the name of the limited liability company with respect to which the certificate of revocation is proposed to be withdrawn, then the secretary of state shall condition the withdrawal of the certificate of revocation on the reinstated limited liability company's amending its articles of organization or certificate of registration so as to designate a name which is not the same as its former name."

year, the Court hereby adopts, in part, the report of the Special Master.[6] The Special Master found, and because this finding is not clearly erroneous, this Court finds, that the total amount of Page's financial contributions to ADS was $9000. The Special Master had before her nine checks by Page: five of the checks were made out to Duane Polselli and had written on the memo line the word "loan"; two of the checks were made out to ADS Realty, totaling $9000; and the last two checks reference the Fitness House property. The Special Master determined that the five checks noted to be "loans" were exactly that: loans and not capital contributions. Further, she found that the two checks referencing the Fitness House property were not capital contributions because in 2006, this Court determined that ADS had no interest in that property. Thus, the Special Master found the Plaintiff's capital contributions totaled $9000.

After analyzing, recording, and sorting through the more than seven hundred documents submitted to her by the Defendants in support of their claimed financial contributions, the Special Master found that the Defendants' financial contributions to ADS totaled $362,005.57. The Special Master then determined Page's interest in ADS to be approximately 3.9%.

II

Standard of Review

Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure governs non-jury trials and provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." "Pursuant to this

[6] Rule 53(e)(2) instructs that "[i]n actions to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." However, the Court "may adopt [the report] . . . in part or may receive further evidence." Here, the Special Master did not have before her any evidence of Page's legal service contributions to ADS. At trial, however, Page presented expert testimony regarding such services. Thus, the Court adopts the Special Master's conclusions as to the financial contributions of the parties, but makes its own determinations regarding the service contributions.

authority, [t]he trial justice sits as a trier of fact as well as of law. Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (internal citations omitted.) Furthermore, although a trial justice is required to make specific findings of fact, he or she need not engage in an "extensive analysis" as long as "the decision reasonably indicates that [he or she] exercised [his or her] independent judgment in passing on the weight of the testimony and the credibility of the witnesses." Wilby v. Savoie, 86 A.3d 362, 372 (R.I. 2014).

III

Analysis

As an initial matter, this Court finds that Page is currently a member of ADS and that he has been since ADS's inception. The testimony of all the Defendants confirms that the original plan for the company was that Page and all three brothers would be equal owners. Though Page's financial contributions are in contention, the Court, through its appointed Special Master, finds that Page did contribute $9000 in capital to the company. Though Page's financial contributions are relatively small, the parties all testified that the basic agreement between them was that they would each contribute their expertise. The Court is satisfied that though his billing methods and bookkeeping may not have been up to par, Page did contribute some amount of legal services to ADS. Moreover, the Court finds Mr. DiPrete's expert testimony credible and accepts his conclusion that although Page lacked the supporting documentation, it is clear that, as Mr. DiPrete testified, he was "substantially involved" with ADS and its legal matters. The Defendants did not contest that Page had a hand in drafting purchase and sales agreements for both the Foodworks and the Fitness House Properties. Further, the Court accepts and finds reasonable Mr. DiPrete's opinion that Page drafted documents, met with attorneys and other

interested parties, attended meetings, negotiated costs, and reviewed loan documents for the benefit of ADS.

Given the Court's determination that Page is, and always has been, a member of ADS, it will now examine Page's claims that the Defendants breached their fiduciary duties to ADS. The only specific allegation in Page's Verified Complaint that accuses the Defendants of a breach of fiduciary duty is Page's assertion that "[t]he Polselli Brothers have each breached [their] duties by, inter alia, not accounting for rents, usurping the corporate business opportunity of purchasing the Fitness House property, and self-dealing."

The Rhode Island Limited Liability Company Act, §§ 7-16-1 et seq. governs generally the rights and obligations of members of a limited liability corporation. Section 7-16-14 states that "[u]nless either the articles of organization or a written operating agreement provide for management by or under the authority of one or more managers . . . the business and affairs of the limited liability company shall be managed by the members." As there has been nothing presented to the Court that would indicate otherwise, ADS's business and affairs were managed by its members. Section 7-16-17(a) imposes essentially the same duty of care onto the members of a member-managed LLC that managers owe to the LLC and its members. Section 7-16-17(a), entitled "Duties of managers," provides: "A manager shall discharge his or her managerial duties in good faith, with the care that an ordinarily prudent person in a similar position would use under the circumstances, and in the manner the manager reasonably believes to be in the best interests of the limited liability company." This is followed by three additional provisions which expand upon the standard of the reasonably prudent manager: the manager's right to rely in good faith on the information produced by experts, § 7-16-17(b); the requirement that the manager exercise informed business judgment, § 7-16-17(c); and the protection of the Business Judgment

Rule, § 7-16-17(d). Finally, § 7-16-17(e) imposes the Duty of Loyalty, which includes the duty to avoid conflicts of interest. See Sweeney v. Reed, No. NC-2005-0565, 2010 WL 581513 at * 5 (R.I. Super. Ct. Feb. 12, 2010), Clifton, J.

As previously noted, the issue of ownership of the Fitness House property was decided by this Court in 2006. Because Kristen Polselli and David Comfort were found to be the owners of the Fitness House property in fee simple, Page's allegations that the Defendants breached their fiduciary duties, as they pertain to the Fitness House property, are without merit.

Further, Page presented no evidence at trial that would establish, or even hint, that the Defendants failed to account for rents or engaged in self-dealing. The only evidence at trial concerning rent pertained to the rent paid by Foodworks Restaurant to ADS. The Court recognizes that the parties testified that the second page of the lease agreement specifies that rent was to be paid monthly in the amount of $6000. However, the Court finds credible Duane Polselli's testimony that the last page of the lease, which does not contain any reference to the amount of rent, was faxed to him, signed, and then faxed back to Page. Section 7-16-17(b) states that in discharging his duties, "a manager is entitled to rely on information . . . if prepared or presented by . . . Legal counsel . . . as to matters the manager reasonably believes are within the person's professional or expert competence." Duane testified that Page, as the attorney for ADS, faxed him the last page of the lease agreement to sign. Duane also testified that the parties had agreed that Foodworks Restaurant would pay $2500 monthly to ADS for rent. This Court finds that Duane could reasonably have believed that drafting a lease agreement was within Page's professional competence; therefore, Duane Polselli was "entitled to rely on information" presented to him by Page and did not breach any of his managerial duties in signing the agreement faxed to him by Page. See § 7-16-17(b)(2).

Further, the Court relies on the handwritten paper—showing that $2500 a month had been contemplated by the parties for rent for "FW"—to find that the Plaintiff has not carried his burden to demonstrate that the rent paid by Foodworks Restaurant was below market value. (Defs.' Ex. H.) Importantly, Page presented no evidence at trial that would establish what a fair market value amount of rent for the property would have been. Without any evidence of what fair market rent prices were, this Court cannot find that the Defendants breached any duty owed to ADS by accepting $2500 a month from Foodworks Restaurant. See Wilby, 86 A.3d at 376.

Therefore, the Court finds that there is insufficient evidence to conclude that the Defendants acted in anything but a reasonably prudent manner in performing their business obligations. The Court finds that the Defendants did not breach their fiduciary duties to ADS.

A different standard applies, however, to Page. As a member of ADS who also acted as the company's attorney, Page was required to heed the duties cited above under § 7-16-17, as well as under the Rules of Professional Conduct concerning an attorney's entry into business transactions with his clients. See DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 770 (R.I. 2000). There is no dispute in the case at bar that Page and the Defendants enjoyed an attorney-client relationship. In DiLuglio, the Supreme Court held that:

> "[w]hen an attorney takes an ownership interest in a close corporation while simultaneously acting as that corporation's attorney, the attorney owes a fiduciary duty to inform the client corporation . . . of the differing interests that exist among the various constituents of the corporate entity and of the existing and potential conflicts of interest that result when an attorney for a close corporation becomes a minority shareholder in that entity." Id. at 769.

The Supreme Court also imposed upon the attorney/owner a duty to advise the corporation and its owners of the "need to seek and obtain independent counsel in connection with [the

attorney's] proposed acquisition and maintenance of an ownership interest." Id. at 771. If an attorney/owner fails to comply with one or more of these responsibilities, his interest may be voidable at the election of the client. Id. at 772. However, this interest is only voidable provided

> "the client acts to undo the transaction within a reasonable time after it learned or should have learned of the pertinent facts . . . unless the terms of the arrangement are so economically unfair or the client is so relatively unsophisticated that equity will not allow the lawyer's misdeeds to stand uncorrected." Id. at 771.

This Court adopts the above standard found in DiLuglio, pertaining to a close corporation, and shall apply that same standard to attorneys who take an ownership interest in an LLC while simultaneously acting as the LLC's attorney. There is no dispute that Page failed to comply with the responsibilities delineated in DiLuglio. The uncontroverted trial testimony established that Page never informed the Defendants of any potential conflicts of interest that may arise from his dual roles in ADS, nor did he inform the Polselli Brothers that they should seek independent counsel before Page became a member of ADS.

Nevertheless, Page argues, the Defendants became aware of the pertinent facts many years ago and, like the Defendants in DiLuglio, should therefore be estopped from voiding his interest. The Court acknowledges that Page acquired his ownership interest in 1994. However, although the DiLuglio Court did hold that the client's failure to act promptly or the client's subsequent ratification of the interest would preclude the client from voiding the attorney's interest, the Court did not stop there. The Court stated "if the client fails to act promptly or ratifies the transaction after discovering the material facts, then equity will not void the transactions *unless* the terms of the arrangement are so economically unfair *or* the client is so relatively unsophisticated that equity will not allow the lawyer's misdeeds to stand uncorrected." Id. at 770-71 (emphasis added.)

Here, though the terms of the arrangement were perhaps not economically unfair in favor of Page, the Court finds that equity will not allow Page's misdeeds to stand uncorrected. The uncontroverted evidence establishes that the Defendants here relied on Page, a long-time family friend and licensed attorney, to provide the legal services to ADS. While the Defendants were not unsophisticated in business transactions, they were without a doubt unsophisticated when it came to legal matters. They relied on Page to act as ADS's attorney. While acting as ADS's attorney and registered agent, Page undisputedly made at least two crucial mistakes: he failed to draft an operating agreement, and he failed to file annual reports.

"LLC members' rights begin with and typically end with the Operating Agreement." Walker v. Res. Dev. Co. Ltd., L.L.C. (DE), 791 A.2d 799, 813 (Del. Ch. 2000). An LLC's ability to remove its members has been called a "key management power," and is often provided for in State statutes. 1 Close Corp and LLCs: Law and Practice § 5:13 (Rev. 3d ed.); see, e.g., Utah Code Ann. § 48-2c-710 "Expulsion of a member." Many courts have held that statutory removal is not exclusive, and members of LLCs may also be expelled or removed via mechanisms found in the company's operating agreement. 1 Close Corp and LLCs: Law and Practice.

Rhode Island's Limited Liability Act does not provide a statutory procedure for involuntary removal, nor does it allow for judicial removal of a member of an LLC. As a general rule, courts are "not 'entitled to write into the statute certain provisions of policy which the legislature might have provided but has seen fit to omit.'" Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000) (quoting Elder v. Elder, 84 R.I. 13, 22, 120 A.2d 815, 820 (1956)). However, another general rule, more specifically in the area of business organizations law, is that absent a provision in an operating agreement allowing for the involuntary removal of members, the

parties seeking removal are left to the default rules. See Walker, 791 A.2d at 814; see also Man Choi Chiu v. Chiu, 71 A.D.3d 646, 647, 896 N.Y.S.2d 131, 132 (2010) (holding that no cause of action existed for the expulsion of a member of an LLC, where the LLC did not have an operating agreement setting forth a mechanism for the expulsion of members.) Given that Rhode Island's statutory default rules do not provide for the involuntary or judicial removal of an LLC member, the members of an LLC that lack an operating agreement are left without a statutory remedy when they wish to remove another member or manager.

The Court will now briefly address the Defendants' request that if Page were found to have a valid interest in ADS, they be allowed to purchase that interest. The Defendants ask this Court to allow them to purchase any interest in ADS that Page has pursuant to §§ 7-1.2-1315 and 7-16-73.[7] The Court declines to do so for the following reasons. Section 7-1.2-1315 (Election to Purchase Statute) generally provides corporations with an opportunity to avoid dissolution. That is to say, if a shareholder of a corporation petitions for the corporation's dissolution, a court may intervene and allow other shareholders the opportunity to buy the petitioning shareholder's interest and thereby avoid dissolution. Section 7-16-73, a provision of Rhode Island's Limited Liability Company Act, provides, in pertinent part:

> "Unless the provisions of this chapter or the context indicate otherwise, each reference in the general laws to a "person" is deemed to include a limited liability company, and each reference to a "corporation," *except for references in the Rhode Island Business and Nonprofit Corporation Acts*, and except with respect

[7] Notably, the Rhode Island Senate Committee on Commerce heard proposed amendments to Rhode Island's Limited Liability Company Act on April 11, 2014. Proposed § 7-16-40.1, entitled "Avoidance of Dissolution by Membership Interest Buyout," essentially mirrors the language of § 7-1.2.1315. If enacted, the amendments would give statutory credence to the Defendants' request. However, the Committee recommended the proposed amendments be held for further study. Thus, the Court shall apply the current version of the statute, which makes no such allowance.

> to taxation, is deemed to include a limited liability company." (Emphasis added.)

The Defendants are apparently attempting to use the above cited provision as a means to justify this Court's application of § 7-1.2-1315 to this case. However, § 7-1.2-1315 is quite clearly found in the Rhode Island Business Corporation Act, and therefore, the Court declines to include the reference to "corporations" in § 7-1.2-1315 to include an LLC.[8]

Thus, a Rhode Island LLC that does not have an operating agreement which properly provides for the removal of members potentially finds itself in the undesirable position of being unable to remove any of its members. The Defendants before this Court are now in exactly the same position. The testimony of the Polselli Brothers demonstrates that Page failed to make all the financial contributions he had promised, was unreliable and sporadic in the contributions he did make, has failed to do any work for the corporation since approximately 2000, and was the reason ADS lost its corporate status for approximately one year. Further, Page concedes that it was his duty to draft the LLC's operating agreement and that he failed to do so. There exists ample evidence in the record to conclude that any amicable relationship that may have existed between the Plaintiff and the Defendants when ADS was first created has long since evaporated. The current tumultuous relationship between the parties and the above noted deficiencies in Page's conduct as a member of ADS clearly prove to this Court that ADS cannot continue to function efficiently under its four current member/managers. See Brennan v. Brennan Assocs., 293 Conn. 60, 77, 977 A.2d 107, 118 (2009) ("In light of the animosity that [the plaintiff]

[8] This Court is unaware of any case in Rhode Island wherein a court has applied the Election to Purchase statute to an LLC, absent a stipulation to such an application. See Marsh v. Billington Farms, LLC, 04-3123, 2006 WL 2555911 n.4 (R.I. Super. Aug. 31, 2006) ("There was a dispute as to whether the buyout statute was applicable to the LLC, since it appears in the Rhode Island Business Corporations Act. However, since the parties have stipulated to application of the buyout statute, this Court need not decide whether it would have been applicable otherwise.")

harbors toward his partners, his distrust of them (which distrust is mutual) and his suspicion that [his partner] committed a fraud, it is not reasonably practicable for him to carry on business with them.")

The Court briefly summarizes the positions in which the instant Defendants now find themselves: they are three members of a four member, member/managed LLC; a contentious and tumultuous relationship has developed between the Defendants and their co-member/manager, such that it is no longer reasonably practical for the four men to continue on as partners; the company's attorney failed to draft an operating agreement which would allow the Defendants to expel or remove the fourth member, so they are left to the default rules found in the state statute; and the only applicable state statute does not provide any method—member initiated or court ordered—by which they can remove the fourth member. Of particular importance to this Court is the fact that the Defendants are in this frustrating position because of the Plaintiff's admitted failure to fulfill his responsibilities as ADS's attorney.

The Court is satisfied that Page's interest in ADS should be voided under well-established principles of equity and other policy considerations. Pursuant to DiLuglio, when an attorney/owner has failed to comply with his responsibilities—namely, his duty to comply with the Rules of Professional Conduct—his interest is voidable at the client's election. However, if that client failed to act promptly or ratifies the interest, the interest may still be voidable if "the client is so relatively unsophisticated that equity will not allow the lawyer's misdeeds to stand uncorrected." DiLuglio, 755 A.2d at 771. Whatever experience or sophistication the Polselli Brothers may have had in business, construction, or accounting, one area in which they were not well versed was the law. The Polselli Brothers relied upon Page as not only their corporate attorney, but also as their personal attorney. Page testified at trial that as the attorney for ADS, it

would have been his duty to prepare an operating agreement that would define the operations of the business and identify the interests of the parties. Providing legal services was Page's main responsibility to the corporation from its inception and, to put it bluntly, he dropped the ball.

Page filed this lawsuit seeking various equitable remedies from this Court: an accounting, inspection of books and records, a temporary restraining order and permanent injunction, etc. Well-established is the principle that "equitable relief is limited to situations in which the party seeking this remedy presents itself to the court with clean hands." Sloat v. City of Newport ex rel. Sitrin, 19 A.3d 1217, 1222 (R.I. 2011). This doctrine "'becomes operative only when a complainant must depend on his own improper conduct to establish his rights against the *other parties to the suit.*'" Rodriques v. Santos, 466 A.2d 306, 311 (R.I. 1983) (quoting School Comm. of Pawtucket v. Pawtucket Teachers Alliance, Local No. 930, 101 R.I. 243, 257, 221 A.2d 806, 815 (1966)). This Court looks generally to the principles underlying the doctrine of unclean hands as guidance for its equitable determination.

While there is no legal requirement in Rhode Island that an LLC must have an operating agreement, this Court has made clear the importance of the operating agreement, and the detrimental situation in which the Defendants are now placed because that document was never drafted. "The Operating Agreement is the heart and soul of the limited liability company." Wayne A. Hagendorf, The Complete Guide to Limited Liability Companies 11-1 (2013). LLC's typically have "broad latitude" to organize and operate its affairs; however, "one should be cautious in drafting the Operating Agreement so as to avoid future conflicts." Id. at 11-8. This Court recognizes that if Page had drafted an operating agreement for ADS, and if he had included in that agreement any method by which the Defendants could have properly removed Page from ADS, the Defendants would have availed themselves of that procedure long ago.

Many of the rights asserted by Page in this lawsuit are only available to him because of his status as a member of ADS. See, e.g., § 7-16-22(b) (entitling a member to inspect company records and obtain information regarding the state of the business and its financial condition.) Given the likelihood that Page would not be a member of ADS had he cautiously drafted an operating agreement, he would not have standing to raise these issues today. This explains the Court's consideration of the doctrine of unclean hands in this matter.

Pursuant to the doctrine of promissory estoppel, a court will enforce an agreement that does not meet the formal requirements of a contract if there existed: a clear and unambiguous promise, reasonable and justifiable reliance upon that promise, and a detriment to the promisee caused by his reasonable reliance on the promise. See Filippi v. Filippi, 818 A.2d 608, 626 (R.I. 2003). This doctrine is applied in contract law, and the promise is considered legally binding, only to avoid injustice. See id. at 625. Here, Page clearly and unambiguously promised ADS he would act as its attorney, and in so doing, promised that he would fulfill his duties and act in accordance with the rules of professional responsibilities, yet he failed to do so. The Polselli Brothers, having known Page since their childhood and having used him as their attorney numerous times before, reasonably and justifiably relied on his promise to their detriment: they now have no way to remove Page from ADS because of the lack of an operating agreement.

Rhode Island law generally provides that a party who has an adequate remedy at law cannot seek relief in equity. See PHL Variable Ins. Co. v. P. Bowie 2008 Irrevocable Trust ex rel. Baldi, 718 F.3d 1, 11 (1st Cir. 2013) (citing Kocon v. Cordeiro, 98 R.I. 222, 200 A.2d 708, 710 (1964).) Here, the Defendants have no adequate remedy at law. Because their lawyer, Page, failed to draft an operating agreement that identified agreed upon methods for expelling members of ADS, because Rhode Island's Limited Liability Act does not provide a statutory

method for doing the same, and because of this Court's refusal to apply § 7-1.2-1315 and allow them to purchase Page's interest, these Defendants are left without legal remedies.

This Court finds that equity will not allow Page's misdeeds to stand uncorrected: his failure to inform his clients of any potential conflicts of interest; his failure to get their written consent, or to advise them of the need to seek advice from independent counsel; his failure to draft an operating agreement; and, his failure to notify the Secretary of the State when he, as ADS's registered agent, moved his office. Accordingly, this Court now voids Page's 3.9% interest in ADS.

Having voided Page's interest in ADS, the Court shall now consider Page's claim that he performed valuable legal services for the LLC, for which he remains uncompensated. This Court heard testimony from Mr. DiPrete, as well as from Page and the Defendants, which established that Page did perform a variety of legal services for ADS. To determine a fair assessment of the legal services Page provided, this Court will rely on the trial testimony and the admitted allegations in the parties' pleadings.

The Defendants' counterclaim assertions and the uncontroverted evidence in this matter established that Page was the attorney and registered agent for ADS from approximately 1994 to 2001. Further, the parties agree that Page represented the Polselli Brothers with their purchase of the Foodworks Property, and handled the relevant financing negotiations between Newport Federal Savings for the Foodworks Property beginning in 1993 up through the closing in 1995. (Defs.' Countercl. ¶ 8.) According to Mr. DiPrete's testimony, this work involved Page having numerous meetings with the Polselli Brothers, meetings with other attorneys, and meetings with the vice president of Newport Federal Savings; drafting the purchase and sales agreement for the property; drafting the lease between Foodworks Restaurant and ADS; and, performing a title

search and handling tax lien issues. Mr. DiPrete reviewed Page's two page document, and based on his own experience as an attorney, estimated that a reasonable amount of time for an attorney with Page's experience and education to spend on these matters is approximately thirty-eight hours. Mr. DiPrete further opined that an hourly rate of $225 would have been the reasonable charge. After a thorough review of Mr. DiPrete's testimony, the Court found the expert to be credible and his opinions reasonable. Therefore, this Court finds that Page's work in assisting with and drafting agreements for the Foodworks Property is reasonably estimated at $8550.[9]

As this Court has voided Page's interest in ADS, for numerous equitable reasons, these services resultantly are categorized as legal services rendered by an independent attorney. ADS benefitted from those legal services and, without proper consideration for them now, Page stands inequitably uncompensated. Therefore, this Court now finds that Page is rightfully entitled to $8550 in legal fees.[10]

Lastly, the Defendants' counterclaim alleged two breaches of contract. The only testimony regarding these counts came from Page himself: he denied that any money is due and owing. As the Defendants did not present testimony or any other evidence supporting either of their breach of contract claims, they failed to carry their burden of proof and those counts are dismissed. See Gorman v. St. Raphael Acad., 853 A.2d 28, 37 (R.I. 2004).

[9] While Page claims to have performed many additional services for ADS, without the proper documentation or affirmation by the Defendants, the Court is not able to credit Page for any additional time he may have spent.

[10] No interest will be included because these services were, up until this Court's Decision, considered capital contributions and therefore have not been due and owing. However, upon the Court's rendering of this Decision, G.L. 1956 § 6-26-1, identifying a post-judgment interest of 12% per year, shall apply.

IV

Conclusion

In sum, upon consideration of various equitable principles, concepts of fairness, and with the goal of seeing justice done, this Court finds as follows: Page's interest in ADS is voided due to his failure to comply with the Rules of Professional Conduct, his failure to protect his corporate client by properly providing it with a method of expelling members from ADS, and the obvious inability of these parties to work together effectively in the future; Page, as of the rendering of this Decision, is no longer a member of ADS and is therefore entitled to reasonable attorney's fees for the substantiated work he did perform competently as the attorney for ADS in the amount of $8550; and, all the remaining claims are dismissed with prejudice. Counsel for Defendants shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Donald Page, Individually and Derivatively on behalf of ADS Investments, LLC v. ADS Investments, LLC, et al.
CASE NO:	NM 2006-0334
COURT:	Newport County Superior Court
DATE DECISION FILED:	August 5, 2014
JUSTICE/MAGISTRATE:	Clifton, J.

ATTORNEYS:

For Plaintiff:	Donald D. Page, *pro se*
For Defendant:	David F. Fox, Esq.