

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

TERRELL K. RALEY, individually, and)
on behalf of 4 POINTS)
HOSPITALITY, LLC,)
)
Plaintiffs,)
)
VS.) NO. 16-196-BC
)
CEES BRINKMAN and BRINKMAN)
HOLDINGS, LLC,)
)
Defendants,)
)
AND)
)
CEES BRINKMAN, individually, and)
on behalf of 4 POINTS)
HOSPITALITY, LLC,)
)
Counterclaimant,)
)
VS.)
)
TERRELL K. RALEY, AMARANTH)
HOSPITALITY GROUP, LLC,)
)
Counterdefendants.)

**MEMORANDUM AND ORDER: (1) DENYING IN PART AND
GRANTING IN PART DEFENDANT BRINKMAN'S MOTION TO REVISE
AND (2) DENYING DEFENDANT BRINKMAN'S
MOTION TO SUPPLEMENT RECORD**

On September 15, 2017, Defendant Brinkman filed two motions. These motions seek for the Court to change its findings of fact and recovery awarded in a July 17, 2017 Memorandum and Order ("July 17, 2017 Trial Decision") following a bench trial.

After reconsidering the record, the July 17, 2017 Trial Decision, and the law, the rulings on these motions is that: (1) the Court continues to deny an award of punitive damages against Plaintiff Raley; (2) as to attorneys fees, the Court grants the motion in part and directs payment by Plaintiff Raley to Defendant Brinkman of \$120,137.79 from the \$240,275.59 Plaintiff Raley owes 4 Points, LLC as reimbursement for non-Pharmacy related expenditures for personal items and other expenses of his other businesses, based upon equitable considerations as authorized by Tennessee Code Annotated section 48-249-805; and (3) the Court denies Plaintiffs' motion to supplement the record and amend damages.

The law, reasoning and orders for these rulings are as follows.

Punitive Damages

The Court maintains its previous reasoning and analysis stated at pages 56-57 of the July 17, 2017 Trial Decision, which is incorporated herein by reference, and it is ORDERED that an award of punitive damages against Plaintiff Raley is denied and Defendant Brinkman's *Motion to Revise Order Denying Defendant Brinkman's Counterclaims For Punitive Damages* is denied.

Attorneys Fees

With respect to attorneys' fees, in its July 17, 2017 Trial Decision the Court declined to award either side recovery of attorneys fees. Each side was to bear the attorneys fees they

had incurred. The context for this was that the Court awarded the following recovery to be paid as follows.

1. Defendant Brinkman owes \$175,000 to 4 Points as a capital contribution.
2. Plaintiff Raley owes 4 Points \$240,275.59 as reimbursement for non-Pharmacy related expenditures for personal items and expenses of his other businesses.
3. 4 Points owes its landlord, Defendant Brinkman Holdings, LLC (“BHL”), \$18,500 for past due rent.
4. 4 Points owes Defendant Brinkman \$5,400 to equalize member distributions to him.
5. 4 Points owes Defendant Brinkman \$371,244.79 in underpaid salary.
6. With respect to Defendant Brinkman’s claim to terminate the membership of Plaintiff Raley in 4 Points, the claim was granted.

Liability for Item 1 was for Brinkman’s breach of contract.

Liability for items 2, 4 and 5 was due to Plaintiff Raley’s breach of fiduciary duty, breach of contract and conversion.

Item 3 was due to a breach of contract.

Defendant Brinkman seeks recovery of attorneys fees pursuant to Tennessee Code Annotated sections 48-249-804(a) and (b), and/or 805. These sections provide as follows.

§ 48-249-804. Award of expenses

- (a) Defendant’s expenses. On termination of the proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including attorneys’ fees, incurred in defending the proceeding, if it finds that the proceeding was commenced without reasonable cause.

(b) Plaintiff's expenses. If a derivative proceeding is successful in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of any such proceeding, the court may award the plaintiff its reasonable expenses, including reasonable attorneys' fees. If anything is so received by the plaintiff, the court shall make such award of the plaintiff's expenses payable out of those proceeds and direct the plaintiff to remit to the LLC the remainder of anything received, and if those proceeds are insufficient to reimburse the plaintiff's reasonable expenses, the court may direct that any such award of the plaintiff's expenses, or portion of the expenses, be paid by the LLC.

* * *

§ 48-249-805. Equitable remedies

If an LLC, or any officer, manager, director or member, as applicable, of the LLC, or other person with the authority to act for the LLC, violates a provision of this chapter, a court in this state may, in a proceeding brought by a member or holder of financial rights of the LLC, grant any equitable relief it considers just and reasonable in the circumstances, and, award expenses, including attorneys' fees and disbursements, to the member or holder of financial rights, as applicable.

Defendant Brinkman's argument, in part, is that he has incurred legal and expert fees of almost \$1 million to date for a \$961,819 recovery to himself and the LLC, but because the damage amounts recovered for Plaintiff Raley's breach of fiduciary duty and conversion are either payment to the LLC or by the LLC, as a 50% member, Brinkman's net recovery, he argues, is only 50% of the total, or \$480,909. "So, in actuality, Brinkman thus far has had to spend *twice as much in fees and expenses* . . . and this matter is not yet concluded. And, although Brinkman obtained termination of Raley's membership interest in 4 Points, 4 Points is required by law to pay Raley fair value for that interest. As a result, due to Raley's bad conduct, which has made it impossible for Raley to remain in the company, Raley has been

allowed to cash out his interest in the Pharmacy and leave Brinkman to bear all of the risk that the Pharmacy will continue to perform at present levels for years into the future.” *Motion to Revise Order Denying Defendant Brinkman’s Counterclaim for Punitive Damages and Attorneys’ Fees, and Memorandum in Support Thereof*, September 15, 2017, at 24 (emphasis in original).

Defendant’s analysis, however, fails to take into account the following.

1. Tennessee adheres strictly to the American rule.

Tennessee has long followed the “American Rule” with regard to attorney’s fees. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 194 (Tenn. 2000). This Rule provides that “a party in a civil action may recover attorney’s fees only if: (1) a contractual or statutory provision creates a right to recover attorney’s fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case.” Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (citing Fezell, 158 S.W.3d at 359; John Kohl & Co. P.C. v. Dearborn & Ewing, 977 S.W.2d 528, 534 (Tenn. 1998)). Otherwise, litigants are responsible for their own attorney’s fees. Cracker Barrel Old Country Store, Inc., 284 S.W.3d at 309 (citing House v. Estate of Edmondson, 245 S.W.3d 372, 377 (Tenn. 2008)).

Eberbach v. Eberbach, No. M201401811SCR11CV, 2017 WL 2255582, at *3 (Tenn. May 23, 2017). Tennessee adheres to the American Rule on recovery of attorneys fees so much so that any recovery of fees on a statute or contract must be clearly and directly connected, in a lengthy and costly production of time records and evidentiary proceeding, to show reasonable and necessary fees for prevailing on that particular statute or contract. Fees incurred for prevailing on causes of action where attorneys fees are not recoverable by statute or contract can not be included in the fee award.

2. Where fees are recoverable under a contract or statute, courts shall only award fees attributable to prevailing on those claims even if it is very difficult to separate out those fees.

In the present case, we agree with the trial court that the issues involved with the claims raised by Yoe were closely intertwined and involved a common core of facts. Furthermore, it is clear that Yoe obtained an excellent and successful result at trial. Under these circumstances, we affirm the judgment that Yoe is entitled to the entire amount of his attorney's fees and costs under the employment agreement.

D.

The trial court held that "Mr. Yoe and [Yoe Enterprises] are entitled to recover their attorney's fees." It ordered Crescent to pay the entire attorney's fee bill rendered to Yoe, a total amount of \$765,880.77. All the parties are in agreement, however, that the employment agreement providing for attorney's fees and costs to the prevailing party was between Yoe and Crescent, and, therefore, Yoe Enterprises is not entitled to an award of its attorney's fees and expenses under that agreement. Although Yoe Enterprises is a corporation wholly owned by Yoe, it and Yoe are legally distinct from one another, and have been treated as such throughout this litigation. The counter-plaintiffs' counsel listed Yoe Enterprises as a separate counter-plaintiff, and brought distinct claims on its behalf, as distinguished from those asserted by Yoe. The attorneys for the counter-plaintiffs also achieved success on behalf of Yoe Enterprises, as it prevailed on its claim related to intellectual properties owned by Yoe Enterprises.

None of the proof regarding attorney's fees contains any differentiation with respect to fees attributable or charged to Yoe, as opposed to Yoe Enterprises. All of the bills and documentation treated the case as if the attorneys had only one client; Yoe and Yoe Enterprises were not billed separately. At oral argument, counsel for the counter-plaintiffs stated that they in reality had just one client, Mr. Yoe, which is somewhat understandable given that he is the only natural person in the case and he wholly owns Yoe Enterprises. But the fact remains that Crescent agreed to pay attorney's fees to Yoe in the event he prevailed against it in a legal dispute; it never agreed to pay the fees of Yoe Enterprises. Counsel also argues that it is impossible to go back and separate

the time spent for his individual claims from the time spent for Yoe Enterprises' claims. While it may be difficult, it is not impossible. In any event, to force Crescent to pay the entire bill of \$765,880.77 would be indulging in the fiction that all of the work done by Yoe Enterprises' attorneys on its behalf was provided gratis, which is neither logical nor just. Consequently, we remand for a determination of the amount of attorney's fees attributable to the work done for Yoe Enterprises. Yoe Enterprises is not entitled to recover the amount of those fees from Crescent.

Crescent Sock Co. v. Yoe, No. E201500948COAR3CV, 2016 WL 3619358, at *8–9 (Tenn. Ct. App. May 25, 2016)

3. Applying the foregoing law of paragraphs 1 and 2, the record establishes that as to Defendant Brinkman recovering \$371,244.79 in underpaid salary and \$227,445.33 in distributions, that inures to him personally. Thus, of the total findings of mispayments by Plaintiff Raley of \$914,241.98, only \$240,275.59 or 26% inure to the benefit of the LLC. The greatest percentage, 74%, is recovery to Brinkman individually and \$18,500 to his company, Brinkman Holdings, LLC as Landlord.

4. Further as stated in the July 17, 2017 Trial Decision at page 59, Defendant Brinkman has not been entirely the prevailing party. He has prevailed on some claims but has found to have breached the Operating Agreement by not making his capital contribution; he caused confusion about the amount of the lease payments The Pharmacy was to make to BHL; and he has been found to have been mistaken about the existence, as part of the salary agreement, of a 4% reserve fund for future development, that would have cost the LLC hundreds of thousands of dollars to fund. Also there is the \$175,000 that Plaintiff Brinkman

has to pay as a capital contribution which was recovered for the LLC by Plaintiff Raley for breach of contract.

5. As stated in the July 17, 2017 Trial Decision at page 59 there was reasonable cause for Plaintiff Raley to file this lawsuit. There was uncertainty and confusion about the terms of the parties' agreements and the performance required which needed to be determined. Further, the parties had reached an impasse in their ability to deal with each other. The parties were at an impasse in making key decisions about the business which surfaced in the litigation, such as renewal of the lease, and hiring and firing of key employees, and in carrying on the business. The alternative of filing a lawsuit to obtain clarity was appropriate and reasonable.

6. Defendant Brinkman sought the remedy of expelling Plaintiff Raley. That remedy comes with the risk of lower performance by the business in the future. Defendant Brinkman did not seek the remedy for Plaintiff Raley to buy Brinkman's membership which would have eliminated future performance risk to Brinkman.

Based upon all of the foregoing, the Court finds that Defendant Brinkman's motion to recover attorneys fees under Tennessee Code Annotated section 48-249-804(a) and/or (b) does not have merit and under that statute is denied.

The part of Defendant Brinkman's motion to recover fees which does have merit is that although Brinkman obtained termination of Raley's membership interest in 4 Points, and Raley breached fiduciary duties to the LLC and Brinkman, Raley's termination is

accompanied by 4 Points being required by law to pay Raley fair value for his membership interest upon his expulsion. Thus, as a 50% member of the LLC, Brinkman receives only 50% value for the LLC recovery at trial yet bears 100% of the cost of the recovery. Further, Plaintiff Raley's breach of fiduciary duties to 4 Points LLC and to Defendant Brinkman is in violation of Tennessee Code Annotated section 48-249-403(a) (b) and (c). As quoted above, Tennessee Code Annotated section 48-249-405 authorizes the Court to grant equitable relief to Brinkman, as a member of the LLC, for the statutory breach of fiduciary duty by Plaintiff Raley.

Under these circumstances, the Court revises the July 17, 2017 Memorandum and Order with respect to the following on pages 2 and 59.

Presently page 2 of the July 17, 2017 Memorandum and Order states,

Plaintiff Raley owes 4 Points \$240,275.59 as reimbursement for non-Pharmacy related expenditures for personal items and expenses of his other businesses.

It is ORDERED that the foregoing on page 2 of the July 17, 2017 Trial Decision is supplemented, and the following is added to the foregoing on page 2.

Half of the \$240,275.59, totaling \$120,137.80, shall be paid to 4 Points by Plaintiff Raley and the other half, \$120,137.79, shall be paid by Plaintiff Raley to Defendant Brinkman, individually. This payment allocation is provided by the Court pursuant to Tennessee Code Annotated section 48-249-805 for Plaintiff Raley's breaches of fiduciary duty under Tennessee Code Annotated section 48-249-403(a) (b) and (c).

With respect to Page 59 of the July 17, 2017 trial ruling, it is ORDERED that it is revised to provide as follows.

Attorneys' Fees and Expenses

It is ORDERED that Defendant Brinkman's claim to recover reasonable attorneys' fees⁸ under Tennessee Code Annotated sections 48-249-804(a) or (b) is denied for the following reasons.

- There was reasonable cause for Plaintiff Raley to file this lawsuit. There was uncertainty and confusion about the terms of the parties' agreements and the performance required as is demonstrated above, which needed to be determined. Further, the parties had reached an impasse in their ability to deal with each other. The parties were at an impasse in making key decisions about the business as demonstrated by the disputes referred to above which surfaced in the litigation, such as renewal of the lease, and hiring and firing of key employees, and in carrying on the business. The alternative of filing a lawsuit to obtain clarity was appropriate and reasonable.
- Defendant Brinkman has not been entirely the prevailing party. He has prevailed on some claims but has found to have breached the Operating Agreement by not making his capital contribution; he caused confusion about the amount of the lease payments The Pharmacy was to make to BHL; and he has been found to have been mistaken about the existence, as part of the salary agreement, of a 4% reserve fund for future development.

It is further ORDERED that pursuant to Tennessee Code Annotated section 48-249-805, for equitable reasons stated in the subsequent November 8, 2017 Memorandum and Order, Plaintiff Raley shall pay half of the \$240,275.59, equaling \$120,137.80, to 4 Points, and shall pay the other \$120,137.79 directly to Defendant Brinkman, individually, for Plaintiff Raley's breaches of fiduciary duty under Tennessee Code Annotated section 48-249-403(a) (b) and (c).

This determination of Defendant Brinkman's claim for attorneys' fees obviates a Phase 4 hearing in this case, referenced in the April 10, 2017 Order, to determine the amount of any attorneys' fees awarded.

⁸ Defendant Brinkman's claim to recover attorneys fees under paragraph 24 of the Operating Agreement was dismissed on summary judgment on April 21, 2017. The reasoning and authorities of the April 21, 2017 Memorandum and Order are incorporated herein by reference.

Motion to Supplement Evidence and Award Additional Damages

With respect to Defendant Brinkman's motion to supplement and award additional damages for the time lag between determinations made by the experts and trial, the recovery Defendant Brinkman seeks is \$40,599.78 based on this reasoning.

Brinkman also moves the Court to amend the damages award for underpaid salaries based on the updated financial records and also based on the Court's findings and conclusions. In particular, the Pharmacy's updated profit and loss statement show that from December 26, 2016 to July 9, 2016 [sic], the Pharmacy had total sales net of sales tax of \$2,626,993.08. (Exh. A at p. 1). The profit and loss statement also shows that during that same time period, the Pharmacy had total costs of goods sold excluding labor of \$873,316.50, resulting in a gross income of \$1,753,676.58. ($\$2,626,993.08 - \$873,316.50 = \$1,753,676.58$). (*Id.*).¹

In view of the Court's findings and conclusions, Raley should have been paid a salary from December 26, 2016 to July 9, 2016 [sic] of 8% of that amount, or \$140,294.13. However, 4 Points updated financial statements show that during that time period, Raley was paid \$221,493.66, which represents an overpayment of \$81,199.53. (Exh. A at p. 4). Brinkman should have been paid 4% of the gross income amount, or \$70,147.06. However, Brinkman was paid \$110,746.81, which represents an overpayment of \$40,599.75.²

Brinkman respectfully requests that the Court amend its Order to require that Raley reimburse the Pharmacy for the net difference between the two overpayments, or an additional \$40,599.78.

¹ The Pharmacy’s updated profit and loss statement includes in costs of goods sold labor costs, which include salaries paid to both Raley and Brinkman (categorized as “Payroll Expense – Owners”). 4 Points’ tax returns, which formed the basis of both parties’ experts’ calculations, did not include labor costs in the costs of goods sold. Instead, costs of goods sold as reported on 4 Points’ tax returns included only product purchases, as shown on Form 1125-A of each return. (Trial Exh. P34 at p. 6; Trial Exh. P53 at p. 6; Trial Exh. P79 at p. 6; Trial Exh. P99 at p. 6; Trial Exh. P113 at p. 6). Indeed, Form 1125-A attached to each tax return shows that no amount of labor costs was included in the calculation of costs of goods sold. (*Id.*). Thus, in determining the Pharmacy’s costs of goods sold, and resulting gross income, from December 26, 2016 to July 9, 2017, the labor costs showed in the Pharmacy’s profit and lost statement should be removed from the costs of goods sold category.

² The overpayments were due to the fact that despite Brinkman’s objections, Raley caused 4 Points to pay salaries based up gross sales, not gross income. Beginning with the pay period following July 9, 2017, the parties agreed that pending a resolution of the buy-out issues, salaries to both Raley and Brinkman would be paid based on gross income.

The Plaintiffs oppose the motion, in part, for failure of the Defendant to cite to actual testimony in the record, as opposed to Defendant Counsel’s recollection, and for the Court to require the motion to be supported by evidence which is or will be part of the record on appeal.

The Plaintiffs’ opposition highlights that Defendant Brinkman’s motion entails not a simple mathematical recalculation to update the damages award but entails reopening the proof and reopening cross examination and defensive proof. This the Court declines to do. Defendant Brinkman’s *Motion to Supplement the Record and to Amend the Damages Award* is denied.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:

Seth McInteer

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