

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

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ANGELA VENDETTI	:	MARCH TERM, 2014
	:	
Plaintiff	:	NO. 04606
	:	
v.	:	COMMERCE PROGRAM
	:	
JACK MCDAVID and 2100	:	CONTROL NO. 15052156
FAIRMOUNT AVENUE, LLC	:	
	:	
Defendants	:	

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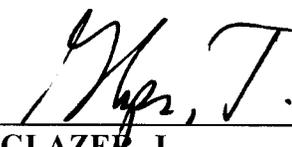
**ORDER**

AND NOW, this 9<sup>th</sup> day of July, 2015, upon consideration of the motion for summary judgment of defendants, Jack McDavid and 2100 Fairmount Avenue, LLC, and any response thereto, it is hereby

**ORDERED**

that the said motion is **GRANTED** and the case is **DISMISSED**.

BY THE COURT:

  
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GLAZER, J.

Vendetti Vs Mcdavid Eta-ORDOP



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<b>FAIRMOUNT AVENUE, LLC</b>	:	
	:	
Defendants	:	
_____	:	

**OPINION**

GLAZER, J.

July 9, 2015

Before the court is the motion for summary judgment of defendants, Jack McDavid and 2100 Fairmount Avenue, LLC. For the following reasons, defendants’ motion is granted in its entirety and the case is hereby dismissed.

**PROCEDURAL AND FACTUAL HISTORY**

Plaintiff, Angela Vendetti, commenced the instant action on March 30, 2014 against Jack McDavid and 2100 Fairmount Avenue, LLC which initially asserted the following counts: (I) derivative action – fraud of director; (II) breach of operating agreement of 2100 Fairmount LLC; (III) breach of fiduciary duty; and (IV) appointment of receiver and reorganization.<sup>1</sup> Plaintiff subsequently filed a motion for leave to maintain the derivative action, which was denied by this court on September 18, 2014. After plaintiff amended her complaint several times in response to preliminary objections, defendants answered the fourth amended complaint on May 18, 2014 and

<sup>1</sup> While plaintiff commenced the action on March 30, 2014, the initial complaint was not filed until August 11, 2014.

simultaneously filed a motion for summary judgment on counts: (I) accounting; (II) breach of operating agreement of 2100 Fairmount LLC; (III) breach of fiduciary duty; and (IV) appointment of receiver, and/or reorganization, and/or equity. As per the most current case management order, discovery in the case closed on April 6, 2015.<sup>2</sup>

The genesis of this action arises from the ownership and operation of certain property by a newly formed entity, 2100 Fairmount Avenue, LLC (hereinafter referred to as “the company”). The company was created after Vendetti and McDavid agreed to jointly purchase the property based upon representations that a coffee shop called “Mugshots,” co-owned by plaintiff and Jill Fink would rent the property under a lease from the company, while McDavid would be the managing member of the company. The original members of the company were McDavid (as managing member), Vendetti, Colin Michael Houston, Jill Fink, and Douglas Ross. After the company suffered financial troubles, McDavid called on all members to make additional cash contributions based upon his authority as managing member under the operating agreement of 2100 Fairmount Avenue, LLC (hereinafter referred to as the “operating agreement”). Mugshots eventually moved out of the premises and the company obtained a new tenant. The record reflects that the business relationship between Vendetti and McDavid soured over a period of time, culminating in this suit and other related actions.<sup>3</sup>

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<sup>2</sup> Plaintiff contends that defendants are withholding certain records and plaintiff is awaiting further discovery. Unfortunately for plaintiff, discovery closed on April 6, 2015. Prior to that deadline, a discovery and settlement master was appointed by the court but the parties were unable to resolve their issues. If plaintiff was discontent with the defendants’ discovery, then plaintiff should have sought relief from the court at the proper time. But that time has passed. Plaintiff cannot rely on allegedly missing documents as evidence that a factual dispute exists at this stage in the proceedings.

<sup>3</sup> See Defendants’ Motion, Exhibit 10 (order denying the petition of Anjilla, Inc. and Angela Vendetti to strike or open the confessed judgment of 2100 Fairmount Avenue, LLC).

## LEGAL ANALYSIS

### A. Standard of Law

Once the relevant pleadings have closed, any party may move for summary judgment “in cases where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” Lance v. Wyeth, 85 A.3d 434, 449 (Pa. 2014) (citations omitted).

The moving party may establish this by utilizing either of the following methods:

Employing the first of these, a movant may rely on uncontroverted facts, and/or allow that the factual allegations made by the non-moving party could be true, while contending that, even accepting such facts, judgment should be rendered for the movant as a matter of law. Alternatively, after discovery, a party may challenge the ability of the non-moving party to adduce evidence of facts material to establishing a claim or defense.

Id. at 449-50 (citing Pa.R.C.P. 1035.2(1)-(2)). Summary judgment may be granted only when the judgment is “clear and free from doubt.” Fine v. Checcio, 870 A.2d 850, 857 (2005). When considering the merits of the motion, a court shall view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Id. However, the adverse party may not simply rely unsubstantiated allegations in its pleadings to overcome the motion. Pa.R.C.P. 1035.3(a) states:

Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

- (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
- (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

B. Count I - Accounting

Plaintiff's initial complaint, filed on August 11, 2014, contained a count for "derivative action – fraud of director." The requested relief included: enjoining McDavid from disposing of assets of the company; freezing the transfer, sale or disposition of the company's stock; ordering McDavid to individually account for the finances and refund any improper distributions; and appoint a receiver to take charge of the assets and property of the company. See Plaintiff's Initial Complaint. As required when asserting a derivative action, plaintiff filed a motion for leave to maintain the action. This court denied plaintiff's motion on the basis that the "Motion and Complaint fell significantly short of establishing a strong prima facie case of the derivative action of fraud" and due to plaintiff's "[failure] to acquire the necessary authorization to file this action on behalf of the limited liability company." September 18, 2014 Order n. 1 (Control No 14083181).

In an attempt to re-plead its derivative claim, plaintiff asserted in its fourth amended complaint an almost identical claim, rebranded as an "accounting." See Plaintiff's Fourth Amended Complaint. Despite a few insignificant changes, the claim's averments and requested relief are a mirror image of the improperly plead derivative action of fraud claim. While the name of the count changed, its merits—or lack thereof—remained the same.

This court is unable to entertain plaintiff's feeble attempt to revive its previously dismissed claim. Plaintiff's count I is hereby dismissed, again.

C. Count II – Breach of LLC Operating Agreement

In order to successfully establish a claim for a breach of contract, the plaintiff must prove: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." Hart v. Arnold, 884 A.2d 316, 332 (Pa.

Super. 2005) (citations omitted). Under Pennsylvania law, interpretation of a written agreement is for the court to determine. Gonzalez v. U.S. Steel Corp., 484 Pa. 277, 398 A.2d 1378, 1385 (1979). “The meaning of an unambiguous written instrument presents a question of law for resolution by the court.” Community College v. Community College, Society of the Faculty, 473 Pa. 576, 375 A.2d 1267, 1275 (1977). Plaintiff asserts a breach of contract claim against McDavid based upon duties created by the company’s operating agreement and McDavid’s alleged failure to act in accordance to the agreement. Based upon the unambiguous language of the operating agreement, and plaintiff’s lack of evidence to support her claims, count II fails as a matter of law.

The first alleged breach arises from McDavid’s failure to provide dividends to the members. Paragraph 17 of the operating agreement provides:

Distributions. Distributions of cash or other assets of the LLC (other than in the dissolution of the LLC) shall be made in the total amounts and at the times *as determined by the Managing Member*. Any such distributions shall be allocated among the Members on the basis of the Members’ percentage interests in the LLC.

Defendants’ Motion, Exhibit 2 (emphasis added). It is within the sole discretion of the managing member whether to provide dividends. The clear and unambiguous language of this provision does not require McDavid to issue distributions at any juncture besides dissolution. Therefore, even if plaintiff’s allegations that McDavid has not distributed cash among the members are true, such conduct is not a breach of the operating agreement.

In addition to the lack of dividends, plaintiff claims McDavid was in breach for refusing to provide “copies of all of Defendant 2100’s financial records, including but not limited to residential and/or commercial rent rolls, K-1s, tax filings, bank statements, and the like.” Fourth Amended Complaint, ¶9. A member’s ability to request various financial documents and/or information is governed by paragraphs 39 and 40 of the operating agreement, as follows:

39. Records and Inspection. The LLC shall maintain at its place of business the Certificate of Organization, any amendments thereto, this Agreement, and all other LLC records required to be kept by the Act, and the same shall be subject to inspection and copying at the reasonable request, and the expense, of any Member.

40. Obtaining Additional Information. Subject to reasonable standards, each Member may obtain from the LLC from time to time upon reasonable demand for any purpose reasonably related to the Member's interest as a Member in the LLC: (1) information regarding the state of the business and financial condition of the LLC; (2) promptly after becoming available, a copy of the LLC's federal, state, and local income tax returns for each year; and (3) other information regarding the affairs of the LLC as is just and reasonable.

Defendants' Motion, Exhibit 2. An important distinction between paragraphs 39 and 40 is the difference in the use of the terms "records" and "information." Based upon its plain meaning, records refers to the actual documents whereas information pertains to the substance of the documents. Aside from the tax returns, providing an inquiring member with information contained in financial documents, but not a paper or electronic copy of those documents, complies with the obligations imposed by paragraph 40. Also, paragraph 40 permits a member to make *reasonable* requests to obtain information on the state of the business *reasonably related* to their interest as a member, not overly broad requests that amount to fishing expeditions for the benefit of another business. Notes from the company's November 30, 2011 annual meeting reveals that McDavid told members certain financial information, such as the company's monthly mortgage payment and "rent roll." See Defendants' Motion, Exhibit 5. Orally transmitting this information at an annual meeting facially complies with providing "information regarding the state of the business and financial condition of the LLC."

More importantly for purposes of this motion, even if Vendetti did not receive certain financial documents she requested, plaintiff has not properly demonstrated that she has suffered

any damages.<sup>4</sup> Rather than providing evidence to support her claims, plaintiff insufficiently relied on the averments in the complaint and made general references to Vendetti's own deposition. While it may be reasonable for a member to request certain records to corroborate information he or she was told regarding the financial state of the business, plaintiff's lack of evidence on the element of damages is fatal to her claim.

Plaintiff also implies that McDavid breached the contract because he requested a capital contribution from plaintiff that was larger than her pro rata share of ownership. See Fourth Amended Complaint, ¶¶12-15. However, the record includes a letter by defendants' counsel to plaintiff acknowledging the error and stated that a new capital call would be issued based upon plaintiff's correct percent of ownership. See Defendants' Motion, Exhibit 2. Since there is no evidence to the contrary, the issue appears to be have been resolved and is deemed moot.

Plaintiff's complaint also includes allegations that McDavid breached a promise that the company would secure a new tenant that would pay \$10,000 per month after plaintiff's business, Mugshots, left the premises. See Fourth Amended Complaint, ¶¶26-27. The ability to decide who may lease real estate owned by the company rests solely with the managing member. The operating agreement explicitly states in paragraph 11, "Managing Only Powers. Notwithstanding any other provisions of this Agreement, only the Manager, on behalf of the LLC, may: (a) sell, encumber or lease any real estate owned by the LLC...." Defendants' Motion, Exhibit 2. The language of the operating agreement is clear that the ability to lease the property is entirely within McDavid's control. The fact that a potential tenant who would pay \$10,000 per month in rent was discussed did not create a new obligation under the operating agreement which required

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<sup>4</sup> In a lackadaisical attempt to establish damages, plaintiff broadly cites to hundreds of pages of documents that were produced during discovery. See Plaintiff's Memorandum of Law in Support of Plaintiff's Answer, p. 5 n. 3-4. Such conclusory comments do not provide sufficient evidence which satisfy plaintiff's burden of proof.

McDavid to lease the property for that amount. McDavid's decision to lease the property to another business does not amount to a breach of the operating agreement.<sup>5</sup>

The final ground for plaintiff's claim of a breach of contract is due to McDavid's refusal to permit plaintiff's own counsel from attending and recording a shareholder meeting on December 30, 2014. See Fourth Amended Complaint, ¶17-22. The meeting was originally scheduled to commence in a public restaurant, but was then relocated by McDavid to a private room in a restaurant owned by another shareholder of the company. Despite plaintiff's desires, defendants prohibited Vendetti's personal attorney from attending and/or taping the meeting, and then forbade Vendetti from recording it herself.

To be successful on her claim, plaintiff must prove that McDavid had a duty as established by the operating agreement to permit members to record annual shareholder meetings and allow a member's personal counsel—who does not share an attorney-client relationship with the company—to attend the meeting as well. As one might expect, the operating agreement is silent on these issues. Since the operating agreement does not impose those duties upon defendant, McDavid cannot be held liable for breaching the contract. Assuming *arguendo* that such terms could somehow be read into the operating agreement, Vendetti has not proffered a shred of evidence that remotely suggests that she suffered damages as a result of this "breach."

Plaintiff's breach of contract claim is legally insufficient due to plaintiff's failure to establish that defendants acted in violation of the express terms of the operating agreement, and/or adduce the slightest evidence that plaintiff has suffered actual damages. Therefore, defendants are granted summary judgment on count II.

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<sup>5</sup> Again, plaintiff did not provide any evidence that she suffered any damages as a member of the company. In fact, Vendetti testified that the new tenant was paying a *higher* monthly rent than Mugshots. See Defendants' Motion, Exhibit 1.

D. Count III – Breach of Fiduciary Duty

A fiduciary duty involves a relationship “between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.” Restatement (Second) of Torts § 874, cmt. A (1979). “[T]he critical question is whether the relationship goes **beyond** mere reliance on superior skill, and into a relationship characterized by “overmastering influence” on one side or ‘weakness, dependence, or trust, justifiably reposed’ on the other side.” eToll, Inc. v. Elias/Savion Adver., Inc., 2002 PA Super 347, ¶ 39, 811 A.2d 10, 23 (2002) (emphasis in original).

Plaintiff alleged a breach of fiduciary claim against McDavid for failing to provide dividends and financial records, engaging in a pattern of “deceit, gross negligence, willful misconduct, or wrongful taking,” and retaining counsel that has a conflict of interest. The limitation of liability between members is detailed in paragraph 24 of the operating agreement, which states in part:

No Member or officer, by reason of being or having been a Member or officer, shall be liable to the LLC or to any other Member or officer for any loss or damages sustained by the LLC or any other Member or officer unless the loss or damage shall have been the result of fraud, deceit, gross negligence, willful misconduct, or a wrongful taking by that Member or officer.

Defendants’ Motion, Exhibit 2. While one member may be liable to another under the operating agreement, plaintiff merely relies on its unsubstantiated averments in its complaint to overcome defendants’ motion. See Plaintiff’s Memorandum of Law in Support of Plaintiff’s Answer, p. 5 (“Plaintiff adequately set forth a cause of action for breach of fiduciary duty in her Fourth Amended Complaint, particularly in the averments contained therein.”). Again, plaintiff cites to defendants’ general production of discovery as a means of establishing damages. See id. at n. 5-6. Plaintiff’s response is entirely devoid of legal arguments, citations to caselaw, or proper

exhibits to support her claims. Therefore, her claim for breach of fiduciary duty cannot stand, and defendants are entitled to summary judgment on count III.

E. Count IV – Appointment of Receiver, and/or Reorganization, and/or Equity

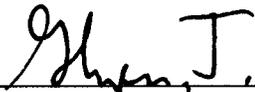
Plaintiff's final cause of action seeks to have McDavid removed as managing member and the company dissolved with all of its assets moved to a new entity formed by a court appointed receiver. Pursuant to 15 Pa.C.S.A. §8972, "On application by or for a member, the court may order dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business *in conformity with the operating agreement.*" (emphasis added).

Here, the company's operating agreement expressly details the method by which a member may seek to remove the managing member. See Defendants' Motion, Exhibit. 2. One of the first requirements mentioned in Paragraph 9(b) is that all members must unanimously vote in favor of removing McDavid as the managing member. See id. Vendetti has not demonstrated, let alone averred, that the remaining members have voted to remove McDavid. If such an event were to occur, paragraph 10 of the operating agreement specifies that member Colin Michael Houston shall become the new manager. See id. Because the operating agreement provides a clear procedure on how to remove McDavid as manager—and plaintiff has seemingly not even attempted to take the initial steps—there is no basis to grant plaintiff's requested relief. Plaintiff's failure to provide sufficient evidence to support her claim for an appointment of a receiver, and/or reorganization, and/or equity, results in a finding in favor of defendant.

**CONCLUSION**

For the aforementioned reasons, defendants' motion for summary judgment is hereby granted, and the case is dismissed in its entirety.

BY THE COURT:

  
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GLAZER, J.