

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: Oct 10, 2014
Motion Sequence # 007, 008

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Support..... X
Affirmation in Opposition..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

Motion by plaintiff PFT Technology, LLC for reconsideration of the court's order, granting in part defendant's motion to compel discovery and denying with leave to renew plaintiff's motion for the return of parts and equipment, is **granted** and **denied** to the extent indicated below. Cross-motion by defendant Robert Weiser for reconsideration

of the court's order with respect to the setting of the valuation date 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. Wieser also claims to have designed and built the highly specialized instruments used by PFT. 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 granted defendant Weiser's motion to compel to the extent that plaintiff was to produce all communications concerning Weiser that bear on the valuation of the company. Plaintiff was also to produce financial records of PFT, including customer contracts and agreements, subsequent to the date the proceeding was commenced, up to and including July 9, 2015. Finally, plaintiff was to produce data showing attorney fees incurred in the present action, up to and including July 9, 2015.

In the order, the court granted plaintiff's cross-motion to set a valuation date to the extent of declaring that the valuation date was July 9, 2012, the day prior to the commencement of the dissolution proceeding. Plaintiff's cross-motion seeking the return of spare parts and supporting equipment, was denied 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 material. Plaintiff's cross-motion for an order referring the matter to mediation was denied, with leave to renew upon the conclusion of discovery.

Plaintiff moves for leave to reargue defendant's motion to compel to the extent that plaintiff was required to produce financial records subsequent to the valuation date. Plaintiff moves for leave to reargue its motion for the return of the spare parts and supporting equipment to the extent that it was required to submit an affidavit identifying the parts and equipment in specific detail.

In directing plaintiff to produce financial records subsequent to the valuation date, the court noted that fair value determinations should take into account the subsequent economic impact on value of the event giving rise to the buyout or dissolution of the company (*Friedman v Beway Realty Corp.*, 87 NY2d 161, 167 [1995]). In the present case, the event giving rise to buyout or dissolution is Weiser's departure from PFT. In view of Weiser's claim to have developed the specialized instruments used by PFT, his knowledge and expertise are arguably critical to the profitability of to company. On the other hand, to the extent that Weiser's knowledge and expertise are now shared by the other managing members, profitability may not be effected. Nevertheless, defendant Weiser is clearly entitled to financial data subsequent to his departure, as bearing on the investment value of his interest in the company. Plaintiff's motion for leave to reargue defendant's motion to compel production of documents is **denied**.

CPLR § 7102[c] provides an application for an order of seizure of a chattel shall be supported by an affidavit which shall clearly identify the chattel to be seized. Although PFT prescinds from requesting the provisional remedy of an order of seizure of the parts and equipment by the sheriff, it nonetheless requests a summary order for the return of the chattels.

Pursuant to Article 71 of the CPLR, an action may be brought to try the right to possession of a chattel. An action under Article 71 is in the nature of a common law replevin action. The burden of proof is on the plaintiff to show a superior possessory right to possession of the chattel (*Bentley v Textile Banking Co.*, 26 AD2d 112 [1st Dept 1966]).

Although Weiser admitted taking the parts and the equipment, he has not conceded that PFT or the individual counterclaim defendants have a superior possessory right to possession of the material. Since Weiser was clearly a member of PFT, plaintiff has not

established prima facie that it had a superior possessory right to the spare parts and equipment. Accordingly, plaintiff's motion for leave to reargue their motion for an order directing the return of the parts and equipment is **granted**. Upon reargument, the motion is **granted** only to the extent that a hearing as to whether plaintiff had a superior possessory right to the parts and equipment shall be held in conjunction with the valuation hearing.

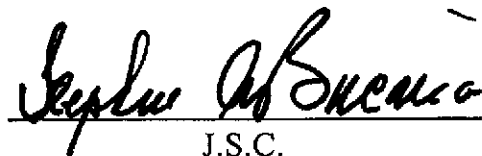
Defendant Weiser cross-moves for leave to reargue plaintiff's motion with respect to setting the valuation date. Defendant argues that the motion was in effect one for summary judgment and the requisite factual showing was not made. Alternatively, defendant argues that Business Corporation Law § 1118(b) has no application to the valuation date for dissolution or buyout of a limited liability company.

In determining the rights of the members of a limited liability company, as between themselves, the court will often analogize to the shareholders of a corporation (See *Tzolis v Wolff*, 10 NY3d 100 [2008]). Thus, in determining the date for the valuation of defendant Weiser's interest, the court appropriately turned to BCL § 1118(b).

As noted, the profitability of the company subsequent to the commencement of the dissolution proceeding is relevant to determining the investment value component of Weiser's interest as of the valuation date. Thus, contrary to defendant Weiser's argument, setting the valuation date one day prior to the commencement of the proceeding will not result in a windfall to the other members. Moreover, excessive members' salaries and other inequitable distributions may be taken into consideration in determining the net asset component of value. Thus, defendant Weiser has not established that he will be prejudiced by setting the valuation date one day prior to the commencement date. The other arguments raised by the parties have been considered and found without merit. Defendant Weiser's motion for leave to reargue plaintiff's motion to set a valuation date is **denied**.

So ordered.

Dated NOV 06 2014


J.S.C.

ENTERED

NOV 12 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE