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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

APPLEHEAD PICTURES LLC, and
RONALD O. PERELMAN, derivatively and on behalf of APPLEHEAD PICTURES LLC,
Plaintiffs,

- v -

RONALD O. PERELMAN, ELLEN BARKIN, GEORGE BARKIN, CAROLINE A. KAPLAN, SLOSS LAW OFFICE LLP, JOHN SLOSS, APPLEHEAD PICTURES II, LLC and JOHN/JANE DOES,
Defendants.

Index No.: 602606/07
Motion Date: 07/21/09
Motion Seq. No.: 03
Motion Cal. No.: 5

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2 – 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

Plaintiff Applehead Pictures LLC (Applehead or the "company") moves, pursuant to CPLR 3212, for an order granting partial summary judgment on Applehead's breach of contract claim against defendant Ronald O. Perelman (defendant) in the amount of $3,433,752.00, together with 9% statutory interest, running from the intermediary date of January 1, 2007 (Motion Sequence No. 3). Defendant Ronald O. Perelman also moves, pursuant to CPLR 3212,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

for an order granting summary judgment in his favor and dismissing Applehead's claim (Motion Seq. No 4). Defendant also moves for an order, pursuant to 22 NYCRR 216.1, directing that this motion and all opposing papers be filed under seal for good cause shown (Cross-Motion to Seq. No 3 & Motion Seq. No 4).[1]

Applehead, a movie development company, is a Delaware limited liability company which was formed in November 2005 by defendant and his then-wife, Ellen Barkin (Ms. Barkin) and George Barkin (Mr. Barkin), who is Ms. Barkin's brother. As per the operating agreement, signed on November 29, 2005, defendant was to provide $1.675 million in funding for the year 2006, and $1.675 million in funding for the year 2007. In addition, defendant was to provide $468,160.00 funding for the company's cash operating expenses for 2005. Defendant also had the option of providing funding for each subsequent two-year period. Defendant contributed the $468,160.00 funding as per the operating agreement, and also provided Applehead with an office space. Ms. and Mr. Barkin were not required to provide any funding for the company. As per the operating agreement, defendant was entitled to 25% net profits and both Ms. and Mr.

---

[1] By Order dated February 11, 2009 (Gische, J.), in the action Perelman v Barkin, Index No. 603897/2007, that action was consolidated into this action as reflected in the caption. For clarity, the court in this decision shall refer to Applehead Pictures as the plaintiff and Ronald O. Perelman as the defendant in accordance with the original caption. The current motions only relate to the original breach of contract action.

Barkin were entitled to 37.5% net profits. Defendant was to be allocated 100% of the net losses.

In early 2006, defendant and Ms. Barkin decided that they would filing for a divorce. Defendant and Ms. Barkin signed a separation agreement on February 9, 2006. The only reference in the separation agreement to Applehead is the requirement that Applehead must vacate its offices from defendant's property. On February 9, 2006, defendant and Ms. and Mr. Barkin signed a new amended operating agreement for Applehead. In this amended operating agreement, defendant committed to provide eight capital contributions to Applehead on eight specific dates in 2006 and 2007. In 2006, he was to provide four capital contributions of $418,750.00 each, and in 2007, the four contributions were each $439,688.00, totaling $3,433,752.00. In this operating agreement, the net profits were changed so that defendant was allocated 2% net profits and both Ms. and Mr. Barkin were allocated 49% net profits. Defendant was still allocated 100% net losses. However, after the net losses equaled the defendant's capital contribution, the losses would be allocated to the members in proportion to their share of the net profits. In the amended operating agreement, defendant was also removed from having any "control, supervision or participation in the company."

Defendant's first contribution as per the operating agreement was due on March 15, 2006. It is agreed defendant did not make this contribution, nor did he make any of the other seven structured payments.

Plaintiff sues for breach of contract. Defendant alleges that, since Ms. Barkin breached the marital separation agreement, he is discharged from any obligation to fund Applehead. According to defendant, the funding obligations were entered into "as part of a complex and heavily negotiated agreement of separation between Ms. Barkin and Mr. Perelman." In pertinent part, defendant alleges that Ms. Barkin breached the separation agreement by breaching the confidentiality agreement as set forth in the prenuptial agreement when she allegedly disclosed information to various media sources regarding the couples' marriage and divorce, and defendant's personal and business affairs. According to defendant, Ms. Barkin also breached the terms of the separation agreement by not taking any steps to obtain a "get" or a religious divorce.

Defendant also alleges that, as a result of Ms. and Mr. Barkin's breach of fiduciary duties to Applehead, he is not obligated to make his capital contributions. Defendant states that the Barkins "failed in their duties to oversee the business affairs of Applehead," and as a result, Applehead failed to make a profit. Defendant further alleges that the Barkins

misappropriated Applehead assets and formed an entity entitled Applehead Pictures II, LLC, which purportedly utilized Applehead resources, yet directly competed with Applehead. It is also alleged that Ms. Barkin formed a company called TBD Productions to compete with Applehead. Finally, defendant argues that Applehead is not entitled to summary judgment because Applehead is unable to establish damages.

Applehead argues that the operating agreement, which was undisputedly signed by all parties, obligates defendant to make payments to Applehead for 2006 and 2007. Applehead states that the separation agreement is a completely independent agreement from the operating agreement, and has no bearing on the operating agreement. It notes that the two contracts make no reference to each other and serve different purposes. Applehead argues that even if the Barkins did breach their fiduciary duties those claims are properly the subject of the defendant's separate derivative lawsuit and that it is not precluded from collecting on defendant's capital contributions even if the defendant prevails on the derivative claims. Finally, Applehead states that its damages are easily calculable as the contributions defendant was supposed to provide plus the contractual interest.

---

[2] The derivative claims are not the subject of the current motions and will not be addressed herein. These now-consolidated derivative claims continue to be litigated.

The parties do not dispute that Delaware law applies to the interpretation of the contract. In Delaware, "to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." VLIW Technology, LLC v. Hewlett-Packard Co., 840 A2d 606, 612 (Del Super Ct 2003). Likewise, in New York, the elements of a breach of contract are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. Morris v 702 East Fifth Street HDFC, 46 AD3d 478, 479 (1st Dept 2007), citing Furia v Furia, 116 AD2d 694 (2d Dept 1986).

Applehead argues that defendant's capital contributions are enforceable contributions and that defendant's three defenses, which include Ms. Barkin's breach of separation agreement, the Barkins' breach of the operating agreement, and the inability to set damages are insufficient as a matter of law to defeat Applehead's entitlement to summary judgment. The court shall examine these defenses in turn.

In his motion for summary judgment, and in response to Applehead's motion, defendant maintains that the operating agreement was amended as part of the separation agreement. According to defendant, although the operating agreement and

separation agreement were executed as separate documents, they were originally drafted as the same document. Since, according to defendant, Ms. Barkin committed breaches of the separation agreement by not obtaining a religious divorce, and by publicly disclosing information about their marriage, defendant argues her conduct relieves defendant of any funding obligations to Applehead.

The court disagrees with defendant's argument. "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." Eagle Industries, Inc. v DeVilbiss Health Care, Inc., 702 A2d 1228, 1232 (Del 1997). As the Court further elucidated

> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. . . Ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Rhone-Poulenc Basic Chemicals Co. v American Motorists Ins. Co., 616 A2d 1192, 1196 (Del 1992).

The operating agreement by its very terms stands on its own and is enforceable separately from, and without reference to, the separation agreement. The two contracts are governed by the laws of two different states, serve different purposes, and do not have identical parties as neither Mr. Barkin nor Applehead are parties in the separation agreement. Accordingly, applying both New York and Delaware law would still result in the amended operating agreement and the separation agreement being interpreted as two distinct and unrelated agreements, imposing separate obligations.

Even were the court to accept defendant's argument that Ms. and Mr. Barkin breached their fiduciary duties to Applehead, such breaches are the subject of a separate derivative claims and are no defense to the enforcement of the operating agreement as defendant can point to no obligation under that agreement that Ms. and Mr. Barkin breached. The amended operating agreement merely states that the business and the affairs of Applehead are to be managed under the direction of the Barkins. It is well settled that

> A party may terminate or rescind a contract because of substantial nonperformance or breach by the other party. Not all breaches will authorize the other party to abandon of refuse further performance. To justify termination it is necessary that the failure of a performance on the part of the other go to the substance of the contract.

Segovia v Equities First Holdings, LLC, 2008 WL 2251218, at *23 (Del Super Ct 2008). The record provided to the court does not indicate that the Barkins breached any material provision of the operating agreement. Accordingly, as no issue of fact has been raised to defeat Applehead's motion for summary judgment, the defendant may not renege on his binding portion of the operating agreement.

When defendant became a member of Applehead, he signed the amended operating agreement, in which he agreed to form the company as a Delaware limited liability company in accordance with the Delaware Limited Liability Company Act. The operating agreement sets forth defendant's required capital contributions. There is also a provision in the same agreement which states that the company may not be dissolved unless the members vote to dissolve the company or there is an entry of a decree of judicial dissolution under Section 18-802 of the Delaware Limited Liability Company Act. No other event, even death or incapacity of a member, will cause the company to be dissolved. Likewise, according to Section 18-502 (a) of the Act, "[e]xcept as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability or any other reason." Section 18-502 (b) continues, "[u]nless otherwise

provided in a limited liability company agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all the members." 6 Del. C. § 18-502 (2009).

Companies form an LLC in Delaware since it is "an attractive form of business entity because it combines corporate-type limited liability with partnership-type flexibility and tax advantages." Elf Atochem North America, Inc. v Jaffari, 727 A2d 286, 290 (Del 1999). Furthermore, Section 18-1101 (b) of the Delaware Limited Liability Act provides that, "it is the policy of [the Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements [internal quotation marks omitted]." Id. at 290, n 20. The Court observed that, similar to the Delaware Limited Partnership Act:

> The Act's basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement. Truly, the partnership agreement is the cornerstone of a Delaware limited partnership, and effectively constitutes the entire agreement among the partners with respect to the admission of partners to, and the creation, operation and termination of, the limited partnership. Once partners exercise their contractual freedom in their partnership agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms.

Id. at 291.

Accordingly, as defendant agreed to the benefits of forming Applehead according to the Delaware Limited Liability Company Act, he must also comply with these same statutes and the contractual obligations created thereunder.

In its complaint, Applehead seeks damages of $3,433,752.00, the total amount of contributions that defendant promised to make as part of the operating agreement, plus the statutory interest rate of 9% for the years that Applehead was deprived of this investment.

Defendant counters that Applehead does not specify the nature of damages which it seeks, and that if Applehead were to assert a claim for lost profits, that claim would be speculative. Defendant also argues that, if Applehead were to receive damages, those would be mitigated due to Ms. Barkin's voluntary funding to Applehead, which she was not required to provide. He argues that New York recognizes the "Drinkwater exception" from Drinkwater v Dinsmore (80 NY 390 [1880]) to the collateral source rule, and argues that his damages should be mitigated due to payment provided gratuitously to Applehead from Ms. Barkin.

However, as Applehead argues, the operating agreement is subject to Delaware law, so the "Drinkwater exception," which is not applicable in Delaware, and all of the New York cases cited by defendant are inapplicable or only apply in the insurance context. Defendant's further argument that the plaintiff's claim

for damages is akin to an equitable claim and therefore is subject to the equitable defense of unclean hands fails because the claim is wholly based on the terms of the contract with no equitable remedy being sought. Defendant admits in the answer not fulfilling his monetary obligations under the contract and therefore no further inquiry is required.

Therefore, the court shall grant Applehead's motion for summary judgment.

Defendant moves that this motion, as well as any accompanying papers, be placed under seal for good cause shown. He alleges that the court papers include details of financial and personal information regarding himself, Ms. Barkin and Applehead, and that the privacy interests of Ms. Barkin and himself should outweigh the public interest. Applehead takes no position on defendant's request.

Uniform Rules for Trial Courts (22 NYCRR) 216.1 (a) provides

> Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

The courts have held that confidentiality is "clearly the exception, not the rule, and the court is always required to make an independent determination of good cause." Matter of Hofmann,

284 AD2d 92, 93-94 (1st Dept 2001). In general, the Court "has been reluctant to allow the sealing of court records, even where both sides to the litigation have asked for such sealing." Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V., 28 AD3d 322, 324 (1st Dept 2006) (citations omitted). The Gryphon Court also noted "the broad constitutional presumption . . . that the public is entitled to access to court proceedings." Id. Even the case cited for support by defendant, Tong v S.A.C. Capital Management, LLC (16 Misc 3d 401 [Sup Ct, NY County 2007]), was affirmed as modified by the Appellate Division, which ultimately vacated the sealing order, stating that "[t]he factors relied upon by the court in sealing the record do not outweigh the public's right of access thereto." Tong v S.A.C. Capital Management, LLC, 52 AD3d 386, 387 (1st Dept 2008) (citations omitted). Accordingly, the defendant has not shown good cause why his interests outweigh the public's right to access court records, and his request to seal the court record shall be denied.

Accordingly, it is hereby

ORDERED that Applehead's motion for summary judgment is GRANTED and the Clerk of the Court is directed to enter judgment in favor of plaintiff Applehead Pictures LLC and against defendant Ronald O. Perelman in the amount of $3,433,752.00, together with interest as prayed for allowable by law at the rate of 9% per annum from the date of January 1, 2007, until the date

of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the defendant's motion for summary judgment (Motion Seq. 4) is DENIED; and it is further

ORDERED that all remaining claims in this action are severed and shall continue to be litigated under this Index Number notwithstanding the entry of judgment on plaintiff's cause of action; and it is further

ORDERED that the defendant's cross motion to seal under Uniform Rules for Trial Courts (22 NYCRR) 216.1 (a) is DENIED; and it is further

ORDERED that the parties are to attend a compliance conference on December 15, 2009, at 11:00 A.M, in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: November 13, 2009 ENTER:

J.S.C.
DEBRA A. JAMES