

<b>BCI Fin. Holdings LLC v RT Two LLC</b>
2022 NY Slip Op 31041(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 653394/2020
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X  
 BCI FINANCIAL HOLDINGS LLC,

Plaintiff,

- v -

RT TWO LLC,

Defendant.

INDEX NO. 653394/2020

MOTION DATE 02/01/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
 MOTION**

-----X  
 RT TWO LLC,

Counterclaim-Plaintiff/  
 Third-Party Plaintiff

- v -

BCI FINANCIAL HOLDINGS LLC,

Counterclaim-Defendant,

- and -

TODD DEMATTEO,

Third-Party Defendant.

-----X  
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 65, 69, 70, 71, 73, 74, 75, 76

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff and counterclaim-defendant BCI Financial Holdings LLC (BCIFH) and third-party defendant Todd DeMatteo (Manager, together with BCIFH, the movants) move for an order (i) granting them summary judgment dismissing defendant and counterclaim-plaintiff RT Two LLC's (RT2) counterclaim for breach of an operating agreement, and (ii) imposing sanctions on RT2 and its counsel for asserting a frivolous counterclaim. RT2 opposes the motion.

## Background

The following facts are based on the movants' Rule 19-a statement and are undisputed unless otherwise noted (NYSCEF # 56-Rule 19-a statement). BCIFH has ownership interests in and manages the New York-based Bankers Capital International, a firm of investment bankers and senior advisors registered with FINRA and BCIFH Advisors Inc., a wholly owned New York corporation (*id.*, ¶ 1). RT2 is a putative member of BCIFH and a party to the Limited Liability Company Operating Agreement of BCIFH, f/k/a TechOps LLC, dated August 16, 2016 (the Operating Agreement) (*id.*, ¶¶ 2, 5). Third-party defendant DeMatteo is the appointed Manager of BCIFH, whose authority and responsibilities are provided in the Operating Agreement (*id.*, ¶¶ 6, 10-15).

BCIFH commenced this action on July 27, 2020, alleging that RT2 breached the Operating Agreement due to its unauthorized transfer of RT2's ownership interest, and seeking a declaratory judgment and indemnification based on the alleged breach (NYSCEF # 1-Complaint). On October 1, 2020, RT2 moved to dismiss the complaint (NYSCEF # 4), which motion was denied by Decision and Order dated May 25, 2021 (NYSCEF # 25).

On June 23, 2021, RT2 filed its answer with counterclaim against BCIFH and Manager (NYSCEF # 26). In its counterclaim, RT2 alleges that BCIFH and Manager breached the Operating Agreement by (1) failing to file the annual tax returns of BCIFH and/or not providing copies of the tax returns to RT2 as required under section 4.6; (2) failing to furnish to RT2 the annual financial statements of BCIFH and copies of the Schedule K-1's as required under section 5.9; (3) failing to maintain separate books of accounts and records for BCIFH as required under section 12.2; (4) refusing to give RT2 a 66.6% interest in BCIFH; and (5) refusing to make any distribution to RT2 (*id.*, ¶¶ 35, 36). RT2 seeks damages in excess of \$3,000,000 for these alleged breaches (*id.*, ¶¶ 37, 38).

Relevant to RT2's counterclaim are the provisions governing the Manager's duties and RT2's rights to distribution and membership interest. In particular, section 4.6 of the Operating Agreement, regarding the filing of tax returns provides:

**4.6 Tax Returns and Other Elections.** The Manager shall cause the preparation and timely filing of all tax returns required to be filed by [BCIFH] pursuant to the Code and all applicable laws of each jurisdiction in which [BCIFH] does business. Copies of all such returns, or summaries thereof, shall be furnished to the Interest Holders within a reasonable time after the end of each Fiscal Year....

(NYSCEF # 48, § 4.6)

The Operating Agreement also provides for the Manager's duties to report BCIFH's financial situation to its interest holders:

**5.9 Reports.** In addition to the tax returns, or summaries thereof, required to be provided under Section 4.6, the Manager shall furnish to the Interest Holders as soon as practicable after the end of each Fiscal Year during the term of [BCIFH], (a) annual financial statements containing a balance sheet as of the end of such Fiscal Year, statements of income, Interest Holders equity, and changes in financial position, and a cash flow statement, on a Federal income tax basis, and (b) a copy of Schedule K-1 to [BCIFH]'s tax return (Form 1065 or any successor form) indicating such Interest Holder's share of [BCIFH]'s income, loss, gain, expense and other items relevant for Federal, state and local income tax purposes.

(*id.*, § 5.9). As a standard practice, the Operating Agreement also provides that Manager shall maintain separate books of accounts and records for BCIFH (NYSCEF # 48, § 12.2).

As BCIFH's interest holder, RT2's economic interests are set forth in Article 4 (Distributions and Allocations) and Article 3 (Capital Contributions and Capital Accounts) of the Operating Agreement. While interest holders like RT2 are entitled to cash distribution on a pro rata basis subject to the Manager's discretion,<sup>1</sup> they nonetheless have no right to demand or receive any return of their capital contribution or interest until BCIFH dissolves.<sup>2</sup>

The movants seek summary judgment dismissing RT2's counterclaim, arguing that the record establishes that they did not breach the Operating Agreement because (1) BCIFH properly filed its tax returns and transmitted copies to RT2; (2) BCIFH transmitted financial statements and Schedule K-1's to RT2; (3) the Manager properly maintained BCIFH's books and records; (4) RT2 is not entitled to receive a 66.6% interest in BCIFH; and (5) RT2 is not entitled to demand distribution under the Operating Agreement. In support, the movants submit evidence including (i) copies of BCIFH's tax returns for 2017 through 2020, (ii) emails from BCIFH to RT2 attaching those tax returns, (iii) emails from BCIFH to

<sup>1</sup> Section 4.1 of the Operating Agreement, entitled "Distributions" provides that:

"Cash Available for Distribution shall be distributed at such times and after such annual, quarterly or monthly periods as may be determined by the Manager to the Interest Holders, pro rata, on the basis of their respective Economic Interests." (NYSCEF # 48, § 4.1).

<sup>2</sup> Section 3.5 of the Operating Agreement, entitled "Return of Capital Contribution" states that:

"Except as otherwise provided in this Agreement, no Interest Holder shall have any right to demand or receive (a) any cash or property of [BCIFH] in return of its Capital Contribution or in respect of its Interest until the dissolution of [BCIFH] or (b) any distribution from [BCIFH] in any form other than cash." (NYSCEF # 48, § 3.5).

RT2 attaching Schedule K-1's for 2017 through 2020, (iv) an email from BCIFH to RT2 attaching 2019 Management Report with financial statements, (v) BCIFH's general ledgers for 2017 through 2020, and (vi) affidavits of BCIFH's officers and counsel averring that each year's tax returns and Schedule K-1's were timely filed and provided to RT2, that each year's financial statements were furnished to RT2, and that BCIFH's books and records were properly maintained (NYSCEF #s 31, 36-47, 52-55). The movants also argue that sanctions are warranted here since RT2's counterclaim is meritless and frivolous.

In opposition, RT2 maintains that BCIFH and Manager breached sections 4.6 and 5.9 of the Operating Agreement, or at least there exist factual disputes that require a denial of summary judgment. As for duties imposed on the Manager under section 4.6, RT2 contends that despite the movants' submission of BCIFH's tax returns, such submission is insufficient since the returns were prepared and forwarded to RT2 late and with no proof that they were actually filed with, or accepted by, the revenue authorities except for the 2017 tax returns. And as for the section 5.9 duties, RT2 contends that the transmission of BCIFH's tax returns to RT2 fail to satisfy the reporting requirement because tax returns cannot be considered "financial statements" (NYSCEF # 69 at 6, 7). To support its position, RT2 submits an affidavit of Robert Tassinari, the agent-in-fact of RT2, who avers that all the tax returns were "notoriously late in coming" and that RT2 has never received any section 5.9(a) financial statements (NYSCEF # 70, ¶¶ 5-10). RT2 also submits an affidavit from Gary Lein, who identifies himself as a professional in the field of accounting, auditing, tax and consulting (NYSCEF # 71). Asked by RT2 to testify "as a fact witness," Lein concludes that the movants had breached sections 5.9 and 4.6 of the Operating Agreement based on his evaluation of the financial documentation furnished by the movants (*id.*).

Notably, RT2 does not oppose the parts of the movants' motion seeking to dismiss RT2's counterclaims based on the Manager's duty to provide copies of Schedule K-1's, the Manager's duty to maintain books and records, and RT2's rights to receive membership interest or distribution (NYSCEF # 69). As for the movants' request for sanctions, RT2 argues that sanctions are inappropriate here since RT2 asserted the counterclaim in good faith.

In reply, the movants argue, *inter alia*, that contrary to RT2's assertion, section 4.6 does not require proof of filing of the tax returns, and that tax returns qualify as "financial statements" under section 5.9 so long as they contain the required information (NYSCEF # 76). In further support of their position that all of BCIFH's tax returns were filed timely, the movants submit a reply affidavit of the Manager and press releases regarding extension of the filing deadlines (NYSCEF # 73-DeMatteo Reply Aff.; NYSCEF #s 74, 75). In addition, the movants argue that the Lein affidavit should be disregarded as improper and deficient.

## Discussion

On a motion for summary judgment, the moving party must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party makes this initial showing, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). While the court must view the facts in a light most favorable to the non-movant and must give that party the benefit of every favorable inference, “bald, conclusory assertions or speculation and a shadowy semblance of an issue” are insufficient to defeat a summary judgment (*Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]; *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]).

### *Duty to file tax returns under section 4.6*

RT2’s first claim that the movants breached their tax-filing duties hinges on section 4.6 of the Operating Agreement. Under that section, the Manager’s duties are two-fold: to timely file all the required tax returns for BCIFH; and to furnish copies or summaries of such returns to BCIFH’s interest holders (NYSCEF # 48, § 4.6). Here, even viewing the evidence in a light most favorable to RT2, the court finds that the movants have met their prima facie burden of showing, through admissible evidence, that they have satisfied their obligations under section 4.6. In particular, the movants has shown that BCIFH’s tax returns were timely filed for each year since its incorporation (NYSCEF #s 38-45) and that RT2 was provided with copies of said returns within a reasonable time after the end of each fiscal year (NYSCEF #s 31, 37, 47, 52, 54).

RT2 has not controverted this showing by establishing the existence of triable factual issues. In this connection, RT2 argues that the movants fell short of their section 4.6 duties as they failed to submit any proof of filing of those tax returns except for the 2017 tax return. This argument is unavailing as it is based on a misinterpretation of the provision. In particular, section 4.6 obligates the Manager to transmit to RT2 “copies of all such returns, or summaries thereof” but not proof of filing with or acceptance of such tax returns by the revenue authorities (NYSCEF # 48, § 4.6).

Furthermore, the Lein affidavit submitted by RT2 is insufficient to raise an issue of fact as to whether there was a breach of section 4.6. As an initial matter, although labeled as a “fact witness,” Lein purports to give an expert opinion as he evaluates the financial documentation, interprets the contract, and opines on whether the contract was breached. On top of that, Lein’s expert qualification is not

adequately established, and his statements are conclusory and unsubstantiated, thus insufficient to raise a triable issue of fact (*see e.g. Browder v New York Health & Hosp. Corp.*, 37 AD3d 375, 375-376 [1st Dept 2007] [finding that defendant's expert affidavit was insufficient to raise an issue of fact where expert's opinion was "lacking in evidentiary foundation" and affidavit did not show that the purported expert had "the requisite background and knowledge to furnish a reliable opinion"]). Moreover, any expert or lay opinion as to legal conclusion is impermissible—ultimately, it is up to the court to determine whether the movants breached the Operating Agreement (*Colon v Rent-A-Ctr., Inc.*, 276 AD2d 58, 61 [1st Dept 2000]).

#### *Duty to report under section 5.9*

In its counterclaim, RT2 also alleges that the movants breached section 5.9 of the Operating Agreement by failing to send RT2 annual financial statements of BCIFH and copies of the Schedule K-1's (NYSCEF # 26, ¶ 35). The movants contradict RT2's allegation with their documentary evidence, showing that copies of Schedule K-1's to BCIFH's tax returns were provided to RT2 in accordance with section 5.9 (NYSCEF # 57, citing NYSCEF #'s 31, 36, 38, 41, 52, 53), which RT2 does not dispute.

As to the financial statements, the movants submit evidentiary support for their assertion that RT2 was provided copies of BCIFH's annual financial statements when it received copies of BCIFH's tax returns each year, since each tax return contains all the information required in section 5.9 (NYSCEF # 57 at 14, 15). Besides, the movants have shown that RT2 separately received a copy of BCIFH's 2019 Management Report containing financial statements of that year (*id.*; NYSCEF #'s 47, 55).

In response, RT2 fails to provide evidence rebutting this proof. RT2 argues, however, that the tax returns cannot be considered "financial statements" under section 5.9 because "tax returns and annual financial statements feature different information" and the provision specifies that the requirement is "in addition to the tax returns, or summaries thereof, required to be provided under section 4.6" (NYSCEF # 69 at 6, 7). This argument is belied by the terms of the Operating Agreement and the movants' documentary evidence. Specifically, while section 5.9 does not define what constitutes "financial statements," it specifies what information the financial statements should consist of and what accounting standard they should apply (NYSCEF # 48, § 5.9). In particular, section 5.9 requires that the annual statements "contain[] a balance sheet as of the end of such Fiscal Year, statements of income, Interest Holders equity, and changes in financial position, and a cash flow statement"—and the documentary evidence shows that all these categories of information are included though reformatted in BCIFH's tax returns sent to RT2.

Section 5.9 also requires the financial statements to be made on “a Federal income tax basis,” which unlike the commonly adopted GAAP standard, is the same basis of accounting that a company is required to use for filing its federal tax return. Thus, the tax returns could serve as “financial statements” since they contain all the required information and adopt the required accounting standard. Even if the court were to accept RT2’s contention that tax returns and financial statements feature different information, RT2 fails to point out what information was not available in the tax returns and how such defects resulted in RT2’s alleged damages such that would raise a material issue of fact. Also, for the reasons stated in connection with section 4.6, the conclusory assertions in the Lein affidavit are insufficient to defeat summary judgment.<sup>3</sup>

### *Duty to maintain books and records under section 12.2*

RT2 claims that the Manager failed to maintain separate books of accounts and records for BCIFH under section 12.2 of the Operating Agreement (NYSCEF # 26, ¶ 35). Here, the movants have met their burden on summary judgment by showing that BCIFH maintained separate books of accounts and records from its operation through the present (NYSCEF # 57 at 15; NYSCEF # 47, ¶ 48; NYSCEF # 38, ¶ 3; NYSCEF # 43, ¶¶ 4, 5; NYSCEF # 46 [general ledgers]). Accordingly, the burden shifts to RT2 to raise a triable issue of fact (*Gilbert Frank*, 70 NY2d at 967). However, RT2 does not address this issue in its opposition, thereby waiving its opposition and abandoning this aspect of the counterclaim (*Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [2012] [holding that plaintiffs abandoned their remaining claims by failing to oppose the parts of defendants’ motion that sought summary judgment dismissing those claims]).

### *RT2’s economic rights*

As for the allegations in the counterclaim that BCIFH refused to give RT2 a 66.6% interest in BCIFH and distributions, they are refuted by the Operating Agreement and in particular, section 3.5 which explicitly prohibits RT2 from demanding or receiving any return of its capital contribution or membership interests until the dissolution of BCIFH (NYSCEF # 48, § 3.5), and section 4.1, which gives the Manager discretion but does not require him to make any distribution (*id.*, § 4.1; *see also id.*, Article 2, the definition of Cash Available for Distribution). In any event, RT2 abandons these aspects of its counterclaim by failing to address them in its opposition (*Josephson*, 94 AD3d at 480).

<sup>3</sup> In support of RT2’s proposition, the Lein affidavit also points to a discrepancy in numbers between the 2019 tax return and the 2019 Management Report, suggesting that tax returns and financial statements provide different information and are not substitutable (NYSCEF # 71, ¶ 8). However, this allegation is contradicted by documentary evidence and therefore must be disregarded. Each item and its corresponding number in the 2019 Management Report can be found in, and are consistent with, the 2019 tax return (NYSCEF # 55-2019 Management Report; NYSCEF # 44-2019 tax returns).

Accordingly, the motion to dismiss the counterclaim is granted. That said, however, sanctions are not appropriate under the circumstances here.

**Conclusion**

In view of the above, it is

ORDERED that the plaintiff BCI Financial Holdings LLC and third-party defendant Todd DeMatteo's joint motion for summary judgment dismissing defendant RT Two LLC's counterclaim is granted, and defendant's counterclaim is dismissed; it is further

ORDERED that plaintiff and third-party defendant's joint motion for sanctions is denied; and it is further

ORDERED that counsel for plaintiff shall serve of a copy of this order, along with notice of entry, by first class mail on defendant within ten days of entry.

This constitutes the Decision and Order of the court.

3/28/2022  
DATE



MARGARET CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER