SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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ZOR ROTHMAN and REVERSING ENTROPY, LLC,

Plaintiffs,

- v -

RNK CAPITAL, LLC, GREY20 FUND LP, ORGANICA WATER, SUNRAY POWER MANAGEMENT, LLC, ROBERT KOLTUN, and JOHN DOES NOS. 1-2,

Defendants.

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INDEX NO. 150120/2015

MOTION DATE

MOTION SEQ. NO. 004, 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 127, 128, 129, 130, 131, 132, 133, 134, 151

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152

were read on this motion to/for sanctions.

Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose and cross move for sanctions and for an inspection of books and records. Defendants oppose.

I. UNDISPUTED BACKGROUND

Plaintiff Rothman is the sole owner and an employee of plaintiff Reversing Entropy, LLC (RE). In 2004, in exchange for a five percent interest in defendant RNK Capital, LLC (RNK), RE paid $62,500. (NYSCEF 104). According to RNK's Limited Liability Company Operating Agreement, dated January 31, 2005, defendant Koltun, RNK's managing member, held a 47.5 percent interest. The remaining 47.5 percent was held by a nonparty. (NYSCEF 113).

On February 27, 2013, in connection with Rothman's recent termination from RNK, RE acknowledged the receipt of a check for $167,172.10, representing RE's capital account balance with RNK. (NYSCEF 115). A distribution schedule reflects that RNK deducted from RE's balance $8,388.06 for undocumented credit card expenses, and another $9,598.90 for RE's share of RNK's estimated net losses. (NYSCEF 117).

Rothman was also a partner and investor in defendant Grey2O Fund LP. In 2014, Grey2O was liquidated and dissolved, resulting in the distribution to its partners, including Rothman, of stock in Cleanwater Partners I Ltd, the fund's sole asset. On February 20, 2015, Koltun sent Rothman a letter detailing the transfer to Rothman of RNK's 26,413 preferred A-1 shares priced at $1.32, and 532 common shares priced at $0.07. (NYSCEF 119). Rothman was subsequently advised that in light of this transfer, his investment in Grey2O was withdrawn. (*Id.*).

In plaintiffs' amended complaint, they allege, as pertinent here, that RNK improperly deducted from a distribution of RE's capital account more than $17,000, that RNK improperly denied plaintiffs an opportunity to examine its books and records despite due demand, that defendants did not distribute the Cleanwater shares to plaintiffs, and that on September 1, 2004 Rothman loaned Koltun $50,000. On December 1, 2005, Rothman and Koltun entered into a new agreement whereby the $50,000 would be converted into an investment in Grey K Environmental Fund LP (Grey K). (NYSCEF 105).

By decision and order dated August 26, 2015, defendants' motion to dismiss was granted in part. Defendants' claim that Rothman had released his claim that funds were improperly deducted from his capital account was rejected. (NYSCEF 106).

By decision and order dated July 14, 2016, plaintiffs' motion for an order requiring RNK to make available for inspection their books and records was denied on the ground that they had failed to state a proper purpose for the inspection. (NYSCEF 108).

On September 30, 2016, defendants served their discovery requests seeking, among other things, all documents concerning the alleged $50,000 loan and the investment in Grey K. (NYSCEF 110).

By decision and order, dated October 5, 2017, plaintiffs' motion to compel defendants to provide plaintiff with copies of all responsive documents relating to the alleged improper deduction, Cleanwater shares, and loan was granted. (NYSCEF 97). On January 30, 2018, plaintiffs filed their note of issue. (NYSCEF 111).

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (motion seq. 004)

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues that require a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In evaluating the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. RE's capital distribution (first cause of action)

1. Contentions (NYSCEF 103, 127, 151)

Defendants assert that RE received its entire RNK distribution and is owed no more, as $17,986.96 was properly deducted for RE's liability for five percent of RNK's losses, which total $9,598.90 for the period between January 1, 2013 and January 11, 2013, and as $8,388.06 was properly deducted for plaintiffs' unauthorized or undocumented credit card expenses. (NYSCEF 103). In support, they submit the affidavit of RNK's chief financial officer (CFO) detailing how he calculated the distributions of money and Cleanwater shares to plaintiffs (NYSCEF 116), a list of undocumented charges allegedly attributable to plaintiffs (NYSCEF 118), and a copy of RNK's employee handbook containing its policy for expense reimbursement (NYSCEF 114).

Plaintiffs deny that the deductions are proper, as RNK's policy for credit card charges was never enforced as to Koltun, and RNK had always approved Rothman's expenses until 2013, when his employment was terminated. Thus, whether RNK's prior failures to enforce its policy as to Koltun and Rothman precludes it from relying on the policy as against Rothman constitutes a question of fact, precluding summary judgment. To the extent that defendants argue that Rothman's acknowledged receipt of the distribution was the equivalent of a release, plaintiffs rely on the August 2015 decision and order. (NYSCEF 106).

In reply, defendants observe that plaintiffs fail to provide documentation of their credit card expenses and argue that Rothman does not deny having failed to provide documentation for those expenses. Rather, he claims that his expenses were "paid by the company." Defendants also maintain that the reimbursement policy did not become effective until July 2011, and thus,

all expenses incurred prior thereto are irrelevant. Defendants also note that Rothman provides no evidence that Koltun received reimbursement without supporting documentation.

2. Analysis

Defendants' list of Rothman's allegedly undocumented expenses reflects $5,619.82 in credit card charges. (NYSCEF 118). Thus, defendants do not demonstrate that $8,388.06 was properly deducted from RE's capital account. And although defendants demonstrate how the initial $185,159.06 was calculated, the distribution schedule is not supported by underlying documentation sufficient to demonstrate that $9,598.90 constitutes RE's share of profits and losses. The CFO's affidavit is likewise unsupported and self-serving. Defendants thus fail to meet their burden in showing, *prima facie*, that plaintiffs' capital account was properly deducted. (*Cugini v Sys. Lumber Co.*, 111 AD2d 114 [1st Dept 1985] [movant's failure to show entitlement to judgment as matter of law necessitates denial of motion, regardless of sufficiency of opposing papers]).

B. Inspection of books and records (second cause of action)

1. Contentions (NYSCEF 103, 127, 151)

Defendants assert that plaintiffs fail to state a proper purpose for inspecting RNK's books and records. Plaintiffs observe that defendants, in their moving papers, now claim that RE owns only 2.5 percent of RNK. Although Rothman acknowledges that a capital call had occurred and that under the Operating Agreement, a failure to fund a capital call results in a dilution of interest, he maintains that RE was never notified that its interest had been diluted and that defendants made the capital call with the intent to dilute RE's interest. Plaintiffs thus argue that they are entitled to an inspection to determine RE's ownership interest given their reasonable

basis for concluding that defendants engaged in wrongdoing relating to their treatment of Rothman and RE. (NYSCEF 127).

Defendants contend that the issue of RE's ownership interest in RNK is raised for the first time in this litigation, notwithstanding plaintiffs' previous awareness of it, and they explain the reduction of RE's ownership as resulting from its failure to fund a capital call. They also offer proof that Rothman's Grey2O interest was transferred to him in the form of Cleanwater shares.

2. Analysis

Under Delaware law, which the parties agree governs here, to be entitled to inspect the books and records of a corporation, the party seeking inspection must demonstrate, by a preponderance of evidence, the existence of a proper purpose for the inspection, reasonably related to the movant's interest. (*Somerville S Tr. v USV Partners, LLC*, 2002 WL 1832830, *5 [Del Ch Aug. 2, 2002]).

Although the valuation of a member's interest constitutes a proper purpose (*Somerville S Tr.*, 2002 WL 1832830, at *8), a request for inspection may be denied if the member has sufficient information to determine that interest (*see Sanders v Ohmite Holdings, LLC*, 17 A3d 1186, 1195 [Del Ch 2011] [inspection may be curtailed when company provided stockholder with sufficient information]).

Here, defendants demonstrate that the reduction in RE's ownership interest, per the Operating Agreement, is based on plaintiffs' failure to fund the February 2013 capital call, which plaintiffs do not deny. Nor do plaintiffs deny that the consequence for failing to fund a capital call is a reduction in ownership and that the reduction was properly calculated. Rather, they claim that defendants' timing and motivation were designed to somehow prevent them from

funding the capital call. Having failed to specify how the timing or motive for the capital call preventing them from finding it, plaintiffs fail to demonstrate a need to inspect the books and records.

To the extent that plaintiffs argue that defendants mismanaged the relevant companies, they offer no evidence of it and fail to establish a credible basis for their request. (*See Lambrecht v Bank of Am. Corp.*, 85 AD3d 576 [1st Dept 2011], *lv denied* 17 NY3d 717 [party seeking inspection must present "credible basis" from which court may infer that waste or mismanagement occurred]; *Thomas & Betts Corp. v Leviton Mfg. Co.*, 681 A2d 1026, 1031 [Del 1996] [statement of mismanagement or waste without evidence is insufficient]).

C. Distribution of Cleanwater shares (third cause of action)

1. Contentions (NYSCEF 103, 127, 151)

Defendants contend that plaintiffs received all of the Cleanwater shares to which they are entitled, relying on documents detailing the transfer of shares to Rothman (NYSCEF 119), and arguing that as neither RNK nor RE was an investor in Grey2O, RE is not entitled to receive a distribution therefrom.

Although Rothman acknowledges receiving Cleanwater shares, plaintiffs argue that defendants do not demonstrate that the number of shares received constituted five percent of the Cleanwater shares owned by Grey2O. In addition, they claim that a question of fact exists as to RE's entitlement to Cleanwater shares, as RNK had an investment in Grey2O.

Defendants dispute plaintiffs' claim that RNK invested in Grey2O and assert that as it only managed the fund, it is not entitled to any of the assets. They observe that plaintiffs offer no evidence of RNK's investment.

2. Analysis

As defendants submit evidence that Cleanwater shares were transferred to Rothman from the Grey2O liquidation, they satisfy their *prima facie* burden. Plaintiffs raise no factual issue absent evidence indicating that the money received did not constitute the amount to which Rothman was entitled. (*See Banco Popular N. Am. v Victory Taxi Mgmt., Inc.*, 1 NY3d 381, 383–384 [2004] [bald assertions of law or fact without support are insufficient to defeat summary judgment]).

Defendants do not, however, satisfy their *prima facie* burden of demonstrating that neither RNK nor RE owned no interest in Grey2O.

D. $50,000 loan (sixth cause of action)

1. Contentions (NYSCEF 103, 127, 151)

Koltun denies any loan from plaintiffs, argues that plaintiffs produce no documentation of it, and asserts that as discovery is closed, plaintiffs are precluded from introducing evidence of it. Defendants offer the affidavit of Koltun in which he denies receiving a loan from Rothman. (NYSCEF 112).

Plaintiffs observe that before this litigation, defendants never denied the existence of the loan, and contend that the loan is evidenced by a copy of a bank entry reflecting demonstrating a deposit of $50,000 into Koltun's account. (NYSCEF 130).

Defendants deny that the bank entry evidences the loan and maintain that Koltun has always denied it.

2. Analysis

Having offered Koltun's affidavit in which he denies having received the loan, defendants meet their *prima facie* burden. (*Miller v City of New York*, 253 AD2d 394, 395 [1st

Dept 1998] [affidavit of party is sufficient to meet *prima facie* burden]). While plaintiffs raise a triable issue of fact with Rothman's affidavit, in which he states that he loaned Koltan $50,000, the banking statement do not, absent any explanation of it.

As no probative evidence is offered beyond the conflicting affidavits, plaintiffs' motion is not subject to summary resolution. (*Ferrante v Am. Lung Assn.*, 90 NY2d 623, 631 [1997] ["(i)t is not the court's function on a motion for summary judgment to assess credibility"]; *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458 [1st Dept 2018] [plaintiff's argument that defendant's allegation that sales were approved by all shareholders were fabrications required credibility determination, which was inappropriate for summary judgment]; *Narvaez v River View Redevelopment Co., LP*, 146 AD3d 722 [1st Dept 2017] [defendant's denial of existence of dangerous condition raised credibility issue that was properly reserved for trial]).

III. PLAINTIFFS' MOTION FOR SANCTIONS (motion seq. 005)

A. Contentions

Plaintiffs argue that defendants should be sanctioned for their frivolous summary judgment motion and reliance on arguments that were previously rejected. Sanctions are also warranted, they assert, by defendants' failure to comply with a discovery order, and they seek an order permitting them access to inspect RNK's books and records for the same reasons articulated in opposition to defendants' motion. (NYSCEF 120).

Defendants contend that their summary judgment motion is meritorious, and that they complied with the discovery order by producing all evidence in their possession. They observe that plaintiffs offer no proof that any evidence is being withheld and do not describe what documents should have been produced. They again deny that plaintiffs are entitled to an inspection. (NYSCEF 136, 148).

B. Analysis

Pursuant to 22 NYCRR § 130-1.1, costs may be awarded to reimburse actual expenses reasonably incurred and reasonable attorney fees. Sanctions may also be imposed against an attorney or party or both, resulting from frivolous conduct, which, as pertinent here, is undertaken: (1) although completely without merit in law; (2) primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) to assert material factual statements that are false.

As defendants' motion for summary judgment is partially granted, it is not completely without merit in law or devoid of colorable argument. Plaintiffs' contention that defendants failed to comply with a discovery order should have been addressed before they filed their note of issue or by moving for an order compelling the discovery or holding defendants in contempt. (*See Orr v Yun*, 74 AD3d 473, 473 [1st Dept 2010] [improper to grant additional discovery where it could have been obtained before note of issue was filed]). Having fail to do so and in certifying in their note of issue that discovery was complete, plaintiffs waived their argument that discovery was not provided. (*See e.g., Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007] [plaintiff waived right to further discovery by filing note of issue and certifying that disclosure was complete and there were no outstanding discovery requests]).

For the same reasons set forth in granting defendants' motion to dismiss plaintiffs' claim for an inspection (*supra*, II.B.), plaintiff's request is denied.

IV. CONCLUSION

Accordingly, it is hereby

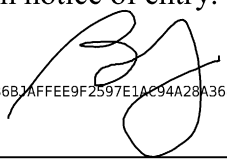
ORDERED, that defendants' motion for summary judgment (sequence four) is granted to the extent of dismissing plaintiffs': (1) second cause of action, and (2) third cause of action as to

the claim that Rothman did not receive the proper amount of Cleanwater shares, and is otherwise denied; it is further

ORDERED, that that plaintiffs' motion (sequence five) is denied in its entirety; it is further

ORDERED, that the remainder of plaintiffs' claims are severed and shall continue; and it is further

ORDERED, that the clerk of the Trial Support Office is directed to place this matter on the non-jury trial calendar upon service of a copy of it this order with notice of entry.



1/22/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE