

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

PFT TECHNOLOGY LLC,

INDEX No. 8679/12

Plaintiff Counterclaim-Defendant,

MOTION DATE: Jan. 30, 2014
Motion Sequence # 003, 004

-against-

ROBERT WIESER,

Defendant Counterclaim-Plaintiff,

-and-

PATRICK KEELAN, THOMAS SMITH and
FRANK CASTELLANO,

Counterclaim-Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation/Affidavit in Support.....	XX
Affidavit in Opposition.....	XX
Memorandum of Law.....	XX

Motion by defendant Robert Wieser for leave to renew his motion for partial summary judgment on his counterclaim for contractual indemnity is **granted**. Upon renewal, defendant's motion for partial summary judgment is **granted** to the extent indicated below. Cross motion by plaintiff PFT Technology LLC for partial summary judgment is **denied**.

This is an action for judicial dissolution 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 managing member of PFT. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano are the other managing members of the company.

Section 4.03(a) of PFT's operating agreement provides that distributions of cash and property shall be agreed to by a "supermajority-in-interest" of the members. The operating agreement defines "supermajority-in-interest" as an interest in excess of 75 %. Thus, it appears that an agreement as to distributions requires the unanimous agreement of the members. Section 6.09 of the operating agreement requires a similar supermajority requirement for expenditures over \$100,000.

Section 7.02(b) of PFT's operating agreement provides that, "The company shall, to the fullest extent permitted by applicable law, indemnify and hold harmless each member...against any and all losses, claims, damages or liabilities...in connection with any matter arising from...this agreement or the company's business or affairs, except for such losses...as are determined by final judgment of a court of competent jurisdiction to have resulted from such indemnified person's bad faith, gross negligence, or willful misconduct..."

Section 7.02(b) further provides that "the company shall from time to time reimburse or advance to any indemnified person the funds necessary for payment of reasonable expenses, including legal fees, incurred in connection with any action, suit or proceeding, upon receipt of a written undertaking ... to repay such amount if a judgment ...establishes that his acts or omissions (i) were in bad faith or involved willful misconduct, (ii) constituted gross negligence, or (iii) were otherwise of such character that New York law would require that such amounts be repaid."

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 July 10, 2012, PFT commenced this action seeking dissolution of the company, after efforts to buy out Wieser's interest were not successful.

In its first cause of action, PFT seeks a declaratory judgment that Wieser breached his fiduciary obligation to the company. 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 its second cause of action, PFT seeks

damages for Wieser's alleged breach of fiduciary duty. In its third cause of action, PFT seeks judicial dissolution of the company.

In his answer, Wieser denies that dissolution of PFT is necessary. Nevertheless, Wieser requests a "fair valuation" of his membership interest in the company. Additionally, Wieser asserts various counterclaims against PFT and the other members of the company. In his first counterclaim, Wieser alleges that the individual defendants breached PFT's operating agreement by paying themselves unauthorized salaries and failing to pay him his share of the income distributions. In his second counterclaim, Wieser alleges that the individual defendants converted the "intellectual property" associated with machinery and equipment which Wieser fabricated for the company. Wieser's third counterclaim is for an accounting with respect to PFT's property.

In his fourth counterclaim, Wieser seeks contractual indemnity for his legal fees incurred in defending the present action pursuant to Section 7.02(b) of the operating agreement. Wieser argues that he is entitled to both indemnity and advancement of legal expenses because, according to Wieser, PFT's breach of fiduciary duty claims are without merit. Wieser also asserts a fifth counterclaim for breach of fiduciary duty against the other members.

By order dated July 1, 2013, defendant Wieser's motion for partial summary judgment with respect to his counterclaim for contractual indemnity was denied. Wieser moves for leave to renew his motion for summary judgment with respect to the indemnity claim on the basis of new facts learned after the motion was decided. Wieser asserts that PFT is presently reimbursing the other managing members for their attorney's fees incurred in defending Wieser's breach of fiduciary duty counterclaims. Wieser argues that there is no basis for this "disparate treatment." Plaintiff cross moves for partial summary judgment dismissing so much of Wieser's indemnity claim as seeks advancement of legal expenses.

Limited Liability Company Law § 420 provides that subject to restrictions in the operating agreement, a limited liability company may indemnify, and advance expenses to, any member "against any and all claims and demands whatsoever," provided no indemnification may be made if a judgment or other final adjudication adverse to such member establishes that a) his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or b) that he personally gained a financial profit or other advantage to which he was not legally entitled. The broad obligation to advance or indemnify members for legal

expenses, and limited exceptions, contained in PFT's operating agreement, parallel the provisions of the statute.

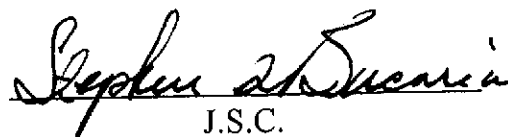
By easing the burden of litigation-related expenses, indemnification provisions help companies to attract officers with various skills and other forms of expertise (*Ficus Investments v Private Capital Mgmt.*, 61 AD3d 1, 9 [1st Dept 2009]). In particular, advancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings (Id). Thus, the right to advancement may often be determined in "summary proceedings," that is upon the papers, while indemnity will frequently require "detailed analysis," or a plenary hearing (Id). Advancement of legal expenses is available in an action by a corporation against an officer for breach of fiduciary duty (*Ficus Investments v Private Capital Mgmt.*, *supra*). Mere allegations of theft will not relieve the company of an obligation to advance expenses (Id at 10). Nevertheless, depending upon the facts and circumstances requiring dissolution of the company, there is no requirement that the members be reimbursed for legal expenses on an equal basis.

In the present case, the primary issue appears to be valuation of the interest of the minority member. In order for the members to resolve their valuation dispute fairly, advancement of legal expenses should be generally available. However, in determining the value of Wieser's interest, the court may adjust his percentage interest upwards or downwards, depending upon the merits of the parties' respective breach of fiduciary duty claims (Cf Business Corporation Law § 1104-a[d]). Under the terms of the operating agreement, legal expenses incurred in an unsuccessful defense of a breach of fiduciary duty claim are not subject to indemnity. Weiser's counsel asserts that there is "virtually no additional work" necessary to be performed in connection with prosecuting his breach of fiduciary duty counterclaims. However, on a summary application for advancement of legal expenses, it is Wieser's burden to establish prima that he is entitled to judgment with respect to PFT's breach of fiduciary duty claims. Weiser has not carried that prima facie burden. Nevertheless, to ensure a "level playing field" with respect to the general issue of valuation of PFT Technology as an ongoing business, an advancement of legal fees should be awarded. Clearly, there has been no unanimous agreement as to reimbursement of legal fees as required by the operating agreement. However, by reimbursing their own legal expenses, the individual counterclaim defendants have impliedly consented to an expenditure of up \$100,000 each, for both the majority and minority members.

Accordingly, defendant Wieser's motion for leave to renew his motion for partial summary judgment on his counterclaim for contractual indemnity is granted. Upon renewal, defendant Wieser's motion for summary judgment is granted only to the extent of ordering plaintiff PFT Technology to reimburse Wieser \$100,000 for legal expenses. Plaintiff's cross motion for partial summary judgment dismissing defendant's counterclaim for advancement of legal expenses is denied.

So ordered.

Dated FEB 20 2014


J.S.C.

ENTERED

FEB 24 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE