SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JEFFREY DOPPELT and RICHARD MATIST,

Plaintiffs,

-against-

HOWARD SMITH, Individually and Doing Business as SMITH ENERGY 1986-A PARTNERSHIP and SMITH ENERGY 1986-A PARTNERSHIP,

Defendants.

----------X

INDEX NO. 650749/14

AFFIRMATION IN OPPOSITION

Andrew T. Cupit, an attorney admitted to practice in the State of New York, affirms the following under the penalties of perjury:

That I am a partner of the Law Offices of Andrew T. Cupit, the attorneys of record for the Plaintiffs, JEFFREY DOPPELT and RICHARD MATIST, and as such am thoroughly conversant with the facts and circumstances herein based upon the contents of the file maintained by this office.

I make this affirmation in opposition to defendants' motion to dismiss.

FACTS

Prior to investment in Smith Energy, defendant Howard Smith approached Plaintiffs about investing in the particular company. Touting his experience in such investments as well as the intended retention of the firm of Berenson, Berenson and Adler with Robert Berenson's personal experience in the industry, to act as collecting and disbursing agent, the said defendant induced reliance in making the particular investment. Due to the foregoing representations, Plaintiffs, Jeffrey Doppelt and Richard Matist individually felt secure in

making an investment of $25,000.00 in Smith Energy (*see* Offering Statement annexed to defendant's motion as Exhibit "A").

It is unknown if defendant Howard Smith made the same representations to other potential investors and what effect such representations had. However, it was these representations upon which these particular Plaintiffs relied and were induced to their detriment, in deciding to invest in Smith Energy (*see* attached affidavits). Despite these representations, the Berenson firm was never retained and defendant Howard Smith took over collecting and disbursing agent duties and responsibilities personally, deciding which bills were paid and to what, profits, if any, were applied (*see* affidavits).

During the life of the partnership and despite a record and unprecedented increase in the price per barrel of oil (*see* Exhibit "A"), no profits were ever disbursed (*see* affidavits).[1] In fact, the few K-1 statements received by the Plaintiffs oddly have the income equaling the expenses each year with never any profits to distribute (*see* K-1s and partnership returns, Exhibits "B" and "C" respectively, as well as Plaintiffs' K-1s for 2003-2009, attached to defendant's motion as Exhibits "C" and "D").

Further, defendant Howard Smith represented that he was using profits to reduce debt instead of paying it to the Plaintiffs (*see* Exhibit "D", August 1, 2000 letter). The same letter admits that despite record increases in the price of oil (which was trading around $14.00 per barrel at the time of investment and soared to over $90.00 per barrel during the term of the

---

[1] It should be noted that defendant's original projection of profitability as set forth in defendant's Exhibit "A" presumed profitability on an annual five (5%) percent increase in oil ultimately to $21.71 per barrel as opposed to the increase that eventually occurred but yet still resulting in no profits.

It should be further noted that at page 9 of the Partnership Summary, the general partners were not entitled to any interest in the partnership until Recoupment of the aggregate amount contributed by the limited partners to the capital of the partnership (defined as 125% of the investment).

partnership), defendant Howard Smith's management of the partnership was leading it to near insolvency "due to the pressure of our unpaid bills."

This begs the factual question to be answered by an accounting and discovery (which has not been had at this point in the litigation), if no profits were disbursed and the bills were unpaid, where were the profits going? Such statement flies in the face of the official K-1s which indicate that the bills were being paid (at least to the exact extent of income, *see* Exhibit "B"). Possibly, it was the protracted litigation between defendant Howard Smith and one of his partners, Jack Lindner, that drove the costs to exceed income (*see* Exhibit "E", regarding Supreme Court, New York County case under index number 119913/1993).

Defendant has the Burden to Demonstrate Entitlement to a Dismissal Under CPLR §3211(a)

It is well-settled that a movant seeking a dismissal under CPLR §3211(a) has the burden of demonstrating that there exists no cognizable cause of action set forth in the complaint. The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts.'" 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 509, (1979). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152, (2002). "Dismissal is only proper when it appears conclusively that plaintiff has no cause of action." HF Lexington KY LLC v. Wildcat Synergy Mgr. LLC, 35 Misc.3d 1210, ___ (Sup. Ct. New York Cnty. 2012). It is submitted that defendant has failed to carry his burden.

Plaintiffs have Legal Capacity Under the Partnership Act of the State of New York to Seek Dissolution

Defendants claim that Plaintiffs lack the legal capacity to bring a suit for dissolution under their Ninth, Tenth and Eleventh Causes of action set forth in their Complaint, due to the partnership agreement providing that such must be done by a majority in interest vote of the Limited Partners. However, this argument completely ignores the clear and plain language of Section 99(1)(c) of the Partnership law of the State of New York, which provides:

> (1) A limited partner shall have the same rights as a general partner to
> * * *
> (c) Have dissolution and winding up by decree of court.

It is submitted that defendants' restriction of the rights of the limited partners of Smith Energy violates the clear language of the foregoing statute and thus, is unenforceable. The statute sets forth no proscription on the amount or level of ownership interest that a limited partner must retain before being permitted by law to seek dissolution of the partnership.

Since defendants' first argument proceeds from an unenforceable provision in the partnership agreement which clearly violates the rights of the limited partners to seek judicial dissolution as set forth under the laws of the State of New York, defendants' first argument is without merit and its motion seeking to dismiss Plaintiff's Ninth, Tenth and Eleventh Causes of Action, should be denied. Regardless, Plaintiffs respectfully request that defendants be compelled to disclose the names and last known addresses of all partners and limited partners of Smith Energy, and that the Court refrain from taking any action on defendant's motion until sixty (60) days after such information has been exchanged to contact such other owners to determine their interests in joining in this action.

Plaintiffs' First Cause of Action is Direct and not Derivative

Plaintiff's First Cause of Action, alleging injury due to defendant's failure to retain the firm of Berenson, Berenson and Adler as collecting and disbursing agent sounds in breach of contract with elements of potential fraud. Taking the partnership agreement as a contract between Smith Energy, defendant Howard Smith and these Plaintiffs, any violation of this agreement is not a right of the company against defendant Howard Smith but an individual limited partner right against the one person violating the agreement. These Plaintiffs relied on this selection and nomination of a collecting and disbursing agent due to their unique experience with the Berenson firm and their familiarity with the relevant abilities and capabilities of the particular firm's principals (*see* annexed affidavits of Plaintiffs). Defendant Smith was well aware of the Plaintiffs' knowledge and experience with the Berenson firm and used such knowledge in inducing Plaintiffs to invest in the company.

It is unknown whether any of the other limited partners relied upon such representations and accordingly suffered any injury as a result of defendant Howard Smith's unilateral action to dispense with the chosen collecting and disbursing agent. Thus, this violation of the partnership agreement, which goes to the Plaintiffs' individual bases for investing in this company, is unique in nature to these Plaintiffs, and not derivative.

The Courts have consistently held that, "Where. . . the plaintiff sues in an individual capacity to recover damages resulting in harm, not to the corporation, but to individual shareholders, the suit is personal, not derivative. . . ." Glenn v. Hoteltron Sys., 74 N.Y.2d 386, 392 (1989). "Where a wrongdoer has breached an obligation to a shareholder which is independent of any duty owing to the corporation, the shareholder has an individual cause of

action." Fellner v. Morimoto, 52 A.D.3d 352, 353 (1st Dept. 2008). As set forth in defendant's motion to dismiss, the limited partnership interest is akin to a shareholder interest.

The breach of contract and fraud claims in this case are individual to these Plaintiffs based upon their particular knowledge and support of the Berenson firm as selected in the partnership agreement. "Whether a given action can be properly classified as a shareholder's derivative action is dependent upon whether the primary injury is to the corporation. Since plaintiff is asserting that he, individually, has been damaged as a result of defendant's breach of its fiduciary duty, there is no basis for requiring him to bring an action as a shareholder." Chalmers v. Eaton Corporation, 71 A.D.2d 721, 722 (3rd Dept. 1979).

The First Department went further to state that an action available to the corporation will not preclude a direct action of an aggrieved shareholder. "[A] shareholder may bring an individual suit if the defendant has violated an independent duty to the shareholder. . .whether or not the corporation may also bring an action." Roffler v. Speer, Leeds & Kellogg, 13 A.D.3d 308, 309 (1st Dept. 2004) *quoting* Ceribelli v. Elghanayan, 990 F.2d 62, 63 (2d Cir. 1993). "The motion court also properly held that allegations of mismanagement of corporations in which the trusts hold an interest were properly made by petitioners directly, and did not require a derivative action since petitioners did not seek to compel a declaration of dividends." Matter of Kaszirer v. Kaszirer, 298 A.D.2d 109, 110 (1st Dept. 2002), *citing* Matter of Brandt, 81 A.D.2d 268 (1st Dept. 1981). It is submitted that the breach of the partnership agreement is individual to the Plaintiffs and not a distinct right of the company, and thus, not derivative.

Plaintiffs' Second Cause of Action is Direct and not Derivative

Plaintiffs' Second Cause of Action alleges that the company, by defendant Howard Smith failed and/or refused to provide a yearly accounting and/or K-1s to the Plaintiffs and by extension, similarly situated individual investors.[2] It is submitted that the provision of a yearly accounting and/or K-1s by defendant Smith on behalf of the company is necessary for the individual limited partners to prepare their yearly personal income tax returns. It is further submitted that the failure to provide the yearly accounting is a violation of general accepted accounting principles.

The failure to provide the yearly accounting or K-1s would affect the limited partners similarly situated in being hampered in the preparation of their individual taxes. However, the injury and its extent are individual and direct to the limited partners and not some right of the company to be enforced against defendant Smith. Further, Section 99 of the Partnership Law affords the right to a limited partner to request and receive an accounting under the proper circumstances which reasonably include preparation of the individual limited partner's yearly income tax returns. Thus, the Second Cause of Action represents a direct claim and not derivative claim.

Plaintiffs' Third Cause of Action Would be Direct and not Derivative Following Dissolution of the Company

Plaintiffs' Third Cause of Action seeks damages against defendant Smith for gross mismanagement, which potentially rises to the level of a bad faith claim to be determined through exchange and review of discovery and completion of an accounting in this matter. The

[2] It is submitted that defendant Smith admitted that he stopped sending the K-1s.

claims would further be direct claims against defendant Smith following dissolution of the company.

As indicated and seemingly not disputed by defendant Smith in his pending motion, the company never generated any profits nor made any distributions to the limited partners regardless of the record increases in oil prices.[3] Thus, there is no discernable reason to keep this company as a going concern. Plaintiffs have sought dissolution of the company in their complaint, as per their rights under New York Partnership Law §99.

Technically, Smith Energy is already a defunct company. Further, defendant Smith, in telephone conversations with your affirmant on September 23, 2013 and October 4, 2013, indicated that he was intending to dissolve the company in early 2014.

Theoretically, once Smith Energy is dissolved, it ceases to exist and with it, the protections of the company entity for defendant Smith. Consequently, if the Court upholds the request to dissolve the company, then the company ceases to exist as a legal entity.

If the company no longer exists, there is no protection of the company and thus, no derivative action necessary to pursue what would become individual claims directly against defendant Smith. The requirement that an action be brought against defendant Smith in the name of the company after same is dissolved would constitute a logistical irregularity. Accordingly, depending upon the state of the company, Plaintiffs' claims in their Third Cause of Action are not derivative and should not be dismissed at this juncture.

---

[3] Yet, despite the lack of any profits or distributions, defendant Smith maintained his offices and the continued payments of over $6,200.00 per month (some months much more) to Michael Gault and George Gault over the life of the partnership (*see* Exhibit "F"). It should be noted that neither of the Gaults are listed in the Partnership Agreement (defendant's Exhibit "A") as supplier or vendors of any sort.

Plaintiffs' Fifth Cause of Action is Based upon Discovery

Plaintiffs' Fifth Cause of Action seeks recovery for accounting irregularities which potentially sounds in bad faith. Basically, Plaintiffs' fifth cause of action seeks an accounting and discovery.

Plaintiffs' complaint alleges no wrongdoing of the partnership independent of defendant Smith's actions. Thus, if the Court finds that the totality of the actions are derivative in nature, Plaintiffs can theoretically dismiss the company defendant and amend their complaint to include derivative action against defendant Smith on behalf of the company, adding Smith Energy as a plaintiff.

However, without discovery and an accounting by defendant Smith for the affairs of the company, the existence or non-existence of such a claim cannot be ascertained at this time. Thus, defendant's application is premature.

Plaintiffs' Sixth Cause of Action is Based upon Discovery

Plaintiffs' Sixth Cause of Action sounds in and is based upon Plaintiffs' request for an accounting. For the same reasons that Plaintiffs submit that their Fifth Cause of Action would not be derivative, Plaintiffs' Sixth Cause of Action is also not derivative. Defendant's motion to dismiss the particular cause of action is similarly premature.

Plaintiffs' Fourth, Seventh, Eighth and Twelfth Causes of Action are Direct

Plaintiffs submit that to the extent that their prior causes of action are direct and not derivative, or are based in a need for further discovery such that defendant's motion to dismiss is premature, Plaintiffs' Fourth, Seventh, Eighth and Twelfth Causes of Action are similarly not derivative or should subject to exchange of discovery and a review of an accounting.

More specifically, Plaintiffs' Twelfth Cause of Action which alleges fraud and parallels the First Cause of Action, is based upon an injury (fraudulent inducement and detrimental reliance) that is direct and distinct to these Plaintiffs based upon their personal experiences and preferences for the involvement of the Berenson firm and defendant Smith's own knowledge of Plaintiffs' preference (*see* attached affidavits). Such is not an action to enforce any right of the company vis-à-vis defendant Smith and thus, is not derivative.

Since defense counsel suggests that all the claims are derivative in nature, being the company of Smith Energy on behalf of the limited partners against defendant Smith, individually, then by representing both defendants herein counsel may be subject to an unwaivable conflict of interests with the existence of the potential derivative claims and should be compelled to select which defendant he is willing to represent.

Nevertheless, an accounting is still needed to determine the extent of the claims against the particular defendant. Since there has been no discovery, there is no ability to ascertain the extent of any malfeasance where the assets of the company can be accounted (e.g., equipment, oil well leases, etc.).

The Plain Language of the Partnership Law Does Not Require Joinder of All Limited Partners

Section 99 of the Partnership Law does not require joinder of all limited partners before requiring an accounting. In fact, the title of the particular section of law which permits a limited partner to seek an accounting of partnership affairs is plainly titled, "Rights of **a** limited partner." [emphasis added].

The clear and distinct language of Section 99 of New York's Partnership Law permits a limited partner to demand an accounting. The language of the particular section itself sets forth NO requirement in its clear and distinct terms that requires joinder of all the limited partners. Section 99 clearly provides that such right is individual to the partner and forcing joinder requires more than the legislature mandated in the exercise of such individual right.

An accounting is a method to ascertain and determine the amount of money damages which would be recoverable in a derivative or direct action. Abrams v. Rogers, 195 A.D.2d 349 (1st Dept. 1993). Since defendant argues that the totality of the complaint should be dismissed under the suggestion that the claims therein are derivative, defendant should not be permitted to restrict the Plaintiffs' rights under the statute to an accounting by which they would be able to determine the existence and extent of any potential derivative claims.

Additionally, requiring joinder of all limited partners is unrealistic and would potentially undermine the rights afforded a limited partner under the statute. Compelling joinder of all limited partners for the purpose of requesting an accounting as is the right under such statutory section is unreasonable where some limited partners may have moved and cannot be located, may have passed away or be simply unwilling or uninterested to participate in the request for any particular reason. Thus, under defendant's reasoning, the refusal to participate of only one single limited partner would deprive Plaintiffs of their legal rights under Section 99 of the Partnership Law and would undermine its clear language and general purpose. Accordingly, it is respectfully requested that this portion of defendant's motion be denied.

If however, the Court requires the participation of additional limited partners in the request for an accounting, Plaintiffs request additional time before a determination is made to contact the remaining limited partners and ascertain their interest in joining in this action.

Plaintiffs' First Cause of Action Sets Forth a Cognizable Claim

Defendant claims, at page 13 of his memorandum of law with respect to the retention of the Berenson firm, that "the Partnership Agreement *nowhere says what the Defendants say it says*." [emphasis in original, [sic] in that presumably the word "defendants" was substituted for "plaintiffs" in the quote]. However, this is patently contrary to the partnership agreement (defendant's Exhibit "A"), at page 10, which states:

> The General Partners, in consultation with Luck, have selected Berenson, Berenson & Adler to act as collecting and disbursing agent, which agent will, on a monthly basis, collect the revenues of the wells, pay certain expenses, remit to Luck the fees to which Luck is entitled under the Operating Agreement and remit the balance directly to the Limited Partners.

Defendant's mischaracterization of the plain language of his own partnership agreement is astonishing. Nevertheless, it was this particular selection of the Berenson firm that induced these Plaintiffs to invest in the company. Plaintiffs' particular familiarity and experience with the Berenson firm, as well as their peculiar knowledge of the abilities of its principals, coupled with defendant's knowledge of their preference for the Berenson firm's involvement in the affairs of the partnership (*see* Plaintiffs' affidavits), is sufficiently plead to set forth a cognizable cause of action. Accordingly, Plaintiffs respectfully request that defendant's motion be denied.

Plaintiffs' Second Cause of Action Sets Forth a Cognizable Claim

Plaintiffs' Second Cause of Action is based upon defendant Smith's failure and/or refusal to provide required K-1s. As set forth above, Plaintiffs' need for the K-1s is integral to the preparation of their personal yearly income tax returns. Additionally, a yearly K-1 is akin to a yearly accounting which permits the limited partners to review the actions and activities of the company over the preceding fiscal or calendar year and decide whether to withdraw their investment. However, without such information, Plaintiffs are left in the dark as to the status of their investment for at least the last four (4) years.

Defendant claims that there was "no reportable income, deductions or credits." However, defendant's motion is premature in that Plaintiffs should be permitted to obtain discovery and an accounting to confirm such statement rather than accept an unsworn argument of counsel in connection with the pending motion to dismiss.

Further, a review of the prior years' K-1s and financials reveal income and expenses that curiously matched each other such that nothing was left to distribute to the limited partners. The mere fact that income equals expenses does not alleviate the partnership or defendant Smith from reporting same to the relevant taxing agencies and providing the obligatory K-1 statements.

Nevertheless, without an accounting and exchange of discovery, Plaintiffs cannot ascertain the credibility of defendant Smith's unsworn statement that there was no reportable income, deductions or credits that obviated the need to report same. Thus, Plaintiffs respectfully request that this Honorable Court deny this part of defendant's motion as premature and permit this cause of action to proceed through discovery.

Plaintiffs' Third Cause of Action Sets Forth a Cognizable Claim

Defendant seeks to dismiss Plaintiffs' Third Cause of Action on the basis of the business judgment rule, which would presumably insulate defendant Smith for the decisions and actions he took on behalf of the company while acting as its general partner. However, as defendant seems to acknowledge, the business judgment rule is not without exception.

"Petitioners' other claims regarding appellant's alleged mismanagement of the trusts were properly upheld, there being issues of fact as to whether appellant's exercise of discretion in declining to make distributions was arbitrary, irrational or not made in good faith." Matter of Kaszirer v. Kaszirer, 298 A.D.2d 109, 110 (1st Dept. 2002), *citing* Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1995). "The business judgment rule is a presumption that courts will not second guess decisions made by the managers of a corporation unless they are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process." HF Lexington KY LLC v. Wildcat Synergy Mgr. LLC, 35 Misc.3d 1210, ___ (Sup. Ct. NY Cnty. 2012) [citations omitted]. Where the Appellate Division found issues of fact, this Court on the pending motion need only find that defendant has failed to carry his burden refuting that Plaintiffs have sufficiently set forth a cognizable claim.

Regardless of defendant's arguments in support of his motion to dismiss, the motion is premature as the exchange of discovery and the accounting requested by Plaintiffs will reveal the existence and the extent of such claims. Accordingly, Plaintiffs respectfully request that

this Honorable Court deny this part of defendant's motion as premature and permit this cause of action to proceed through discovery.

Plaintiffs' Twelfth Cause of Action Sets Forth a Cognizable Claim

Defendant seeks dismissal of Plaintiffs' Twelfth Cause of Action *inter alia* as being derivative, unable to demonstrate a related loss and questioning the extent of the misrepresentations alleged. It is submitted that Plaintiffs have addressed this part of defendant's motion regarding the misrepresentations and their peculiar effect on these Plaintiffs. For the sake of brevity, Plaintiffs respectfully refer the Court to their attached affidavits and also back to their prior arguments in opposition to defendant's motion to strike their First and Twelfth Causes of Action.

Additionally, Plaintiffs submit that this cause of action will be further revealed and defined in discovery. Thus, defendant's motion to dismiss Plaintiff's Twelfth Cause of action is premature. Accordingly, Plaintiffs respectfully request that this Honorable Court deny this part of defendant's motion as premature and permit this cause of action to proceed through discovery.

Defendant's Request for Bond is Inapplicable to the Particular Case and Excessive

Defendant further moves, pursuant to Partnership Law §115-b, to require Plaintiffs to post a bond for security in the amount of $10,000.00. However, the particular section by its very language refers to actions under section 115-a, derivative claims. Defendant's motion even acknowledges that the statute provides security "for expenses be furnished in a derivative case." (Defendant's motion at page 16).

Defendant's arguments in his motion are clear that he views all of Plaintiffs' claims as derivative in nature and seeks to dismiss nearly each and every cause of action as not being brought in a derivative capacity. To suggest that the direct claims should have been brought as a derivative action and seek to dismiss on such grounds while trying to apply a statute that provides for a bond to be posted only in connection with a derivative claim is a contradiction.

"The first and second counts were clearly nonderivative and hence were not subject to the security requirements of section 115-b and should not have been dismissed for failure to provide security." Lerman v. Tenney, 425 F.2d 236, 237 (2d Cir. 1970).

It should be noted that since October 2013, Plaintiffs have been requesting an accounting from defendant Smith. Further, defendant's argument that neither Plaintiff maintains a sufficient capital account with the company to avoid imposition of posting a bond is without merit. As indicated, the particular section by its very language applies only to derivative actions which the instant case is not, at least at this time. Additionally, defendant Smith's mismanagement of the company caused diminution in value of the Plaintiffs' interests therein. Defendant Smith should not be permitted to hide behind his malfeasance in ruining the value of Plaintiffs' capital accounts with the company in an attempt to compel the posting of a bond where Plaintiffs are seeking to enforce their rights under §99 of the Partnership Law.

The circumstances justifying an accounting are even more prevalent in the fact that Plaintiffs' complaint seeks dissolution of the company. Dissolution of a company normally needs to be followed with a full and final accounting of the company's financial affairs.

Further, the amount that defendant Smith seeks to act as security for the accounting is excessive. It is suggested that defendant Smith's expensive request is geared to dissuading

Plaintiffs from proceeding in that they may not be able to raise such an exorbitant amount to post as a bond thereby denying them their rights under §99 for an accounting and "their day in court."

It is submitted that the Court should decide what would be a reasonable amount for a bond, even if applicable under the circumstances. However, since none of Plaintiffs' claims were styled as derivative claims, defendant Smith's request for a bond is inapplicable.

WHEREFORE, it is respectfully requested that defendant's motion be denied in its entirety and that this Honorable Court grant Plaintiffs such other and further relief as to this Court seems just, proper and appropriate.

Dated: June 24, 2014

ANDREW T. CUPIT