

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011399

05/28/2015

JUDGE PRO TEM COLLEEN L. FRENCH

CLERK OF THE COURT
S. Ortega
Deputy

J J B HOLDINGS L L C

PHILIP R RUPPRECHT

v.

MARK FURTMANN, et al.

KYLE BRANSON SHERMAN

RULING

The Court has read and considered the following:

- Defendant's Motion for Summary Judgment;
- Plaintiff's Response to Mark Furtmann's Motion for Summary Judgment;
- Defendant's [sic] Reply to Plaintiff's Response to Motion for Summary Judgment;
- Plaintiff's Motion for Summary Judgment on Count IV;
- Defendant's[sic] Response to Plaintiff's Motion for Partial Summary Judgment on Count IV;
- JJB Holding's Reply in Support of its Motion for Summary Judgment on Count IV;
- Plaintiff's Motion to Compel Disclosure and Discovery; and
- Defendant's [sic] Response to Plaintiff's Motion to Compel Disclosure and Discovery.

The Court has also read and considered the statements of fact submitted by the parties, the relevant statutes, procedural rules and case law, and the arguments of counsel.

Defendants seek summary judgment on the following portions of Plaintiff's First Amended Complaint and Cross claim: (1) Count I – Breach of Fiduciary Duty; (2) Count II –

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011399

05/28/2015

Breach of Contract; and (3) Count IV – Declaratory Relief. Plaintiff seeks summary judgment on its Count IV, which seeks Declaratory Relief. The Court finds that each party is entitled to partial judgment in their favor.

I. Count I - Breach of Fiduciary Duty

Plaintiff claims, in Count I, that Defendants breached their fiduciaries duties owed to Plaintiff. The Court agrees with Defendants' position that Arizona statutes governing LLCs do not establish a fiduciary relationship between members. Such fiduciary relationships can, however, be established between members of an LLC in their operating agreement. *See, TM2008 Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421, 424-25 ¶ 15, 323 P.3d 704, 707-08 (App. 2014).

The Operating Agreement at issue creates no fiduciary duties between the members, except to refrain from “grossly negligent conduct, intentional misconduct, or a knowing violation of the law.”

Based upon the limited nature of the fiduciary duties articulated in the Operating Agreement and the allegations contained in Plaintiff's First Amended Complaint with its Statement of Facts, the only issue wherein there appears to even be a possibility of a disputed issue of material fact is whether the acts of Defendant Mark Furtmann specified in the First Amended Complaint constitute “intentional misconduct.” Therefore summary judgment in favor of Defendants is appropriate on this claim as it relates to everything but the issue of whether those acts occurred, whether they constitute “intentional misconduct,” and whether Plaintiff suffered damages as a result.

II. Count II - Breach of Contract

At oral argument, Plaintiff conceded that whether Defendants breached the Operating Agreement by admitting new members was no longer an issue. The issues that remain on the breach of contract claim are whether Defendants breached the Operating Agreement by paying compensation to Mark Furtmann in excess of an amount approved pursuant to that agreement, and in “attempting to exercise the option in derogation of the terms of the Operating Agreement.”

The Court finds that disputed issues of material fact exist regarding whether payments to Mark Furtmann constituted a breach of the operating Agreement. The Court also finds, in accordance with the discussion below, that Defendants are not entitled to summary judgment on this issue of whether they breached the Operating Agreement by not fulfilling their duties under the option agreement.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011399

05/28/2015

III. Count IV - Declaratory Judgment

In Count IV, Plaintiff seeks a declaratory judgment from this Court holding that it still owns 50% of Furtmann Bros. LLC. By this declaration, Plaintiff seeks to invalidate Defendants 2012 MAF Construction, LLC, JF Framing, LLC, and MF Management, LLC's alleged exercise of the option to purchase 25% of JJB's interest in Furtmann Bros. LLC.

The law is clear that an option must be exercised strictly according to its terms. *Best v. Miranda*, 229 Ariz. 246, 248 ¶ 7, 274 P.3d 516, 518, ¶ 7 (App. 2012). The Court must look to the language of the option contract itself in order to determine what acts constitute acceptance of the option. *Mack v. Coker*, 22 Ariz.App. 105, 107, 523 P.2d 1342, 1345 (App. 1974). Unless the parties to an option specifically require tender of payment in order to exercise the option, tender is not necessary in order to exercise the option. *Hart v. Hart*, 35 Va. App. 221, 544 S.E.2d 366, 373 (Va. Ct. App. 2001).

In the instant case, the Court finds that Section 20 of the Operating Agreement provides that the Option is exercised when notice is given. The "notice" requires only that Defendants notify Plaintiff of their intention to exercise the purchase right, and date and location of the closing of the sale. Notice of the purchase price is not specifically required in order to exercise the option. Section 20 provides that the purchase price can be determined either by agreement of the parties or by an appraisal, but does not require that it be determined before the notice is given and the option therefore exercised. Perhaps the parties envisioned discussing and deciding the issue of purchase price before formal notice would be given to exercise the option, it is not required within the language of the option. Similarly, the terms of the Operating Agreement do not require tender of payment in order to exercise the option. Rather, the language in the Operating Agreement concerning payment terms relates to the terms of the purchase and not to the exercise of the option itself. Specifically, Section 20 of the Operating Agreement provides that the first payment of 10% of the purchase price is due within 120 days *of the exercise of the option*. Therefore, Defendants are not correct in claiming that they did not exercise the option when they provided notice of election in June, 2010. Additionally, as the Operating Agreement provided that the option was a "one-time right," Defendants' claim that they exercised the option by providing notice again in 2012 is without merit.

Plaintiff errs in claiming, however, that it is entitled to a declaration from this Court that because the Defendants' 2012 efforts to exercise the option is void, it is still 50% owner of Furtmann Bros. LLC. Defendants' exercise of the option created a bilateral contract for sale, binding upon Plaintiff as optionor as well as upon Defendants as optionee. *See, Mack*, 22 Ariz. App. at 108, 523 P.2d at 1345. If Plaintiff's argument is correct that Defendants actually exercised their option in 2010, then Plaintiff was obligated to sell 25% of its interest in Furtmann Bros. LLC to Defendants at that point, for the then appraised value of \$146,596.00. Thus,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011399

05/28/2015

Plaintiff still rightfully owns only 25% of Furtmann Bros. LLC. Plaintiff cannot argue that the option was exercised and also that it still rightfully owns 50% of Furtmann Bros. LLC, as if it had not been exercised. In another, somewhat related lawsuit, Plaintiff was credited \$133,500.00 for the value of 25% of Furtmann Bros. LLC. as if the option had been exercised in 2012, against its existing debts owed to Defendants. The fact that Plaintiff accepted this benefit belies its claim that it still owns 50% of Furtmann Bros. LLC.

Based upon the foregoing,

IT IS ORDERED granting Defendants' Motion for Summary Judgment on Count I – Breach of Fiduciary Duty, as it relates to everything but the issue of whether the alleged acts occurred, whether they constitute “intentional misconduct,” and whether Plaintiff suffered damages as a result.

IT IS FURTHER ORDERED denying Defendants' Motion for Summary Judgment on Count II – Breach of Contract.

IT IS FURTHER ORDERED denying Defendants' Motion for Summary Judgment on Count IV – Declaratory Judgment.

IT IS FURTHER ORDERED granting Plaintiff's Motion for Summary Judgment on Count IV – Declaratory Judgment as it relates to Defendants' exercise of the option in 2010, and denying it in all other respects, including on Plaintiff's claim that it still owns 50% of Furtmann Bros. LLC.

Regarding Plaintiff's Motion to Compel Disclosure and Discovery,

IT IS FURTHER ORDERED granting Plaintiff's Motion to Compel Disclosure and Discovery in part, as follows:

- Documents relating to unreasonable compensation items 4-6 (as numbered in Motion to Compel);
- Documents relating to affiliates items 7 and 13 (as numbered in Motion to Compel);
- Financial information items 16-19 (as numbered in the Motion to Compel); and
- Mark Furtmann's calculations, i.e. the spreadsheet.

IT IS FURTHER ORDERED granting Plaintiff's request for an additional 2 hours to depose Mark Furtmann.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011399

05/28/2015

IT IS FURTHER ORDERED granting Plaintiff's request for an award of reasonable attorney fees and cost in bringing the Motion to Compel. Plaintiff shall file an appropriate affidavit within 14 days of the date of the filing of this minute entry.