

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: Feb. 2, 2015
Motion Sequence # 009

The following papers read on this motion:

Notice of Motion.....	X
Affidavit in Support.....	X
Affirmation in Opposition.....	XX
Reply Affidavit.....	X
Sur-Reply.....	X

Motion by plaintiff PFT Technology, LLC for a preliminary injunction restraining defendant Robert Weiser from engaging in allegedly wrongful competition with PFT Technology is **denied**.

This is a special proceeding for judicial dissolution of a limited liability company. 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 leaks, 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 Wieser 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 notice of motion dated January 13, 2015, plaintiff moves for a preliminary injunction restraining Wieser from engaging in allegedly wrongful competition with PFT Technology. 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...." In opposition, Wieser denies that he is competing with PFT Technology.

Limited Liability Company Law § 702 provides that on application by or for a member the Supreme Court may decree 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 operating agreement. To obtain dissolution, the petitioning member must establish, in the context of the operating agreement, that 1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or 2) continuing the entity is financially unfeasible (*In re 1545 Ocean Ave, LLC*, 72 AD3d 121, 131 [2d Dept 2010]). In view of the ongoing, acrimonious dispute between Wieser and the other members, and PFT's apparent need for Wieser's technological expertise, it appears that management is unable to reasonably promote the state purpose of PFT. Thus, absent a buyout of Wieser's 25 % interest, see *Mizrahi v Cohen*, 104 AD3d 917 [2d Dept 2013]), dissolution is likely to be granted.

In these circumstances, where the members are no longer able to carry on the business of PFT, and dissolution is imminent, the operating agreement does not prohibit the members from engaging in other business activity. Plaintiff's motion for a preliminary injunction restraining defendant Wieser from engaging in business in competition with PFT Technology is **denied**.

So ordered.

Dated **FEB 26** 2015


J.S.C.

ENTERED

MAR 05 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE