

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

CONSUELO N. SOLIS-KING,)	
individually and on behalf of)	
KG HOSPITALITY GROUP LLC)	
d/b/a FOO BAR,)	
)	
Plaintiffs,)	
)	
VS.)	NO. 16-70-BC
)	
JOSHUA T. GOBLE, individually and)	
as a member of KG HOSPITALITY)	
GROUP LLC d/b/a FOO BAR,)	
)	
Defendant.)	

RULINGS AND ORDERS FROM APRIL 2, 2018 BENCH TRIAL,
AND MEMORANDUM OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Case Summary

This lawsuit pertains to a bar and restaurant in which Ms. Solis-King (when referred to individually herein it shall be the “Plaintiff”) and Defendant Goble were each a 50% member in the Plaintiff LLC. The lawsuit was filed by the Plaintiff for herself and on behalf of the Plaintiff LLC. The Plaintiff claims that Defendant Goble engaged in oppressive conduct to her LLC member rights and breached the LLC oral operating

agreement, fiduciary duties and retained distributions owed to the Plaintiff. The causes of action of the Verified Complaint are

Count I—Breach of contract,

Count II—Accounting,

Count III—Breach of fiduciary duties of loyalty and care and breach of duty of good faith and fair dealing,

Count IV—Conversion, and

Count V—Judicial Dissolution and Termination of the LLC.

The Plaintiffs sought recovery of damages and attorneys fees.

Defendant Goble denied the Plaintiffs' claims and filed a Counterclaim alleging wrongdoing against the Plaintiff similar to the conduct stated in her Verified Complaint and the same causes of action of breach of contract, accounting, breach of fiduciary duty and conversion. Defendant Goble sought a referral to mediation for the parties to attempt to negotiate a buy-out. Failing that, Defendant Goble also sought dissolution and winding up of the LLC, and recovery of damages and attorneys fees.

After an unsuccessful attempt at mediation, separate orders were entered on March 28 and 29, 2017, dissolving, winding up and liquidating KG Hospitality Group LLC d/b/a Foo Bar. A claims procedure was ordered, including publication for unknown claimants pursuant to Tennessee Code Annotated section 48-249-611. One creditor of the Plaintiff LLC was identified, the Tennessee Department of Revenue, and potentially a

second creditor, Auto Owners Insurance, who held a surety bond on behalf of KG Hospitality Group LLC for any Tennessee Department of Revenue tax liability.

Discovery proceeded, and it was determined that the various LLC bank accounts had been closed. A trial was scheduled to begin on April 2, 2018 to decide the parties' claims against each other, and the claims of the Plaintiff LLC.

Within 30 days of the trial, the Plaintiffs sought to amend the complaint and continue the trial to join Three Point Five Star, LLC d/b/a Cobra ("Cobra") as a party. The Plaintiffs asserted that during the deposition of the Defendant in January 2018 the Plaintiff discovered that Defendant Goble, acting on behalf of KG Hospitality Group LLC d/b/a Foo Bar, without the knowledge and consent of the Plaintiff, sold the business in August 2016, to Cobra. The Plaintiffs assert this entity was formed by a group of KG Hospitality Group LLC d/b/a Foo Bar employees. Cobra consists of four members: Samantha Barrett, Rebecca Cobb, Matt Gray and Nikolaos Gehrke. The Defendant denied that he had sold the Foo Bar to Cobra.

The Plaintiffs' proposed amendment consisted of claims to join the Cobra parties in connection with the alleged sale of the business asserting claims of conspiracy and fraudulent conveyance against Cobra and Defendant Goble.

Because the claims the Plaintiffs sought to add could be brought separately and independently against Defendant Goble and Cobra in a second phase of this lawsuit, the Plaintiffs' motion to continue was denied, and the ruling on the Plaintiffs' motion to amend, filed March 2, 2018, was held in abeyance until the conclusion of the April 2, 2018

trial. The rationale was that it would be a benefit to all the parties and nonparties if the present parties' claims of breach of contract, accounting, breach of fiduciary duties and conversion were decided first to inform and potentially narrow the Plaintiff's claims against Defendant Goble and Cobra about the alleged sale.

The trial was conducted April 2 through April 4 with the Defendant representing himself. At the conclusion of trial, the case was taken under advisement. Provided below are the rulings, orders, and findings of fact and conclusions of law.

Rulings and Orders

It is ORDERED as follows.

The Plaintiff LLC is awarded recovery on its Count II breach of fiduciary duty claim and Count IV conversion claim against Defendant Goble for \$27,800 he withdrew from the LLC bank account in August 2016 to pay personal expenses. *See* TENN. CODE ANN. § 48-249-403 (West 2018). By May 18, 2018, Defendant shall pay these funds into the registry of the Court for satisfaction and payment for the liens and claims of all monies due to the Tennessee Department of Revenue, who has been sent a copy of this judgment, and to Auto Owners Insurance to the extent it has paid monies out of its bond to the Tennessee Department of Revenue. Should any funds remain after payment of these liens and claims, the funds shall be paid to the Plaintiff as a credit on her judgment against Defendant Goble awarded below.

Should these liens and claims of the Tennessee Department of Revenue and, potentially, Auto Owners not be satisfied upon entry of the final order in this case, pursuant to Tennessee Code Annotated section 48-249-114(d), Plaintiff Consuelo Solis-King and Defendant Joshua T. Goble are jointly and severally liable for the liens and claims of all monies due to the Tennessee Department of Revenue, who has been sent a copy of this judgment, and to Auto Owners Insurance to the extent it has paid monies out of its bond to the Tennessee Department of Revenue. Plaintiff Consuelo Solis-King, however, is awarded and shall be indemnified by Defendant Goble for any amounts Plaintiff Consuelo Solis-King pays to Auto Owners Insurance or to the Department of Revenue because these liens and claims were incurred while the Defendant was the operator and manager of the LLC, and he did not assure these were paid.

The Plaintiff prevails on her Count I breach of contract claim, Count III breach of fiduciary duty claim, and Count IV claim for conversion, and shall recover damages from Defendant for distributions she should have received of \$65,829.68.

The Plaintiffs' Count II claim for an accounting is dismissed with prejudice as moot. The Plaintiffs in discovery performed the accounting.

As to Count V for Judicial Dissolution and Termination, the LLC has been dissolved. Left under section 48-249-617 is the filing of a decree of termination. That shall be done after the recovery of Plaintiffs' attorneys' fees are quantified.

The Plaintiffs' claim to recover attorneys' fees is granted for services rendered from the January 2016 filing of the lawsuit to March 2, 2018 when the Plaintiffs filed their

motion to continue the trial and amend. This recovery is awarded as compensation for obtaining information and the accounting the Plaintiffs' Counsel performed to provide the Court financial books and records of the LLC for the winding up and dissolution. Attorneys' fees are not awarded subsequent to March 2, 2018, because the Plaintiffs' motion to continue was denied, the motion to amend is found below to be futile, and the Plaintiff did not entirely prevail at trial. She is found by the Court to also have breached the parties' oral operating agreement and her fiduciary duties.

By May 25, 2018, Plaintiffs' Counsel shall file their application for recovery of attorneys' fees from the January 2016 filing of this lawsuit to March 2, 2018. The attorneys' fee application shall include the matters required by Local Rule 5.05. Defendant's opposition to the fee amount shall be filed by June 12, 2018. A Reply, if any, is due June 18, 2018. Thereafter the Court shall determine the amount of attorneys' fees on the papers.

As to Defendant's Counterclaim, no recovery is awarded because the Defendant failed to prove he suffered damages personally from the breaches of the Plaintiff. The Counterclaim is dismissed with prejudice.

With respect to the Plaintiff's motion to amend to keep the case open to proceed with a claim against Defendant Goble and Cobra for fraudulent conveyance and conspiracy, the motion is denied as futile. The proof established that there was no personalty, fixtures or furnishings of the Business to be fraudulently conveyed. There were no premises owned by the LLC to convey, as the premises were leased. As far as any

business opportunity, there was none because of the parties' impasse and dysfunction in operating the LLC. The Court accredits Defendant Goble's testimony that he did not receive any money or any consideration from Cobra for the Business, the Plaintiffs' examination of the Defendant's account proved no such exchange, and there simply was no proof that there was anything of value to or of the Business to be bought or paid for.

The findings of fact and conclusions of law on which these rulings and orders are based are as follows.

Findings of Fact and Conclusions of Law

Background Findings of Fact

The Plaintiff is the Defendant's aunt. The proof established that the Plaintiff's father and Defendant's grandfather had been an owner/operator in the restaurant/hospitality industry and that the Plaintiff had worked at such iconic Nashville venues as Nero's, Maude's Courtyard, McCabe's Pub, Sunset Grille, Midtown Cafe. The Defendant also had experience in working for 10 years at Hooters and music/entertainment set-up and operation. These two parties formed the Plaintiff LLC in August 2012 to take over a turnkey bar and restaurant, described by the Defendant as a dive bar (the "Business"), located at 2511 Gallatin Road in East Nashville. The Business was open 19 hours a day, 7 days a week.

On August 6, 2012, the Plaintiff and Defendant filed Articles of Incorporation with the Tennessee Secretary of State to establish their member-managed LLC. The parties paid \$80,000 to the former owner to take over the business. This price was for him to recoup four rooftop air conditioning units he had purchased and installed. Many of the furnishings: pool table, prep sinks, booths are owned by the Landlord. Four or so bartenders and employees were hired.

On September 1, 2012, the Business entered into a 3-year lease through August 2015. It was a triple net lease with the tenant paying insurance and taxes, and the rent increased annually. The testimony was unclear whether the LLC was the tenant and if the Plaintiff and Defendant signed as guarantors. The Business opened September 15, 2012 and featured music and DJ entertainment.

The Court accredits the Plaintiff's testimony that in addition to an \$80,000 loan from the Plaintiff's father, the Plaintiff contributed \$27,000 in start-up funds. The Court accredits this testimony because the Plaintiff used all of her savings to start up the business which savings totaled at the time around \$27,000. The proof established that the Defendant contributed \$9,000 and contributed materials and labor to repair the premises.

The proof established there was no written operating agreement and that the parties orally agreed to both contribute equally to the operating and management of the Business, including working at the Business. The Court finds that the parties agreed that each, the Plaintiff and Defendant, would be paid weekly \$500, which was then increased to \$600 per

week, and, if the Business had any remaining profit after all bills were paid, the remaining profits would be split equally.

The first quarter of the Business September 2012 to December 2012, the Business paid its bills and its employees; each party received a \$12,760 distribution (trial exhibit 9, K-1s); and the parties had no dispute until mid-2013. Disputes arose at that time over each side removing money from the LLC account with the other side alleging the removal was for personal not LLC purposes and an incident concerning revocation of the LLC's liquor license.

The Court finds that the Plaintiff temporarily, unilaterally removed herself from the LLC to obtain a mortgage on her personal home. This occurred in December 2012. Even though the Plaintiff rejoined the LLC as a member, nevertheless, the domino effect of her temporary withdrawal occurred subsequently when the liquor license of the Business was revoked in September 2013 for having only one LLC member. Reinstatement was not permitted. The Defendant had to reapply for the Business to be relicensed.

During this same time, the Court additionally finds that the Plaintiff withdrew funds from the Business which caused the Business' checks to be dishonored, including the federal withholding checks.

At the end of 2013 into 2014 the Plaintiff's and Defendant's relationship deteriorated, and disputes and accusations escalated. The parties retained attorneys and unsuccessfully attempted a buy-out and other measures. The parties obtained orders of protection against each other. The Defendant opened new accounts for the Business.

The Plaintiff, seeing withdrawals by the Defendant and new accounts opened, withdrew \$16,000 on October 16, 2013, from the Business' primary operating account. The Plaintiff claims she was advised to do so by her attorney.

By February 2014 the parties were at an impasse in operating the Business together, and the Plaintiff quit working at the Business. From 2014 to September 2016, the Defendant solely managed and operated the Business. The proof established that the Plaintiff was not paid \$600 per week for 56.43 weeks at various times during the January 2013 through August 2016 timeframe as per the following chart.

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
2013	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	None
2014	None	None	None	None	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600
2015	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600	\$600
2016	None	None	None	None	None	None	None	None				

When the 3-year lease for the Business terminated in September 2015, the Defendant renewed it for one year. In January of 2016 this lawsuit was filed. As the Business' lease came to a close in September 2016, the Defendant was advised by an attorney that the Defendant could not keep a liquor license without renewal of the lease, and that the Defendant could not be part of any new business operating on the premises.

The proof established that at the beginning of September 2016, the Landlord terminated the lease and reimbursed the Defendant the September 2016 rent payment

which was \$3,800. Shortly thereafter, Cobra opened a restaurant/bar at the 2511 Gallatin Road location. The proof established that the Defendant had a romantic and shared living arrangement with the main owner, Samantha Barrett, of Cobra and that the Defendant works part-time at the location for Cobra. The Defendant denies he sold the Business to the new owners, and denies he has any side deal with the new owners.

During the time the Defendant solely managed and operated the Business from February 2014 through September 2016, the Court finds that the Defendant did not maintain books and records, and failed to have tax returns and K-1 Statements prepared regularly and timely, and did not provide Plaintiff distributions except for the intervals when she was paid \$600 per week as charted above. Because of these defalcations, Plaintiffs' Counsel has had to engage in time-consuming discovery and an accounting to recreate the finances of the Business. The Court finds that the Defendant's objections to the recreation and accounting by Plaintiff's Counsel carries no weight because the Defendant's testimony about the finances was sketchy and contradictory, and he did not maintain books and records as he was required to do by law in a member-managed LLC.¹

¹ The duty of care includes the duty to "refrain[] from engaging in any grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law." Tenn. Code Ann. § 48-249-403(c).

The duty of loyalty includes the duty to "account to the LLC and to hold as trustee for it any property, profit or benefit derived by the member in the conduct . . . of the LLC's business" in a member-managed LLC:

- (1) To account to the LLC and to hold as trustee for it any property, profit or benefit derived by the member in the conduct or winding up of the LLC's business, or derived from a use by the member of the LLC's property, including the appropriation of any opportunity of the LLC;

TENN. CODE ANN. § 48-249-403 (West 2018).

The Court further finds that the Defendant withdrew in August 2016 \$24,000 from the LLC bank account for personal medical needs and he personally retained a \$3,800 refund from the Landlord to the LLC on the September 2016 rent payment.

As to the Plaintiffs' allegations that the Defendant sold or obtained value from Cobra for the Business, the Court finds there is not proof of this for several reasons. First, there was no personalty, fixtures or furnishings of the Business to be conveyed. The Landlord owned those. Secondly, the \$80,000 the parties had paid for the Business was the amount the former operator had expended on air conditioning. There was no proof the \$80,000 was spent on assets which the Defendant in turn could have conveyed to Cobra. Additionally, there were no premises owned by the LLC for the Defendant to convey; the premises were leased. Also, there was no lease of the LLC to assign; it had expired. As far as any business opportunity, there was none because of the parties' impasse and dysfunction in operating the LLC. The Court accredits Defendant Goble's testimony that he did not receive any money or consideration from Cobra for the Business in large part because there simply was no proof that there was anything of value to or of the Business to be bought or paid for.

Findings and Conclusions on Liability

From the foregoing findings of fact, the Court concludes that the Plaintiff was the first to breach the operating agreement and her fiduciary duties by temporarily removing herself from the LLC, and that she contributed to the parties' impasse and dysfunction in

operating the Business with her temporary withdrawal from the LLC and withdrawing money from the Business resulting in insufficient funds for checks that had been written on the LLC account.

The Court further finds the Defendant also contributed to the impasse and dysfunction and breached the operating agreement and his fiduciary duties by not maintaining accurate books, records, tax returns, tax filings, not providing distributions to the Plaintiff, and withdrawing LLC funds for personal needs.

Findings and Conclusions of Law on Damages

With respect to damages, the Court finds the Plaintiff LLC is entitled to recover from Defendant Goble. The Court also finds that the Plaintiff is entitled to recovery for the Defendant's breaches. As to the Defendant, he is awarded no recovery because the Court finds he personally sustained no damages as a result of Plaintiff's breaches.

As to recovery by the Plaintiff LLC, the Court finds that the Defendant shall pay back into the registry of the Court the \$24,000 he withdrew from the LLC account in August 2016 to pay personal medical bills, and he shall also pay into the registry of the Court the \$3,800 rent reimbursement paid by the Landlord in September 2016. These funds (totaling \$27,800) were monies of the LLC.

As to the Plaintiff's damages, the Court has used the Business' profit and loss statements which existed from January 1, 2014 through May 31, 2016, and the K-1 Statements for years 2012, 2013 and 2015 (trial exhibits 6, 9 and 16). The evidence

established that, except for the various \$600 per week payments made to the Plaintiff charted above, the Plaintiff received a K-1 distribution only in 2012. Even though tax returns were filed for 2013 and 2015 containing K-1s, none of these distributions were made to the Plaintiff in 2013 and 2015. No tax returns were filed for 2014 and 2016. The Court has adopted the extrapolation of Plaintiffs' Counsel of \$45,150.92 as the K-1 disbursement owed for 2014, and \$43,280.76 as the K-1 disbursement owed for 2016 in the absence of K-1 filings by the Defendant. The Court adopts the Damages Calculation Model of Plaintiffs' Counsel as follows:

Damages Calculation Method

Year	K-1 Disbursement
2013	\$53,626.00—from tax return trial exhibit 6
2014	\$45,150.92—extrapolated by Plaintiff's Counsel
2015	\$38,546.00—from tax return trial exhibit 16
2016	<u>\$43,280.76</u> —extrapolated by Plaintiff's Counsel
Total:	\$180,603.68

The Plaintiff claims she should recover the total \$180,603.68 for distributions she did not receive. The Court, however, deviates some, at this point, from the Plaintiff's damage calculation.

As just noted, the Plaintiff asserts that in addition to the \$600 per week the Plaintiff received from 2013 through 2016, as charted above, she should recover a total \$180,603.68 for K-1 distributions she did not receive for the years January 2013 through August 2016. The Plaintiff asserts the \$600 per week she received was salary and does not count as a credit against distributions she seeks to recover.

There were, however, no W-2s or 1099s filed for the parties. The proof was clear that the \$600 per week was not reported to the IRS as wages. Accordingly, the Court finds that the greater weight and preponderance of the evidence is that the \$600 per week the parties were to be paid was not salary but instead were distributions.

Thus the Court finds that subsumed in and a part of the total \$180,603.68 distributions calculated above is the \$600 per week for the 191.29 weeks for years January 2013 through August 2016, which the parties had agreed to distribute, and which totals \$114,774. This \$114,774, must then be credited and deducted from the \$180,603.68. That deduction ($\$180,603.68 - \$114,774$) leaves \$65,829.68 the Plaintiff is entitled to recover in distributions from the Defendant she did not receive when he was managing and operating the Business.

As for the proof from the above chart that the Plaintiff did not regularly receive the \$600 per week and there were 56.43 weeks, as shown in the chart above, that the Plaintiff was not paid, the Court does not add this amount ($\$600 \times 56.43 = \$33,858$) back in as recovery of distributions to the Plaintiff. The Court reasons that after February 2014 the Plaintiff was not participating in the management and operation of the Business. After February 2014 the Plaintiff did not contribute money, services or her time to the Business. The Defendant had to take on those responsibilities 100%. Accordingly, the 56.43 weeks of \$600 per week in distributions (\$33,858) the Plaintiff did not receive shall not be recovered from Defendant Goble. This decision for the Plaintiff not to be paid the

\$33,858 is to account for the Plaintiff abandoning the operating and management of the LLC and leaving that solely for the Defendant to bear.

As to the claim of both the Plaintiff and Defendant to recover their start-up contributions, the Court dismisses those claims. The proof did not establish that the parties agreed that their initial investments were loans to be paid back by the LLC or that there was an agreement these would be paid back or recouped.

The Court additionally determines that the Plaintiffs are entitled to recover attorneys' fees, pursuant to Tennessee Code Annotated section 48-249-805, for their services from the filing of the lawsuit through March 2, 2018, as compensation for obtaining information and the accounting they performed to provide the Court financial books and records of the LLC for the winding up and termination of the LLC. Attorneys fees are not awarded subsequent to March 2, 2018, because, as found above, the Plaintiff herself committed some breaches of the parties' oral operating agreement and her fiduciary duties, and she did not entirely prevail at trial.

The Defendant's claim to recover attorneys' fees is denied based upon his failure to keep accurate books and records and make distributions to the Plaintiff which has handicapped winding up of the LLC.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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

M. Ben Moore, II

Colin B. Calhoun

Joshua T. Goble

Tennessee Department of Revenue

Auto Owners Insurance