Original

SHORT FORM ORDER **INDEX NO.: 62839-2013**

PUBLISH

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 12-23-2014
Motion Submit Date: 12-23-2014
Motion Sequence No.: 006 MOTD

LORIANN MARGIOTTA, individually, as personal representative of the ESTATE OF ANTHONY A. TANTILLO, and as a shareholder or member of, and derivatively on behalf of and for the benefit of, TOJO REALTY, INC., NISSAN 112 SAKES CORP, T TANTILLO REALTY, LLC., CARS UNLIMITED OF SUFFOLK, LLC., TRW PROPERTIES, LLC., RIVERHEAD AUTO MALL, LTD., 920 REALTY LLC., and NORTH SHORE CHEVROLET, LLC., and THOMAS TANTILLO, individually, as a shareholder or member of and derivatively on behalf of and for the benefit of, TOJO REALTY, INC., REALTY, INC., NISSAN 112 SALES CORP., T TANTILLO REALTY LLC., CARS UNLIMITED OF SUFFOLK, LLC., TRW PROPERTIES LLC., RIVERHEAD AUTO MALL LTD., 920 REALTY LLC., and NORTH SHORE CHEVROLET, LLC,

Plaintiffs,

- against -

RAYMOND TANTILLO, TOJO REALTY, INC., NISSAN 112, SALES CORP., T TANTILLO REALTY, LLC., CARS UNLIMITED OF SUFFOLK COUNTY, LLC., TRW PROPERTIES, LLC., RIVERHEAD AUTO MALL, LTD 920 REALTY LLC and NORTH SHORE CHEVROLET, LLC,

Defendants.

Plaintiff Lori Ann Margiotta, on behalf of herself and her brother and co-Plaintiff, Thomas Tantillo, seeks an order of the Court compelling Defendants North Shore Chevrolet LLC, T. Tantillo Realty LLC, 920 Realty LLC and Cars Unlimited of Suffolk, LLC (the "entities"), to make distributions to herself and Thomas Tantillo

pursuant to NY Limited Liability Company Law § 507. Defendants oppose the motion.

According to Plaintiff, Lori Ann Margiotta, from the time she and her co-Plaintiff brother, Thomas Tantillo, became members of the four entities and until the death of their father, they always received periodic distributions commensurate with their respective membership interests in the same (those beings 22% in North Shore Chevrolet, 7.8% in T Tantillo Realty, 25% in 920 Realty and 7.8 % each in Cars Unlimited. For the first time, in May 2013, the movants received only $24,000 each solely from North Share Chevrolet and no distributions from the other three entities. However, she asserts and provides documentary proof that all four entities filed tax returns for 2013, purporting to assess Thomas Tantillo and herself with $44,564 in combined ordinary business income; $30,981 in combined net rental income, and $71,580 in long term capital gains as reflected in the Plaintiffs' respective Schedule K-1 forms. At the same time, the moving Plaintiffs have asserted that managing member of these entities, Defendant Raymond Tantillo, has dramatically increased his salary paid from the same entities, again since the death of their father, Anthony Tantillo. Plaintiffs contend that such actions violate the fiduciary duty owed them by managing member Raymond Tantillo who has wrested control of these entities following the death of Anthony Tantillo and place the moving Plaintiffs in the unfair position of having to face tax consequences for income they have not received.

In opposition to the motion, counsel on behalf of Raymond Tantillo and the four LLC entities sets forth that Plaintiffs have not provided proof of any adverse tax consequences as they have not provided their 2013 personal tax returns. In addition,

she argues that there is no mandatory obligation to make distributions unless the managing member receives the same or unless that requirement is set forth in the parties' operating agreement. Counsel attaches copies of all the relevant operating agreements, none of which contain a mandatory distribution requirement. Specifically, these subject agreements provide that:

"The Cash Receipts of the Limited Liability Company shall be distributed to the Members from time to time at such times as the Managing Members shall determine".

"It is contemplated that distributions will be made if the Managing Members deems[sic] such distributions to be prudent and feasible".

In addition, the relevant operating agreements provide that:

"[a] Managing Members[sic] duty of care and the discharge of the Managing Members[sic] duties to the Limited Liability Company and the Members is limited to refraining from engaging in grossly negligent conduct, intentional misconduct or a knowing violation of the law".

In addition, counsel points to provisions in the subject operating agreements which limit the managing member's liability to engagement in acts constituting grossly negligent conduct, intentional misconduct or a knowing violation of the law. Therefore, since Raymond Tantillo has the power to decide when to make distributions but no duty to do so except as required by LLC Law § 507, which only comes into play when a member withdraws or the company dissolves, there assertedly exists no basis for the Plaintiffs' request for relief herein. Based upon what Defendants' counsel has termed the Plaintiff's frivolous conduct in making this

motion, without any support, she seeks sanctions pursuant to 22 NYCRR § 130-1.1.

In reply, the Plaintiffs argue that Defendants have not rebutted their claim that despite 2013 Schedule K-1 forms demonstrating allocation of profits of $147,000 to Margiotta and Thomas Tantillo, these Plaintiffs received far less than such sums. In addition, they assert that Raymond Tantillo submits no affidavit denying that he has increased his salary to compensate himself alone for the lack of distributions from the four entities. Plaintiffs' counsel argues that sanctions are inappropriate where, as in this case, there are sound grounds for their application to the Court.

Once a member of Limited Liability Company takes on the role of manager, his conduct is held to a relatively high standard, **LLC Law § 409 (a); Tzolis v Wolff**, 10 NY 3d 100, 104-105 (2008). Consistent with this principle , the Court holds that Raymond Tantillo is a fiduciary of both the entities and minority members, Margiotta and Thomas Tantillo. It is the subject operating agreement that sets forth the rights and duties of the members and managers among themselves, including limits on such potential liability. However, there can be nothing in the operating agreement that limits or an any way eliminates liability for acts that constitute bad faith. **LLC Law § 417 (a)(1); § 420; TIC Holdings LLC v HR Software Acquisitions Group Inc**, 301 AD 2d 414, 415 (1st Dep't 2003).

In this case, the Court's examination of the subject operating agreements as well as the relevant statutory and case law reveals the following. Raymond Tantillo has the obligation to act, as managing member of the subject entities, in good faith and with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances, **LLC Law § 409 (a)**. This duty includes a

requirement that he refrain from self dealing where such interferes with his fiduciary duties, **see, Nathanson v Nathanson**, 20 AD 3d 403 (2d Dep't 2003). Under the subject operating agreements, as the managing member, Raymond Tantillo is given broad authority to determine whether and when to authorize company distributions to a particular company's members. Thus, to the extent that he determined that, for whatever business reason, distributions would not be forthcoming for the years in question, this Court would not be in a position to question his determination. However, the Plaintiffs have raised an issue, which if properly demonstrated, would demonstrate the kind of self dealing which would, in the Court's view, interfere with his duty of good faith. They have set forth that in the one year after the death of Anthony Tantillo, when Raymond Tantillo took over the full operation of the four entities, he eliminated all distributions to LLC members and utilized the subject funds to substantially increase his personal income from these entities. In response to this claim although counsel denies the allegation, Raymond Tantillo failed to submit an affidavit.

It is the Court's belief that if Raymond Tantillo acted in the manner described by Plaintiffs, he was acting in violation of his obligations under the LLC Law and would, therefore, ultimately be required to make distributions to the Plaintiffs as requested. In this vein, the Court does not find the issue of whether Plaintiffs suffered negative tax consequences from the subject K-1's to be relevant to its determination. The Court notes that Raymond Tantillo had the opportunity to provide a response to the self dealing allegations by setting forth 1) whether he, in fact, received any distributions from the four entities for 2013; 2) whether he increased his income from those entities in 2013 from the prior two years; 3) if so, by what amount;

and 4) if he granted himself such increases, the reason therefor. He has not done so.

However, the relief requested at this juncture is in the form of a mandatory injunction. Such relief is rarely granted under New York law, where, as in the case at bar, the movant would be receiving the ultimate relief pendente lite and could ultimately be compensated through monetary damages, **Rosa Hair Stylists Inc v Jaber Food Corp**, 218 AD 2d 793 (2d Dep't 1995); **see, Matos v City of New York**, 21 AD 3d 936 (2d Dep't 2005); **Neos v Lacey**, 291 AD 2d 434 (2d Dep't 2002).

Accordingly, the motion to compel the Defendant entities to make distributions to Lori Ann Margiotta and Thomas Tantillo is denied at this juncture. However, the issue raised remains open as part of the ultimate holding in this action.

Based upon the Court's finding that Plaintiff Margiotta has raised a significant legal issue, the Court denies Defendants' application for sanctions.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 11, 2015
Riverhead, New York

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