STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 125-4-15 Frcv
JOSEPH ALLEN, KAREN ALLEN, and M & J MAPLE RIDGE, LLC, PLAINTIFFS v. SCOTT LONGE, DEFENDANT	DECISION ON MOTIONS FOR SUMMARY JUDGMENT

ENTRY ORDER

In this action the plaintiffs, Joseph and Karen Allen ("the Allens"), seek specific performance to force the defendant, Scott Longe ("Mr. Longe"), to sell his interest in the company that the three of them formed in 2012 to produce and sell maple syrup. Pending before the Court are two motions for partial summary judgment by the Allens and a motion for summary judgment by Mr. Longe. The Allens are represented by Attorney Steven J. Watson and Mr. Longe is represented by Attorney George E. Spear, II.

The fundamental question this Court must answer is whether Mr. Longe is bound by his offer to sell his 50% interest in M & J Maple Ridge, LLC (LLC). The Allens argue that the offer must be construed under the buy-sell agreement signed by Mr. Longe and the Allens on September 1, 2013, and that the offer became binding when the Allens accepted. For the reasons explained below, the Court disagrees. Mr. Longe's summary judgment motion is therefore GRANTED in part and the Allens partial summary judgment motion is DENIED in part. This opinion also addresses other counts or issues the parties have presented for summary judgment motion purposes.

Factual Background

The Court recites the following uncontested facts solely for the purpose of deciding the pending motions for summary judgment:

The Allens and Mr. Longe formed a limited liability company in 2011 to gather sap and make maple syrup for sale. Complaint Ex. A ¶ 2. On November 17, 2012, the three partners signed an operating agreement to "regulate the affairs of the company" and "govern relations

among the members." Id. at 1, 4; see 11 V.S.A. § 4003(a). The three most relevant features of the agreement are 1) it set up the LLC as an at-will company, which means there is no specified date on which the company is set to expire; 2) the Allens are described as "husband & wife, tenants by the entirety"; and 3) the members' capital contributions in exchange for their interests in the company were listed generally as unspecified "Capital Infusion and Sweat Equity," which were to be provided within 10 days of the date the agreement was signed. Compl. Ex. A ¶¶ 6–7.

By the time the agreement was signed, the Allens had offered the use of the sugarbush to the operation—83 acres for which they borrowed $140,000 to purchase. Karen Allen Aff., ¶ 3; Joseph Allen Aff. ¶ 3. For his part, Mr. Longe had taken out a $70,000 loan with People's Trust Company that was co-signed by his parents. Karen Allen Aff., ¶ 6; Joseph Allen Aff. ¶ 6. The loan was further supported by a 15-year lease that Mr. Longe signed as a tenant with the Allens as the landlord for the use of their land as a sugarbush. Karen Allen Aff., ¶ 7; Joseph Allen Aff. ¶ 7; Scott Longe's Countercl. Ex. A.

By 2013, Mr. Longe's parents no longer wanted to provide security for his $70,000 loan. Karen Allen worked with the Vermont Agricultural Credit Corporation (VACC) to refinance Mr. Longe's loan. Karen Allen Aff., ¶ 20; Joseph Allen Aff. ¶ 18. The end result was a new loan secured by a second mortgage lien on the 83 acres owned by the Allens and the company's equipment. Karen Allen Aff. Ex. E ¶ 3.

The LLC also signed a 9/1/13 lease to use the Allens' land as a sugarbush, and Mr. Longe and the LLC were added as debtors on existing VACC loans to the Allens. Karen Allen Aff., ¶ 22 and Ex. C; Ex. E ¶ 17(m). The 2013 Lease from the Allens makes no reference to the 2011 Lease held by Mr. Longe as lessee. Neither lease says that it an exclusive lease to the Allens' sugarbush. No documents were signed to terminate Mr. Longe's 2011 lease. There are no documents stating that Mr. Longe was to contribute his 2011 lease lessee rights to the LLC (or relinquish his 2011 leasee rights) as part of his unspecified "capital infusion" under the LLC Agreement, at Section 7, as part of his capital infusion/ sweat equity contribution to the LLC. The 2013 lease to the LLC also had a proviion that the sugarbush lease to the LLC would terminate if the LLC ceased to yuse the lease property for maple sugar production. 2013 Lease at Para. 6.

A further condition for the VACC loan was that the LLC execute a buy-sell agreement, which had been promised in the operating agreement but not executed. Karen Allen Aff., ¶ 25; Joseph Allen Aff. ¶ 22; Compl. Ex. A ¶ 16. The buy-sell agreement was dated September 1, 2013 and signed by Mr. Longe and the Allens. Comp. Ex. B. The three most relevant features of the

buy-sell agreement are 1) the introduction, which states that the parties wish to provide a guaranteed market for a deceased member's interests at a fair value and impose restrictions on the transfer of interests during the members' lifetimes; 2) identification of the LLC members, in that the Allens "shall be considered one member and Scott Longe shall be considered a member"; and 3) requirements that a member wishing to sell his interests in the LLC must first serve written notice to the other member, who then has 60 days to purchase the interests at the price determined by the adjusted book value.[1] Id. If the other member opts not to purchase the interests, the selling member is free to sell them to a third party, as long as the price is not less than the price fixed in the agreement. Id. If the selling member is willing to lower his price, he must again give the other member the right of first refusal at that lower price. Id.

On May 16, 2014, Mr. Longe sent a certified letter to the Allens at their home address offering to sell his interest in the company for $40,000. Compl. Ex. C. On June 30, 2014, the Allens responded through their attorney, accepting the offer with some changes. Karen Allen Aff. Ex. G. In their response, the Allens construed Mr. Longe's offer as an offer made pursuant to the buy-sell agreement. Id. Instead of accepting Mr. Longe's interest for the price he offered—$40,000—the Allens adopted and demanded the price dictated by the terms of the buy-sell agreement, which was the adjusted book value of his 50% share in the LLC. Id. Based on the calculations made by the LLC's accountant, Mr. Longe's share was worthless at the time he offered to sell, and in fact was worth a negative $2,319.76. Id.[2]

Mr. Longe did not accept the Allens' offer. Longe Aff. ¶ 8; Karen Allen Aff. ¶ 37; Joseph Allen Aff. ¶ 29. On April 1, 2015, the Allens filed suit against Mr. Longe in their names and in the name of the LLC. Compl. Mr. Longe filed counterclaims against the Allens on April 20, 2015. Since his offer to sell his interests in the LLC, Mr. Longe has not made any capital or sweat equity contributions to the LLC. Karen Allen Aff. ¶ 42; Joseph Allen Aff. ¶ 34.

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[1] The adjusted book value is the company's assets minus its liabilities, divided by the total number of interests outstanding. The adjusted book value is to be "determined as of the last day of the month preceding the month in which the" selling member either dies or offers to sell his interests, and is to be "determined by the accountant or accounting firm then servicing the LLC's books, in accordance with generally accepted accounting principles. Compl. Ex. B 2-3.

[2] The Allens submitted to the Court their attorney's written response to Mr. Longe, which included an offer to purchase Mr. Longe's interest to prevent a possible lawsuit. Karen Allen Aff. Ex. G. The Allens subsequently sought to strike their counteroffer as inadmissible under V.R.E. Rule 408, which prohibits evidence made pursuant to offers to compromise when the evidence is "offered to prove liability for, the invalidity of, or the amount of a claim that was disputed as to either validity or amount." Pls.' Statement of Disputed Facts in Opp'n to Def.'s Mot. for Summ. J. ¶ 7. The Court need not determine this question because the details of the Allens' counteroffer are immaterial to the Court's decision and need not be spelled out here nor further considered. The fact that they made a counteroffer is material, as discussed *supra*.

As a result of this litigation, the LLC is not eligible for additional loans from VACC. Karen Allen Aff. ¶ 40; Joseph Allen Aff. ¶ 33. In the spring of 2016, the Allens used approximately $8,700 of their own money to purchase a vacuum pump and sap releaser for the LLC. Karen Allen Aff. ¶ 41; Joseph Allen Aff. ¶ 33. The Allens also contend that Mr. Longe used about $10,000 of the LLC funds to make payments on a personal vehicle and/or personal trips. Karen Allen 7/15/16 Aff. ¶'s 15 and 16.

Apart from the main loan documents, the parties have competing statements about having contributed labor and/ or goods to the sugar bush operation during the time they worked together. As there have been no accountings between the parties, there are lots of details to be ferreted out on financial issues. The LLC Operating Agreement has no details as to who paid or contributed what ultimate sums or hours of labor for the initial capital contributions. The Agreement states no details if there was any agreement or understanding as to whether any member was required to work for the LLC (and if so for how many hours doing what) to claim salary or a distributional interest from profits, after making his or her initial infusion of unspecified sweat equity and/or capital infusion.

The parties' dispute has generated a plethora of claims and counterclaims – 20 in fact. Plaintiffs' nine count amended complaint seeks recovery for [1] breach of contract (the buy/sell in the Operating Agreement); [2) breach of implied covenant of good faith and fair dealing claims (arising out of Mr. Longe's conduct regarding claimed duties owed under the Operating Agreement); [3] promissory estoppel (relating to the buy/sell contract communications); [4] conversion of LLC assets by Mr. Long that were converted to his own use; [5] unjust enrichment (retention by Longe of the Allens' "sweat equity" without compensation to them); [6] expulsion of Mr. Longe from the LLC; [7] declaratory judgment that theAllens' 2013 Lease with the LLC replaced the 2011 Allens / Longe Lease; and [8] declaratory judgment on the Allen's right to enforce the Buy/Sell agreement against Mr. Longe; and [9] specific performance, requiring Mr. Long to sell his 50% LLC interests to the Allens for the "book value" per the Agreement.

Mr. Longe has responded with an eleven count counterclaim. Some of its allegations are a bit harder to characterize but it appears to seek recovery under its eleven counts for : [1] breach of duties owed Mr. Longe, as a member of the LLC, by the Allens, by intentionally withholding from Mr. Longe an accounting and information on the LLC and barring his participation in the LLC [2] negligent breach of the LLC duties described in Count 1 by the Allens; [3] breach of the Allens' 2011 lease to Mr. Longe; [4] negligent breach of the Allens' 2011 lease to Mr. Longe; [5] breach

of duties of loyalty and/or good faith and fair dealing owed by the Allens to Longe in in the formation of the LLC; [6] negligent breaches of the duties from count 5; [7] breach of duties of loyalty and/or good faith and fair dealing owed by the Allens to Longe in in the operation of the LLC; [8] conversion of LLC assets and profits by the Allens; [9] unjust enrichment of the Allens by Mr. Longe's efforts; [10] conversion of Mr. Longe's property by the Allens; and [11] a count to expel the Allens from the LLC.

Plaintiffs, the Allens, filed a 6/10/16 motion for partial summary judgment. It essentially and primarily seeks enforcement of the Allens claim that Mr. Longe, by initiating the Buy/Sell sell provision, and by offering to sell his LLC interest for $40,000, is legally required to complete the sale for the book value under the operative Buy / Sell agreement. The motion also seeks to Dismiss Count II of the counterclaim, Mr. Longe's count to enforce the 2011 Lease, on the grounds that as a matter of law it was replaced by the 2013 lease. The Allens' first motion for partial summary judgment does not appear to seek summary judgment on any other of their counts.

Defendant, Mr. Longe, filed a 6/17/16 motion for summary judgment. In that motion he seeks to have the entire Complaint dismissed. As to the Allens' counts that arise out of the alleged breach of the Buy/Sell Agreement by Longe, he asserts there was no breach and those claims fail. He challenges the LLC' standing to sue him and whether it is a real party in interest. Mr. Longe's motion does not expressly address all of the Allens' counts, such as their claim he converted some LLC money for a personal truck or a trip.

In their original motions neither Mr. Longe nor the Allens sought summary judgment on Mr. Longe's counterclaims and they in general are not addressed here. However, the Allens moved on 11/28/16 for summary judgement on certain Scott Longe counterclaims (Counts 2,) on the basis of the "economic loss" doctrine. No opposition memo was filed by Mr. Longe. This second motion for partial summary judgment is addressed below.

Discussion

I. Legal Standard

The court will grant summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(a); *Robertson V. Mylan Labs., Inc.*, 2004 VT 15 ¶ 15, 176 Vt. 356. In determining whether there is a genuine issue

as to any material fact, the court accepts as true the allegations made in opposition to the motion for summary judgment. Id. Those allegations must be supported by affidavits or other evidentiary material. Id. Additionally, the nonmoving party receives the benefit of all reasonable doubts and inferences. Id.

Summary judgment is appropriate where a contract is unambiguous on its face. See *Cate v. City of Burlington*, 2013 VT 64 ¶ 15, 194 Vt. 265. If there is ambiguity, the meaning of a contract "becomes a mixed question of law and fact and summary judgment may not be appropriate." Id.

II. Analysis

Limited liability companies are a popular form of business because they offer their members unrestricted limited liability and favorable tax treatment while combining some of the best attributes of partnerships and corporations. L. Smiddy & L. Cunningham, *Corporations and Other Business Organizations: Cases, Materials, Problems* 152 (8th ed. 2014). Through their operating agreements, which are essentially contracts between the members, members set their own rules for managing the affairs of the company and the relationships among each other. 11 V.S.A. § 4003(a). Where the operating agreement leaves gaps in addressing various issues that may arise, the Vermont statutes stand in. Id.

In forming M & J Maple Ridge LLC, the Allens and Mr. Longe apparently had high hopes, using their daughters' initials to name the company. Had things turned out as planned, their barebones operating agreement, augmented somewhat by the buy-sell agreement, might have been adequate. But the agreement is of little help in the situation the partners find themselves in, where one partner wants out at a price the others are unwilling to pay.

The central question in this case is whether Mr. Longe was bound by the written offer he made to the Allens to sell his 50% interest for $40,000. The Allens argue that the buy-sell agreement established what is required to make and accept an offer, and that Mr. Longe's offer implies an offer to sell for the adjusted book value if the Allens rejected his $40,000 price. The Court disagrees with this interpretation for two reasons.

First, by its plain language, Mr. Longe's offer to sell his stake in the LLC for $40,000 constitutes an offer of a substituted contract. Had the Allens accepted his offer, the substituted contract would have replaced the terms of the buy-sell agreement. *Restatement (Second) of Contracts* § 279 cmt. a ("A common type of substituted contract is one that contains a term that is

inconsistent with a term of an earlier contract between the parties."). At that point, if Mr. Longe's initial offer had been accepted in full, had Mr. Longe reneged on his accepted offer to sell his stake for $40,000, the Allens would be able to enforce Mr. Longe's duty to make good on that offer. Id. Because they would have accepted the substituted contract with their agreement to buy at $40,000, the Allens would not be able to require Mr. Longe to sell for the adjusted book value price as set in the buy-sell agreement. Id. at cmt. a, illus. 2. That is not what happened here.

Second, the Allens made a ***counter-offer*** to Mr. Longe, using the terms of the buy-sell agreement to justify a much lower price. By making their counteroffer, the Allens terminated their power of acceptance of Mr. Longe's offer. *Restatement (Second) of Contracts* § 39 cmt. a ("The termination of the power of acceptance by a counter-offer merely carries out the usual understanding of bargainers that one proposal is dropped when another is taken under consideration"); see also *Benya v. Stevens and Thompson Paper Co., Inc.*, 143 Vt. 521, 525 ("An acceptance that modifies or includes new terms is not an acceptance of the original offer; it is a counteroffer by the offeree that must be accepted or rejected by the original offeror."). Mr. Longe rejected the Allens' counter-offer. Because there was never a meeting of the minds between Mr. Longe and the Allens, there was never a contract for Mr. Longe to sell his interests and for the Allens to buy them. Neither side is bound by the offers they made.

The Buy/Sell Agreement does not allow a member to require another member to sell his or her interests on demand. The selling member decides if and when to sell. (There may be a forced sale of a member's interest, from his or her estate if the member dies, under Section 4.01 of the Buy/Sell Agreement.)

With the court finding Mr. Longe not required to sell his LLC interests for their book value (unless he clearly offered to do so), and the Allens not being able to force a sale – the court finds no breach of the Buy /Sell Agreement. That result also means that as a matter of law Mr. Longe breached no implied duties of good faith or fair dealing under the Buy /Sell and there were no promises by him that reasonably should have caused forbearance.

The Allens' motion for partial summary judgment, to the extent it extends to their Counts 1, 3, 8 and 9, is denied. Mr. Longe is entitled to summary judgment on Counts 1, 3, 8 and 9 of the Amended Complaint. The parties' rights and obligations to each other stem from facts and claims other than their failed buy out negotiations.

Count 2 of the Allens' complaint alleges Mr. Longe engaged in several acts that violated the implied covenant of good faith and fair dealing in the Operating Agreement. These alleged breaches include [a] failure to provide "sweat equity"; [b] diversion of about $10,000 of his capital infusion to private purposes; [c] and the alleged refusal to sell his LLC interest for the "book value" price. The discussion above dispenses with the alleged refusal to sell the LLC interests as this court has determined there was no such duty.

Vermont courts "will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract *based upon the same conduct."* See *Monahan v. GMAC Mortgage Corp.*, 2005 VT 110, ¶ 54 fn. 5, 179 Vt. 167 (emphasis in original) (citing *Cary Oil Co. v. MG Ref & Mktg., Inc.*, 90 F.Supp.2d 401, 419 (S.D.N.Y.2000) (stating "a claim for breach of the implied covenant will be dismissed as duplicative if the conduct allegedly violating the implied covenant is also the predicate for breach of the underlying contract.")); *Harsch Properties, Inc. v. Nicholas,* 2007 VT 70, ¶ 14 (no separate cause of action if same conduct also applies to straight breach of contract claim); *Howe Center, Ltd. v. Suburban Propane, L.P.*, No. 702-9-08 Rdcv 2010 WL 3525971 (7/2/09)(Cohen, J); *One Source Environmental, LLC v. M+W, Zander Inc., et al* , 13 F.Supp.3d 350, 361 (D. Vt. 2014)(Sessions, J)(applying VT law).

Because the Allens' breach of implied covenant of good faith and fair dealing alleges no conduct other than acts that themselves are alleged to constitute the breaches of the Operating Agreement, Mr. Longe is entitled to summary judgment on Count 3, alleging breach of implied covenant of good faith and fair dealing under the Operating Agreement contract.

The Allens' motion for partial summary judgment also seeks to dismiss Mr. Longe's Counterclaim's Count 3, seeking to enforce the 2011 Lease. The Allens principally claim their 2011 lease, to Mr. Longe was replaced by their 2013 Lease to the LLC. The court finds that the circumstances and lease documents do not necessarily lead to this legal conclusion and summary judgment on this point is not appropriate. As noted, the leases are not facially exclusive, and there was no express termination of the 2011 lease to Mr. Longe. His signature as a member of the LLC, to its entry of the 9/1/13 lease could be consistent with there being two lessees sharing the sugar bush, or Mr. Longe holding residual lease rights if the LLC were to cease its maple sugar operations. The court cannot at this point determine if the Allens assumptions the Allens / Longe 2011 lease was being terminated was fully justified where the second lease was solely or

primarily entered to appease the financing bank. Although the Allens' arguments are persuasive and may sway a jury – there was so much unstated about these parties' relationship that Mr. Longe is entitled to have a jury hear the full facts and determine the relationship between the parties under these documents, the LLC agreement and by their conduct. "Summary judgement is not warranted simply because the movant offers facts that appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." *Provost v. Fletcher Allen Health Care, Inc.* , 2005 VT 115, ¶ 15 (internal quotation marks omitted). "Further, it is not for the trial judge to adjudicate who is more credible, plaintiff or defendants and their affiants, in the context of a motion for summary judgment." *Id.* (internal quotation marks omitted).

Thus the Allens' motion to dismiss count 3 of the counterclaim is denied.

The court turns to Mr. Longe's summary judgment motion, asking that the nine count complaint be dismissed. The court has already agreed with Mr. Longe as to the now dismissed Counts 1,2, 3, 8 and 9.

As to Count 4, the conversion count, Mr. Longe has not contested the Allens' affidavit that he used portions of his capital infusion for private car payments and a trip. He is not entitled to summary judgment on Count 4.

In Count 5 of the Complaint, the Allens claim Mr. Longe was unfairly enriched because he the benefits of the Allens "sweat equity" without fair compensation to them. Due to the dearth of detail as to who did what, when and how, for the business, summary judgment is not appropriate on this count of the Complaint.

Count 7 of the Complaint seeks a declaratory judgment that Mr. Allen breached the 2011 lease by not paying the $1.00 / tap rent and the 2011 lease was replaced by the 2013 Lease. Mr. Longe is not entitled to summary judgment on this count. It presents valid issues for trail. The court has noted the interplay between the leases is for the jury to determine. It appears that Mr. Longe may be in breach for not paying the $1.00 / tap under the 2011 lease (he did not contest that in his affidavit). The extent of any damages, and the impact of that breach on the lease's enforceability by Mr. Longe, will await trial.

Mr. Longe challenges the LLC's standing in this case, and moves for dismissal of Count 6 to expel him. (Mr. Longe in Count 11 of his own counterclaim, moves to expel the Allens from the LLC). The court considers these LLC operational and procedural matters.

The Vermont legislature repealed and replaced the former limited liability law in July 2015. (Act 17, creating§§ 4001 - 4163). However, under Section 12(c) of Act 147, generally the new law does not apply to LLC's formed before 7/1/15 unless the LLC's members vote to be bound by the new Act by amending their operating agreement. Further, Section 12(d) of the Act states Act 17 "does not affect an action commenced, a proceeding brought, or a right accrued before July 1, 2015". This suit was filed in April 2015 and the court will apply the former LLC Act.

The parties have briefed the issue as to whether the Allens, as the joint owners of 50% of the LLC ownership interests, have the legal ability to vote to approve a suit by the LLC against Mr. Longe. The court concludes in general the Allens have such power, but the court questions if the LLC has its own claims to assert here, versus the members asserting claims against each other.

Mr. Longe argues that the Allens together are one member of the LLC, which means they together have only one vote and cannot sue him in the name of the LLC. He notes that the operating agreement identifies the Allens as tenants by the entirety. Compl. Ex. A ¶ 7. But such designation only refers to their ownership of their 50% share in the LLC, not in their voting rights. When spouses hold property as tenants by the entirety, "neither spouse has a share that can be disposed of or encumbered without joinder of the other spouse." *Cooper v. Cooper*, 173 Vt. 1, 20 (2001). Each spouse is individually vested with title to the whole estate. *Bellows Falls Trust Co. v. Gibbs*, 148 Vt. 633, 633 (1987 (mem.). The defining characteristic is the unity of estate; there is one title and each spouse owns the whole. *RBS Citizens, N.A. v. Ouhrabka*, 2011 VT 86 ¶ 8, 190 Vt. 251.

The buy-sell agreement, which was signed about 10 months after the operating agreement does identify the Allens as one member, but only for the purposes of the buy-sell agreement. Compl. Ex. B 1. This makes sense when understood in the context of their tenancy-by-the-entirety ownership of their 50% stake. It does not retroactively turn them into one member for the purposes of the rest of the operating agreement. The Allens are listed as members in the opening paragraph of the operating agreement, which unequivocally states that there are three members in the LLC. Each of the Allens signed the operating agreement and were identified as members in their signature lines. Id. at 1 and 4. In a member-managed LLC, each member has equal rights in the management and conduct of the company's business[3] (11 V.S.A. section 3054(1)), except for

[3] By contrast when shareholders vote as shareholders in corporations, their votes are weighted by the number of shares they own and control. See 11A V.S.A. section 7.21(a).

limited issues where unanimous consent of the members are needed – see 11 V.S.A. section 3054 (c). As two of the three voting members of the LLC, the Allens are able to cause the LLC to sue Mr. Longe as they have done. The LLC's operating agreement provides that "[t]he business and affairs of the Company shall be under the exclusive management and control of all of the Members, with all decisions being decided by a majority vote of the Members." Complaint, Ex. B 1. at ¶ 5.

Although the Allens may have the legal right to authorize the LLC to sue Mr. Longe, it is unclear to the court that any of the claims asserted by the Allens are claims that belong to the LLC, rather than t the Allens as co-members of the LLC with Mr. Longe. Under 11 V.S.A. section 3060(a) one or more LLC member(s) may sue another LLC member for legal or equitable relief to enforce the suing member's rights under the operating agreement or under the LLC statutes, or to otherwise protect the interests of the suing member, including rights and interests arising independently of the member's relationship of the company. The Allens claims asserted here (including the claim to expel Mr. Longe – see below) appear to be solely or primarily to enforce their own rights, as LLC members, against Mr. Longe. The court will defer dismissal of the LLC as a party in this action to provide the Longes the opportunity to identify what, if any claims, they assert the LLC holds other than the claims they are authorized to make on their own behalf.

Mr. Longe seeks summary judgment on the Allens' Count 6, to expel him, and Mr. Longe in turn under his counterclaim (Count 11)seeks to expel the Allens from the LLC. Vermont law authorizes members to seek such relief from the court, but only under limited purposes. Under 11 V.S.A. §3081(5)(A) to (C), a court is authorized to expel a member by judicial ***determination on application by*** the company ***or another member*** if the member to be expelled is:

> (A) engaged in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's business;
> (B) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members . . . ; or
> (C) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the person as a member.

As the statute provides, the limited liability company itself is not required to authorize a judicial expulsion action. Allegedly affected members can sue to expel the member committing the actionable conduct, even where the suing members are in the minority or own small percentages of the LLC interests. Thus the Allens' claim to judicially expel Mr. Longe (and his counterclaim

to expel them) do not derive from the LLC authorizing the claim. Members may sue each other directly for such relief.

At this point in the motion practice, Mr. Longe seeks summary judgment as to the Allens' claim that they are entitled to an order expelling Mr. Longe "because his conduct does not make it reasonably practicable to carry on the LLC's business with him has a member." Compl. ¶ 60.

The parties have made competing allegations that the other side has locked them out of the business, or interfered with the business operation. The allegations and affidavits on those points are largely conclusory with scant details. The fact that Mr. Longe has not been directly involved in the business since May 2014 is not sufficient reason in itself for this Court to order his expulsion. The only contribution Mr. Longe was required to make under the written express terms of the operating agreement is an indefinite amount of "Capital Infusion and Sweat Equity," which was to have been provided to the LLC within 10 days of the date the agreement was signed back in November of 2012. No continuing efforts or funds are expressly required under the written agreement. The Allens have not presented any evidence that the LLC is unable to carry on its business without Mr. Longe's active involvement. On the contrary, as recently as the spring of 2016, the business was apparently functioning as the Allens used $8,700 in personal funds to purchase a vacuum pump and sap releaser for the LLC which were presumably used to produce maple syrup. The Allens allege that Mr. Longe did not provide the promised sweat equity, and that his use of LLC funds for $10,000 in private purchases, and their need to invest the $8,700, impacted the LLC. If the parties had clearly agreed to each provide key skills or tasks and Mr. Longe did not do so, that might have impacted the company's ability to operate. It is conceivable that Mr. Longe's conduct prevented the LLC from being "reasonably practicable" to carry on its business, but that determination will be very fact dependent.

The Vermont Supreme Court has not clarified "reasonable practicable" standard to expel a member. Courts in other states have concluded that the mere fact that LLC members have conflicts is not sufficient to obtain a court order to expel member, especially where business decisions may be made by a majority vote of members, and any member is free to disassociate from the LLC.

After reviewing cases from other jurisdictions the Colorado Court of Appeals adopted a seven factor test. Factors to be considered– no one of which is necessarily dispositive, and all of which are not required– include: (1) whether the management is unable or unwilling to reasonably permit or promote the purposes for which the company was formed; (2) whether a

member or manager has engaged in misconduct; (3) whether the members have clearly reached an inability to work with one another to pursue the company's goals; (4) whether there is deadlock between the members; (5) whether the agreement provides a means of navigating around the deadlock; (6) whether, due to the company's financial position, there is still a business to operate; and (7) whether continuing the company is financially feasible. *Gagne v. Gagne*, 338 P.3d 1152 (Col. App. 2014). New Jersey recently adopted this test in a case applying New Jersey's LLC law to obtain a judicial dissolution where a member is expelled after conduct .which "makes it not reasonably practicable to carry on the business with the member" as part of the LLC. *IE Test, LLC v. Carroll*, 140 A.3d 1268 (N.J. 2016).

Although the court need not determine the exact standard or factors to apply, the "reasonably practicable" standard requires review of the individual circumstances. This determination will require consideration of the many contested facts, and details as to which of the parties did what for the LLC's operations at different times in issue, and how (if at all) that seriously prevented the LLC from harvesting and selling maple. Therefore Mr. Longe's motion to dismiss Count 6 is denied.

Lastly the court turns to the Allens' 11/28/16 second motion for summary judgment, seeking to dismiss certain counter claim counts alleged in negligence. The court agrees Mr. Longe's Count 2 appears to allege a negligent breach of contract; Count 4 appears to allege a negligent breach of lease; and Count 6 appears to allege a negligent breach of the implied covenant of good faith and fair dealing in the formation of the LLC. Counts 2 and 4 assert negligence recovery for the breach of contract counts alleged in Count 1 (Operating Agreement) and Count 3 (lease).

The economic loss rule "prohibits recovery in tort for purely economic losses." *Long Trail Condo House Ass'n v. Engelberth Construction, Inc.*, 2012 VT 80, ¶ 10, quoting and citing *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 30, 181 Vt. 513. The rule serves to maintain a distinction between contract and tort law. *Long Trail, supra; EWBWS, supra.* Here the losses for the alleged breach of the Operating Agreement and the lease arise out of those contracts. Recovery may be sought for these losses under the contract claims.

Moreover, the claimed losses for Mr. Longe are for intangible economic loss, with no physical injury to person or property. The "economic losses" to which the economic-loss rule applies are *intangible* economic losses, and do not include losses accompanying physical harm to persons or property. See *Long Trail,* 2012 VT 80, ¶ 10, 59 A.3d 752 (" 'negligence actions are

limited to those involving unanticipated *physical injury* ' " (emphasis added) (quoting *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 30, 181 Vt. 513, 928 A.2d 497)); *Glassford v. BrickKicker*, 2011 VT 118, ¶ 41, 191 Vt. 1, 35 A.3d 1044 ("When, as here, *economic loss without physical injury* is claimed by plaintiff, the obligation of defendant is governed by the contract terms, and not the law of negligence." (emphasis added)); *Wentworth v. Crawford & Co.*, 174 Vt. 118, 126, 807 A.2d 351, 356 (2002) ("*absent some accompanying physical harm*, there is no duty to exercise reasonable care to protect another's economic interests" (emphasis added)); *Springfield Hydroelectric*, 172 Vt. at 314, 779 A.2d at 70 ("[N]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another *unless one's conduct has inflicted some accompanying physical harm.*") (emphasis added) (quotation omitted).

Count 6 is a count for negligent breach of the implied covenant of good faith and fair dealing. Where the implied covenant of good faith and fair dealing has been recognized in Vermont, it has been premised in tort, not in contract. *Monahan v. GMAC Mort. Corp*., 2005 VT 110 Para. 54, fn. 5*; Greene v. Stevens Gas Service*, 2004 VT 67 Para. 25. Thus Count 6 is in essence a negligent tort claim seeking recovery of intangible economic losses where there is no physical injury to property or persons. Count 6 is subject to dismissal under the principles state above.

Counts 8 and 10 of Mr. Longe's counter-claim appear to be conversion counts – an intentional tort. The Allens' second motion for summary judgment to dismiss those counterclaim counts under the economic loss doctrine is DENIED.

Conclusion

The Court finds that Mr. Longe is not bound by the terms of the buy-sell agreement to sell his 50% interest in M & J Maple Ridge LLC to the Allens. The offer he made to sell his share for $40,000 was an offer of a substituted contract, which the Allens rejected with their counter-offer. Neither offers are binding.

The Allens' motions for partial summary judgment as to Counts 1, 3, 8 and 9 of their Complaint is DENIED, and Mr. Longe's motion for summary judgment to dismiss the Allens' Counts 1, 2, 3, 8 and 9 is GRANTED, but DENIED as to the Allens' Counts 4, 5, 6, and 7. The Allens' second motion for partial summary judgment to dismiss Mr. Longe's Counterclaim Counts 2, 4 and 6 is GRANTED, but DENIED as to Counts 8 and 10.

The court recognizes that the delay in obtaining a court ruling in these motions may have delayed the parties in completing the mediation in this matter. By February 6, 2017 the parties will report to the court whether they have completed mediation. If the parties have not mediated the case by 2/7/17, they will by such a date have scheduled a mediation date and report to the court the scheduled date. If the parties are not presently trial ready, by February 6, 2017 they shall also file a proposed amended discovery schedule seeking any short extensions to complete discovery.

The court will hold a pretrial before the trial in this matter. The claims and defenses here are a combination of legal and equitable claims arising from a common set of facts. A jury trial has been demanded. It is the court's inclination, in the interests of judicial economy, to hear all of the legal and equitable claims in a single trial. V.R.C.P. 39(d); *LeBlanc v. Snelgrove*, 2015 VT 112, Para. 39. In such a trial the jury verdict must come first, after which the court may issue findings on the equitable claims that must be consistent with the jury verdict. *Le Blanc* at Para. 39, citing *Retrovest Assocs. v. Bryant*, 153 Vt. 493, 495 n. 1(1990).

Dated in St. Albans, January 17, 201[7]

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Hon. Michael J. Harris, Civil Division
Vermont Superior Court, Franklin Unit

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