SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **48**

Justice

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MICHAEL FRUHLING and ADAM HOCHFELDER,

Plaintiff,

- v -

ANTHONY WESTREICH, MAX GLOBAL, LLC, FRIEDMAN, LLP, RICHARD KLASS, JOHN DOE, and XYZ CO.,

Defendants.

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INDEX NO. 161487/2017

MOTION DATE

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 383, 384, 385, 386, 387, 388, 389, 390, 391, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 426

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In motion sequence number 014, defendants Anthony Westreich and Max Global LLC[1] (MG) move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff Adam Hochfelder's amended complaint with prejudice.[2]

Background

The court's prior decision and order on motion sequence numbers 004 and 005 provides a detailed background of the dispute, which will be supplemented as necessary for this motion (Prior Order).[3] (NYSCEF 123, Amended Decision and Order

[1] As of August 2015, MG no longer exists. (NYSCEF Doc. No. [NYSCEF] 356, MG's Delaware Certificates of Formation and Cancellation.)
[2] In the Prior Order, the court dismissed all causes of action brought by plaintiff Michael Fruhling as Trustee of the Hochfelder Family Trust, and dismissed defendants Friedman, LLP from this action. (NYSCEF 123, Amended Decision and Order [mot. seq. nos. 004, 005] at 9, 13.)
[3] The court adopts all capitalized terms as used in the Prior Order.

[mot. seq. nos. 004, 005].) The court dismissed the second, third, fifth, sixth and seventh causes of action. (*Id.* at 14.[4]) The first and fourth causes of action, for an accounting and breach of the Third Amended and Restated Limited Liability Company Agreement (LLC Agreement), remain. (*Id.*) Although the first and fourth causes of action survived dismissal, this court expressly held that the "breach of contract claim can proceed on a limited basis with regard to the tax returns prepared for 2011-2015 only[,]" and that "Westreich shall provide documents necessary to permit Hochfelder to confirm that his own tax returns and K-1 forms for 2011 and 2015 were calculated correctly and to answer to the New York State tax authorities and identify the nature or location of the $20+ million allocated to Hochfelder's MG capital account...." (*Id.* at 11-12.)

Legal Standard

Summary judgment should be granted only when it is clear that no triable issue of fact exists. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986] [citation omitted].) On a motion for summary judgment, the burden is on the movant to make a showing of entitlement to summary judgment as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) If such a showing has been made, the burden shifts to the opposing party to produce sufficient evidence to establish the existence of material issues of fact. (*Id.*) In deciding a summary judgment motion, the "evidence must be analyzed in the light most favorable to the party opposing the motion." (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997] [citation omitted].)

[4] Pages refer to NYSCEF generated pagination.

Discussion

First Cause of Action for an Accounting

This decision supplements the record. (NYSCEF 426, tr at 22:18-23:5.) Defendants' motion for summary judgment on the first cause of action is granted.

As a preliminary matter, plaintiff's "accounting" claim is really a claim for books and records because plaintiff is ultimately seeking MG's records to determine "the correctness of allocations of income" to plaintiff and to answer to the then-pending tax audits. (NYSCEF 394, Amended Compl. ¶¶ 43-44, 70.) Specifically, plaintiff alleges that he is "entitled to an accounting of the finances of [MG] sufficient to determine the correctness of [MG's] allocation of income to [plaintiff] . . . and the K-1s issued to [MG's] members." (*Id.* ¶ 70; *see also id.* at 18 [requesting that the court order an accounting of MG's finances to determine the "allocations of income for tax years 2011 to the present and for specific performance of the obligation to properly account for MG's allocation of income to plaintiff"].) An equitable accounting "is designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession." (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011] [citation omitted].) For the reasons below, summary judgment is granted on the first cause of action.

Defendants argue that they have complied with the Prior Order to produce documents necessary for plaintiff to answer to the New York State tax authorities, and thus, plaintiff's accounting claim is moot and should be dismissed. Further, defendants contend that that plaintiff has neither objected nor raised any issue regarding the sufficiency or responsiveness of defendants' production. Plaintiff, on the other hand,

argues that discovery is not complete as defendants have failed or refused to provide documentation that could evidence the "book to tax differences" and that the note of issue has not been filed. Although plaintiff concedes that he has not demanded additional documentation since March 26, 2021, he asserts that it was only evident that more discovery was needed after receipt of defendants' expert David P. McKelvey's report.[5]

First, plaintiff's contention that he needs more documentation to evidence the "book to tax differences" is not only vague but controverted by plaintiff's own expert, Ken DeMarinis.[6] DeMarinis clarified in his deposition that the documents he required to determine whether there was a built-in gain are from 2002, the time plaintiff was Tax Matters Partner of MG.[7] (NYSCEF 420, DeMarinis depo tr at 90:14-93:14.) While plaintiff was Tax Matters Partner, he had retained Anchin Block & Anchin (Anchin) to prepare MG's 2002–2004 tax returns. (NYSCEF 406, Plaintiff's Response to Defendants' Rule 19-a Statement ¶ 15 [admitting that Hochfelder was Manager and Tax Matters Partner of MG from 2002 to 2004 and retained Anchin to prepare MG's tax

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[5] McKelvey is a Certified Public Accountant (CPA) at Friedman, LLP. (NYSCEF 363, McKelvey aff [May 31, 2018] ¶ 1.) Friedman, LLP prepared MG's tax returns from 2005-2014. (*Id.* ¶ 5.)

[6] DeMarinis is a CPA at Abbate DeMarinis, LLP. (NYSCEF 404, DeMarinis aff ¶ 1.)

[7] In his report, DeMarinis opines that "[t]he McKelvey report discusses how Hochfelder contributed multiple property partnership interests he held prior to joining Mr. Westreich and that those properties contained a built-in gain (fair market value in excess of basis) to be recognized by Hochfelder, upon the sale of the individual properties. No documentation and/or appraisals were provided for the purposes of recording that transaction, and therefore it is difficult to ascertain what the true fair market value of the properties in question. This omission brings into question the validity and/or the arbitrary nature of the valuation of the built-in gain. Accordingly, the missing information is vital in determining the built-in gain and/or loss. In the event that there truly is a built-in gain (which I am not convinced there is), the maximum amount of profit allocable to Hochfelder would not exceed $(51,236,849), as stated in the operating agreement." (NYSCEF 405, DeMarinis Report at 8-9.)

returns and its members' Schedule K-1s].) However, neither McKelvey nor plaintiff were able to obtain the necessary documents from Anchin because Anchin had destroyed the records related to the preparation of the tax returns and Schedule K-1s pursuant to Anchin's document retention policies. (*Id.* ¶¶ 54-55 [admitting that while Anchin produced documents pursuant to a March 5, 2020 so ordered stipulation, it provided a cover lettering stating "that any other records that had once been Anchin's possession relating to the preparation of Max Global's tax returns and the Members Schedule K-1s were destroyed in accordance with Anchin's document retention policies."].) Thus, these documents no longer exist without fault on any party or nonparty and neither expert had access to them, including the original preparer of these tax documents.[8] Plaintiff's purported need for this discovery is further belied by the fact that he has, to this day, failed to move to compel further discovery or set forth other discovery that is required to prosecute his claims in his action. Plaintiff's reliance on the fact that no note of issue was filed does not warrant a different conclusion.

Breach of the LLC Agreement[9]

In Delaware, to establish a breach of contract, plaintiff must demonstrate the existence of a contract, whether express or implied, a breach of an obligation imposed by that contract, and damage to the plaintiff. (*VLIW Tech., LLC v Hewlett-Packard Co.*, 840 A2d 606, 615 [Del 2003].) In the amended complaint, plaintiff alleges that defendants breached the LLC Agreement by failing to "correctly and promptly compute and report income of members, correctly maintain [plaintiff's] capital account, and issue

[8] Spoliation has not been alleged by plaintiff. In any event, Anchin was under plaintiff's control.

[9] The parties agree and apply throughout their briefs that the LLC Agreement is governed by Delaware law.

correct K-1s for [MG] for tax years 2011 to the present." (NYSCEF 394, Amended Compl. ¶¶ 93-94.) Specifically, plaintiff alleges that MG, in contravention of the LLC Agreement's mandate not to allocate income beyond plaintiff's capital loss account (negative $51,236,849.00), allocated to him $21 million in income that plaintiff never received.

Defendants argue that the plain language of sections 8.1 and 5.6 of the LLC Agreement warrants dismissal of plaintiff's breach of contract claim.

Section 8.1 provides:

> "8.1 Preparation of Tax Returns. The Manager shall arrange for the preparation and timely filing of all returns of Company income, gain, deduction, loss and other items necessary for federal and state income tax purposes and shall use all reasonable efforts to furnish to Members as soon as practicable following the close of the taxable year the tax information reasonably required for federal and state income tax reporting purposes. The classification, realization and recognition of income, gain, losses and deductions and other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the Manager shall determine. The taxable year of the Company shall be the same as its fiscal year."

(NYSCEF 351, LLC Agreement at 31.) Westreich asserts he complied with section 8.1 of the LLC Agreement.

Section 5.6 provides:

> "5.6 Experts. The Manager may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisers selected thereby. The opinion of such Persons as to matters which the Manager reasonably believes to be within such Person's professional or expert competence shall constitute full and complete authorization and protection in respect of any action taken or suffered or omitted by the Manager."

(*Id.* at 27.) Westreich argues that he was expressly permitted to consult with, and rely on, the opinions of the accountants he retained to fulfill his obligations under the LLC Agreement. He argues that, under section 5.6, the reasonable choice of accountants fully and completely protects "any action taken or suffered or omitted by the Manager." Finally, defendants argue that there is no provision in the LLC Agreement capping the allocations to plaintiff and any alleged breach of this restriction. Thus, where none exists, defendants argue that plaintiff's breach of contract claim is not supported by the language of the LLC Agreement.

In opposition to this motion, plaintiff points to section 4.2(f), which states:

> "(f) Tax Allocations. For federal income tax purposes, allocations of items of Company income, gain, loss and deduction shall be made in the same manner as provided in Section 4.2(a) and (b), except that appropriate adjustments shall be made to the allocations to the extent required under Section 704(c) of the Code and the regulations thereunder and under Sections 1.704-1(b)(2)(iv)(d), (f) and (g) of the Treasury Regulations using any method permitted by the Treasury Regulations. The amount of any built-in gain in the properties of the Company existing as of the date hereof that is allocable to Hochfelder under Section 704(c) of the Code shall be unaffected by the transactions contemplated by the Separation Agreement and the amendments to this Agreement to reflect such transactions. The parties acknowledge that the value of properties contributed directly or indirectly by Hochfelder to the Company on or around April 19, 2002, at the time of contribution by Hochfelder, is no less than an amount computed consistently with the amounts reflected on the Form K-1 (particularly lines F and J thereof) provided to Hochfelder by the Company for the year 2002."

(*Id.* at 22.) Plaintiff argues, in a conclusory fashion, that section 4.2(f) was breached when Westreich overallocated "fifty million dollars worth of income in 2013, which caused the excess allocation of [$21 million dollars]." (NYSCEF 407, Memo in Opp at 6.) Plaintiff does not argue or explain where there is an allocation cap in section 4.2(f)

of the LLC Agreement, nor can he. An allocation cap is found nowhere in section 4.2(f), contrary to plaintiff's conclusory and circular argument. When "interpreting a contract, the Court[s in Delaware] must give priority to the parties' intentions as reflected in the four corners of the agreement." (*Bathla v 913 Market, LLC*, 200 A3d 754, 759-60 [Del 2018] [internal citation and quotation marks omitted].) As in New York, courts in Delaware "must interpret clear and unambiguous terms according to their ordinary meaning, and in an unambiguous, integrated written contract, the Court may not use extrinsic evidence to vary[ ] or contradict[ ] the terms of that contract." (*Id.* at 760 [internal citation and quotation marks omitted] [brackets in original].)

Tellingly, despite plaintiff's insistence that 4.2(f) contains an allocation cap, plaintiff does not proffer another reasonable interpretation of 4.2(f), or any interpretation for the matter, in an effort to support his argument. Therefore, defendants' motion is granted and plaintiff's cause of action for breach of the LLC Agreement is dismissed.

Plaintiff offers a series of unavailing arguments in an attempt to save his claim. For example, plaintiff asserts that there are triable issues of fact because defendants, in bad faith, over-allocated funds and "[b]ased on the record alone, it is unclear whether or not Westreich acted in good faith when allocating the funds to [p]laintiff[.]" (NYSCEF 407, Memo in Opp at 7.) Plaintiff points to nothing in the record to support this assertion, and as there is no provision within the LLC Agreement capping allocation, plaintiff's assertion fails to raise a material issue of fact.

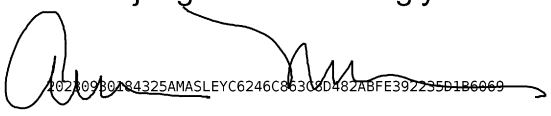
Plaintiff also asserts that McKelvey is biased because McKelvey is both a fact witness (as McKelvey prepared the tax returns at issue) and defendants' expert witness and the dual role creates a credibility issue. This attempt to raise a triable issue of fact fails. Under section 8.1, the Manager (Westreich) arranges for the preparing and timely

filing of all of MG's returns and shall provide to members the tax informational as soon as practicable. Section 5.6 grants the Manager (Westreich) the authority to consult with and rely on the opinions of experts and professionals, which includes accountants. Importantly, section 5.6 also provides "[t]he opinion of such Persons as to matters which the Manager reasonably believes to be within such Person's professional or expert competence shall constitute full and complete authorization and protection in respect of any action taken or suffered or omitted by the Manager." Thus, a triable issue of fact would arise if there was dispute over whether Westreich reasonably believed Freidman, LLP possessed the requisite professional or expert competence. Plaintiff has not raised an issue of fact over the reasonableness of Westreich's choice in retaining Friedman, LLP, and more importantly, plaintiff concedes in his opposition brief that McKelvey is a qualified accountant. (NYSCEF 407, Memo in Opp at 8 ["There is no doubt that McKelvey is a qualified accountant …."].)

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the County Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly.



9/30/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE