IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRINCE WILFORD, individually and derivatively on behalf of RUBICON EQUITIES, LLC,	)	
Plaintiff,	)	
VS.	)	**NO. 15-856-BC**
GABRIEL COLTEA, RBN FT MANAGER, LLC and RBN FT INVESTOR, LLC,	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 29, 2016 AND (2) SETTING 5/20/16 DEADLINE FOR FILING MEDIATION INFORMATION

As a matter of law, Defendant Coltea's motion for summary judgment on Count II of his Counterclaim, to judicially dissolve and within 30 days proceed with liquidation of the Plaintiff LLC, Rubicon Equities, pursuant to 6 Del. C. § 18-802,[1] must be denied because there is a genuine issue of material fact: whether the parties' dispute and inability to agree upon the desirability of continuing the LLC is a bona fide dispute or, on the other hand, whether the dissolution is sought in bad faith or is something other than a genuine inability to agree.

[1]Article IX § 9.12 *Governing Law* of the Operating Agreement provides that Delaware Law applies.

In arriving at this determination, the Court concludes that Defendant Coltea has demonstrated as a matter of law two of the criteria for a judicial dissolution of an LLC and part of the third criterion:

— the LLC must have two fifty-percent members;

— those members must be engaged in a joint venture; and

— the members must be unable to agree upon whether to discontinue the business or how to dispose of the assets.

Haley v. Talcott, 864 A.2d 86 (Del. Ch. 2004); *Vila et al. v. BVWeb Ties, LLC* 210 WL 3866098 (Del. Ch. Oct. 1, 2010).

There is no dispute that the Plaintiff LLC has two 50% members to satisfy the first criterion. Additionally, adopting the authority and analysis of the April 18, 2016 *Reply Memorandum in Further Support of Motion for Summary Judgment* at pages 3-5, the Court concludes that the LLC is a joint venture to satisfy the second criterion. It is the third criterion which causes the Court to deny Defendant Coltea summary judgment.

6 Del. Code § 18-802 provides that upon an "application by or for a member or manager a court of chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Case law further provides that whether it is "reasonably practicable" to carry on the business of a limited liability company is to be analyzed in accordance with the three criteria listed above taken from the analogous area of dissolution of corporations

under 8 Del. C. § 273. *Haley v. Talcott*, 864 S.2d 86 (Del. Ch. 2004). As listed, the third criterion consists of circumstances where the two members are "unable to agree upon whether to discontinue the business or how to dispose of the assets," and shall be referred to herein for ease of reference in short form as "impasse."

One species of impasse is where "the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business . . . ." *In re Arrow Inv. Advisors, LLC*, No. CIV.A.4091–VCS, 2009 WL 1101682 at *2 (Del. Ch. Apr. 23, 2009). Examples of dysfunctional management provided in *In re Arrow Inv. Advisors* are a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.

In this case, Defendant Coltea has compelling summary judgment facts of impasse. In a conversation tape recorded by Defendant Coltea, the content of statements made by Plaintiff Wilford admitted that the relationship of the LLC members is dysfunctional. Plaintiff Wilford's characterization of the working relationship with Defendant Coltea included these recorded comments:

- "It's a disaster. It's as bad a disaster there can be without people shedding blood."
- "Well, we don't work together well. We both know that."
- "We don't complement each other. We get on each other's nerves."
- "You like autonomy...and that's what you should have."
- "For the last year and a half I never imagined that we'll ever do another deal together.
- "You and I have no ability to...get along in business."

- "You and I have no ability to work together."
- The relationship has "just been brutal."
- The business relationship with Coltea is "...a . . . failed marriage."

The legal significance of the Plaintiff's comments is the business purpose of the LLC, stated in Article II, § 2.6 of the Operating Agreement, to engage in the acquisition, ownership, management, development, leasing of real estate assets. Filtering the Plaintiff's comments of dysfunctional management through the LLC's purpose leads to a reasonable inference that the dysfunctional business relationship of the members thwarts and makes it impossible for the members to accomplish the business purpose.

These conditions fit the case law quoted above of impasse of LLC management that has "become so dysfunction or its business purpose so thwarted that it is no longer practicable to operate the business." *In re Arrow Inv. Advisors, LLC*, No. CIV.A.4091–VCS, 2009 WL 1101682 at *2. Judicial dissolution exists "to enable deadlocked shareholders to bring closure to what has become an inefficient and unworkable relationship.' *In re Magnolia Clinical Research, Inc.*, 2000 WL 128850, at *2 (Del. Ch. Jan. 3, 2000). It does not mandate that parties struggle until they have destroyed their relationship entirely and jeopardized their business." *Matter of Bermor, Inc.*, No. CV 8401-VCL, 2015 WL 554861, at *3-4 (Del. Ch. Feb. 9, 2015).

Once impasse has been demonstrated with respect to an LLC, the court must look to the LLC operating agreement to see if there is a less drastic alternative such as a buy-sell arrangement or other provision such as appointing an agreed-upon third manager, that would

resolve the dispute. *Vila v. BVWebTies LLC*, No. CIV.A. 4308-VCS, 2010 WL 3866098, at *8 (Del. Ch. Oct. 1, 2010). In this case, however, the Operating Agreement does not contain a mechanism to resolve the deadlock. Rather, the LLC Agreement provides that a member or manager may seek judicial dissolution.

Yet, even where the Operating Agreement provides no dispute resolution mechanism, judicial dissolution is not automatic. There is the additional requirement that the impasse be bona fide and genuine. If the impasse is manufactured by the party seeking dissolution or is being used in bad faith to defraud or accomplish a result inimical to the LLC entity, Delaware law says judicial dissolution is inappropriate.

In the seminal case of *Arthur Treacher's Fish & Chips, Inc. v. Ft. Lauderdale, Inc.*, 386 A.2d 1162, 1167 (Del. Ch. May 10, 1978), the court refused to strike a defense to a petition for dissolution which defense asserted that the real purpose of the petition for dissolution was "in furtherance of a scheme and conspiracy to defraud the respondent of his interest in the corporation" and "to coerce the respondent into selling his interest in the corporation to petitioner and his alleged co-conspirators." Recognizing the important policy of speed in dissolution, the court nevertheless did not strike the defense to hasten to dissolution. The rationale for allowing the defense was "a court of equity is duty-bound to protect shareholders to enforce fiduciary duties where wrongdoing is alleged and where there are allegations of a conspiracy." *Id.* As explained by Judge Cantrell of the Tennessee Court

of Appeals, in a 1988 Tennessee case referring to *Arthur Treacher's Fish & Chips, Inc.*, "A party should not be allowed to create dissension in the corporation, and then, like the defendant who killed his parents and begged for mercy because he was an orphan, use this grounds for the courts to dissolve the corporation." *McLaren v. Falk*, 1988 WL 53353 (May 27, 1988 Tenn. Ct. App.) *4.

In later cases, Delaware's bad faith defense to judicial dissolution has been described as circumstances where the actual foundation for dissolution is something other than a genuine impasse. *McKinney-Ringham*, 1998 WL 118035 at *5. A more specific case law example of bad faith is using dissolution manipulatively to exploit a specific future business opportunity that would rightfully belong to the company. *Xpress Mgmt., Inc. v. Hot Wings Int'l, Inc.*, No. CIV.A. 2856-VCL, 2007 WL 1660741, at *6 (Del. Ch. May 30, 2007).

Additional insight into the defense is that circumstantial evidence of intent, design and timing as well as credibility and inferences have been considered to determine bad faith. After conducting a trial, the court in *Vila v. BVWebTies LLC*, No. CIV.A. 4308-VCS, 2010 WL 3866098, at *8 (Del. Ch. Oct. 1, 2010) took into account and made findings about events leading up to the deadlock. Deciding that the dissolution was not sought in bad faith, the court looked to circumstances such as one of the managers, alleged to have acted in bad faith, had first proposed to commit an additional $500,000 to the LLC and had tried to implement changes to transform the LLC before asserting impasse. These were the findings for the

court's decision that he had not "in bad faith manufactured a phony deadlock" so he could take profits for himself.

After a trial in *Matter of Bermor, Inc.*, No. CV 8401-VCL, 2015 WL 554861, at *3-4 (Del. Ch. Feb. 9, 2015), the court found that actions alleged to be indicative of bad faith had other rationales, such as a fraternal concern motivated a request for resignation, and that the informal presentation of suggestions instead of providing those at board meetings was because that was in keeping with the routine and policy of the company.

In both of these cases the courts had actions from which competing inferences could be drawn about provoking or manufacturing a deadlock in bad faith, and those were determined at trial based upon oral testimony providing evidence of the circumstances, context and credibility.

Applying the foregoing Delaware law to the summary judgment record in this case, the Court starts with the proof the Defendant relies upon to establish the existence of a bona fide impasse. That is the statements, quoted above, made by the Plaintiff on March 23, 2015 which admits the parties' working relationship is dysfunctional. The Plaintiff's March 23, 2015 statement, however, cannot be looked at in a vacuum because, as the above cases illustrate, Delaware law recognizes there can be "phony" deadlocks manufactured in bad faith. Surrounding events and circumstances, from which inferences about design can be drawn, must be examined.

Accordingly, in addition to the Plaintiff's March 23, 2015 statements quoted above, the Court sees that the summary judgment record contains facts that in its first year the LLC management relationship was functional. As it must on summary judgment, the Court incorporates and adopts herein the facts cited by the Plaintiff at pages 4-5 of the April 1, 2016 *Plaintiff's Response and Opposition to Defendant's Motion for Summary Judgment* that from 2012-2013 regularly the parties collaborated and collectively worked through potential deals. They discussed financial information in detail including rent rolls, equity sources, visited the properties together, shared letters of intent and jointly edited deal proposals. This was prior to the Plaintiff LLC closing, on March 14, 2013, purchase of an interest in the UBS Tower, and obtaining a management contract and fees on the Tower.

After the UBS Tower purchase was completed in 2013 and when the financial outlook for the UBS Tower began to look positive, the Plaintiff has testified that the Defendant began proposing to buyout the Plaintiff's interest. With that the Plaintiff couples other summary judgment facts that, although Defendant Coltea claims during this time he sought to buyout the Plaintiff's interest because he believed they could not work together, during his deposition he was unable to cite a specific dispute with the Plaintiff that caused Defendant Coltea to believe that.

Additional facts of record are that in 2014 Defendant Coltea set up a separate LLC bank account to which he would not provide the Plaintiff access. On February 2, 2015, the Plaintiff asked Defendant Coltea to provide the Plaintiff access to the account. The

Plaintiff's characterization is that the Defendant "complained," to which the Plaintiff responded that he was not accusing the Defendant of anything, that he just wanted to know the financial status of the company. Access was not provided. Moreover, this conversation about the bank account occurred just prior to when the Plaintiff, in February 2015, made the statements above indicative of dysfunctional management.

From these events of Defendant Coltea's repeated proposals to buyout the Plaintiff and Defendant Coltea's refusal to provide access to the bank account, the Plaintiff asserts an inference can be drawn that the dissolution being sought by Defendant Coltea was in bad faith to assure the Public Square Garage investment opportunity for himself. The Plaintiff argues that the dysfunction of the LLC members, exhibited by the Plaintiff's tape recorded comments quoted above, was seeded, stoked and provoked by Defendant Coltea's attitude and actions toward Plaintiff Wilford and the LLC at a point in time when Defendant Coltea had determined and was making plans to take the Public Square Garage opportunity for himself.

In addition to inferences of provocation the Plaintiff draws from the record, the summary judgment record contains actions Defendant Coltea was taking, unknown to the Plaintiff. These actions are stated at pages 7-18 of the Plaintiff's April 1, 2016 *Response* alleging that the Defendant provided the Plaintiff misleading information about the Public Square Garage opportunity while, in tandem, Defendant Coltea was pursuing measures to take the opportunity for himself and complete purchase of the Garage, using the Plaintiff

LLC, with subsequent ownership and management of the Garage in the Defendant LLCs formed by Defendant Coltea.

In addition to Defendant's actions to accomplish usurpation of the Public Square Garage, the Plaintiff also asserts facts indicative of Defendant Coltea's bad faith that dissolution of the Plaintiff LLC would result in the Plaintiff losing short term profits and the longer term appreciation of the ownership interest from the purchase of the UBS Tower. As it stands now, the Plaintiff receives an annual property management fee based on the gross revenues generated by the UBS Tower and an annual $300,000 asset management fee. If the Court dissolves the LLC, it will lose its right to collect these fees.

As to the loss of the longer term appreciation of investment in the UBS Tower, the Plaintiff asserts that dissolution of the LLC is an event under the UBS Tower Operating Agreement for the other equity partners to buyout the LLC. If dissolution occurs now, it is before the investment has realized its full potential. In this regard paragraph 27 of the Verified Amended Complaint states facts that "The 315 Operating Agreement also provides that in the event Rubicon is dissolved, Rubicon's two other equity partners – SSB 1, LLC and M&E Assets LLC – 'shall have the right (at their sole discretion) to purchase the entire Interest of [Rubicon] for a purchase price equal to the fair market value of [Rubicon's] Interest[.]' (Exh. B, § 9.3). In the event Rubicon is dissolved, therefore, Rubicon and its members would not only stand to lose the Asset Management Fee and Property Management Fee [of the UBS Tower] discussed above, but could also be forced to sell their interest in the

UBS Tower at present value, thus depriving them of the expected appreciation of their investment."

Defendant Coltea disputes the above inferences of bad faith and provocation of an impasse. Defendant Coltea asserts that his actions were taken in the context of his different construction and understanding of the Operating Agreement.

Nevertheless, the motion before the Court is one for summary judgment. If competing inferences can be drawn from the undisputed facts, summary judgment is inappropriate. Based on the summary judgment record, the Court concludes that a reasonable fact finder could infer that Defendant Coltea manufactured discord between the parties in order to take the Public Square Garage opportunity for himself and infer bad faith in seeking dissolution.

In so concluding, the Court is cognizant that a bad faith defense has been applied sparingly by Delaware courts. Gaining an advantage by seeking dissolution does not constitute bad faith. *Fisk Ventures, LLC v. Segal*, No. CIV.A. 3017-CC, 2009 WL 73957, at *6 (Del. Ch. Jan. 13, 2009), *aff'd*, 984 A.2d 124 (Del. 2009) ("The LLC Agreement is a negotiated contract and Fisk Ventures has the right to attempt to maximize its position in accordance with the LLC Agreement's terms. If Fisk Ventures chooses to exercise its leverage under the LLC Agreement to benefit itself, it is perfectly within its right to do so. Additionally, Segal offers no facts to support his contentions that Fisk Ventures seeks

dissolution simply to buy Genitrix's assets at fire sale prices. A party cannot simply allege a conclusory inequitable action . . . .").

The Court is further aware that an incidental benefit to one party over the other as a result of dissolution is not a basis for denial of dissolution:

> The fact one who seeks his statutory entitlement to dissolve the enterprise in order to extract his investment from it may incidentally benefit from dissolution cannot be a basis for the Court to deny an otherwise appropriate petition. It frankly seems unlikely one would ever petition for dissolution until one concluded the benefits derived from the continued association with the enterprise were outweighed by the disadvantages flowing from the continued operation.

McKinney–Ringham, 1998 WL 118035, at *5. Because there is nothing to suggest that "'the actual foundation for this action' is something other than 'a genuine inability to agree upon the desirability of discontinuing this joint venture,'" the petition is granted. *McKinney–Ringham,* 1998 WL 118035, at *5 (quoting *Arthur Treacher's,* 1980 WL 268070, at *3).

No. CV 8401-VCL, 2015 WL 554861, at *5 (Del. Ch. Feb. 9, 2015).

As well, denying dissolution on the sole basis that it may cause disproportionate harm to one of the parties over the other is not appropriate:

> Most importantly, however, the *potential* for an inequitable result is not a basis to deny dissolution under section 273 in any event because the statute provides a mechanism to *avoid inequity.* The statute states that if the parties cannot agree to a plan of dissolution, the Court may appoint a trustee or receiver who will ensure an equitable division of the proceeds.[30] This policy clearly cushions any negative impact dissolution may have on joint venturers.
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> * * *
>
> This Court finds little discretion to avoid dissolution where joint venturers are hopelessly deadlocked with no hope of an amicable resolution of their

> differences. "Once the requirements of § 273 are met, the exercise of such discretion is limited to a determination of whether or not a bona fide inability to agree exists between the two shareholders. Where the Court so finds, and I do so here, then the petitioner, as here, is entitled to the relief provided by the statute."[31] The dissolution plan can guarantee equity to both parties if they each take a reasonable, measured approach.

In re McKinney-Ringham Corp., No. CIV. A. 15071, 1998 WL 118035, at *6 (Del. Ch. Feb. 27, 1998) (footnotes omitted).

There also is a thread running through Delaware law that a dissolution proceeding is not the vehicle for redressing breach of fiduciary duty claims:

> The issues in a dissolution proceeding are narrowly limited to those concerns directly related to the dissolution. *In re: Southern One-Stop, Inc.*, Del.Ch., C.A. No. 7500-NC, Hartnett, V.C. (Dec. 3, 1986). Actions which are adversarial in nature, such as requesting relief from a breach of a fiduciary duty and the impressing of a trust upon corporate opportunities taken by a director, are not matters directly related to a dissolution proceeding and cannot be raised therein. *In re Arthur Treacher's Fish & Chips, Inc.*, Del.Ch., 386 A.2d 1162 (1978).

In re Cambridge Fin. Grp., Ltd., No. CIV.A. 9279, 1987 WL 19677, at *3 (Del. Ch. Nov. 9, 1987); *see also Short v. McNatt*, No. CIV. A. 10077, 1991 WL 85839, at *4 (Del. Ch. May 20, 1991).

Taking the foregoing case law into account, the Court concludes the facts and inferences therefrom relied upon by the Plaintiff in the summary judgment record are more than an incidental disadvantage or disproportionate harm to the Plaintiff if judicial dissolution proceeds. As characterized by the Plaintiff, a fact finder could reasonably infer that in seeking to dissolve the LLC, Defendant Coltea intended to create a roadblock to

prevent the LLC from capitalizing on the Public Square Garage opportunity. While these facts and inferences are relevant to Plaintiffs' claims of breach of fiduciary duty, fraud, and tortious interference, the Court concludes the facts and inferences are also relevant on summary judgment as indicia of bad faith dissolution. In so concluding the Court primarily relies upon the refusal of the court in *Arthur Treacher's* to strike bad faith defenses made in that case to dissolution, and the circumstantial evidence of bad faith, considered by the courts in *Bermor* and *Vila* in a trial on the merits, although ultimately it was determined there was no bad faith. The facts and inferences supplied by the Plaintiff fit within the description in Delaware law of the narrow bad faith defense that dissolution is being used, not because there is a genuine impasse, but to manipulate an outcome in bad faith.

Further, of lesser significance but nevertheless a consideration on summary judgment is that the Court listened to the disc, of the recorded conversation between the Plaintiff and Defendant dated March 23, 2015, that is part of the summary judgment record. The Court's impression is that even though the content of Plaintiff's remarks admits the relationship of the LLC members is dysfunctional, the tone of the discussion was not hostile. At the beginning of the meeting, both parties even discussed their upcoming Spring Break plans. This content versus tone dichotomy adds to the benefit the Court would have by hearing oral testimony at trial in context with testimony about other facts.

Under these circumstances the Court must deny summary judgment because there is a genuine issue of material fact on whether there is present in this case the third criterion necessary for judicial dissolution: a bona fide impasse.

In addition to the requirement as a matter of Delaware law that the Court find that the impasse is bona fide and genuine, Delaware law also vests discretion in a court in ordering dissolution. The analogous corporate case law provides that even after the three criteria have been met, the Court must exercise discretion in determining whether dissolution is appropriate. *In re Arthur Treacher's Fish & Chips*, 1980 WL 268070, at *4 (Del. Ch. July 1, 1980). The exercise of that discretion is not talismanic or formulaic. The decision to grant dissolution, while codified, is an equitable remedy. The ultimate decision to grant judicial dissolution depends upon and is tailored by the specific facts and circumstances of each case. *Meyer Nat. Foods LLC v. Duff*, No. CV 9703-VCN, 2015 WL 3746283, at *6, n. 57 (Del. Ch. June 4, 2015). Judicial dissolution is to be used "sparingly" as a"last resort." *In Re Arrow Inv. Advisors* at *2 and *5.

Using that discretion in this case and in addition to finding there is a fact question on the existence of a bona fide impasse, the Court denies dissolution due to timing. Although somewhat procedurally different from this case, because the prompt for delay of dissolution was a motion for a stay of the Delaware dissolution proceeding pending the outcome of breach of fiduciary litigation in another forum, nevertheless *Xpress Mgmt., Inc. v. Hot Wings*

Int'l, Inc., No. CIV.A. 2856-VCL, 2007 WL 1660741, at *6 (Del. Ch. May 30, 2007) provides precedent for the proposition that it is appropriate to first determine which assets a company owns through litigation regarding breach of fiduciary duties and torts before dissolution is ordered. Holding off on dissolution until after the breach and tort trial is concluded assures that the assets to be distributed are known and can be done in an orderly and final manner, and that there is no conflicting verdict about the company's assets.

Applying the *Xpress Mgmt., Inc.* rationale to this case, the Court reasons that in the Verified Amended Complaint, the Plaintiff seeks either that the Defendants' interest in the Public Square Garage be ordered to be conveyed to the Plaintiff or a constructive trust be imposed. Additionally, as noted above, paragraph 27 of the Amended Verified Complaint states that the Plaintiff LLC, upon dissolution, loses its ownership interest in the UBS Tower and revenue stream from management fees.

Under these circumstances, were the Court to grant dissolution prior to disposition or trial on the Plaintiff's tort and breach claims, the Court is not able to forecast the effect and consequences to the relief sought in the Plaintiff's case, and such relief might be rendered ineffectual should the Court proceed to order dissolution now. For this discretionary reason, as well, the Court denies Defendant's motion for summary judgment for judicial dissolution and liquidation.

It is therefore ORDERED that Defendant Coltea's motion for summary judgment is denied.

With respect to case management, as the close of discovery approaches, the Court has determined that it will soon issue, on its own initiative, an order referring this case to mediation. The Court has held off on mediation for the parties to obtain discovery because this is a case alleging misleading and deception, and mediation would not be meaningful until the parties have had an opportunity to unearth facts. It is the Court's impression that Counsel have agreed to discovery past the May 20, 2016 discovery cutoff in the case litigation plan. It is therefore ORDERED that by May 20, 2016, Counsel shall file a Notice providing the dates of any additional discovery scheduled after May 20, 2016 for the Court to know in setting a time in its upcoming order for mediation.

Ellen Hobbs Lyle

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Steven Riley
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