

**BCI Fin. Holdings LLC v RT Two LLC**

2024 NY Slip Op 31582(U)

May 2, 2024

Supreme Court, New York County

Docket Number: Index No. 653394/2020

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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BCI FINANCIAL HOLDINGS LLC	INDEX NO.	<u>653394/2020</u>
Plaintiff,	MOTION DATE	<u>11/24/2023</u>
- v -	MOTION SEQ. NO.	<u>005</u>
RT TWO LLC,	<b>DECISION + ORDER ON MOTION</b>	
Defendant.		

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161  
 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff BCI Financial Holdings LLC (plaintiff or BCIFH) brings this action against defendant RT Two LLC (defendant or RT2) asserting claims for declaratory judgment, breach of contract, and indemnification. Now before the court is plaintiff's motion for partial summary, pursuant to CPLR 3212, for an order (1) granting judgment in plaintiff's favor on its first cause of action for declaratory judgment, (2) granting judgment in plaintiff's favor as to liability on its third cause of action, and (3) striking defendant's first, second, fourth, and fifth affirmative defenses (NYSCEF #s 124-125). Defendant opposes the motion. For the following reasons, plaintiff's motion is granted.

**Background**

The following facts are drawn from the parties' Rule 19-a statements and counterstatements, and their accompanying exhibits and affidavits. They are undisputed unless otherwise noted.

BCIFH is a holding company whose business includes holding an ownership interest in and managing Banker's Capital International, a New York City-based firm comprised of investment bankers and senior advisors registered with the Financial Industry Regulatory Authority (FINRA) (NYSCEF # 139 – Pltf 19-a ¶ 1; NYSCEF # 135 – DeMatteo aff ¶ 2). Formally known as TechOps LLC, BCIFH was incorporated on or about August 16, 2016, when Todd M. DeMatteo (DeMatteo), non-party Michael Rosenberg, and RT2 entered into the Limited Liability Company

Agreement of TechOps LLC (the Operating Agreement) (Pltf 19-a ¶ 1; NYSCEF # 126 – OA).<sup>1</sup>

As set forth in the Operating Agreement, the “purpose” of BCIFH was to “conduct any lawful business or activity whatsoever, as permitted by applicable law and as determined from time to time by the Manager” (OA § 1.3). In furtherance of this purpose, the Members of BCIFH “intended that the primary business of [BCIFH] shall be to acquire, operate and manage the BD Target [i.e., a registered broker-dealer, as defined in the Operating Agreement], and to carry on any other activities necessary to, in connection with, or incidental to the foregoing, as the Manager in his discretion may deem desirable” (OA § 1.3). The Manager, i.e., DeMatteo, was, in turn, given “full authority, power and absolute discretion to make all decisions with respect to [BCIFH’s] business and to perform such other services and activities as set forth in th[e] Agreement (Pltf 19-a ¶ 9; OA § 5.1[a]; DeMatteo aff ¶ 11).

Although the parties offer competing accounts regarding the circumstances surrounding the formation of BCIFH, there is no meaningful disputes that BCIFH was incorporated after discussions between DeMatteo, Robert Tassinari (Bobby) and Ronald Tassinari (Ron, and together with Bobby, the Tassinaris), who was at the time the sole member of RT2 (*see* Pltf 19-a ¶¶ 2-8, 17; NYSCEF # 142 – Deft Counterstatement at resp #s 2-8; DeMatteo aff ¶¶ 4-10; NYSCEF # 152 – Bobby aff ¶¶ 4-5). As part of these discussions, DeMatteo affirms that he insisted that no Member of BCIFH would sell, transfer, or otherwise encumber its interest in BCIFH without DeMatteo’s prior knowledge and consent as Manager (*see* Pltf 19-a ¶ 4; DeMatteo aff ¶ 6). DeMatteo further explains that, although he consented to Bobby having a role as an advisor to RT2, he would not agree to Bobby holding ownership interest in RT2 given his purported negative standing and history with FINRA (*see* Pltf 19-a ¶¶ 5-7; DeMatteo ¶¶ 7-9). Therefore, according to DeMatteo, the parties agreed that RT2 would be a passive investor in BCIFH, RT2 would be solely owned and controlled by Ron, and any change in RT2’s ownership and control would require written consent from DeMatteo (*see* Pltf 19-a ¶ 8; DeMatteo aff ¶ 10).

The parties’ agreement was memorialized in Article VII of the Operating Agreement (*see* Pltf 19-a ¶¶ 12, 16-20; DeMatteo aff ¶¶ 10, 12).<sup>2</sup> Specifically, Section 7.1 of the Operating Agreement provided that “no Interest Holder shall have the right to Transfer any Interest without the prior written consent of the

<sup>1</sup> Under the Operating Agreement, a Member of BCIFH is defined as “each Person who (a) executes a counterpart of this Agreement as a Member as of the date hereof or (b) is admitted as a Member after the date hereof in accordance with this Agreement and who executes a counterpart of this Agreement and/or any related documents requested by the Manager” (OA at Art. II). Thus, DeMatteo, Rosenberg, and RT2 were the original Members of BCIFH (Pltf 19-a ¶ 11).

<sup>2</sup> Although RT2 apparently disputes whether the Tassinaris agreed to DeMatteo’s conditions, it does not dispute that the Operating Agreement contains provisions limiting the transfer of membership interests (Deft Counterstatement at resp # 8).

Manager, which consent may be withheld for any reason or no reason, in the sole discretion of the Manager” (Pltf 19-a ¶ 18; OA § 7.1 [a]). And “[w]ith respect to a Member that is not a natural person, a Transfer shall also include a Transfer of any Controlling interest, whether direct or indirect, in such Member by any owner thereof,” which was defined as an “Entity-Interest Transfer” (Pltf 19-a ¶ 18; OA § 7.1 [b]).<sup>3</sup>

The Operating Agreement then sets forth certain consequences of a failure to comply with Section 7.1’s prohibition on Entity-Interest Transfers (*see* Pltf 19-a ¶¶ 19-20). Specifically, Section 7.3(b) provided that “[i]f an Entity-Interest Transfer” occurs that is “not in strict compliance with th[e] Agreement, then the Member (the ‘Entity-Interest Member’) in which an interest has been transferred” shall “(i) forfeit all of its rights as a Member of the Company under this Agreement and pursuant to the [Delaware Limited Liability Company] Act,” and “(ii) [ ] be deemed to be an Economic Interest Holder for all purposes, and shall be only entitled to receive its share of Net Profits and Net Losses [and] other allocable items and distributions to which the Entity-Interest Member would have been entitled” (OA § 7.3 [b]). Section 7.3(b) further states that “[a]n Entity-Interest Member shall be liable to the Company and the other Members for any losses or damages any of them may sustain by reason of any such Entity-Interest Transfer” (*id.*). Meanwhile, pursuant to Section 7.5, “[a]ny Transfer or attempted Transfer of an Interest in violation of the terms of this Agreement” would be deemed “null and void and have no effect” (Pltf 19-a ¶ 20; OA § 7.5). And in the event a “Member’s Interest is Transferred or purportedly Transferred,” that Member shall “indemnify the Company, the Manager, the other Members and their respective directors, officers, employees, representatives and agents” for “any and all loss, liabilities, damages and expenses, including, without limitation, legal fees, court costs, tax liabilities and/or loss of tax benefits, arising directly or indirectly from any Transfer or purported Transfer in violation of [ ] Article VII” (OA § 7.5).

Notwithstanding these provisions in the Operating Agreement, in or about June 2019, RT2 purportedly admitted Bobby as a 50% owner, such that RT2 was no longer solely owned by Ron (*see* Pltf 19-a ¶¶ 21-23; DeMatteo *aff* ¶ 13). At no point did RT2 seek DeMatteo’s written consent for this apparent transfer (Pltf 19-a ¶ 21; DeMatteo *aff* ¶ 14). Instead, DeMatteo first learned of this alleged transfer of

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<sup>3</sup> As set forth in the Operating Agreement, “Transfer” is defined as “any sale, assignment, transfer, gift, exchange, bequest or other disposition of an Interest, in any manner, voluntary or involuntary, by operation of law or otherwise” (OA at Art. II). “Interest” is then defined as an “Economic Interest and/or Membership Interest as the context shall require” (Pltf 19-a ¶ 13; OA at Art. II). “Membership Interest,” in turn, is defined as “a Member’s entire interest in the Company . . . including, without limitation, such Member’s right to receive distributions and such other rights that the Member may enjoy under th[e] Agreement and the Act,” while “Economic Interest” constitutes “the right, expressed as a percentage, to share in the allocation of one or more of the Company’s allocable items including, without limitation, Net Profits and Net Losses, and/or in distributions of the Company’s assets” (Pltf 19-a ¶¶ 14-15; OA at Art. II).

ownership interests in RT2 in or about December 2019 when Bobby provided him with documentation evidencing that the Tassinaris each owned a 50% interest in RT2 (Pltf 19-a ¶ 29; DeMatteo aff ¶ 16; NYSCEF #s 137-138). DeMatteo immediately objected at the time, and he now affirms that he would never have given his written consent to RT2 (Pltf 19-a ¶¶ 30, 33; DeMatteo aff ¶¶ 15, 17).

It turned out, however, that RT2 had, in fact, transferred far more than 50% of Ron's ownership interest in RT2 to Bobby (*see* Pltf 19-a ¶ 35). Rather, on October 4, 2019, Ron executed an "Assignment and Assumption of Membership of RT Two, LLC to Robert F. Tassinari" (the October 2019 Assignment) (*id.* ¶¶ 24, 34; NYSCEF # 128). And pursuant to the October 2019 Assignment, Ron, as the "owner of 100 Percent Interest in RT TWO LLC," assigned "ALL OF HIS right[s], title, dut[ies], obligation[s], and interest[s]" in RT2 to Bobby (Pltf 19-a ¶ 24; NYSCEF # 128 at Recitals & ¶ 1). Bobby countersigned the assignment on October 7, 2019, and then on October 8, 2019, RT2 amended its corporate disclosures with the Nevada Secretary of State to reflect Bobby's 100% ownership interest in RT2 (Pltf 19-a ¶¶ 25-26; NYSCEF #s 129-130). RT2 did not obtain DeMatteo's written consent for this transfer, nor did the Tassinaris otherwise disclose the existence of this transfer to DeMatteo at any point (Pltf 19-a ¶¶ 27-28; DeMatteo aff ¶¶ 18-19).

Neither RT2 nor the Tassinaris deny that the October 2019 Assignment occurred or that RT2 never obtained DeMatteo's consent for that assignment (*see* Deft Counterstatement at resp #s 21-35). Instead, RT2 claims that BCIFH and/or DeMatteo purportedly breached the Operating Agreement by failing to register the BD Target with FINRA (*see id.* ¶¶ 4-12), which caused RT2 to "fear[] the loss of its two million dollar investment" (Bobby aff ¶ 21). RT2 (through Bobby's affidavit) therefore avers that it "revert[ed] the ownership of [RT2] to the Tassinaris collectively"—and thus admittedly breached the Operating Agreement—to meet a purported "common law obligation to mitigate damages" following DeMatteo's alleged breach (*see id.*). For his part, DeMatteo denies that he acted in contravention to Operating Agreement, and, in any event, he avers that any failure to register the BD Target or BCIFH with FINRA was caused by RT2's own conduct (*see generally* NYSCEF # 155 – DeMatteo Reply aff ¶¶ 2-23; NYSCEF #s 156-158).

### **Discussion**

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Although summary judgment is "considered a drastic remedy," "when there is no genuine

issue to be resolved at trial, the case should be summarily decided” (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]).

In moving for summary judgment on its first cause of action and third cause of action (as to liability), BCIFH contends that it has conclusively established RT2 breached Article VII of the Operating Agreement by transferring a “Controlling” interest in RT2 from Ron to Bobby and that it is therefore entitled to the contractual remedies provided for under Sections 7.3(b) and 7.5 of the Operating Agreement (*see* NYSCEF # 140 – MOL at 11-14; NYSCEF # 161 at 1-2). The court agrees.

To start, it is undisputed that, as of October 2019, Ron assigned 100% of his interest in RT2 to Bobby (*see* Pltf 19-a ¶¶ 24-26, 34-35; Deft Counterstatement at resp #s 24-26, 34-35). It is further undisputed that Ron effectuated the October 2019 Assignment without DeMatteo’s knowledge or explicit consent (Pltf 19-a ¶¶ 27-33; Deft Counterstatement at resp #s 27-33). RT2 therefore plainly breached Section 7.1 of the Operating Agreement by engaging in an expressly prohibited “Entity-Interest Transfer” (*see* Pltf 19-a ¶¶ 12, 18; Deft Counterstatement at resp #s 12, 18; *see also* OA § 7.1 [b]). RT2’s breach, in turn, triggered various consequences pursuant to Sections 7.3(b) and 7.5 of the Operating Agreement, including (1) RT2’s forfeiture of all rights as a Member of BCIFH, (2) RT2’s relegation in membership status from Member to Economic Interest Holder, (3) RT2’s liability to BCIFH for losses or damages resulting from the Entity-Interest Transfer, (4) nullification of the Entity-Interest Transfer (Pltf 19-a ¶¶ 19-20; Deft Counterstatement at resp #s 19-20).

Based on this undisputed record, BCIFH has made a prima facie showing of its entitlement to declaratory judgment as to its first cause of action for a declaration that, upon the occurrence of the Entity-Interest Transfer, RT2 forfeited its rights as a Member of BCIFH, RT2 became an Economic Interest Holder of BCIFH, and the Entity-Interest Transfer is null and void (*see* CPLR 3001 [“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy”]). BCIFH has also established—and RT2 does not meaningfully dispute (*see* Deft Counterstatement at resp # 20)—its entitlement to indemnification under the plain and unambiguous terms of Section 7.5 for the “loss, liabilities, damages and expenses” incurred by BCIFH, including legal fees and court costs, that arose from RT2’s breach of Article VII (*see* OA § 7.5; *Senior Tour Players 207 Mgt. Co. LLC v Golftown 207 Holding Co., LLC*, 853 A2d 124, 127 [Del Ch 2004] [observing that “the [LLC] Act . . . grants LLCs broad authority to provide for indemnification by contract” and that “it is ‘the policy of [the LLCA] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements”]).

Critically, RT2 does not dispute any of the above conclusions and findings. Instead, RT2 essentially argues in its opposition that it breached the Operating

Agreement to mitigate damages resulting from BCIFH's purported breach of the Operating Agreement (*see* NYSCEF # 153 – Opp at 10-12). As explained below, RT2's factually and legally unsupported justification for its breach of the Operating Agreement fails to defeat BCIFH's prima facie entitlement to summary judgment.

It is true that, under Delaware law,<sup>4</sup> there is a “general duty to mitigate damages if it is feasible to do so” (*see NAMA Holdings, LLC v Related WMC LLC*, 2014 WL 6436647, at \*25 [Del Ch Nov. 17, 2014] [citing *Am. Gen. Corp. v Cont. Airlines Corp.*, 622 A2d 1, 11 [Del Ch 1992]). This doctrine of mitigation of damages, however, is “an affirmative defense” that may be pleaded in response to a plaintiff's claim for damages (*see Tanner v Exxon Corp.*, 1981 WL 191389, at \*4 [Del Super July 23, 1981]). And this duty to mitigate damages only arises “after a defendant has breached its duty to a plaintiff” (*see McKinley v Casson*, 80 A3d 618, 627 [Del 2013]). RT2 cites to no authority—nor has this court identify any authority through its own research—supporting the nonsensical notion that a defendant can absolve itself of liability for an undisputed breach of contract based on its self-serving contention that any such breach was necessary to mitigate its own damages or exposure to harm.

At any rate, RT2 fails offer any evidence establishing that there was a breach of the Operating Agreement to which it needed to mitigate damages in response. RT2 claims that pursuant to Section 1.3 of the Operating Agreement, BCIFH's “primary business” was “to acquire, operate and manage the BD Target,” and that BCIFH and/or DeMatteo breached this “purpose” by failing to register the BD Target with FINRA (*see* Opp at 10-11). Although neither BCIFH or DeMatteo dispute that the BD Target was not ultimately registered with FINRA (in part, due to RT2's own conduct) (*see* DeMatteo Reply aff ¶¶ 8-16), RT2's contention that this amounted to a breach of Section 1.3 ignores the plain and unambiguous terms of the Operating Agreement, which establishes that BCIFH's “purpose” is actually to “conduct any lawful business or activity” and that DeMatteo has broad authority and discretion as the Manager to do effectuate this “purpose” (*see* OA §§ 1.3, 5.1 [a]). And documents and affidavits submitted in connection with BCIFH's motion indicate that DeMatteo did seemingly act within his authority and with an aim at achieving BCIFH's business objectives (*see* DeMatteo Reply aff ¶¶ 16-23; NYSCEF #s 156-158). As RT2 fails to proffer any evidence indicating that DeMatteo abused his broad discretion or authority, or that BCIFH or DeMatteo otherwise frustrated BCIFH's stated “purpose,” it had no basis to invoke a common law obligation to mitigate its damages as a justification for the October 2019 Assignment and the resulting breach of the Operating Agreement.<sup>5</sup>

<sup>4</sup> RT2 cites to New York law in its opposition, but the Operating Agreement is clear that “any disputes arising hereunder or in connection herewith shall be governed by and in accordance with the laws of the State of Delaware” (OA § 12.3)

<sup>5</sup> Insofar as RT2 claims that BCIFH and DeMatteo also breached Sections 4.6 and 5.9 of the Operating Agreement, those claims were already dismissed by the court in its Decision and Order,

Finally, BCIFH also moves to strike RT2's first, second, fourth, and fifth affirmative defenses as either unsupported by competent evidence or contrary to the undisputed record (*see* MOL at 15). RT2 fails to contest this portion of BCIFH's motion in its opposition. Accordingly, this argument is deemed conceded and the first, second, fourth, and fifth affirmative defenses are stricken (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] [concluding that failure to address issue in responding brief indicated intention to abandon claim]; *Am. Express Travel Related Servs. Co., Inc. v Homestyle Dining, LLC*, 2019 WL 132524, at \*2 n4 [Sup Ct, NY County, Jan. 8, 2019] [concluding that argument was "deemed conceded" by defendant when it did not "address the merits of [plaintiff's] argument in its opposition"]).

In sum, because BCIFH has met its burden of making a prima facie showing of its entitlement to judgment as a matter of law, and RT2 has failed to rebut that showing, BCIFH's motion for partial summary judgment is granted on its first cause of action for declaratory judgment and granted as to liability on its third cause of action for indemnification. Furthermore, because RTwo, LLC failed to rebut or otherwise address BCIFH's showing that RT2's first, second, fourth, and fifth affirmative defenses are unsupported by competent evidence and contrary to the undisputed record is conceded by RT2, that portion of BCIFH's motion seeking to strike these affirmative defenses is also granted.

### **Conclusion**

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment in its favor on its first cause of action for declaratory relief is granted to the extent below; and it is further

ORDERED, ADJUDGED, and DECLARED that (1) upon the occurrence of an Entity-Interest Transfer, as defined in the Limited Liability Company Agreement of TechOps LLC (the Operating Agreement), of a 100% ownership interest in defendant from non-party Ron Tassinari to non-party Robert Tassinari, (i) defendant has forfeited all of its rights as a Member of plaintiff (as defined in the Operating Agreement), and (ii) defendant RT Two, LLC is deemed to be an Economic Interest Holder of plaintiff (as defined in the Operating Agreement) for all purposes, and therefore it shall only be entitled to receive its share of Net Profits and Losses and shall not have any rights of a Member of plaintiff; and (2) the Entity-Interest Transfer of a 100% ownership interest in defendant from non-party Ron Tassinari to non-party Robert Tassinari is deemed null and void and shall have no effect; and it is further

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dated March 28, 2022, which granted BCIFH's motion for summary judgment dismissing RT2's counterclaim (*see* NYSCEF # 79).



ORDERED that plaintiff's motion for summary judgment in its favor as to liability on its third cause of action is granted, such that plaintiff is entitled to indemnification for its losses, liabilities, damages, and expenses, including legal fees and court costs in connection with this action in an amount to be determined at trial; and it is further

ORDERED that plaintiff's motion for summary judgment striking defendant's first, second, fourth, and fifth affirmative defenses is granted and those affirmative defenses are stricken; and it is further

ORDERED that plaintiff is directed to serve a copy of this Decision and Order with Notice of Entry on defendant via NYSCEF within ten (10) days of the entry of this order.

This constitutes the Decision and Order of the court.

05/02/2024  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE