

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

EAST QUOGUE JET LLC, HARRY GORDON,
SHERWOOD GORDON, AND GLORIA GORDON,

Plaintiff(s),

INDEX No. 8179/04

-against-

MOTION DATE: 1/3/07

EAST QUOGUE MEMBERS LLC and
HARVEY WILES,

Defendant(s).

MOTION SEQ. No. 6-MD
7-MG

EAST QUOGUE MEMBERS LLC and
HARVEY WILES,

Third-Party Plaintiff(s),

-against-

BRUNO MAIDA, ANGELA MAIDA, and
LAWRENCE SCHLOSSER,

Third-Party Defendant(s).

The following papers read on this motion:

Plaintiffs Notice of Motion/Affirmation/Affidavit/Exhibits
Defendants Notice of Cross-Motion/Affirmation/Affidavit/Exhibits
Opposition and Reply
Reply
Memorandum of Law

East Quogue Jet LLC v. East Quogue Members, LLC, et al.

In this action plaintiffs EAST QUOGUE JET, HARRY SHERWOOD and GLORIA GORDON bring four causes of action against the defendants EAST QUOGUE MEMBERS and HARVEY WILES. In these applications, the plaintiffs seek summary judgment on their First and Fourth causes of action. Defendants oppose and seek summary judgment dismissing the Complaint in its entirety. They also seek an Order granting them summary judgment on the causes of action alleged in the third party Complaint against the third party defendants.

Defendant EAST QUOGUE MEMBERS, LLC is a limited liability company formed pursuant to Sec. 203 of New York's Limited Liability Company Law in May, 2002. It is apparently undisputed that this Limited Liability Company is governed by an Operating Agreement, dated May 7, 2002.

In the Verified Amended Complaint plaintiffs allege that they are all members of EAST QUOGUE MEMBERS, LLC with the following interests: (1) Harry Gordon-1.33%; (2) Sherwood and Gloria Gordon-16.67%; and (3) East Quogue Jet- 35.02%. They allege that the defendant HARVEY WILES is the managing agent for the defendant Company since August 2, 2002. The plaintiffs allege that WILES is the sole signatory to the Company's bank accounts and has control over the company's finances.

On August 2, 2002, defendant EAST QUOGUE MEMBERS purchased a resort motel in East Quogue, New York for the sum of \$1,400,000.00. It is apparently undisputed that on April 15, 2004 the company sold the premises for the sum of \$2,425,000.00, and received \$1,122,000.00 as net proceeds.

In the Complaint plaintiffs allege that the defendants have failed to meet their obligations under EAST QUOGUE MEMBERS, LLC's Operating Agreement and the Limited Liability Company Law. They claim that defendants WILES and EAST QUOGUE MEMBERS have failed to keep proper records or hold required meetings. The plaintiffs have demanded that the defendants provide them with the names and addresses of the Company's bank accounts wherein the proceeds of the property sale is being held. They also demanded the defendants provide a statement as to whether any monies from the proceeds of the sale have been paid or otherwise distributed, and if so, to whom, when and for what purposes. They also seek an accounting of the company's finances from inception.

It is undisputed that the defendants have refused to comply with this Demand.

In the First cause of action the plaintiffs seek a Declaratory judgment ordering the defendants to provide the information and records sought.

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In the Second cause of action plaintiffs seek damages from the individual defendant, HARVEY WILES. The plaintiffs allege that WILES wrongfully used monies of the Company to pay certain fees and monies to non parties in connection with the real property, and that he must reimburse the Company for such payments.

In the Third cause of action they allege that WILES, as managing member of EAST QUOGUE MEMBERS between August 2, 2002 to April 15, 2004, was responsible for the operation of the resort motel on the Company's property. They allege that WILES did not properly manage the facility which resulted in lost profits. The plaintiffs allege that WILES acted negligently and with nonfeasance and an accounting is necessary to learn the extent of the operations financial condition during his management.

Finally, in the Fourth cause of action plaintiff EAST QUOGUE JET seeks a ruling that it is a member of the defendant Company, EAST QUOGUE MEMBERS, LLC. Plaintiffs allege that EAST QUOGUE JET is a limited liability company formed in accordance with Section 203 of the LLC, and it owns 35.02% membership interest in the defendant Company. Defendants argue that as of May 21, 2004, EAST COAST JET is not a member of the Company. The plaintiffs seek a declaratory judgment resolving this dispute.

In this motion plaintiffs seek summary judgment on both the First and Fourth cause of action which seek declaratory judgments.

Defendants oppose and seek an Order granting them summary judgment dismissing the Complaint, contending that the stated causes of action cannot be brought by individuals in their individual capacity. The defendants argue that the plaintiffs have no standing to seek an accounting as this is not a derivative action. They further argue that since the State Limited Liability Corporation Law does not provide a statutory derivative action, the relief sought cannot be Granted.

The Court disagrees. The State's Limited Liability Company Law does not specifically allow derivative actions and is silent as to whether the request for an accounting must be made as part of a derivative action. Although counsel for the defendants argues that this precludes any action for an accounting, Courts have determined that a cause of action for an accounting is an equitable remedy where the plaintiff has alleged the essential elements of a fiduciary relationship and a charge of wrongdoing against the parties with such a duty. In this instance, the Court finds that the plaintiffs have asserted a valid cause of action for an accounting against the defendant member of the LLC, defendant WILES because they have alleged that

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he stands in a fiduciary capacity to them, the other members of the LLC, and they have alleged mismanagement. *Lio v. Zhong*, 10 Misc.3d 1068A (2006); *KSI Rockville, LLC. v. Eichengran*, 305 AD2d 681 (2nd Dept 2003). In addition Section 1102(a) of the LLC mandates that members are entitled to review the financial information of the Company, and the LLC's own Operating Agreement provides that they are entitled to that information. Thus, the Court finds that the plaintiffs have demonstrated that they have an equitable and contractual right to an accounting, without having to address whether derivative actions are authorized by Statute.

Thus, based on the proof presented, the Court grants that portion of the plaintiffs' motion seeking summary judgment on their First cause of action seeking an accounting, and denies the defendants' application for summary judgment striking that request.

As to the plaintiff's Fourth cause of action seeking a declaratory judgment stating that EAST QUOGUE JET is a member of the defendant EAST QUOGUE MEMBERS LLC, defendants oppose and seek a dismissal of this claim. Counsel for the defendants argues that this plaintiff has not made any capital contribution to the defendant EAST QUOGUE MEMBERS LLC and therefore cannot be a member. Counsel also argues that even if it were to be considered a member, it has no viable claim since plaintiff EAST QUOGUE JET was a "Faithless Servant."

Counsel argues that EAST QUOGUE JET, through its manager, third party defendant SCHLOSSER, received 49.17% of the profits of the defendant corporation for services rendered, without any contributions. Counsel for the defendants argues that this was not made known to the other members, and that it constitutes wrongdoing by not only SCHLOSSER, but also EAST QUOGUE JET. Thus, he argues that the plaintiff cannot have standing, because it cannot recover pursuant to the Faithless Servant Doctrine. *Feiger v. Iral Jewelry LTD.*, 41 NY2d 928 (1977).

Again the Court disagrees. Whether the plaintiff can actually recover damages is a determination to be made after a trial on the merits of defendants' counterclaims and third party claims. That determination does not preclude standing.

Based on the proof presented, the plaintiff's motion for summary judgment on its Fourth cause of action seeking a declaratory judgment stating that plaintiff EAST QUOGUE JET is a member of defendant EAST QUOGUE MEMBERS, is Granted. That portion of the defendants' motion seeking summary judgment dismissing that cause of action, is Denied.

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The defendants also seek summary judgment dismissing the Second and Third cause of action and on their third party complaint.

Plaintiffs oppose, arguing that wrongdoing by defendant WILES, and/or third party defendants, should only be determined after a trial, as there are material issues of fact in dispute. Counsel for plaintiff also opposes any judgment on the claims against LAWRENCE SCHLOSSER, arguing that he is not represented by an attorney, and apparently is currently hospitalized with dementia.

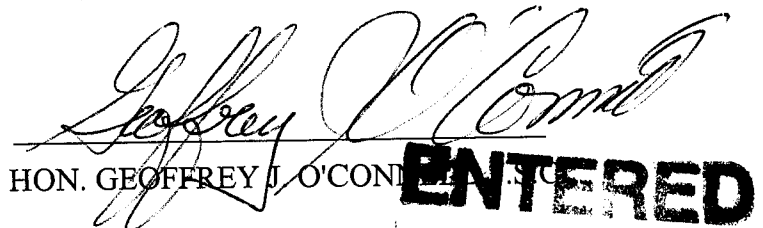
There is no evidence presented, that any Court of competent jurisdiction has adjudicated Mr. SCHLOSSER to be an incapacitated person, thus he is presumed to be able to act, and defend the claims against him, on his own behalf. Without proof of such an adjudication, the Court cannot find him not responsible, nor can it fail to address the third party plaintiff's claims indefinitely.

However, the Court agrees with the plaintiffs that the proof presented in this matter, largely deposition testimony of the members of the EAST QUOGUE MEMBERS LLC, conflicts in large part on the responsibilities of the various parties, and the agreements made which ultimately effected the finances of the EAST QUOGUE MEMBERS LLC. The Court must note that there are significant discrepancies regarding what agreements were entered and the binding effect on the LLC, as well as the noticeable lack of writings evidencing any of these agreements. The documents provided are non-conclusive on any of the issues raised.

Based on the proof presented, the Court cannot grant defendants summary judgment dismissing the Second and Third causes of action as alleged in the Complaint, nor can it grant the defendants/third party plaintiffs summary judgment on the third party complaint.

It is, SO ORDERED.

Dated: *Mar 14, 2007*


HON. GEOFFREY J. O'CONNOR, J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**