

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PFT TECHNOLOGY LLC,

Plaintiff Counterclaim-Defendant,

-against-

ROBERT WIESER,

Defendant Counterclaim-Plaintiff,

-and-

PATRICK KEELAN, THOMAS SMITH and
FRANK CASTELLANO,

Counterclaim-Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 8679/12

MOTION DATE: March 30, 2015
Motion Sequence # 010

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Support..... X
- Affidavit in Opposition..... XX

Motion by plaintiff PFT Technology, LLC for leave to reargue its motion for a preliminary injunction restraining defendant Robert Weiser from engaging in competition with PFT Technology is **granted**. Upon reargument, the motion is **denied**.

Plaintiff PFT Technology, LLC is engaged in the business of detecting gas and fluid leaks in power networks for public utilities. Defendant Robert Weiser is a founder and 25 % member of PFT. PFT uses highly specialized instruments to detect the gas and fluid leads, which Wieser claims to have built and designed. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano are the other 25 % members of the company.

During 2011, a dispute arose between Weiser and the other members of PFT concerning his salary and equity distributions as compared to those of the other members. The majority members initially tried to remove Weiser for cause and then offered to buy out his interest. On July 10, 2012, PFT commenced this proceeding seeking dissolution of the company on the ground that it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. PFT also asserts various breach of fiduciary duty claims against Weiser, alleging that he used his company credit card for personal expenses, abandoned his responsibilities to PFT, and rendered certain of the company's instruments non-operational.

In his answer, Weiser asserts various counterclaims for breach of fiduciary duty against the individual counterclaim defendants. Weiser alleges that the individual counterclaim defendants breached PFT's operating agreement by paying themselves unauthorized salaries and failing to pay him his share of the income distributions. Weiser further alleges that the individual counterclaim defendants converted the "intellectual property" associated with machinery and equipment which Weiser fabricated for the company.

By order dated May 21, 2014, the court determined that the valuation date was July 9, 2012, the day prior to the commencement of the dissolution proceeding. By order dated November 6, 2014, plaintiff's motion for an order directing Weiser to return certain parts and equipment was granted to the extent of ordering a hearing as to whether plaintiff had a superior possessory right to the parts and equipment, to be held in conjunction with the valuation hearing. By order dated February 26, 2015, the court denied PFT's motion for a preliminary injunction restraining Weiser from engaging in competition with the company.

PFT moves for leave to reargue its motion for a preliminary injunction on the grounds that certain factual issues were supposedly misapprehended by the court.

First, PFT states that it is no longer seeking dissolution of the company. The court notes that plaintiff's third cause of action for dissolution has not been withdrawn. Moreover, courts 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 intervene without dissolution and a full accounting applies to disputes between members of a limited liability company. While the Limited Liability Law does not expressly

authorize a buyout in a dissolution proceeding, it is an appropriate equitable remedy in such a proceeding (*Mizrahi v Cohen*, 104 AD3d 917, 920 [2d Dept 2013]). In the present case, the court is reluctant to adjust the parties' breach of fiduciary duty claims, absent dissolution or buyout of Weiser's interest.

PFT's amended operating agreement provides that, "Until the time that the Company is terminated and dissolved pursuant to the terms of this agreement, the members shall not, directly or indirectly, engage in any business activity directly or indirectly in competition with the business of the company...." However, the members of a limited liability company owe each other a fiduciary duty of good faith (Limited Liability Company Law § 409[a]). Thus, the court must interpret the provision in the operating agreement as prohibiting a departing minority member from competing with the company, only so long as the majority members proceed in good faith with the dissolution of the company. PFT has not established a likelihood of success on the merits that it is proceeding in good faith with dissolution of the company.

Plaintiff's motion for leave to reargue its motion for a preliminary injunction restraining defendant Wieser from engaging in business in competition with PFT Technology is **granted**. Upon reargument, the motion is **denied**.

Plaintiff's motion to compel discovery is **denied**, with leave to subpoena the requested emails at the valuation/dissolution hearing previously ordered by this court. The case is certified for trial. Plaintiff shall serve a note of issue within 90 days of the date of this order.

So ordered.

Dated APR 13 2015


J.S.C.

ENTERED

APR 15 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE