

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: June 18, 2013

Motion Sequence # 001, 002

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affidavit in Opposition.....	X
Affidavit/Affirmation in Support.....	XX
Reply Affidavit/Affirmation.....	XX
Memorandum of Law.....	XXX
Statement Rule 19-A.....	X
Response to Statement Rule 19-A.....	X

Motion by defendant Robert Wieser for partial summary judgment on his counterclaim for contractual indemnity is **denied**. Cross motion by plaintiff PFT Technology LLC for the admission pro hac vice of William D. Wallach, Esq. is **granted**. Cross motion by plaintiff to compel discovery is **denied** with leave to renew at the preliminary conference.

This is an action 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 Wieser is a member of the company.

A dispute arose between Wieser and the other members, and efforts to buy out Wieser's interest were not successful. 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.

This action was commenced on July 10, 2012. PFT seeks a declaratory judgment that Wieser breached his fiduciary obligation to the company. In its second cause of action, PFT seeks damages for Wieser's alleged breach of fiduciary duty. In its third cause of action, PFT seeks judicial dissolution of the company.

In his answer, Wieser denies that dissolution of PFT is necessary (Def's ex 3 at ¶ 59). Nevertheless, Wieser appears to request a "fair valuation" of his membership interest in the company. Additionally, Wieser asserts various counterclaims against PFT and counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano, who are members of the company. In his first counterclaim, Wieser alleges that counterclaim defendants breached PFT's operating agreement by paying themselves unauthorized salaries and failing to pay him his share of the income distributions. In his second counterclaim, Wieser alleges that counterclaim defendants converted the "intellectual property" associated with machinery and equipment which Wieser built or refurbished for the company. Wieser's third counterclaim is for an accounting of PFT's property.

Wieser's fourth counterclaim is for contractual indemnity. Section 7.02(b) of PFT's operating agreement provides that, "The company shall, to the fullest extent permitted by applicable law, indemnify and hold harmless each member...against any and all losses, claims, damages or liabilities...in connection with any matter arising from...this agreement or the company's business or affairs, except for such losses...as are determined by final judgment of a court of competent jurisdiction to have resulted from such indemnified

person's bad faith, gross negligence, or willful misconduct..."

Section 7.02(b) further provides that the company shall from time to time reimburse the indemnified person's reasonable expenses, including legal fees, incurred in connection with any action, upon receipt of a written undertaking to repay such amount if a judgment establishes that his acts or omissions were in bad faith or involved willful misconduct or gross negligence. Pursuant to this provision, Wieser seeks to recover his legal fees incurred in defending the present action. Wieser also asserts a fifth counterclaim for breach of fiduciary duty against the other members.

Wieser is moving for partial summary judgment with respect to his fourth counterclaim for contractual indemnification. Wieser argues that he is entitled to both indemnity and advancement of legal expenses because, according to Wieser, PFT's breach of fiduciary duty claims are without merit.

Limited Liability Company Law § 420 provides that subject to restrictions in the operating agreement, a limited liability company may indemnify, and advance expenses to, any member "against any and all claims and demands whatsoever;" provided no indemnification may be made if a judgment or other final adjudication adverse to such member establishes that a) his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or b) that he personally gained a financial profit or other advantage to which he was not legally entitled.

By easing the burden of litigation-related expenses, indemnification provisions help companies to attract officers with various skills and other forms of expertise (*Ficus Investments v Private Capital Mgmt.*, 61 AD3d 1, 9 [1st Dept 2009]). Depending upon the nature of the business, investigations and legal proceedings, requiring separate counsel for the corporate official, may be inevitable (Id). In other industries, it is less likely that a corporate official named in an action will require separate counsel.

In either event, the right to advancement of legal expenses is distinct from the right to indemnity (Id). Advancement provides corporate officials with immediate interim relief from the financial burden of ongoing out-of-pocket expenses (Id). Thus, the right to advancement may be determined in "summary proceedings," that is upon the papers and in advance of trial. On the other hand, the right to indemnity, or recoupment, depends upon lack of bad faith, gross negligence, or willful misconduct.

Because the resolution of such issues turns upon all the circumstances in the case, the right to indemnity is ordinarily not amenable to adjudication in summary fashion.

Advancement of legal expenses is available in an action by a corporation against an officer for breach of fiduciary duty (*Ficus Investments v Private Capital Mgmt.*, *supra*). However, defendant seeks advancement of expenses in a dissolution proceeding, where he is the sole dissenting member. In these circumstances, it is difficult to determine whether defendant's current legal expenses are reasonable. Moreover, defendant has not established that investigations or legal proceedings are a frequent occurrence in the instrumentation or detection services industry. Thus, when the parties negotiated the PFT operating agreement, they may not have regarded Wieser's need for separate counsel as inevitable. Nor has defendant established prima facie that his actions towards PFT were in good faith. Accordingly, defendant Wieser's motion for summary judgment on his counterclaim for contractual indemnity is **denied**.

Plaintiff's cross motion for the admission pro hac vice of William D. Wallach, Esq. is **granted**. Plaintiff's cross motion to compel discovery is **denied** with leave to renew at the preliminary conference.

A Preliminary Conference has been scheduled for August 23, 2013 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated

JUL 01 2013


J.S.C.

ENTERED

JUL 03 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE