

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

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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Re: *Allan Wagamon v. David B. Dolan*,
Civil Action No. 5594-VCG (Consolidated)

Dear Counsel and Litigant:

The Yiddish word “chutzpah” conveys the idea of an audacious insolence; a mixture of nerve and gall. It implies an indifference to the effect of one’s own effrontery. The word in its most negative sense might fit the Plaintiff, David Dolan, here, did it not carry a slight sense of levity utterly lacking in this proceeding.

A. Facts

InterNetworking Technologies (“INT”) was started in 1995 or 1996 as a joint venture between Defendant Allan Wagamon and Plaintiff David Dolan. The

two men were brothers-in-law. They incorporated INT in 1999.¹ The business provided on-site tech support to businesses and individual customers in the area of southern Delaware.² Wagamon and Dolan worked together in this business for many years.³

That relationship came to an abrupt end in April 2008, when Wagamon learned that for some time Dolan had been sexually abusing Wagamon's daughter and his niece. Both victims were minor children. Initially, Dolan fled the State of Delaware to evade arrest.⁴ However, on May 16, 2008, Dolan was apprehended and was subsequently charged with a number of crimes, including the rape of Wagamon's daughter and niece.⁵ Dolan pled guilty to those crimes and was sentenced to 25 years incarceration, suspended after 15 years for probation.⁶ He is currently an inmate of the Department of Corrections and has not performed any work on behalf of INT since his criminal behavior came to light. He is also subject to restrictions on his use of computers and his access to the Internet.⁷

After Dolan abandoned his duties at INT in an attempt to evade arrest, Wagamon, as the sole remaining officer of INT, wound the business down and

¹ See Pl.'s Opening Br. Supp. Mot. Summ. J. 3.

² See Def.'s Opening Br. Supp. Mot. Summ. J. 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.*, Ex. 1, Ex. A, at 1-5.

⁷ *Id.*, Ex. 1, Ex. A, at

permanently closed it in September of 2008.⁸ On August 8, 2008, Wagamon formed his own IT business, a Delaware LLC known as Wagamon Technology Group (“WTG”). Thereafter, Wagamon pursued his interests through the WTG entity.

On June 23, 2010, Wagamon filed a Petition to dissolve INT under 8 *Del. C.* § 273. Subsequently, Dolan filed this action seeking relief against Wagamon on a number of theories. The two actions have been consolidated here.⁹ On February 17, 2011, I dismissed all of Dolan’s causes of action except for those arising from alleged breaches of fiduciary duty owed directly by Wagamon to Dolan as a joint venturer.¹⁰ On March 9, 2011, I granted Wagamon’s motion to dissolve INT, and I appointed Seth Thompson, Esq. as trustee to dissolve INT and wind up its affairs.¹¹ Dolan asserts that Wagamon breached his fiduciary duties to Dolan by ceasing the operation of INT and by transferring INT’s assets to WTG without accounting to Dolan.¹² Dolan also seeks to recover against INT’s accountant, William Krieg, for aiding and abetting Wagamon’s alleged breaches of duty. The parties have conducted discovery and have submitted the matter on cross motions for summary judgment.

⁸ *Id.*

⁹ The two actions have been consolidated under C.A. No. 5594-VCG.

¹⁰ *Wagamon v. Dolan*, 2011 WL 684615, at *2 (Del. Ch. Feb. 17, 2011).

¹¹ *See* Approved Order to Appoint Seth Thompson Trustee 1, Mar. 9, 2011.

¹² Pl. Dolan’s Br. Supp. Mot. Summ. J. 3.

B. Standard

The path that leads to summary judgment is well-worn. In order to demonstrate an entitlement to summary judgment, a party must demonstrate that no issues of material fact remain and that he is entitled to judgment as a matter of law.¹³

C. Discussion

As I explained in my decision dismissing most of the claims of Dolan's complaint, Wagamon and Dolan were joint venturers who owed one another fiduciary duties.¹⁴ Dolan argues that Wagamon has breached his fiduciary duties in two ways. First, Dolan argues that Wagamon breached a duty to maintain INT as a going concern for the benefit of its owners, Wagamon and Dolan. Second, Dolan alleges that Wagamon converted assets of INT to the use of WTG, and otherwise has improperly accounted to Dolan for his share of the dissolved entity. For the following reasons, I grant summary judgment in favor of Wagamon on the former issue, and reserve judgment on the latter pending an accounting by the trustee.

1. Wagamon's Duty to Continue Operating INT

In an equal 50-50 joint venture, such as INT, each partner owes the other "a fiduciary duty of utmost good faith, fairness and honesty with respect to their

¹³ *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

¹⁴ *Wagamon v. Dolan*, 2011 WL 684615, at *2 (Del. Ch. Feb. 17, 2011).

relationship to each other and to the enterprise.”¹⁵ In this case, these fiduciary duties surely encompassed a duty by both Wagamon and Dolan to give their best efforts in operating INT to each party’s mutual benefit. The record before me suggests that they were successful partners from INT’s inception until 2008, when the parties’ personal and professional relationship was destroyed by Dolan’s criminal conduct and subsequent abscondment.

Wagamon asserts that after April 2008 further operation of INT was impractical given Dolan’s incarceration and the court-ordered prohibition of Dolan’s use of a computer.¹⁶ I agree. It was Dolan’s abandonment of INT, initially to avoid criminal process, that terminated the joint venture.

After the joint venture ended in April, neither Wagamon nor Dolan owed each other any fiduciary duty of loyalty.¹⁷ The death of the entity was the result of Dolan’s actions, not Wagamon’s. Wagamon was entirely free to create WTG and engage in competition with INT from the time that Dolan abandoned the enterprise.¹⁸ Accordingly, Dolan’s claims—against Wagamon or against Kreig—

¹⁵ *In re Arthur Treacher’s Fish & Chips of Ft. Lauderdale, Inc.*, 386 A.2d 1162, 1166 (Del. Ch. 1978). *Cf.*

¹⁶ Petition for Dissolution ¶ 10.

¹⁷ *See Dionisi v. DeCampli*, 1995 WL 398536, at *9 (Del. Ch. June 28, 1995) (“While joint venturers in fact owe each other and the enterprise a fiduciary duty of utmost good faith, fairness and honesty, that duty ends with the death of the joint venture.”) *amended* 1996 WL 39680 (Del. Ch. Jan. 23, 1996).

¹⁸ *See id.* at *10 (“A director or officer is permitted to engage in business activities which are in competition with the corporation after the director or officer leaves a corporation, absent an agreement to the contrary.”).

for breach of fiduciary duty that relate to Wagamon’s formation of WTG or the loss of INT’s profits, employees, customer lists, or goodwill must fail.

Because of my decision, I need not reach Wagamon’s defense of unclean hands asserted against Dolan. I note, however, that Dolan’s criminal behavior itself, no matter how vile or contemptible, does not relate directly to the equitable relief sought here, and thus does not amount to unclean hands. Dolan’s abandonment of his duties to the LLC, however, as part of his flight from the jurisdiction to evade legitimate legal process, does represent manifest wrongdoing relating to the very breach—failure to operate the LLC for the benefit of its principals—for which Dolan seeks relief. In this circumstance, were any relief available, this Court of equity would not provide it.¹⁹

2. Wagamon’s Duty to Account for INT Assets

Notwithstanding the termination of the joint venture, Dolan is still entitled to 50% of INT’s liquidation value. Wagamon concedes as much. For the reasons described above, Dolan’s criminal activity is not related to his right to receive a share of the LLC upon liquidation in a way which would negate relief under the doctrine of unclean hands. The parties dispute the value of INT’s assets and

¹⁹ “Unclean hands” is a doctrine under which this Court preserves and vindicates its status as a court of equity. “The Court of Chancery jealously guards its domain as a court of equity; therefore, one who seeks equity from the Court must not have acted inequitably himself in the same transaction.” *Encite, LLC v. Marsh*, 2011 WL 5920896, at *6 (Del. Ch. Nov. 28, 2011). Under the doctrine, the Court will refuse equitable relief “in circumstances where the litigant’s own acts offend the very sense of equity to which he appeals.” *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).

liabilities and where those assets now reside; Dolan contends that Wagamon has converted assets of INT to his own use. Accordingly, I direct the trustee to conduct an accounting of INT. Once the accounting is complete, I will consider Dolan's claims related to the misappropriation of INT assets as appropriate, including the aiding and abetting claim against Krieg.

D. Conclusion

For the forgoing reasons, Dolan's motion for summary judgment is denied in part, and Wagaman's motion for summary judgment is granted in part, with respect to the breach of a duty to continue INT for the benefit of its principals. Consideration of the cross motions for summary judgment on the remaining issues is continued pending an accounting by the trustee. To the extent the foregoing requires an order to take effect,

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III