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CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: April 23, 2010
Decided: May 4, 2010

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Re: *Borin v. Rasta Thomas LLC, et al.*
Civil Action No. 5344-CC

Dear Counsel:

I have carefully reviewed the briefs related to defendants' motion to alter or amend my April 6, 2010 judgment. I have also reviewed the briefs related to plaintiff's motion for reconsideration of my April 6, 2010 ruling on attorney's fees, costs, and expenses. This letter sets forth my decisions on both motions.

I begin with defendants' motion to alter or amend judgment. That motion is DENIED. For the Court to grant defendants relief under Court of Chancery Rule 59(e), defendants must demonstrate "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."[1] The Court will not grant a motion to alter or amend judgment if the party simply restates the arguments it has already made and which have been rejected.[2] Defendants do not assert that there has been a change in controlling law or that new evidence has

[1] *Chrin v. Ibrix, Inc.*, 2005 WL 3334270, at *1 (Del. Ch. Nov. 30, 2005).
[2] *Id.*

become available. Rather, defendants assert that the April 6, 2010 judgment was erroneous and resulted in a manifest injustice.

The April 6 ruling awarded plaintiff $64,507.10, which represented 35% of the $184,306 in income that was allocated to plaintiff on Rasta Thomas LLC's (the "Company") Schedule K-1 for tax year 2009. The income allocation was based on the Company's operating agreement, which provided that 40% of the Company's income would be allocated to plaintiff for tax reporting purposes. The operating agreement also required the Company to make a tax distribution of 35% of the income allocated to plaintiff so that plaintiff could pay her taxes. Defendants argument at trial was that the Company did not have to pay plaintiff a tax distribution because the operating agreement was superseded by the settlement and repurchase agreements plaintiff and defendants entered into on December 16, 2009 in connection with the buyout of plaintiff's investment in the Company. I disagreed with defendants' position, ruling that it was inconsistent for defendants to treat the operating agreement as binding on the parties for purposes of allocating income to plaintiff while simultaneously treating it as superseded and not binding for purposes of making the tax distribution tied to the income allocation.

When plaintiff's investment in the Company was repurchased on December 16, 2009, the repurchase agreement specified that she would be paid the following cash amounts:

1. $250,000, characterized as "Closing Date Cash Consideration;"

2. $26,938.62, characterized as the remaining balance on her "Unpaid Annual Salary" of $100,000;

3. $11,331.95, characterized as a return of her "Capital Contribution."

These payments were collectively characterized as the "Purchase Price" for plaintiff's 40% interest in the Company.

At trial, defendants argued that the cash distributions plaintiff received on December 16, 2009 constituted consideration for her membership interest in the Company, as well as for the tax distribution plaintiff was entitled to under the operating agreement. I disagreed, ruling that the repurchase agreement did not specify that the cash distributions plaintiff received in exchange for her membership interest were also intended to satisfy the Company's tax distribution

obligation to plaintiff. As shown above, the characterization of these payments does not in any way indicate that they satisfy a tax distribution obligation.

Defendants now argue that a *portion* of the cash distributions plaintiff received on December 16, 2009 should be applied to the tax distribution the Company owes plaintiff. Specifically, defendants assert that $25,000 of the $26,938.62 distribution plaintiff received as the balance of her "Unpaid Annual Salary" should be applied to the tax distribution owed plaintiff. This would reduce the Court's previous judgment from $64,507.10 to $39,507.10. Defendants argue that the operating agreement entitled plaintiff to $75,000 in annual distributions, that she had been paid $73,061.38 as of December 16, and that the remaining $1,938.62 owed her under the operating agreement was paid as part of the "Unpaid Annual Salary" distribution of $26,938.62. According to defendants, the $25,000 balance of the "Unpaid Annual Salary" should be treated as a tax distribution or plaintiff will receive a windfall of $25,000, which would be manifestly unjust.

Defendants' argument is essentially a rephrasing of the argument they made at trial; that the cash distributions made to plaintiff on December 16, 2009 were in lieu of the Company's tax distribution obligation for 2009. I decline to amend the Court's judgment on the basis of a rephrased argument.

Nor do I believe that the Court's judgment will result in manifest injustice. A fair reading of the repurchase agreement indicates that the cash distributions paid on December 16, 2009 were not intended to satisfy the Company's tax distribution obligation, they were intended to repurchase plaintiff's 40% interest in the Company. The operating agreement defined the $26,938.62 "Unpaid Annual Salary" distribution as part of the "Purchase Price" of plaintiff's interest. Nowhere does the repurchase agreement mention that this amount has anything to do with the Company's tax obligation to plaintiff. I cannot read something into the repurchase agreement that simply is not there as *that* would be manifestly unjust.[3]

[3] Defendants argue that the $250,000 payment characterized "Closing Date Cash Consideration" was the actual purchase price for plaintiff's 40% interest in the Company and that the $26,938.62 payment characterized "Unpaid Annual Salary" was separate and apart from that. Defendants argue that the $26,938.62 should be applied to the Company's tax distribution obligation because plaintiff is not an employee of the Company and therefore is not entitled to a "salary." I concede that using the term "salary" to describe a distribution to plaintiff is odd. But use of this term does not lead me to conclude that the $26,938.62 was intended to be a tax distribution. I am satisfied—based on the record evidence and testimony at trial—that the parties agreed to increase plaintiff's annual distribution from $75,000 to $100,000 as part of the buyout of

I now turn to plaintiff's motion for reconsideration of my ruling on attorney's fees. That motion is also DENIED. There are two bases upon which plaintiff asserts that her attorney's fees should be shifted to defendants. I discuss each briefly.

First, plaintiff argues that defendants breached the settlement agreement by refusing to make the tax distribution required by the operating agreement after using the operating agreement to allocate income to her on the Schedule K-1. Plaintiff seeks reimbursement of her attorney's fees under the settlement agreement. In my April 6 ruling, I held that that *operating* agreement was breached, and that plaintiff was therefore not entitled to attorney's fees under the settlement agreement. I remain convinced that this ruling was correct. Defendants represented that the execution and performance of the settlement agreement would not breach or conflict with the operating agreement. The act of entering into the settlement agreement did not breach the operating agreement. Performance of the settlement agreement required defendants to release all claims against plaintiff, avoid disparagement of plaintiff, and repurchase plaintiff's interest in the Company under the terms of the repurchase agreement. These actions did not breach the operating agreement either. Rather, the operating agreement was breached because defendants refused to abide by its terms; specifically the requirement to make a tax distribution to cover allocated income. Because the operating agreement was breached, the provision in the settlement agreement providing for the shifting of attorney's fees is not triggered.

Second, plaintiff argues that defendants acted in bad faith by refusing to file for a tax extension, causing her to incur the costs of expedited litigation to enforce a clear contractual right. The Court has the power to award attorney's fees where the party against whom fees are assessed acted in bad faith.[4] If a defendant forces a plaintiff to seek judicial intervention to enforce a clearly defined right this is evidence of bad faith.[5] But a defendant's conduct will not constitute the type of bad faith warranting a shift in fees unless it rises to "a high level of

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plaintiff's interest in the Company. Given that plaintiff had received prior distributions of $73,061.38, the $26,938.62 payment was necessary to bring the annual distribution to $100,000. This is evidenced by the fact that the repurchase agreement characterizes the $100,000 as part of the "Purchase Price" of the buyout. Nothing indicates that this payment was related to the tax distribution obligation of the Company.

[4] *Abex, Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, at *20 (Del. Ch. Dec. 22, 1994).

[5] *Id.*

egregiousness."[6] In this case, plaintiff's contractual right to a tax distribution was not so clearly defined as to permit me to comfortably conclude that defendants' refusal to pay it—as well as their refusal to make an accommodation with the tax filing deadline—was an act of bad faith. While plaintiff's arguments in this case were the better and stronger ones, defendants' arguments were not outlandish or frivolous. Accordingly, I decline to shift fees. Each side must bear its own costs.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[6] *In re Sunbelt Bev. Corp. S'holder Litig.*, 2010 WL 26539, at *15 (Del. Ch. Jan. 5, 2010) (internal quotation omitted).