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SCANNED ON 9/24/2007

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

PRESENT: HERMAN CAHN PART 49

Justice

Index Number : 600123/2007

CESARIO, DINO

vs

ABSOLUTE PLUS MANAGEMENT,

Sequence Number : 002

DISMISS

INDEX NO.

MOTION DATE 6/4/07

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED

OCT 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 10/18/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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DINO CESARIO,

Plaintiff,

-against- Index No. 600123/07

ABSOLUTE PLUS MANAGEMENT, LLC, ENRICO DE ALESSANDRINI, KENNETH J. ARMSTEAD, JOHN FUJIWARA, DAVID KANOUSE, and ALAN DANNEELS,

Defendants.

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CAHN, J.:

This action concerns a dispute over the ownership interests in a limited liability company and the salaries and distributions paid to its members.

Defendants move to dismiss the Amended Complaint upon documentary evidence and for failure to state a claim (CPLR 3211[a][1] and [7]).

The Amended Complaint

The following facts are taken from the Amended Complaint and the relevant transactional documents annexed to the parties' Submissions. Defendant Absolute Plus Management, LLC ("APM") is an asset management firm specializing in managing commodity and interest rate-based strategies for institutional investors. Defendant Enrico De Alessandrini ("Alessandrini") is APM's founding member and CEO. The defendants Kenneth J. Armstead ("Armstead") and John Fujiwara ("Fujiwara") are members and officers of APM. Defendants David Kanouse ("Kanouse") and Alan Danneels ("Danneels") are managers, minority owners and officers. Plaintiff Dino Cesario ("Cesario") is a manager and executive officer of APM.

Plaintiff alleges that because of his clout and business connections as a Senior Managing Partner at a large financial services firm, in late 2004 and early 2005 Alessandrini recruited him to join APM and start a new fund called APM Empyrean Partners (the "Fund"). Alessandrini offered plaintiff a 30.33% ownership interest in the company and to credit plaintiff's capital account with a $100,000 contribution. The 30.33% interest was fully paid and non-assessable; there was no requirement for plaintiff to contribute additional capital to maintain his stake in the company.

Plaintiff's ownership interest later increased to 35.34% when he agreed to acquire 5.01% of Armstead's interest. On March 31, 2005, the company's operating agreement (the "Operating Agreement") was amended to reflect the following ownership interests:

APM, Inc. (Alessandrini)	35.34%
Cesario	35.34%
Armstead	25.33%
Kanouse	5.00%
Danneels	4.00%[1]

Schedule B to the Operating Agreement reflected that the members' respective capital contributions as of 2005 were as follows:

APM, Inc. (Alessandrini)	$100,000
Cesario	$100,000
Armstead	$ 75,750
Kanouse	$ 15,150
Danneels	$ 12,120

[1] As discussed below, the fact that the sum of these percentage ownership interests is 105%.01 forms part of the dispute between the parties.

Footnotes next to the amounts listed for Armstead, Danneels and Kanouse designate each contribution "[a]s a subscription receivable."

Under section 5.2(b)(iii) of the Operating Agreement, a supermajority vote representing a minimum 75% of the Company's outstanding ownership interests is required to approve compensation to any employee in excess of $350,000. Section 5.2(c)(iii) requires unanimous approval for any non-pro rata distribution to members.

In May 2005, plaintiff agreed to invest $500,000 in the Fund. At the same time, plaintiff's former employer made a previously-agreed upon investment in APM. Seven months later, however, due to the inability to raise matching funds from other sources, the company returned those funds.

APM announced the delayed launch of the Fund in December 2005. Although plaintiff had considered leaving, he was persuaded that the company could sell its current products and generate enough funds for the launch. When it became apparent that the other members of APM would not contribute their own money, plaintiff hired a trader to help market the Fund. During this time, plaintiff was also involved in developing new products which attracted over $100 million in new investments, which were spread between two of the company's funds.

In or around July 2006, due in substantial part to plaintiff's marketing efforts and connections, the company received additional investments from two financial services companies. APM's assets grew from $200 million to $600 million by August 2006. However, over the summer plaintiff's relationship with Alessandrini soured after plaintiff expressed concerns with certain partnership arrangements, loans and private equity deals the Company had through Armstead. The complaint alleges that Alessandrini began cutting plaintiff out of all

company correspondence and decision-making as part of a plan to freeze him out of APM while reaping the rewards of his prior efforts.

Plaintiff asserts that in late July 2006, Alessandrini placed Fujiwara, a close personal friend and partner in a previously failed business venture, in a "sinecure" position at APM. In late November 2006, plaintiff met with Alessandrini and Armstead in an attempt to reach a consensus about plaintiff's role in the company. After that failed, the company's managers, at a December 18, 2006 board meeting, approved Alessandrini's proposal to grant Fujiwara an 18% interest in the company in return for a $59,347.08 capital contribution. The minutes of the meeting reflect the following ownership percentages following Fujiwara's admission to membership:

APM, Inc. (Alessandrini)	28.97%
Cesario	24.87%
Armstead	20.77%
Fujiwara	18.00%
Kanouse	4.10%
Danneels	3.28%

The minutes also show that prior to Fujiwara's admission, plaintiffs ownership interest was 30.33%, rather than 35.34% as set forth in the Operating Agreement. Further, the minutes indicate that plaintiff's interest was "Unfunded" and stated that if plaintiff failed to remit $81,999.86 by the close of business on December 20, 2006, his right to purchase would be deemed relinquished.

Plaintiff alleges that Alessandrini made payment a prerequisite to plaintiff's receipt of a pro rata distribution of the company's 2006 profits. Plaintiff wired the required amount to the company on December 19, 2006.

The distributions were not, however, made on a pro rata basis. Instead, plaintiff received only $2,328.02 beyond his guaranteed salary of $200,000, while the remaining members received amounts ranging for $71,569.90 to $420,163.84. Furthermore, all members except plaintiff received salaries exceeding $350,000, including Fujiwara, who received $421,569.90 despite being a member for less than two weeks. On December 26, 2006, Alessandrini proposed that plaintiff be removed as a manager, officer and member of the company and drafted a resolution providing for his possible withdrawal from APM.

The Amended Complaint sets forth six causes of action. The first alleges that defendants breached the Operating Agreement: by improperly reducing his interest from 35.34% to 24.87%; by improperly granting Fujiwara an 18% equity interest for inadequate consideration, in order to dilute plaintiff's interests and his corresponding ability to veto proposals requiring a supermajority vote; by denying plaintiff his contractual right to veto compensation to other members exceeding $350,000 and to veto the non-pro rata distributions; by requiring plaintiff to make the additional capital contribution; and by depriving plaintiff of his pro rata year-end distribution. The second and third causes of action seek recovery for this same wrongdoing under theories of breach of the duty of good faith and fair dealing and breach of fiduciary duty. The fourth cause of action seeks return of the $81,999.86 capital contribution on the theory that plaintiff was fraudulently induced to wire the funds. The fifth and sixth causes of action seek declaratory and injunctive relief in connection with plaintiff's alleged ownership interest in APM and his corresponding contractual rights.

Defendants' Arguments in Support of the Motion

In support of their motion to dismiss, defendants submit a copy of the 2005 Schedule K-1's for plaintiff and Alessandrini, and a 2005 Compensation Plan (the "Compensation Plan"), and

argue that these documents demonstrate that they acted in full compliance with the Operating Agreement. Specifically, they contend that the K-1's confirm that Alessandrini's beginning ownership interest in APM was in fact 35.34%, and that plaintiff's interest was only 30.33% rather than the 35.34% attributed to him (by virtue of an alleged typographical error) in the Operating Agreement. Defendants insist that it was actually Alessandrini who purchased an additional 5.01% interest from Armstead, and note that plaintiff alleges merely that he "agreed" to buy that share without asserting that he actually completed the purchase. They further argue that Fujiwara was properly admitted by a majority vote after making a capital contribution directly proportional to plaintiff's own contribution (in accord with section 4.2 of the Operating Agreement) and that plaintiff's share was thus properly reduced to 24.87% pursuant to section 8.2(b).

Given this reduction, they argue, plaintiff's interest was insufficient to bar the resulting 75.13% supermajority vote in favor of the members' 2006 compensation. Defendants also urge that the Compensation Plan permitted the award of non-pro rata distributions without the member approval otherwise required by section 5.2(c)(iii) of the Operating Agreement. With respect to plaintiff's capital contribution, defendants contend that the K-1 establishes that it was not paid. They assert that the $100,000 attributed to plaintiff on Schedule B of the Operating Agreement merely confirms that he was obligated to pay it immediately upon execution, in contrast to the members whose contributions were listed as later "receivable."

Discussion

The motion to dismiss is granted as to the second and third causes of action and the plea for punitive damages, but is otherwise denied.

First, the Amended Complaint states a valid cause of action for breach of contract. Such a cause of action survives dismissal under CPLR 3211(a)(7) where it specifies the terms of the contract, the consideration, plaintiff's performance and the nature of the alleged breach (see Furia v Furia, 116 AD2d 694 [2d Dept 1986]). Plaintiff's allegations that defendants paid salaries and made distributions in violation of the express terms of the Operating Agreement requiring member approval are plainly cognizable, see TIC Holdings, LLC v HR Software Acquisitions Group, Inc., 301 AD2d 414 [1st Dept 2003]; Bischoff v Boar's Head Provisions Co., Inc., 38 AD3d 440 [1st Dept 2007]) as are the other claims for relief arising from the dispute over plaintiff's actual percentage ownership interest in the company (see Chalem v Bonime, 155 AD2d 360 [1st Dept 1989]).

Defendants' reliance on the Operating Agreement and other documentary evidence is misplaced. A pre-answer challenge premised on documentary evidence must fail unless the materials "conclusively establish[ ] a defense to the asserted claims as a matter of law" (see Leon v Martinez, 84 NY2d 83 [1994]; Sotomayor v Medifast, Inc., 28 AD3d 309 [1st Dept 2006]). Far from proving their case, the documents proffered by defendants only add to the serious confusion created by, inter alia, the fact that the Operating Agreement pegs the members' total ownership interests at an impossible 105.01%.

Defendants' bald assertion that the extra 5.01% interest was misattributed to plaintiff rather than Alessandrini plainly raises an issue of credibility. None of the documents submitted by defendants corroborates the alleged transfer of a 5.01% interest from Armstead to Alessandrini. The Schedule K-l's (which plaintiff claims he had not previously seen) do not resolve the matter but simply demonstrate that there is a conflict between those schedules and the Operating Agreement. In this connection, it may also be noted that while the parties agree

that someone (either plaintiff or Alessandrini) owned a 35.34% share, Schedule B to the Operating Agreement indicated they each contributed capital of $100,000 -- a fact that would result in an equity percentage of 33% apiece.

The complaint also raises legitimate issues over the adequacy the consideration paid by Fujiwara for his interest in APM. Section 4.1 of the Operating Agreement provides that "[i]f any additional Member is admitted to the Company . . . the Percentage Interest and Fair Market Value (if agreed to or otherwise set by all Members) . . . shall be set forth opposite each Member's name of Schedule A." Section 4.2 requires that "[u]nless otherwise agreed to by all members, the members shall make all Capital Contributions in proportion to their respective Percentage Interests." Insofar as the space for supplying the fair market values of the members' interests was left blank when the Operating Agreement was executed in 2005 and the values were supplied when Fujiwara was purportedly admitted in 2006, it cannot be determined whether the $59,347.08 he contributed was sufficient to purchase an 18% interest.

Plaintiff would have been able to block the supermajority vote required to approve compensation payments exceeding $350,000 had his interest exceeded 25% -- which it would have had Fujiwara not been admitted, or had plaintiff been credited with the 5.01% share from Armstead. Thus, a fact question exists over whether those payments were properly authorized. Similarly, the propriety of non-pro rata distributions is sharply in dispute, and cannot be resolved by reference to the 2005 Compensation Plan above. It is not clear whether the Plan governs the 2006 distributions in dispute or dispenses with the Operating Agreement's requirement of unanimous consent.

The dispute over whether plaintiff was actually required to contribute $100,000 (or the $81,999.86 he ultimately did), or was automatically credited with a capital contribution, also

raises a factual issue which cannot be decided on the record (see KSI Rockville, LLC v Eichengrun, 305 AD2d 681 [2d Dept 2003][ambiguity in Operating Agreement over whether 'Capital Contribution' could consist in part of services required resolution by referee]; 38 Town Associates v Barr, 225 AD2d 613 [2d Dept 1996][whether monies contributed were loans or capital contributions raised question of fact]). Once again, the K-1's relied upon by defendants conflict with the Operating Agreement. Defendants' argument regarding the agreement's failure to designate plaintiff's contribution as "credited" or as a "signing bonus" is specious, especially in view of the language of section 4.2 which declares that "[t]he Members have made Capital Contributions as set forth on Schedule B attached hereto." And while some of the other members' contributions were listed as "subscription receivables," this fact does not compel the inference that plaintiff was required to contribute funds upon execution of the agreement. It could as easily be interpreted to mean that nothing was "receivable" from plaintiff because the company was, as he asserts, crediting him with the amount. This possible interpretation is further supported by the absence from the record of any demand for a contribution from plaintiff until the December 2006 meeting.

The controversy over plaintiff's equity ownership in the company, and his corresponding rights, is a justiciable one sufficient to sustain the fifth and sixth causes of action for declaratory and injunctive relief (see Chalem, 155 AD3d at 440; Kevin Spence & Sons, Inc. v Boars Head Provisions Co., 5 AD3d 352 [2d Dept 2004]; Int'l Banknote Co. v Muller, 713 F Supp 612 [SDNY 1989]). However, the second through fourth claims are dismissed. Claims for breach of the implied duty of good faith and fair dealing, breach of fiduciary duty and fraud, which do not arise out of facts separate from or allege damages distinct from a contract or related cause of action, should be dismissed as duplicative (see AG Capital Funding Partners, L.P. v State Street

Bank and Trust Co., 40 AD3d 392 [1st Dept 2007]); Rivas v Amerimed USA, Inc., 34 AD3d 250, [1st Dept 2006]); The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 [1st Dept 2004]). All of plaintiff's rights in this dispute relate to his equity ownership in and capital contribution to the company, matters which can be resolved by reference to the terms of the Operating Agreement and other contracts which govern the parties' obligations to each other.

Accordingly, it is hereby

ORDERED, that the motion to dismiss is granted to the extent of dismissing the second, third and fourth causes of action of the Amended Complaint and is otherwise denied, and it is further

ORDERED, that the Clerk shall enter judgment accordingly, and it is further

Dated: October 18, 2007

ENTER:

J.S.C.