

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

GUY-MICHEL PHILOGENE and GUY-MICHEL PHILOGENE, a MEMBER OF VERITY ASSOCIATES, LLC suing in the right of VERITY ASSOCIATES, LLC,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiffs,

INDEX No. 5308/09

MOTION DATE: 7/15/16
Motion Sequence 004

-against-

RONALD G. DUCKETT,

Defendant.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by defendant Ronald Duckett for summary judgment on his counterclaim for judicial dissolution of plaintiff Verity Associates, LLC is **denied**. Upon searching the record, summary judgment is **granted** to defendant dismissing plaintiff's complaint and summary judgment is **granted** to plaintiff dismissing defendant's counterclaims.

This is an action for breach of fiduciary duty. Plaintiff Guy-Michel Philogene holds a 50% membership interest in plaintiff Verity Associates, LLC. Verity was formed on October 19, 2001 and is engaged in the business of publishing cookbooks via the internet. Defendant Ronald Duckett is the other 50% member of Verity. The parties formed Verity

with approximately \$700 working capital which was derived from another venture. The parties did not contribute any other capital (Deposition of plaintiff at 17-18).

Section 9 of Verity's operating agreement dated October 10, 2002 provides that, "Each member shall agree not to own an interest in, manage or work for another business...if such ownership or activities would compete with [the business of Verity]..."

Philogene alleges that as early as January 2003 Duckett misappropriated Verity's email lists and customer information, solicited Verity's customers, and developed a business competing against Verity.

This action was commenced on March 20, 2009. In his first cause of action, plaintiff seeks a permanent injunction, restraining defendant from soliciting Verity's customers and engaging in a competing business. In the second cause of action, plaintiff seeks damages for breach of fiduciary duty. In the third cause of action, plaintiff seeks an accounting. The fourth cause of action is also for breach of fiduciary duty. The fifth cause of action is for breach of the operating agreement.

In his amended answer, defendant asserts counterclaims for unpaid compensation, breach of the duty of loyalty, breach of the operating agreement, and judicial dissolution of Verity. A note of issue was filed on January 24, 2012. Motions for summary judgment were due March 24, 2012.

By notice of motion dated May 24, 2016, defendant moves for summary judgment on his counterclaim for judicial dissolution of Verity. Defendant alleges that since 2006 plaintiff has withdrawn from management and fails to perform any services for the company.

In opposition, plaintiff argues that the motion is untimely. On the merits, plaintiff asserts that his responsibilities toward Verity are being performed by an employee, Thomas Grossman. Plaintiff asserts that Verity continues to operate as a viable internet marketing company.

The delay in filing defendant's summary judgment motion was caused by extensive settlement negotiations, including mediation which was ultimately not successful. Additionally, plaintiff's attorney sought leave to withdraw from the case on two separate occasions. In these circumstances, the court determines that there is good cause to address the merits of defendant's summary judgment motion.

Under Limited Liability Company Law § 702, a court may order dissolution of an LLC if it is not "reasonably practicable" to carry on the business in conformity with the

articles of organization or operating agreement. Under this standard, the petitioning member must establish that 1) management is unable or unwilling to reasonably permit or promote the stated purpose of the entity, or 2) continuing the entity is financially unfeasible (**In re 1545 Ocean Ave, LLC**, 72 AD3d 121, 131 [2d Dept. 2010]). Dissolution is a drastic remedy, which is not to be granted unless management is unwilling or unable to promote the company's stated purpose or continuing the company is financially unfeasible (Id).

The court concludes that plaintiff is willing and able to promote Verity's stated purpose of engaging in online cookbook marketing. Moreover, continuing Verity is financially feasible. Accordingly, defendant Ronald Duckett's motion for summary judgment on his counterclaim for judicial dissolution of plaintiff Verity Associates, LLC is **denied**.

However, in view of the short period of time in which the parties operated in business together, the minimal capital investment on both sides, the approximately equal value of the services provided by both parties, and the fact that the parties are now engaged in competing businesses, the court concludes that no further adjustment in their interests is necessary. Therefore, upon searching the record, summary judgment is **granted** to defendant dismissing plaintiff's complaint and summary judgment is **granted** to plaintiff dismissing defendant's counterclaims.

So ordered.

Date: AUG 09 2016


J.S.C.

XXX **ENTERED**

AUG 11 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE