

Matter of Felzen v PEI Mussel Kitchen, LLC
2022 NY Slip Op 30906(U)
March 21, 2022
Supreme Court, New York County
Docket Number: Index No. 151225/2015
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 151225/2015

IN THE MATTER OF APPLICATION OF ANTHONY
FELZEN, HOLDER OF TWELVE PERCENT OR MORE OF
ALL OUTSTANDING MEMBERSHIP CERTIFICATES OF
PEI MUSSEL KITCHEN, LLC D/B/A FLEX MUSSELS,

MOTION SEQ. NO. 009

Petitioner,

- v -

PEI MUSSEL KITCHEN, LLC D/B/A FLEX MUSSELS, A
NEW YORK LIMITED LIABILITY COMPANY, ROBERT
SHAPIRO, LAURA SHAPIRO, ALEXANDRA SHAPIRO,
MICHAEL ASHKENAZY, JONATHAN KRIEGER and ARIEL
SCHUSTER,

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 215, 216

were read on this motion to/for SUMMARY JUDGMENT.

Petitioner Anthony Felzen moves for summary judgment on his amended petition. The Court has issued previous decisions and rulings in this matter and adopts the facts and defined terms as stated therein. In brief, the petitioner, a member of respondent PEI Mussel Kitchen LLC (“the LLC”), has alleged that rights that were granted to him by the LLC’s operating agreement of the LLC were violated when certain ownership interests in the LLC were transferred to others without his written consent. Petitioner seeks an order: (1) granting him a declaratory judgment for breach of fiduciary duty and breach of contract against respondents; (2) granting summary judgment and awarding him an equitable accounting of respondents’ assets and the value of petitioner’s interest in the LLC to be overseen by a Special Referee appointed by the Court pursuant to CPLR §4301; (3) granting summary judgment on his claim for access to

books and records pursuant to §1102 of the New York Limited Liability Company Law (the “LLC Law”), and pursuant to the Limited Liability Company Agreement of PEI Mussel Kitchen LLC entered into on or around April 17, 2010 (the “Original LLC Agreement”); (4) awarding reimbursement of petitioner’s costs and expenses related to the review and audit of the LLC’s books and records; (5) awarding reimbursement of petitioner’s attorneys’ fees and costs related to this action; and (6) awarding damages totaling the sum to which petitioner is entitled as determined by a Special Referee; and (7) granting such other relief as this Court deems just and proper.

Previously, the petitioner engaged an evaluator, Virgo Lee, to conduct a valuation of the LLC. According to the petitioner, Mr. Lee uncovered substantial gaps in the LLC’s books and records inconsistent with accepted accounting standards. Additionally, this Court previously issued a decision and order on September 1, 2017, which dismissed the then petition in this case for failing to join all the necessary parties. However, this Court stated the following with respect to the petitioner’s demand for an accounting and books and records access:

The Original Operating Agreement, which the Amended Petition alleges should still be in effect, clearly obligated the managing members to open the books and provide certain financial information, which according to the Amended Petition has not been provided. Further in *East Quogue Jet, LLC*, the Court held, that an individual member of an LLC had a right to demand an accounting (*East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089 [2d Dept 2008]). Additionally, members of a “limited liability company may seek an equitable accounting under common law” (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]). Therefore, petitioner is entitled to an accounting of Company’s records.

On November 22, 2017, petitioner filed a second Amended Petition which joined the necessary parties and requested the aforementioned relief. Petitioner claims he has made numerous requests to obtain the LLC’s books and records but has been rebuffed. He now moves for summary judgment and respondents oppose.

DECLARATORY JUDGMENT

Although petitioner seeks summary judgment on his demand for a declaratory judgment on his breach of fiduciary duty and breach of contract claims against respondents, it would be inappropriate to summarily grant such relief. There are numerous issues of fact which can only be resolved at a hearing. Initially this Court notes that the duties of a member of an LLC towards other members are set forth in Limited Liability Corporation Law §§ 409 (a) and 409(c) as follows:

NY Limited Liability Company Law § 409(a) provides:

A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.

NY Limited Liability Company Law §409(c) provides:

A person who so performs his or her duties in accordance with this section shall have no liability by reason of being or having been a manager of the limited liability company. To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct.

The gravamen of petitioner's allegations has always centered around his claim that respondents breached their fiduciary and/or contractual duties towards him by selling and/or transferring their membership interests in the LLC to each other without petitioner's written consent. Respondents have consistently claimed that the transfers did not violate the LLC's Original Operating Agreement and that, in any event, petitioner was fully aware of the transfers when they were being negotiated between the parties and never raised any objections. These issues cannot be resolved on a summary judgment motion and must be resolved at a hearing. Furthermore, petitioner also claims that respondents breached their fiduciary duty by failing to properly attribute the economic value of those interests to him and by depriving him of his

rightful voting share in the LLC. Petitioner has failed to demonstrate that he is entitled to judgment as a matter of law on this contractual claim.

Finally, petitioner alleges that respondent Robert Shapiro improperly used LLC funds to purchase an additional ownership interest in the LLC and/or that he used company funds for improper or unauthorized purposes. Once again, these claims have consistently been disputed by respondents and petitioner has fallen far short of meeting the burden necessary to entitle him to summary judgment on those claims. Thus, a hearing is required. Accordingly, petitioner's request for summary judgment on his claims for declaratory judgment, breach of fiduciary duty and/or breach of contract is denied.

ACCOUNTING AND ACCESS TO BOOKS AND RECORDS

Petitioner seeks summary judgment on his claims of entitlement to an equitable accounting and access to the books and records of the LLC. The petitioner is entitled to summary judgment on his demand for an accounting. Indeed, this Court has already determined that the petitioner is entitled to an accounting of the LLC's assets. The LLC's Original Operating Agreement clearly obligated the managing members to open the books and provide certain financial information which, according to the Amended Petition, has not been provided. This Court has also already found that petitioner, as an individual member of the LLC, has the unquestionable right under the common law to demand an accounting (*see Gottelib v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]; *East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089 [2d Dept 2008]).

Additionally, petitioner has the right to examine the books and records of the LLC pursuant to Limited Liability Company Law §1102(b), which provides that "any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement,

inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable." Petitioner falls within that category and, contrary to the arguments of respondent's counsel, it is irrelevant whether some of the information in the books was already provided during discovery. The only information which petitioner has been able to obtain since his initial investment are two years of tax return filings (obtained through discovery and not as part of a regular disclosure practice) and a limited audit conducted in 2014. No books or records have been supplied for calendar years 2018 or 2019. Thus, petitioner has a definite and viable claim for an accounting and an inspection of the books and records of the LLC.

Accordingly, it is hereby:

ORDERED that petitioner's motion for summary judgment on his first cause of action for declaratory judgment and/or breach of fiduciary duty is denied; and it is further

ORDERED that petitioner's motion for summary judgment on his causes of action for equitable accounting and books and records access is granted and this matter is hereby referred to a Special Referee or Judicial Hearing Officer ("JHO") for the purpose of conducting the accounting; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part

(which are posted on the website of the Court at www.nycourts.gov/supctmanh at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days of the date of this Decision, submit to the Special Referee Clerk by e-mail an Information Sheet (which can be accessed at the “References” link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that Respondents shall provide access to all of the books and records of the LLC, at a time and location convenient to the parties, and shall serve a proposed accounting within 60 days from the date of this order and the Petitioner shall serve objections to the proposed accounting within 30 days from service of the respondents’ accounting papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, including evidence concerning the award of attorneys’ fees, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury and, except as otherwise directed by the assigned JHO/Special Referee for

