

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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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: Jan 11, 2016  
Motion Sequence # 012, 013, 014

The following papers read on this motion:

Notice of Motion.....	XXX
Affirmation/Affidavit in Support.....	XXXXX
Affirmation/Affidavit in Opposition..	XXXXXX
Reply Affirmation/Affidavit.....	XXX
Memorandum of Law.....	XXXX
Reply Memorandum of Law.....	XX
Rule 19-a Statement.....	X
Reply to Rule 19-a Statement.....	X

Motion (seq. 12) by defendant Robert Wieser for partial summary judgment with respect to the claims in the complaint and defendant's counterclaims is **granted** and **denied** to the extent indicated below. Motion (seq. 13) by plaintiff PFT Technology, LLC for leave to renew its motion for the return of its parts and equipment is **granted** to the extent indicated below. Motion (seq. 14) by defendant Robert Wieser for the appointment of a receiver, an order of attachment, and for injunctive relief is **granted** only to the extent indicated below.

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 % managing member of PFT. PFT uses highly specialized instruments to detect the gas and fluid leaks, which Wieser claims to have built and designed. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano are the other 25 % managing members of the company. Section 6.05 of PFT's amended operating agreement provides that a managing member may be removed for cause by a super majority-interest of the members, defined as more than 75% of the total interest. "Cause" includes willful and material neglect of the "normal and reasonable duties" of the managing member (Deft's ex 7).

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. On October 24, 2011, Keelan sent Wieser a letter asserting that he was in possession of three gas chromatographs which belonged to the company. Keelan stated that the other members had determined that Wieser's failure to return the equipment was a willful and material neglect of his duties. Keelan stated that Wieser would be removed as a managing member if the equipment was not returned in operational condition within 30 days (Deft's ex 16).

On July 10, 2012, PFT commenced this action against Wieser. 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 the first cause of action, PFT seeks a declaratory judgment that Wieser breached his fiduciary duty to the company. In the second cause of action, PFT seeks damages against Wieser for breach of fiduciary duty. In the third cause of action, PFT seeks 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.

In his answer, Weiser asserts various counterclaims against the other members. In the first counterclaim for breach of the operating agreement, Weiser alleges that the other members paid themselves unauthorized salaries and failed to pay him his share of the income distributions. In the second counterclaim, Weiser alleges that the other members converted the “intellectual property” associated with machinery and equipment which Weiser fabricated for the company. In the third counterclaim, Weiser seeks an accounting. In the fourth counterclaim, Weiser seeks contractual indemnification pursuant to Section 7.02(b) of the operating agreement. That section provides that the company shall reimburse or advance the funds necessary for payment of reasonable expenses, including attorney fees, incurred in connection with any action or proceeding, upon receipt of a written undertaking to repay such amounts if a judgment adverse to the indemnified person establishes that his acts or omissions were in bad faith or involved willful misconduct. In the fifth counterclaim, Wieser seeks damages for breach of fiduciary duty.

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 Wieser from engaging in competition with the company. Article VIII of 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....” The court interpreted this provision as prohibiting a departing minority member from competing with PFT, only so long as the majority members were proceeding in good faith with the dissolution of the company (Limited Liability Company Law § 409[a]). The majority members of PFT had not established a likelihood of success on the merits that they were proceeding in good faith with dissolution of the company.

By notice of motion dated September 9, 2015, defendant Robert Wieser moves for partial summary judgment with respect to the claims in the complaint and defendant’s counterclaims. Wieser asserts that his use of the company credit card to pay personal expenses did not breach his fiduciary duty to the other members because company

practice was to allow Wieser and the other members to charge personal expenses to the company. Wieser asserts that he performed his duties until he received the notice of removal in October 2011. Wieser alleges that he repaired the instruments and returned them to PFT in operational condition. Wieser asserts that PFT did not suffer any damages by his withholding the instruments because the company had an ample number of instruments to perform its work. Finally, Wieser argues that PFT abandoned its claim for dissolution because, in support of reargument of a discovery motion, its counsel asserted that management was able to promote the purposes of the company (Deft's ex 3, ¶ 9-10).

In opposition, PFT asserts that Wieser wrongfully competed with PFT while still a member of the company. PFT asserts that Wieser formed a new company in Utah, PFT Tracer Instruments, Inc. PFT asserts that Wieser initially refused to return PFT's machines and continues to withhold the parts and equipment needed to ensure that PFT's equipment remains operational.

Limited Liability Company Law § 702 provides that the court may decree judicial dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or the operating agreement. Dissolution is a drastic remedy, which is not to be granted unless management is unwilling or unable to promote the company's stated purpose or continuing the company is financially unfeasible (*1545 Ocean Ave v Crown Royal Ventures*, 72 AD3d 121, 131 [2d Dept 2010]).

The court concludes that PFT and its majority members have not abandoned their claim for dissolution of the company. In view of the ongoing dispute among the parties, the majority members, Keelan, Smith, and Castellano are unable to carry on business with Wieser. Accordingly, defendant's motion for summary judgment dismissing plaintiff's third cause of action for dissolution is **denied**. Upon searching the record, summary judgment is **granted** to plaintiff with respect to its third cause of action. Plaintiff shall settle a formal order of dissolution of PFT Technology, LLC within 30 days of the electronic scanning of this order.

Defendant's motion for summary judgment with respect to his third counterclaim for an accounting is **granted**. The accounting shall be conducted in conjunction with the valuation hearing (Cf Business Corporation Law § 1118[b]).

With respect to plaintiff's first cause of action for a declaratory judgment, defendant's motion for summary judgment is **granted** to the extent of declaring that the

parties breached their fiduciary duties to each other by charging personal expenses to the company. An adjustment with respect to personal expenses will be made in conjunction with the valuation hearing. Defendant's motion for summary judgment with respect to plaintiff's first and second causes of action for breach of fiduciary duty is **denied** to the extent that plaintiff alleges Wieser abandoned his responsibilities by establishing a competing company before he left PFT and withheld needed parts and equipment from the company.

With respect to Weiser's counterclaim for breach of the operating agreement by paying unauthorized salaries and failing to pay Wieser his share of distributions, defendant's motion for partial summary judgment is **granted**. An adjustment as to salaries and distributions will be made in conjunction with the valuation hearing.

Defendant's motion for summary judgment with respect to his second counterclaim for conversion of intellectual property is **denied**. The court concludes there is a factual issue as to whether the design of the instruments is defendant's intellectual property.

Defendant's motion for partial summary judgment with respect to his fourth counterclaim for indemnification of legal fees is **denied**. By order dated February 20, 2014, the court awarded defendant \$100,000 as legal fees in connection with the valuation of defendant's interest in the company. The court's order with regard to legal fees was affirmed by the Appellate Division, (*PFT Technology v Wieser*, 129 AD2d 689 [2d Dept 2015]). Defendant has not established *prima facie* that the award of legal fees was inadequate for that purpose. As the court noted in its prior order, 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. Defendant has not established that plaintiff's breach of fiduciary duty claim is without merit. Defendant's motion for summary judgment with respect to his fifth counterclaim for breach of fiduciary duty is **denied**. However, plaintiff PFT Technology is restrained from any further distributions or payment of legal fees, pending further order of the court. Upon the valuation hearing, plaintiff shall account for all legal fees paid with company funds and the court shall make any necessary adjustment as appropriate (Business Corporation Law § 1118[b]).

By notice of motion dated October 26, 2015, plaintiff PFT moves for leave to renew its motion for the return of its parts and equipment. On May 21, 2014, the court denied plaintiff's motion for the return of these items, with leave to renew upon an affidavit identifying the parts and equipment in more specific detail and the value of each category of parts and equipment or the aggregate value of all of the items (See CPLR §

7102[c]). By order dated November 6, 2014, the court, upon reargument, granted the motion for return of the parts and equipment to the extent of ordering a hearing as to whether PFT had a superior possessory right to the items. The hearing with regard to the parts and equipment was to be held in conjunction with the valuation hearing. The court notes that, at the time of the November 6, 2014 order, dissolution of the company had not yet been ordered.

In support of its renewed motion for the return of the equipment, plaintiff alleges that in July 2008 it purchased three Varian 3800 gas chromatographs, serial numbers 105768, 105769, and 105770, for \$56,832.74. Plaintiff alleges that it also purchased valves and solenoids, which are required to be used with the chromatographs, from a company known as Valco. Plaintiff alleges that instruments shown on the website of Wieser's new company, PFT Tracer Instruments, resemble the chromatographs which PFT purchased in 2008. Accordingly, plaintiff's motion for leave to renew its motion for the return of the parts and equipment is **granted**. Upon renewal, the court determines that the parts and equipment are the property of PFT. However, rather than ordering the return of the property at this time, the court will determine the appropriate remedy, i.e. an order of possession or an offset for the value of the property, in conjunction with the valuation hearing (See CPLR § 7108).

By notice of motion dated December 11, 2015, defendant Wieser moves for the appointment of a receiver, an order of attachment, and for an order requiring the other managing members to file an amended 2014 partnership tax return. Section 4.03 of the operating agreement provides that all distributions of "cash and property" shall be made as agreed by a super majority of interest. Since a super majority exceeds 75 % of the interests, distributions of cash and property must be made by the unanimous consent of the members. Wieser alleges that the other managing members each received \$125,000 more than Wieser in 2011, \$446,000 more than Wieser in 2012, \$675,000 more than Wieser in 2013, and \$1,014,000 more than Wieser in 2014. Wieser alleges Castellano and Smith received \$446,000, and Keelan received \$557,000, in 2015, while Wieser did not receive any distribution. Wieser alleges that, between 2011 and 2015, the other managing members made substantial contributions to their 401(k) and defined benefit accounts without making corresponding contributions on behalf of Wieser.

Wieser requests the appointment of a temporary receiver and a preliminary injunction, restraining any further distributions, in order to ensure that PFT's profits are distributed in accordance with the operating agreement. Alternatively, Wieser requests an order of attachment against PFT's corporate bank accounts, as well as the personal accounts of the other managing members, in the total amount of \$8,120,000 to secure a

judgment which may be awarded to him in the action. Finally, Wieser requests an order directing PFT file an amended 2014 tax, apparently to reflect the return of partner distributions which Wieser anticipates being ordered (The 2014 return continues to list Wieser as a partner.)

In opposition, PFT argues that Wieser was not entitled to any distributions because he stopped working for the company. PFT further argues that Wieser has not established the danger of irreparable harm.

Business Corporation Law § 1113 provides that at any stage of an action or special proceeding seeking judicial dissolution of a corporation, the court may, in its discretion, make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment of a receiver, who may be a director, officer, or shareholder of the corporation. Receivership is similarly available in a proceeding seeking the judicial dissolution of a limited liability company (*Doyle v Icon, LLC*, 103 AD2d 440 [1<sup>st</sup> Dept 2013]).

A party moving for the appointment of a temporary receiver must submit clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interest (*Bd of Managers v Nob Hill Condominium*, 100 AD3d 673 [2d Dept 2012]). The appointment of a receiver is a drastic remedy; the court should exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established (*Matter of Armienti & Brooks*, 309 AD2d 659 [1<sup>st</sup> Dept 2003]). The use of corporate funds without authorization does not establish a risk of potential loss and may be addressed in the final accounting between the shareholders (*Matter of Harrison Realty Corp.*, 295 AD2d 220 [1<sup>st</sup> Dept 2002]).

The court concludes that defendant Wieser has not made a clear and convincing showing that a receiver should be appointed. The court notes that PFT showed ordinary business income of \$1,019,245 for 2014 (Deft's ex 4). Wieser's claims for breach of the operating agreement with respect to unequal distributions may be addressed upon the final accounting. Accordingly, defendant Wieser's motion for the appointment of a receiver is **denied**, with leave to renew should circumstances change.

CPLR § 6201 provides that an order of attachment may be granted in any action, except a matrimonial, where plaintiff would be entitled to a money judgment, and the defendant is a non-domiciliary residing without the state, or is domiciled in the state and cannot be personally served, or has transferred assets with the intent to defraud his

creditors or frustrate the enforcement of a judgment.

Attachment is a "harsh remedy" and is construed narrowly in favor of the party against whom the remedy is invoked (VisionChina Media Inc. v Shareholder Representative Services, 109 AD3d 49, 59 [1<sup>st</sup> Dept 2013]). Whether to grant an order of attachment rests within the discretion of the court (Id). The party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment (Id at 60). The risk should be "real," whether based upon defendant's financial position or past and present conduct (Id). The court may consider defendant's history of paying creditors or defendant's stated or indicated intent to dispose of assets (Id).

It appears that the managing members' intent in paying themselves substantial distributions was to avoid paying tax at the company level. Nevertheless, because PFT's practice appears to have been to pay out all its income in the form of partnership distributions, there is cause for concern that PFT will not be able to satisfy defendant's judgment. The court notes that the joint valuation expert valued PFT at \$4,070,000. Thus, defendant Wieser's 25 % interest appears to be valued at \$1,017,500. The disparity in distributions for 2011-2014 is \$2,260,000. Accordingly, defendant Wieser's application for an order of attachment is **granted**, unless plaintiff PFT Technology posts an undertaking with a reputable surety to secure defendant's judgment in this action in the amount of \$3.2 million. If the undertaking is not posted within 15 days of the electronic scanning of this order, defendant may settle an order of attachment in that amount.

Absent evidence of bad faith, fraud, self-dealing, or other misconduct, the courts must respect business judgments (Pugliese v Mondello, 57 AD3d 637 [2d Dept 2008]). Clearly, the other managing partners have been self-dealing with respect to their partnership distributions vis a vis defendant Wieser. Nevertheless, Wieser has not established that the 2014 partnership tax return was filed in bad faith. Accordingly, defendant Wieser's motion for injunctive relief as to the 2014 partnership tax return is **denied**.

So ordered.

Dated JAN 21 2016

*Stephen A. Bucaria*  
J.S.C.

**ENTERED**

JAN 25 2016  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE