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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

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9 DAVID KUMAR, *et al.*,

10 Plaintiffs,

11 v.

12 WADE M. ENTEZAR, *et al.*,

13 Defendants.

No. C11-1082RSL

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

14 This matter comes before the Court on plaintiffs' "Motion for Summary Judgment."
15 Dkt. # 106. Although the scope of the motion is not entirely clear, it appears plaintiffs seek a
16 determination that Wade Entezar and Carl Van der Merwe are liable for breach of contract and
17 breach of fiduciary duties, reserving the amount of damages for trial.¹ Defendant Van der Merwe
18 filed an opposition, but the Court was subsequently notified that plaintiffs have settled their claims
19 against Carl and Karin Van der Merwe. The Court has considered all of the papers submitted by the
20 parties in order to determine whether there are genuine issues of material fact that preclude summary
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24 ¹ Because plaintiffs offer very few facts and no analysis regarding the potential liabilities of
25 Geneva Entezar, Karin Van der Merwe, Vladimir Baydovskiy, Donata Baydovskiy, Entezar
26 Development Group, Inc., Quincy 132 LLC, or WC Quincy LLC, the Court has not attempted to
evaluate their exposure in this litigation.

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

1 disposition as to defendant Entezar.²

2 Summary judgment is appropriate when, viewing the facts in the light most
3 favorable to the nonmoving party, there is no genuine dispute as to any material fact that would
4 preclude the entry of judgment as a matter of law. L.A. Printex Indus., Inc. v. Aeropostale, Inc.,
5 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case “bears the
6 initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v.
7 Catrett, 477 U.S. 317, 323 (1986)) and identifying those portions of the materials in the record
8 that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the
9 moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party
10 fails to identify specific factual disputes that must be resolved at trial. Hexcel Corp. v. Ineos
11 Polymers, Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of
12 evidence in support of the non-moving party’s position will not preclude summary judgment,
13 however, unless a reasonable jury viewing the evidence in the light most favorable to the non-
14 moving party could return a verdict in its favor. U.S. v. Arango, 670 F.3d 988, 992 (9th Cir.
15 2012).

16 **A. Breach of Contract**

17 On August 15, 2006, Quincy WC, LLC (a limited liability company owned by
18 defendant Entezar), and Quincy Development, LLC (a limited liability company owned by plaintiff
19 Kumar), entered into a Limited Liability Company Agreement to form Quincy 132, LLC. The
20 purpose of the venture was to acquire a piece of property in Grant County, construct the
21 improvements necessary to obtain final plat approval, and build and sell 134 single-family homes.
22 Plaintiffs identify four breaches of the LLC Agreement, each of which is considered below:

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26 ² Van der Merwe’s request to strike all evidence obtained from the Department of Justice is
DENIED.

1. Appointment of Van der Merwe as Manager

1 The LLC Agreement identifies defendant Wade Entezar as the “Manager” of the
2 company and provides that “[i]f the Manager becomes unable to fulfill his duties hereunder as a
3 result of either death or disability, then the Manager may retain a third party to perform all duties of
4 the Manager hereunder subject to the approval of Member David Kumar (“Member KUMAR”),
5 which approval will not be unreasonably withheld.” Dkt. # 106-2 at ¶ 1.14 and ¶ 5.4. Plaintiffs
6 assert that Entezar breached this provision when he failed to obtain Kumar’s approval before making
7 defendant Van der Merwe a Manager. It is undisputed that Entezar did not seek Kumar’s permission
8 to make Van der Merwe a Manager of the LLC. There is, however, very little evidence from which
9 one could conclude that Entezar actually attempted to elevate Van der Merwe to that position.
10 Entezar was not dead or disabled as specified in ¶ 5.4 of the Agreement, and plaintiffs can point to
11 only a single instance in the record where Van der Merwe was identified as a “Manager.” Pursuant
12 to the LLC Agreement, Entezar had the power to delegate to employees or agents of the LLC tasks
13 necessary for the conduct of the LLC’s business. Dkt. # 106-2 at ¶ 5.1. Whether Entezar simply
14 authorized Van der Merwe to act on behalf of the LLC or whether he unilaterally appointed him as a
15 “Manager” cannot be determined as a matter of law. Plaintiffs have not, therefore, shown that they
16 are entitled to judgment on this part of their breach of contract claim.

2. Approval of Construction Contract

18 Although the LLC Agreement gave Entezar extensive powers and authority, it
19 specifically reserved to Kumar the right to review and approve certain key decisions. Pursuant to
20 ¶ 5.2.2, Entezar was required to obtain Kumar’s prior approval of “[t]he final terms of the
21 construction contract with ENTEZAR DEVELOPMENT GROUP (if applicable) or the general
22 contractor for the Project.” Plaintiffs argue that Entezar breached the LLC Agreement when Quincy
23 132, LLC, entered into a construction contract with Entezar Development Group EW, LLC
24 (“EDEW”), without obtaining Kumar’s approval.

25 The supporting evidence is equivocal and fails to show the absence of a genuine issue
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1 of material fact. Plaintiffs rely on a draft contract dated August 1, 2006, between the LLC and
2 EDEW (Dkt. # 106-4, Ex. 7) and Van der Merwe's statement that a construction contract existed
3 (Dkt. # 106-4, Ex. 3, Interrogatory 4). Quincy 132, LLC, did not come into existence until August
4 15, 2006, however, and could not have executed the draft contract on which plaintiffs rely. No final
5 contract has been located or produced. To the extent defendants acted as if a final contract had been
6 executed, Van der Merwe stated that each member of the LLC, presumably including Kumar,
7 approved the contract with EDEW. If that were the case, there would be no breach of ¶ 5.2.2 of the
8 Agreement. The Court cannot resolve the ambiguities in the record in the context of this motion for
9 summary judgment.

10 **3. Contractual Fiduciary Duty: The Design-Builder Fee**

11 Plaintiffs argue that Entezar breached the LLC Agreement by having his construction
12 company, EDEW, charge \$102.42 per square foot for the design and construction services it
13 provided. Plaintiffs do not object to the fact that Entezar was engaged in a separate and potentially
14 competing business venture: the LLC Agreement expressly permits such activities. Dkt. # 106-2 at
15 ¶ 5.1. Rather, plaintiffs argue that Entezar failed to use his "reasonable best judgment consistent
16 with [his] fiduciary responsibility to the Company" to resolve any conflict of interest that might arise
17 between the competing companies. Plaintiffs argue that the LLC Agreement obligated Entezar to
18 provide design and construction services to Quincy 132, LLC, and that he breached his fiduciary
19 duties under the contract by causing EDEW to charge for those same services.

20 Plaintiffs' argument is based on a strained interpretation of the initial contributions
21 section of the LLC Agreement. Dkt. # 106-2 at ¶ 8.1.1. It is undisputed that both parties agreed to
22 contribute \$3,000,000 to the project. Plaintiffs maintain that Entezar's \$3,000,000 contribution
23 consisted of a \$500,000 piece of property³ and a promise to provide expertise and development
24 services worth \$2,500,000 in the future. Under this interpretation, EDEW was obligated to provide

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26 ³ The LLC Agreement states that the purchase price of the property is \$550,000, not \$500,000.

1 at least \$2,500,000 in design and construction services on the project before it could begin charging
2 the LLC. Plaintiffs therefore argue that, by charging a design-build fee at the outset, Entezar was
3 double-dipping: he was getting a capital contribution credit for services that he was also being paid
4 \$102.42 per square foot to provide.⁴

5 Plaintiffs' interpretation is not the most natural reading of the initial capital
6 contributions section of the Agreement, however. Entezar's contribution to the project involved the
7 assignment of his right to purchase the Grant County property for \$550,000. Despite the stated
8 purchase price, the parties expressly agreed that the property's fair market value with the
9 preliminary plat approval was \$3,000,000. Entezar and his companies had obtained the preliminary
10 plat approval prior to the effective date of the LLC Agreement. Dkt. # 106-2 at ¶ 3.1.1. Thus, a
11 reasonable interpretation of the contract is that, at the time the LLC was founded, Entezar
12 contributed \$3,000,000 worth of real estate and past development services, thereby satisfying his
13 initial capitalization obligations. While Entezar's company, Quincy WC, LLC, promised "to
14 continue to contribute services to the Company relative to the development and construction of the
15 Project" (Dkt. # 106-2 at ¶ 8.1.1), there is no indication that Quincy WC, LLC, failed to provide the
16 promised services or that other Entezar entities were obligated to provide their services for free. Nor
17 is there a contractual requirement that Quincy 132, LLC, hire an Entezar entity to provide the design
18 and construction services. Had the LLC hired an unrelated general contractor, it would undoubtedly
19 have had to pay for the services rendered out of the members' cash contributions. It is hard to
20 imagine that the parties intended a situation where the LLC would receive a windfall (free design
21 and construction services) if an Entezar-related entity were hired as general contractor, but would
22 have to spend down its cash reserves if it contracted with a separate entity.

23 Plaintiffs have not shown that their interpretation of the initial capital contributions
24 section reflects the intent of the parties at the time of contracting and are not entitled to summary

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26 ⁴ Plaintiffs have not argued that the \$102.42 per square foot charge was greater than the costs
and expenses EDEW reasonably expected to incur in providing the design-build services for the project.

1 judgment on this part of their breach of contract claim.

2 **4. Contractual Fiduciary Duty: Charging for Building Materials**

3 Plaintiffs argue that Entezar breached his contractual fiduciary duties when he had
4 Quincy 132, LLC, purchase building materials from another Entezar-related entity, Executive
5 Building Products. Under Washington law, however, contracting parties may make “practically any
6 agreement they wish” regarding the scope and nature of activities in which a fiduciary may
7 participate. Bassan v. Investment Exchange Corp., 83 Wn.2d 922, 925 (1974). As noted above, the
8 parties expressly agreed that Entezar could engage in competing business ventures: the mere fact
9 that Quincy 132, LLC, purchased building materials from Executive Building Products would not,
10 therefore, exceed the authorized scope of the fiduciary’s conduct. If, however, Executive Building
11 Products made an unconsented profit from the sales, such self-dealing may run afoul of Entezar’s
12 fiduciary obligations.

13 Defendants have not identified any provision of the LLC Agreement authorizing
14 Entezar to make a profit from the sale of materials or services to Quincy 132, LLC, or setting forth a
15 formula, either express or implied, for establishing the amount of a permissible profit. While
16 Washington law permits profit-generating transactions to be retroactively authorized by consent of
17 the members after the fact (see Bassan, 83 Wn.2d at 927), there is no evidence of any such post-
18 transaction consent in the record before the Court. Thus, the only remaining question is whether
19 Entezar made a profit on the sales from Executive Building Products to Quincy 132, LLC. Once
20 again, the evidence on this key issue is equivocal. Plaintiffs do not provide any evidence related to
21 Executive Building Products’ costs or profit margin. The only evidence plaintiffs provide in support
22 of this self-dealing claim are copies of a check from Quincy 132, LLC, to Executive Building
23 Products, numerous checks from Quincy 132, LLC, to EDEW, and two checks from Executive
24 Building Products to Entezar. Dkt. # 106-5, Ex. 9.⁵ The fact that Quincy 132, LLC, wrote checks to

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26 ⁵ There are also copies of two checks made out to Entezar with no discernable payor.

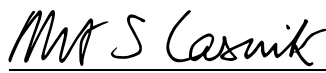
1 service and material providers does not give rise to an inference of wrongful profit-taking or
2 disloyalty. The distribution of cash from Executive Building Products to Entezar, however, suggests
3 that Executive Building Products was generating a profit from its dealings with Quincy 132, LLC,
4 and that Entezar was either siphoning those profits or benefitting from very favorable loan terms.
5 Profit-taking is not the only inference that could be drawn from the evidence: Executive Building
6 Products could have other sources of income and/or Entezar's loans could have been approved
7 and/or at market rates. Plaintiffs have failed to show the absence of genuine issues of material fact
8 regarding this aspect of their breach of contract claim.

9 **B. Breach of Fiduciary Duty**

10 In addition to his contractual obligation to resolve any conflicts of interest using his
11 best judgment in light of his fiduciary responsibilities to the LLC, Entezar had a statutory obligation
12 to refrain from "gross negligence, intentional misconduct, or a knowing violation of law." RCW
13 25.15.155. It is entirely possible that Entezar intentionally engaged in unconsented profit-taking,
14 siphoned money from the LLC, approved the misuse of company funds for personal loans to himself
15 and Van der Merwe, authorized fraudulent recordkeeping, and/or failed to keep reasonable and
16 accurate records of expenditures charged to the development project. The evidence of wrongdoing
17 is equivocal, however, and very limited. Plaintiffs have failed to show the absence of a genuine
18 issue of material fact regarding their breach of fiduciary duty claim and are not entitled to
19 summary judgment.

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21 For all of the foregoing reasons, plaintiffs' motion for summary judgment is
22 DENIED.

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24 Dated this 24th day of January, 2014.

25 
26 Robert S. Lasnik
United States District Judge