

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SCOTT CASACCIO,

Plaintiff,

-against-

AMERICAN RECYCLING MANAGEMENT,
LLC, d/b/a AMERICAN RECYCLING, LLC
and CHRISTOPHER HEIN,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 8408/13

MOTION DATE: Jan. 28, 2014
Motion Sequence # 001

The following papers read on this motion:

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

Motion by defendants to dismiss the complaint based upon a release, and statute of limitations, and for failure to state a cause of action is **granted** to the extent of dismissing the complaint with leave to replead.

This is an action for breach of fiduciary duty and an accounting. In 2003, plaintiff Scott Casaccio, defendant Christopher Hein, and defendant Anthony Gentile purchased defendant American Recycling Management, LLC. Casaccio alleges that the parties orally agreed that Gentile was to hold a 26 % interest and that Hein and Casaccio were each to hold

a 37 % interest in the limited liability company. Casaccio alleges that Hein and Gentile managed the recycling business, while Casaccio was a “silent partner.”

During 2004, Casaccio and Hein began a new venture, where they solicited approximately \$1.4 million from investors in order to lend money to debtors whose homes were in foreclosure. Casaccio alleges that, after the housing market crashed in 2007, he and Hein, agreed to repay the investors in the real estate venture from their shares of the profits of the recycling company. Casaccio alleges that Hein failed to repay the real estate investors as promised and Hein has failed to account to Cassacio for the earnings of the recycling business since 2008. Casaccio issued a release in favor of Hein and a separate release in favor of American Recycling Management, LLC and its subsidiaries and affiliates on December 26, 2012. This action was commenced by filing of a summons with notice on July 12, 2013. The summons named Casaccio’s father, Anthony Casaccio, as the plaintiff. However, the complaint is brought in the name of plaintiff Scott Casaccio. In the complaint, Casaccio asserts claims for inspection of the books and records of the recycling company pursuant to Limited Liability Company Law § 1102, breach of fiduciary duty, conversion, and an accounting.

Defendants move to dismiss the complaint based upon the releases, statute of limitations, and for failure to state a cause of action.

CPLR 305[c] provides that the court at any time in its discretion, and upon such terms as it deems just, may allow any summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced. The court determines that there was no prejudice in the summons inadvertently being issued in the name of plaintiff’s father as opposed to the plaintiff. Accordingly, the court will deem the summons and amended summons to have been served in the name of plaintiff Scott Casaccio.

“[C]ourts are generally loath to intercede in squabbles between partners that result in piece-meal adjudications, preferring that partners either settle their own differences amicably or dissolve and finally conclude their affairs by a full accounting” (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560,564-65 [1988]). The same reluctance to intercede absent dissolution applies to disputes between members of a limited liability company. As noted, the complaint does not contain a cause of action for dissolution of American Recycling Management, LLC.

A release is binding as between partners and as between members of a limited liability company (*Kamerman v Curtis*, 285 NY 221 [1941]). Plaintiff has released defendants with

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respect to the affairs of American Recycling Management until December 26, 2012. However, in conjunction with a petition for dissolution, plaintiff may seek an accounting with respect to the affairs of American Recycling after that date.

Accordingly, defendants' motion to dismiss the complaint is **granted** with leave to replead. Plaintiff may serve a complaint asserting claims for dissolution of American Recycling Management, breach of fiduciary duty, and an accounting within 15 days of the date of this order. Plaintiff's claim for conversion is **dismissed** for failure to state a cause of action.

A Preliminary Conference has been scheduled for March 7, 2014 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated FEB 18 2014


J.S.C.

ENTERED

FEB 21 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE