

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

DECENT.

PART 5

Index Number : 601546/2004

GOTTLIEB, HELENE

vs

NORTHRIVER TRADING CO. LLC

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/20/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-9

12-13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

N.B. -- Defendants to file note of issue by May 31, 2007.

FILED
MAY 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/9/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----- X

HELENE GOTTLIEB,

Plaintiff,

Index No. 601546/04

- against -

DECISION AND ORDER

NORTHRIVER TRADING COMPANY LLC; STEVEN
SCHLAM; ARIEL WOLFSON; MORRIS WOLFSON;
AARON WOLFSON; and ABRAHAM WOLFSON,

Defendants.

----- X

NORTHRIVER TRADING COMPANY LLC and
STEVEN SCHLAM,

Counterclaimants,

- against -

PHILIP GOTTLIEB a/k/a FEIVEL GOTTLIEB,

Additional Defendant
on the Counterclaims.

FILED
MAY 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

----- X

JANE S. SOLOMON, J.:

Defendants North River Trading Company LLC (North River), Steven Schlam, Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson move, pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint, and (2) partial summary judgment on North River's fifth and sixth counterclaims that it asserts against plaintiff Helene Gottlieb and additional defendant on the counterclaim, Philip Gottlieb a/k/a Feivel Gottlieb (Feivel).

Plaintiff and Feivel (together, the Gottliebs) cross-move (1) pursuant to CPLR 3212 (f), for an order denying or deferring defendants' motion pending examinations before trial of defendants and the deposition of non-party witnesses; (2) compelling defendants to appear for depositions before trial; and (3) extending all outstanding discovery cut-off dates and the date for the filing of a certificate of readiness and note of issue by at least 90 days.

In her verified amended complaint, plaintiff alleges as follows: plaintiff seeks to compel defendants to provide her with an accounting of the financial affairs of North River, a New York limited liability company, and of which plaintiff is a member. Co-defendant Schlam is a managing member of North River, and co-defendants Ariel Wolfson and/or Morris Wolfson, Aaron Wolfson, and Abraham Wolfson are North River's other members. North River was formed in 1994, and was engaged in the business of trading securities through December 31, 2000, at which time it ceased trading activities, and had assets exceeding \$2 million. From 1995 to 1999, plaintiff held a 50% interest in North River. Since 1999, and continuing to the present, plaintiff has held a 20.6 % interest in North River.

From May 31, 2001 to the present, plaintiff has unsuccessfully sought an accounting of North River's financial affairs, including income and expenses, profits and losses,

overpayments of trading commissions, surcharges to traders regarding payments made to "Spear Leeds" for clearing transactions on North River's behalf, the amount of accounts receivable and efforts being made to collect the same, and the net amount due to her. The amended complaint alleges further that defendants have imposed onerous and unreasonable preconditions on an accounting beyond plaintiff's means to satisfy, such as the requirement that any accounting be conducted by an accountant that defendants approve in advance.

Plaintiff seeks judgment compelling North River and Schlam, as managing member, to provide plaintiff and defendants Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson with a complete accounting of North River's financial affairs, including, but not limited to, income and expenses, profits and losses, overpayment of trading commissions, the amount of accounts receivable and efforts being made to collect the same, and the net amount due plaintiff, and a money judgment in any amount determined upon such accounting to be due plaintiff, the liquidation of the North River, pre- and post-judgment interest, costs, disbursements, and legal fees and expenses.

Defendants contend that North River has complied with all of its obligations under the Limited Liability Company Law (LLC Law). Additionally, in their answer, they interpose seven counterclaims by which they seek compensation from plaintiff and

Feivel for fraud, breach of contract, and breach of trust and fiduciary duty. Of particular relevance to these motions, the fifth counterclaim alleges that, pursuant to the agreement with North River, Feivel, through his nominee (plaintiff), agreed to personally bear 45% of any loss sustained by the company. As a result, plaintiff and Feivel are obligated, jointly and severally, to North River in the amount of \$287,378, plus interest. The sixth counterclaim alleges that, based on Feivel's status as a member of North River (presumably, through his "nominee"), he was permitted to open a personal sub-account to make personal trades using his and plaintiff's own capital. The Gottliebs are 100% responsible for the sub-account's losses which, at the time that North River ceased doing business, was a loss of \$201,123.

Defendants allege that Feivel used his wife, plaintiff, as an instrumentality to commit insurance fraud against insurance companies, and to trade securities with impunity without attracting inordinate attention. To facilitate this scheme, Feivel directed that his interest in North River be given to plaintiff, as nominee, and he directed that no membership certificates are to be issued to North River's principals, and that no operating agreement be prepared or adopted. Allegedly, plaintiff's purported interest in North River was a sham, and her interest illusory.

Defendants further allege that Feivel misused his status to unlawfully gain access to the daily confidential positions held and trades made by members, and forwarded them to entities and individuals outside the company in a bad faith scheme to promote his own ends at North River's expense. Feivel began trading a copious quantity of securities in his personal sub-account, he incurred "breathtaking losses," and he began to indiscriminately draw large amounts from North River's accounts. Allegedly, the reckless trading, coupled with mounting losses in his personal sub-account, led to serious consequences to the company.

According to defendants, because of North River's precarious financial situation, in 1999 the partners and Feivel entered into an agreement whereby Feivel agreed to dilute his share of profits in the company from 45% to 20.6% to offset his losses. Nevertheless, Feivel continued to drain company resources, and North River ceased doing business in 2000. The Gottliebs had losses in Feivel's personal sub-account exceeding \$200,000, and their percentage share of North River's losses as of December 31, 2003, was almost \$300,000. In August 2002, North River loaned Feivel an additional \$25,000. No part of the loan was ever repaid, despite due demand.

Defendants now seek dismissal of the complaint and judgment on their fifth and sixth counterclaims. Defendants

contend that North River has provided plaintiff with all documents pertaining to its finances and, thus, it has satisfied its obligations under the LLC Law. These include balance sheets, income statements, tax returns, bank statements, canceled checks, vendor invoices, correspondence, detailed brokerage statements and work papers. Allegedly, North River turned over every document in existence that it had in its possession and under its control. In support of their motion for judgment on the fifth and sixth counterclaims, defendants submit a financial report, with exhibits, prepared by Steven Levy, a forensic accountant.

The Gottliebs argue that defendants have not provided them with anything resembling an accounting, and that defendants' self-styled "expert" is not a certified public accountant; rather he is a fraud investigator who holds himself out as a specialist in solving "forensic mysteries." Thus, they argue, his report is inadmissible, and it fails to satisfy North River's accounting obligations.

As a preliminary matter, I note that the amended complaint fails to articulate why plaintiff named Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson as defendants, and it seeks no remedy as against them. In addition, the caption in the amended answer names North River as the sole counterclaimant, yet in the first counterclaim, Schlam, as well as North River are seeking damages. However, it appears that the

sole counterclaimant on the fifth and sixth counterclaims at issue on these motions is North River.

The record establishes that North River has provided all of the documents that it is required to provide under the LLC Law. Section 1102(b) provides:

Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

Section 1102(a) sets forth five categories of documents a limited liability company is required to maintain, including a current list of the names and last known addresses of managers, if any; a current list of the names and addresses of members together with their contribution and share of profits and losses; a copy of the articles of organization and all amendments thereto; a copy of the operating agreement; and copies of the federal, state and local tax returns for the three most recent fiscal years.

Plaintiff has not identified any of the items listed in section 1102 (a) that she has been unable to obtain. Indeed, they disagree with the information provided in some of these items, but North River contends that it has provided the

information in its possession. Although the Gottliebs are entitled to information from North River for the additional reason that the information may be related to the counterclaims (see *Sachs v Adeli*, 26 AD3d 52 [1st Dept 2005]), plaintiff is not entitled to an accounting merely by virtue of her status as a member of the limited liability company. There is nothing in the LLC Law to suggest otherwise, nor does plaintiff provide any other basis upon which to base an alleged entitlement to an accounting. Plaintiff's cited cases are without force, because they do not involve limited liability companies (see *Allied Bingo Supplies of Fla., Inc. v Hynes*, 27 AD3d 597 [2d Dept 2006] [at-will partnership]; *Italia Imports v Weisberg & Lesk*, 220 AD2d 226 [1st Dept 1995] [issue of whether party entitled to an audit is governed by the parties' engagement letter agreement]; *Marine Trust Co. of Buffalo v Pierce*, 53 NYS2d 710 [Sup Ct, Erie County 1945] [trustee seeking to have account judicially settled]). Any other materials that are necessary to oppose the counterclaims can be sought, or should have been sought, through discovery.

Defendants' motion for summary judgment on its counterclaims is granted in part. North River contends that after Feivel sustained losses in his personal sub-account in 1997 and 1998, he was given a choice to either infuse additional capital or have his percentage of allocation of profits reduced. Allegedly, Feivel was willing to infuse only \$90,000, and he

agreed in 1999 to a reduction of plaintiff's share of the profits from 45% to 20.6%, to offset the losses.

North River supports its claim for summary judgment with the affidavit prepared by Steven Levy, a forensic accountant and president of Steven Levy Investigations, that purports to show the amounts that the Gottliebs owe. Levy arrived at the following conclusions: First, the Gottliebs maintained a negative balance in North River's capital account of \$309,455 as of the end of North River's 2005 fiscal year, which is corroborated by North River's tax returns and form K-1's. Second, the Gottliebs owe \$201,123 for trading losses under the trading sub-account used by Feivel. North River's clearing house, Spear Leads & Kellogg, tracked and recorded each trade transaction that Feivel and the other members generated. Daily and monthly statements generated by the clearing house show unequivocally the amount of Feivel's losses in the personal sub-account.

North River contends that Levy's affidavit satisfies its burden of proving the Gottlieb's liability under the fifth counterclaim, which alleges that plaintiff is liable for 45% of North River's losses. Levy states that he reviewed tax returns, work papers and profit and loss statements, and concluded that the numbers on the tax returns and Forms K-1 were consistent with his analysis. North River also contends that it has met its

burden of showing that the Gottliebs are liable under the sixth counterclaim because Feivel's trading losses in the personal sub-account are not disputed.

The Gottliebs argue that North River has not established a prima facie case because Levy's report is inadmissible evidence. This assertion is without merit. According to Levy: (1) he is a forensic accountant and president of Steven Levy Investigations, an entity that North River retained to conduct a review of its financial records and perform an investigative audit of its assets, liabilities and operations; (2) he derives his expertise in conducting forensic audits from 27 years of employment with the Internal Revenue Service, 21 years of which he spent as a Special Agent responsible for conducting criminal investigations of individuals and corporate entities; (3) he reviewed financial documents for what is now Ernst & Young, and the New York City Department of Taxation and Finance employed him as a tax analyst; (4) he is a certified fraud examiner, holds a Bachelors Degree of Business Administration and an Accounting and Masters Degree in Taxation, and (5) has been an "Enrolled Agent," which permits him to represent individuals and business entities before the Internal Revenue Service.

Plaintiff has failed to undermine the veracity of Levy's asserted credentials. The assertion that Levy is not a

certified public account is inconsequential, because there is no requirement that a party can only be granted summary judgment as to financial matters if it is based upon the report or affidavit of a person with such credentials (see e.g. *Spodek v Feibusch*, 267 AD2d 299 [2d Dept 1999] [evidence consisting of unverified and noncertified schedules that plaintiff's bookkeeper or accountant prepared is not admissible, because they were not accompanied by an affidavit of either the bookkeeper or accountant])).

The Gottliebs have established, however, that there are material issues of fact that preclude the granting of summary judgment on the fifth counterclaim (see Affidavit of Howard Spindel, a Senior Managing Director of Integrated Management Solutions, sworn to October 26, 2006). For example, Levy's report is based upon disputed assumptions that Schlam holds a 10% interest in North River, that plaintiff's original interest was 45%, but it was diluted to 20.6 % from July 1, 1998 to December 31, 1999, and that North River collected a trading fee on each executed trade (referred to by the parties as the "vigorish" or "vig") that was to be shared between the Wolfsons and Schlam on an 84%/16% basis (Levy Affidavit, ¶ 9). Feivel denies Schlam's assertion that he agreed to a reduction in the sharing of profits from 45% to 20.6%.¹ There is no documentation as to this alleged

¹ I note that Feivel states in his affidavit, sworn to October 26, 2006, that an agreement was never made to reduce the Gottlieb

agreement, and the controverting assertions raise credibility issues not appropriate for summary disposition (*Keena v Hudmor Corp.*, 37 AD3d 172 [1st Dept 2007]). Another issue (among others) is based on the assertion that Levy did not follow LLC Law section 503 in calculating plaintiff's share of profits and losses. Section 503 provides that profits and losses are allocated among members as provided for in the operating agreement, and if the operating agreement does not so provide, then

profits and losses shall be allocated on the basis of the value, as stated in the records of the limited liability company if so stated, of the contributions of each member, but not including defaulted obligations to make contributions, to the extent they have been received by or promised to the limited liability company and have not been returned to any such member

According to Schlam, no operating agreement was prepared (by definition, an operating agreement is in writing [LLC Law section 102[u]]), and the Levy affidavit does not clearly address the alternate factors referenced in section 503. Finally, Feivel alleges that some transactions involving other North River members are not reflected in the figures Levy relied upon, so his

interest from 45% to 20.6% (¶ 24). However, the Gottlieb complaint itself alleges that, from 1995 to 1999, plaintiff held a 50% interest in North River, and that since 1999, and continuing to the present, plaintiff has held a 20.6 % interest.

opinion in inherently flawed.

There is no meaningful opposition to North River's arguments with respect to the sixth counterclaim, by which North River seeks to recover Feivel's trading losses made under his personal sub-account. Feivel contends that there were other trading losses as well. That may be so, but it does not relieve him of a responsibility to make North River whole if he is required to reimburse it for his sub-account deficit. The liability of other members is beyond the scope of this action. Since there is no question of material fact with respect to the personal sub-account, North River is entitled to partial summary judgment on that claim. However, questions of fact with respect to the Gottlieb's liability on the other claims suggest the possibility that they may be entitled to a set-off such that entry of judgment against them at this time is inappropriate.

The cross motion to extend discovery deadlines is denied, because the relief sought already was granted under the Scheduling Order dated December 18, 2006, that, among other things, vacated the temporary stay of discovery that was granted on November 1, 2006, and directed that witnesses be deposed by February 28, 2007. Accordingly, it is

ORDERED that the motion by defendants North River Trading Company LLC, Steven Schlam, Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson is granted only to

the extent of dismissing the complaint and granting summary judgment in favor of North River on the sixth counterclaim in the amount of \$201,123, with interest from September 13, 2005, and is otherwise denied; and it further is


ORDERED that the Clerk is directed to enter judgment dismissing the complaint, with costs and disbursements to be taxed at the conclusion of the action; entry of judgment on the sixth counterclaim shall abide the conclusion of the action as well; and it further is

ORDERED that the cross motion by plaintiff Helene Gottlieb and additional defendant on the counterclaim, Philip Gottlieb a/k/a Feivel Gottlieb, is denied; and defendants' shall file and serve a note of issue by May 31, 2007.

Dated:

May 9, 2007

ENTER:



J.S.C.

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