

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

PRESENT: **HON. CAROL EDMOND**PART 35

Justice

Index Number : 653372/2012

BEAUCHAMP, GREGORY

vs

JOHNSTONE, JEREMY

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 5.14.2013

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

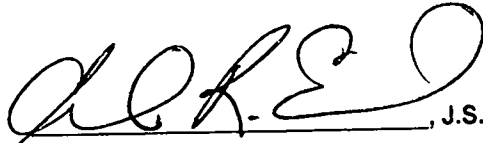
Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion by plaintiff Gregory Beauchamp, in his individual capacity, and as a member of Port and Passage, LLC, for an order, pursuant to CPLR 3211(a)(1) and (7) and 3016(b) to dismiss the counterclaims brought by defendant Jeremy Johnstone, in his individual capacity, and as a member of Port and Passage, LLC, is denied; and it is further

ORDERED that plaintiff shall serve an Answer to the counterclaims within 20 days of service of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order and notice of entry upon all parties within 20 days of entry.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):
Dated: 7.15.2013

  
J.S.C.  
**HON. CAROL EDMOND**

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
GREGORY BEAUCHAMP, in his individual capacity,  
and as a member of Port and Passage, LLC, a company  
organized under the laws of the State of New York,

Plaintiff,

-against-

JEREMY JOHNSTONE, in his individual capacity,  
and as member of Port and Passage, LLC, a company  
organized under the laws of the State of New York,

Defendant.

-----X  
Carol R. Edmead, J.S.C.:

Index No.: 653372/2012

DECISION AND ORDER

Motion Seq. #001

MEMORANDUM DECISION

In this action for, *inter alia*, breach of statutory operating agreement and breach of fiduciary duty, plaintiff Gregory Beauchamp ("plaintiff"), in his individual capacity, and as a member of Port and Passage, LLC ("the Company") moves pursuant to CPLR 3211(a)(1) and (7) and 3016(b) to dismiss the counterclaims of defendant Jeremy Johnstone ("defendant").

*Background Facts*

According to the complaint, in October of 2011, plaintiff and defendant agreed to create an enterprise, *i.e.*, the Company, to sell motion graphics and video production services for profit. The parties agreed that plaintiff would be the Executive Director and Producer of the enterprise, and defendant would be the creative director. Both parties were responsible for generating business for the Company.

On October 9, 2011, the parties agreed that the Company would loan defendant \$10,000.

On November 23, 2011, the parties filed articles of organization for the Company, "Port and Passage, LLC" in the State of New York, but did not execute a written operating agreement.

Plaintiff alleges that the parties orally agreed that he would retain a majority vote in the management of the Company.

On December 14, 2011, defendant borrowed an additional \$2,000 from the Company. On December 30, 2011, defendant borrowed an additional \$2,500 from the Company.

By May of 2012, plaintiff became concerned with defendant's conduct in operating the Company, such as defendants' failure to complete his responsibilities as creative director, and his failure to bring in his appropriate share of business. Plaintiff alleges that while he generated almost \$300,000 in business, defendant only generated approximately \$40,000 in business.

On or about May 9, 2012, plaintiff and defendant met to discuss plaintiff's concerns, and agreed that defendant would withdraw from the Company on May 31, 2012. The parties also executed a document on May 9, 2012,<sup>1</sup> providing that "Jeremy Agree[d] to" finish certain projects "In return for:" "\$6750 - Salary for May" and "\$5,000 -Severance" (totaling \$11,750) plus certain Company equipment (the "May 9 Document") (See Complaint, Exh. 1).

On May 11, 2012, defendant took the original copy of the May 9 Document from the office, and withdrew \$27,500 from the Company's bank account, which was allegedly approximately half of the funds in the account.

Consequently, plaintiff commenced this action alleging causes of action for (1) breach of statutory operating agreement based on defendant's withdrawal of funds and equipment on May 11<sup>th</sup> and his failure to repay the three loans, (2) breach of contract based on defendant's withdrawal of funds on May 11<sup>th</sup> in excess of the amount due him pursuant to the May 9 Document; and (3) conversion and breach of fiduciary duty based on defendant's May 11<sup>th</sup>

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<sup>1</sup> Though dated "4/9/12," both parties refer to this document as one that was signed on May 9<sup>th</sup>.

withdrawal. Plaintiff also seeks a judgment declaring that defendant withdrew from the Company as of May 11, 2012.

In his Answer, defendant denies that the loans, and asserts counterclaims alleging that defendant usurped corporate opportunities and diverted them to himself in breach of plaintiff's fiduciary duty (first count) and in violation of the Limited Liability Company Law (second count).

Defendant asserts that as Executive Director, plaintiff was to handle the business aspect of the Company, while defendant, as Creative Director, would handle all aspects of the creative and production aspects of the Company media content, such as developing the creative content, development, and production aspects of the Company. In this way, plaintiff and defendant were equal partners in the management and operations of the Company. Defendant asserts that based on defendant's portfolio and abilities, the Company secured several clients and projects, each valued at least \$20,000 to \$150,000. However, after the Company secured business, plaintiff diverted these clients and projects to himself and his wholly owned company, the El Paso Tetherball Company d/b/a The Bindery NYC, for his personal benefit. Therefore, defendant alleges that he is entitled to an equal share of all proceeds resulting from the projects and clients, and admits to signing the May 9 Document, taking it out of the office, and withdrawing \$27,500 from the Company bank account.

Consequently, defendant seeks \$400,000 against plaintiff based on plaintiff's breach of his fiduciary duty and for violating the New York Limited Liability Company Law by usurping corporate opportunities. Defendant also seeks a declaration that all income generated through activities or entities created by plaintiff prior to May 9, 2012 be deemed lawfully owned by the

Company, Port and Passage, LLC, and that defendant is entitled to an equal share of all such proceeds.

In support of the instant motion to dismiss the counterclaims, plaintiff argues that defendant fails to state a claim for breach of fiduciary duty, since defendant's admitted agreement to withdraw from the Company in consideration of a sum certain, which defendant admits to receiving, precludes him from asserting the existence of any damages caused by plaintiff. Plaintiff contends that defendant's claim that he remains an equal member of the Company is belied by defendant's own admission, and the documentary evidence, namely the May 9 Document. Plaintiff argues that defendant fails to particularize his breach of fiduciary duty claim as required by CPLR 3016(b), as he is unclear as to whether plaintiff's alleged diversions occurred before or after defendant's withdrawal from the Company. Plaintiff further asserts that the court should dismiss defendant's second counterclaim for violation of the New York Limited Liability Company Law because defendant lacks standing since he was no longer a member of the Company when he withdrew, cannot allege any damages, and the claim is duplicative of defendant's first counterclaim.

In opposition, defendant argues that his counterclaims, coupled with his affidavit, demonstrate with particularity his claim for breach of fiduciary duty, but if necessary, can be amended to incorporate his affidavit if permitted by the Court. Defendant also contends that his second counterclaim is not duplicative because he is entitled to present alternate claims for relief.

Defendant argues that the May 9 Document is unenforceable, since it does not represent a meeting of the minds. Further, the May 9 Document is ambiguous as to material facts, and, as demonstrated by plaintiff's subsequent act of forwarding a "Separation and General Release

Agreement,” (the “Separation Agreement”) fails to integrate key commercial terms upon which the parties have yet to come to an understanding. The Separation Agreement shows that any discussion between the parties about the separation and relinquishment of defendant's rights in the Company was, at best, incomplete; unlike the May 9 Document, the Separation Agreement advised each party to consult their respective counsel, impermissibly deemed the salaries previously paid to defendant as loans to the defendant, included a release and covenant not to sue plaintiff, and a confidentiality provision, exclusively allocated defendant's portfolio and intellectual property to the Company, and deemed defendant a mere employee, as opposed to an equal partner as they first agreed. Defendant claims that he was pressured and coerced into signing the May 9 Document, that plaintiff misrepresented that \$11,750 represented half of the Company's net proceeds, and that based on the above, that he is still a member of the Company. Defendant also attests that plaintiff refused to provide him with access to the Company's financial documents. Furthermore, defendant recently discovered (when he received the tax returns in February 2013) that plaintiff's other companies, El Paso Tetherball Company and the Bindery, were named as members of the Company on the Company's tax returns for 2011 and 2012 respectively.

In reply, plaintiff argues that the May 9 Document is an enforceable separation agreement, and is supported by defendant's own admissions that he agreed to withdraw from the Company on May 9 in exchange for \$11,750, and to permit the transfer of certain Company equipment. Plaintiff argues that under caselaw, the parties' conduct subsequent to the execution of the May 9 Document establishes the finality of the agreement to separate.

### *Discussion*

Generally, on a motion to dismiss based upon failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (see, CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). The standard for such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (see *Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46, 558 NYS2d 917 [1st Dept 1990]). However, where the parties have submitted evidentiary material, the criterion is whether the proponent of the pleading has a cause of action, not whether he had stated one (*Guggenheim v. Ginzenburg*, 43 NY2d 268, 275, 401 NYS2d 17 [1977]).

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that "a defense is founded upon documentary evidence." Dismissal is warranted where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," or where undisputed facts negate or dispose of the claims in the complaint (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

### *Breach of Fiduciary Duty*

In order to properly plead a claim for breach of fiduciary duty, a movant must allege (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty, and (3) damages directly caused as a result of the breach (*Burry v. Madison Park Owner, LLC*, 84 AD3d 699,

699-700, 924 NYS2d 77 [1st Dept 2011]). Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in a cause of action based on breach of fiduciary duty,<sup>2</sup> that "the circumstances constituting the wrong shall be stated in detail."

Here, defendant's breach of fiduciary duty counterclaim alleges that plaintiff and defendant created the LLC, Port and Passage by filing the articles of organization on November 23, 2011, without a written operating agreement, and that plaintiff diverted projects to himself or his wholly owned company for his own personal benefit. On its face, these conclusory allegations fail to sufficiently detail the breach of fiduciary cause of action. However, in opposition, defendant submits an affidavit wherein he attests that after the Company was formed, there were "pitch meetings" with several clients, *i.e.*, Under Armour, Matchbox, Future Brand, and Exelon, and that their projects were valued at approximately \$20,000 to \$150,000. (Affidavit, p. 1). "By May 2012, it became apparent to [defendant] that Plaintiff was assuming total control of the Company, *excluding [defendant] from important creative and development meetings and engaging in self-interested conduct.*" (P. 2) Defendant continually asked plaintiff *for the Company's financial documents, to no avail* (*id.*). Further, plaintiff allegedly engaged in corporate usurpation based upon plaintiff's two companies being added as members on the Corporation's tax returns *for 2011* and 2012, without defendant's knowledge. Thereafter, on plaintiff presented defendant with May 9 document, which addressed only certain items, such as

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<sup>2</sup> CPLR 3016(b) provides:

Fraud or mistake. Where a cause of action or defense is based upon . . . breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.



hardware, domain and funds, and “incorrectly represented” to defendant that \$11,750 was approximately half of the Company’s net proceeds. Such allegations are sufficient to assert a breach of fiduciary duty claim.

Although defendant states that plaintiff “funneled all of the Company’s existing clients into his new company” *after* May 9, 2011, such claim does not negate any alleged breaches of plaintiff’s fiduciary duty owed to defendant prior to such date. It has been held that an LLC managing member continues “to owe fiduciary duties” to the LLC members until the LLC is dissolved (*McGuire v. Huntress*, 83 A.D.3d 1418, 920 N.Y.S.2d 531 [4<sup>th</sup> Dept 2011]) (rejecting contention that the fiduciary duty owed to LLCs members ceased when the members orally agreed for one member to buy out the equity interests of the other, since the duty continues until the LLCs were actually dissolved); *see also* LLC Law § 203(d), “A limited liability company formed under this chapter shall . . . continue until the cancellation of the limited liability company's articles of organization”). And, although it is has been held that a withdrawal of a member of an LLC may trigger a dissolution of an LLC (*see Spires v. Casterline*, 4 Misc.3d 428, 778 N.Y.S.2d 259 [Sup. Ct., Monroe County 2004]), such a withdrawal does mandate a dissolution unless it is found that “it is not reasonably practicable to carry on the business” (*Horning v. Horning Const., LLC*, 12 Misc. 3d 402, 816 N.Y.S.2d 877 [Sup. Ct., Monroe County 2006] citing LLC Law 702), and there is no indication that the LLC herein was dissolved. Thus, at this pleading stage, it cannot be said that defendant failed to state such a breach of fiduciary duty claim.

Further, plaintiff’s reliance on the May 9 Document to defeat the counterclaims is misplaced. Although the May 9 Document contains terms regarding the defendant's separation

from the Company, *i.e.*, the remaining work to be completed by defendant, a schedule of defendant's severance payment, and a division of the Company's equipment and domain names between the parties, defendant attests that plaintiff misrepresented the value of the Company in inducing defendant to sign the Document.<sup>3</sup> Thus, contrary to plaintiff's contention, it cannot be said that defendant's withdrawal of the funds precludes him from asserting the existence of any damages, and precludes defendant from asserting a claim to damages based on his status as member of the Company. And, the May 9 Document does not conclusively establish a defense to defendant's allegations of plaintiff's breaches of his duty occurring *prior to* the Document's execution.

*Violation of New York Limited Liability Company Law*

The parties agree that the LLC is governed by a "statutory" operating agreement, since they did not execute a written operating agreement. In this regard, where "there is no written operating agreement of the LLC, the statutory default provisions of the Limited Liability Company Law become the operating agreement (*Spires v. Casterline*, 4 Misc. 3d 428, 778 N.Y.S.2d 259 [2004]). Pursuant to the Limited Liability Company ("LLC") Law §401, and in the absence of any indication in the record to the contrary:

(a) Unless the articles of organization provides for management of the limited liability

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<sup>3</sup> The Court notes that defendant's argument that the May 9 Agreement is not binding based upon the plaintiff's proffer of the unexecuted Separation Agreement is unavailing. "[E]ven where parties contemplate a more formal agreement, or, indeed, a 'fuller agreement' "(*Conopco, Inc. v. Wathne Ltd*, 190 AD2d 587, 588, 593 N.Y.S.2d 787 [1st Dept 1993]), a document may nonetheless be enforceable where it contains essential or material terms of the agreement "and otherwise manifests [the parties] mutual intent to be bound" (*Kochiam Intl. v. Communication Control Sys.*, 243 AD2d 284, 285, 663 NYS2d 966 [1st Dept 1997], quoting *TAJ Int'l Corp. v. Edward G. Bashian & Sons, Inc.*, 251 AD2d 98, 101, 674 NYS2d 307 [1st Dept 1998]). The May 9 Agreement contains no language indicating that it is merely an agreement to agree, and the Separation Agreement is unexecuted by either side.

company by a manager or managers or a class or classes of managers, *management of the limited liability company shall be vested in its members* who shall manage the limited liability company in accordance with this chapter, subject to any provisions in the articles of organization . . . .

(b) *If management of a limited liability company is vested in its members, then (I) any such member exercising such management powers or responsibilities shall be deemed to be a manager for purposes of applying the provisions of this chapter, unless the context otherwise requires, and (ii) any such member shall have and be subject to all of the duties and liabilities of a manager provided in this chapter.* (Emphasis added).

Pursuant to LLC Law § 409 (a), a “manager shall perform his or her duties as a manager ... in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.” Thus, under New York law, this duty imposed on the manager of limited liability company (LLC) is the same fiduciary standard applied to corporate directors (*In re Die Fliegermaus LLC*, 323 B.R. 101 [Bkrtcy SDNY 2005]).

As stated above, defendant alleges sufficient facts to support a breach of fiduciary duty claim against plaintiff. As such, it cannot be said that defendant did not allege a violation of New York Limited Liability Company Law claim.

### *Conclusion*

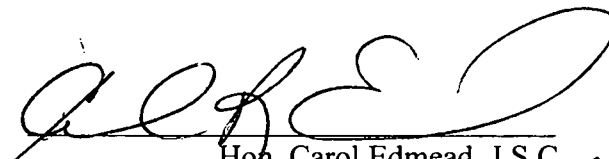
Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Gregory Beauchamp, in his individual capacity, and as a member of Port and Passage, LLC, for an order, pursuant to CPLR 3211(a)(1) and (7) and 3016(b) to dismiss the counterclaims brought by defendant Jeremy Johnstone, in his individual capacity, and as a member of Port and Passage, LLC, is denied; and it is further

ORDERED that plaintiff shall serve an Answer to the counterclaims within 20 days of service of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order and notice of entry upon all parties within 20 days of entry.

Dated: July 15, 2013



Hon. Carol Edmead, J.S.C.

**HON. CAROL EDMEAD**