ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PFT TECHNOLOGY, LLC,

Plaintiff Counterclaim-Defendant,

-against-

ROBERT WIESER,

Defendant/Counterclaim-Plaintiff,

-and-

PATRICK KEELAN, THOMAS SMITH and FRANK CASTELLANO,

Counterclaim-Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 8679/12

MOTION DATE: Sept 6, 2016
Motion Sequence # 017, 018, 019

The following papers read on this motion:

Notice of Motion.....XXX
Affidavit/Affirmation in Support.....XX
Affidavit in Opposition.....XX
Affirmation in Further Support.....X
Brief in Opposition.....X
Memorandum of Law.....XXX

Motion (seq. # 17) by defendant Robert Wieser for an award of attorney's fees is **denied** with leave to renew at the conclusion of the trial. Motion (sequence # 18) by defendant Wieser to preclude counterclaim defendants Keelan, Smith, and Castellano from testifying as to defendant's abandonment of the company is **denied**. Motion (sequence #19) by defendant Robert Wieser to strike a portion of the report of plaintiff's expert Ian

Ratner and to preclude Ratner from testifying as to a discount for lack of marketability is **denied**.

This action arises from a dispute between members of a limited liability company. Plaintiff PFT Technology, LLC is engaged in the business of detecting gas and fluid leaks in power networks for public utilities. Defendant Robert Wieser is a founder and 25% member of PFT. PFT uses highly specialized instruments to detect the gas and fluid leads, which Wieser claims to have built and designed. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano together hold the other 75% interest in the company.

Section 6.09 of PFT's amended operating agreement provides that expenditures over $100,000, distributions of profits, dissolution of the company, and other major decisions require the consent of a "supermajority-in-interest" of the members, defined as more than 75% of the total interest in the company.

Section 7.02(b) of the operating agreement provides that, "The company shall, from time to time, reimburse or advance ...the funds necessary for payment of reasonable expenses, including attorney fees, incurred in connection with any action or proceeding, upon receipt of a written undertaking... to repay such amounts if a judgment... adverse to the indemnified person establishes that his acts or omissions were in bad faith or involved willful misconduct...."

Article VIII of PFT's amended operating agreement provides that, "Until the time that the Company is terminated and dissolved pursuant to the terms of this agreement, the members shall not, directly or indirectly, engage in any business activity directly or indirectly in competition with the business of the company...."

During 2011, a dispute arose between Wieser and the other members of PFT concerning his salary and equity distributions as compared to those of the other members. On October 24, 2011, Keelan sent Wieser a letter asserting that he was in possession of three gas chromatographs which belonged to the company. Keelan stated that the other members had determined that Wieser's failure to return the equipment was a willful and material neglect of his duties. Keelan stated that Wieser would be removed as a managing member if the equipment was not returned in operational condition within 30 days.

On July 10, 2012, PFT commenced this action against Wieser. PFT alleges that Wieser used his company credit card for personal expenses, abandoned his responsibilities to PFT, and rendered certain of the company's instruments non-operational. In the first cause of action, PFT seeks a declaratory judgment that Wieser breached his fiduciary duty to the company. In the second cause of action, PFT seeks damages against Wieser for breach of

fiduciary duty. In the third cause of action, PFT seeks dissolution of the company on the ground that it is not reasonably practicable to carry on the business with Wieser as a member (complaint ¶ 59).

In his answer, Wieser asserts various counterclaims against the other members. In the first counterclaim for breach of the operating agreement, Wieser alleges that the other members paid themselves unauthorized salaries and failed to pay him his share of the income distributions. Wieser alleges that the other managing members each received $125,000 more than Wieser in 2011, $446,000 more than Wieser in 2012, $675,000 more than Wieser in 2013, and $1,014,000 more than Wieser in 2014. Wieser alleges Castellano and Smith received $446,000, and Keelan received $557,000, in 2015, while Wieser did not receive any distribution. Wieser alleges that, between 2011 and 2015, the other managing members made substantial contributions to their 401(k) and defined benefit accounts without making corresponding contributions on behalf of Wieser.

In the second counterclaim Wieser alleges that the other members converted the "intellectual property" associated with machinery and equipment which Wieser fabricated for the company. In the third counterclaim, Wieser seeks an accounting. In the fourth counterclaim, Wieser seeks contractual indemnification pursuant to Section 7.02(b) of the operating agreement. In the fifth counterclaim, Wieser seeks damages for breach of fiduciary duty.

By order dated May 21, 2014, the court determined that the valuation date was July 9, 2012, the day prior to the commencement of the dissolution proceeding. By order dated November 6, 2014, plaintiff's motion for an order directing Wieser to return certain parts and equipment was granted to the extent of ordering a hearing as to whether plaintiff had a superior possessory right to the parts and equipment, to be held in conjunction with the valuation hearing.

By order dated January 21, 2016, the court granted defendant Robert Wieser's motion for partial summary judgment with respect to plaintiff's first cause of action for a declaratory judgment to the extent of declaring that the parties breached their fiduciary duties to each other by charging personal expenses to the company. The court directed that an adjustment with respect to personal expenses would be made in conjunction with the valuation hearing.

In the order of January 21, 2016, the court further granted defendant Wieser partial summary judgment with respect to his first counterclaim for breach of the operating agreement by paying unauthorized salaries and failing to pay Wieser his share of distributions. The court further granted Wieser partial summary judgment with respect to his

third counterclaim for an accounting. The court directed that the accounting, including the adjustment as to salaries and distributions, would be made in conjunction with the valuation hearing.

In the January 21, 2016 order, upon renewal, the court granted plaintiff PFT's motion for the return of certain parts and equipment to the extent of declaring that three Varian 3800 gas chromographs, serial numbers 105768, 105769, and 105770, as well as certain valves and solenoids, which were required to be used with the chromographs, were the property of PFT. However, rather than ordering the return of the property, the court reserved the issue of the appropriate remedy, i.e. a order of possession or an offset for the value of the property, to the valuation hearing (See CPLR § 7108).

In the January 21, 2016 order, the court granted defendant Wieser an order of attachment in the amount of $3.2 million as security for any judgment to be obtained on his counterclaims. The court directed defendant to settle a formal attachment order. In response, plaintiff deposited $1,017,500 into court to be applied to any judgment defendant might be awarded. Defendant then prepared two proposed order which were rejected by the court. An order of attachment in the net amount of $2,182,500 was finally issued on April 4, 2016.

By order dated April 28, 2016, the court, upon reargument, denied defendant's motion for partial summary judgment dismissing plaintiff's cause of action for dissolution of PFT Technology. In view of the super-majority requirement and the dissension among the members, it did not appear to be reasonably practicable to carry on the business in conformity with the operating agreement (Limited Liability Company Law § 702). However, dissolution is a drastic remedy, which is not to be granted unless management is unwilling or unable to promote the company's stated purpose or continuing the company is financially unfeasible (***1545 Ocean Ave v Crown Royal Ventures***, 72 AD3d 121, 131 [2d Dept. 2010]). Moreover, while the Limited Liability Company Law does not expressly authorize a buy-out in a dissolution proceeding, buy-out may be an appropriate equitable remedy (***Mizrahi v Cohen***, 104 AD3d 917, 920 [2d Dept 2013]). Defendant represented that "the other managing members will buy out his share." The court deemed defendant Wieser's representation that the majority members would buy out his interest as an irrevocable offer to sell his 25% interest at fair value (Cf Business Corporation Law § 1118[a][offer to purchase at fair value is irrevocable]). Nonetheless, the court reserved the issue of dissolution to the valuation hearing.

In the April 28, 2016 order, the court, upon reargument, further granted defendant's motion for advancement of legal expenses to the extent that plaintiff was directed to pay defendant an additional $150,000 within five days of service of a copy of this order.

Limited Liability Company Law § 420 provides that, "Subject to the standards and restrictions..set forth in its operating agreement, a limited liability company may...indemnify and hold harmless, and advance expenses to, any member...from and against any and all claims and demands whatsoever...." The operating agreement may provide for advancement of a member's expenses, even in an action where the member is charged with breach of his fiduciary duty to the company (***Ficus Investments v Private Capital***, 61 AD3d 1 [1st Dept. 2009]).

Based upon PFT's operating agreement, the court determined that the members of PFT Technology were entitled to advancement of their reasonable legal expenses in this action. However, to the extent that either plaintiff or defendant has delayed the action, their attorney fees are not reasonable and may not be charged to the company. The court noted that members Keelan, Smith, and Castellano were united in interest and sought dissolution in the name of PFT Technology. The court noted that because the majority members own 75% of the company, and pay 75% of the expenses, equity might allow plaintiff to be advanced a greater amount of legal expenses, than defendant would be advanced, though not necessarily in a three to one ratio. In any event, plaintiff PFT was restrained from paying any further legal fees with company funds pending further order of the court. Any further advancement, or charge back, of legal fees was reserved for the valuation hearing.

Defendant Wieser moves for a further advancement of attorney's fees in the amount of $180,386.50 incurred in "enforcing" the attachment order. However, the first two proposed attachment orders submitted by defendant were not in proper form (See McKinney's Forms § 11:118) The proposed orders sought to obtain disclosure in aid of attachment and other relief not specifically granted in the January 21, 2016 order. Accordingly, defendant Wieser's motion for an award of attorney fees incurred in enforcing the attachment order is **denied**. Any further award of attorney fees to either party will be considered in conjunction with the trial.

Defendant Wieser moves to preclude counterclaim defendants Keelan, Smith, and Castellano from testifying as to defendant's abandonment of the company. In seeking to preclude plaintiff from offering evidence as to his abandonment of PFT, defendant argues that he is entitled to his 25% share of distributions, regardless of his participation in the management or operations of the company. In opposition, plaintiff argues that Wieser's lack of participation in management, and request to be bought out, are relevant to the issue of dissolution. Additionally, plaintiff argues that defendant's plans to compete against PFT are relevant to plaintiff's breach of fiduciary duty claims. With respect to the covenant not to compete, while the court denied plaintiff a preliminary injunction restraining Weiser from competing with PFT, it did not preclude plaintiff from seeking damages arising from this claim. In view of the relevance of this evidence to various issues in the case,

defendant's motion to preclude plaintiff from offering evidence of Wieser's abandonment of PFT Technology is **denied**.

Finally, defendant moves to strike a portion of the report of plaintiff's expert Ian Ratner and to preclude Ratner from testifying as to a discount for lack of marketability. In arguing that plaintiff's expert should be precluded from applying a lack of marketability discount, defendant argues that such a valuation deduction is equivalent to a discount based upon the fact that defendant holds a minority interest in the company. Defendant further argues that such a discount would result in a minority interest being treated unfairly relative to the majority and encourage oppressive conduct on the part of the majority shareholders.

Where minority shareholders exercise their right to appraisal, i.e. to be bought out at fair value, there should be no discount for minority status (**Friedman v Beway Realty Corp**, 87 NY2d 161, 169 [1995]). Such a discount would deprive minority shareholders of their proportionate interest in a going concern (Id). A minority discount would also significantly undermine the remedial goal of protecting dissenting shareholders from being forced to sell at unfair values imposed by those dominating the corporation, while allowing the majority to proceed with the desired corporate action (Id).

However, to prohibit a discount for minority status is not necessarily to preclude a discount for lack of marketability of the stock of a close corporation. The three major elements of value of a company are net asset value, investment value, and market value (**Friedman v Beway Realty Corp.**, 87 NY2d 161, 167 [1995]). The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result (Id). Consistent with this rule, value may be determined through capitalization of earnings, taking into account the unmarketability of the corporate stock (Id at 169). Where income received by the company is capitalized to determine value, the expert may calculate the present discounted value of future income streams, as of the valuation date. While the court need not give any weight to a supposed marketability discount, the expert should not be precluded from applying such a discount in his analysis. Defendant's motion to preclude plaintiff's expert from testifying as to a marketability discount is **denied**.

So ordered.

Date : SEP 15 2016

Stephen A. Bucaria
J.S.C.

ENTERED

SEP 16 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE