

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

JONATHAN KING,

Plaintiff,

VS.

DEAN CHASE,

Defendant.

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NF
NO. 16-30-BC

DAVIDSON COUNTY
CHANCERY COURT
SEP 29 2016
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FILED

**MEMORANDUM AND ORDER: (1) GRANTING AND DENYING
IN PART DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS AND (2) SETTING OCTOBER 7, 2016 DEADLINE
FOR SCHEDULING RULE 16 CONFERENCE**

This lawsuit was filed by a Partner against the Manager of the Partnership for allegedly refusing the Plaintiff access to the Partnership's books and records, and not identifying the Partnership's accountant. These actions, the Plaintiff asserts in its Complaint, violate the Partnership Agreement and the Tennessee Revised Uniform Partnership Act, citing to section 6.1(a) and (c) of the Partnership Agreement, and Tennessee Code Annotated section 61-1-403(b) and (c).

The case is before the Court on the Defendant's Motion for Judgment on the Pleadings. The Motion asserts that the Complaint should be dismissed on these grounds:

1. The Defendant is not a proper party because he is not a Partner, only the Manager of the Partnership. The two sections of the Partnership Agreement cited by the Plaintiff in the Complaint which allegedly have been breached—section 6.1(a) and (c)—provide that it is the Partnership who has the duty to provide the Plaintiff/Partner with

access to books and records. Section 6.1 imposes no duty upon the Defendant. Similarly, the two Tennessee Code Annotated sections cited in the Complaint, sections 61-1-403(b) and (c)—place the obligation on the Partnership to provide access to books and records.

2. The Plaintiff's Complaint is moot because the pleadings and other filings ordered by the Court have granted the Plaintiff access to the books and records of the Partnership.

3. The Plaintiff's prayer for relief, requesting an award of attorney's fees, must be dismissed because there is no specific statutory or contractual authorization for such recovery. *Cracker Barrel Old County Store, Inc. v. Epperson*, 284 S.W.3d 303, 305-09 (Tenn. 2009).

4. Plaintiff's prayer for prejudgment interest must be dismissed because there is no allegation that the Plaintiff has been denied the use of funds or damages for prejudgment interest to relate to.

5. The Defendant is entitled to partial judgment on the liability portion of its unjust enrichment counterclaim against the Plaintiff. The benefit conferred upon the Plaintiff is that the Defendant has, among other things, had to defend the lawsuit. Because such actions were obviously taken for the benefit of NV Partners and thus represent legitimate business expenses of the Partnership, the Plaintiff has appreciated the benefits provided by the Defendant.

Improper Party Challenge—Denied

Taking separately each of the grounds for judgment on the pleadings, the Court begins with the Defendant's claim that he is not a proper party. The Court's ruling on this basis for judgment on the pleadings is that it is denied as follows.

In Section 5.1 of the Partnership Agreement, it is the Defendant, the Partnership's Manager, who is vested with the authority to make decisions of the Partnership. Next, paragraphs 15 through 18 of the Complaint assert that the Plaintiff was denied his Partnership Agreement right of access to books and records and identification of the Partnership accountant, and that that decision, to deny those rights, was made by the Defendant.

In *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585 (1980), the Court of Appeals held that an agent cannot escape liability for wrongful acts against third persons "simply because the agent was acting within the scope of the agency or at the direction of the employer." *Id.* at 590 (citations omitted). The decision further explains that an officer or director of a corporation who commits or participates in the commission of a tort is likewise liable to third parties regardless of the liability of the corporation. *Id.*

Applying the *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011) standard to the pending motion and *Brungard*, the Court's analysis, with respect to the proper party challenge by the Defendant is, that section 5.1 of the Partnership Agreement establishes that it is the duty of the Defendant, the Managing Partner, to make the decisions of the Partnership, "no Partner, other the Managing Partner shall have the power

or authority to act for or bind the Partnership in its capacity as a Partner.” Next, paragraphs 15-18 of the Complaint, which must be taken as true on the Motion for Judgment on the Pleadings, assert irregularities in the accounting of the Partnership and that the Plaintiff was denied his Partnership access and rights to books and records and identification of the accountant pursuant to the Partnership Agreement and the Tennessee Partnership Act. Further, the section 5.1 duties of the Managing Partner, quoted above, establish that it is the Defendant who took those actions on behalf of the Partnership to allegedly commit the wrongful conduct of denying the Plaintiff access to the books and records. Thus, paragraphs 15-18 of the Complaint allege violations not only of the contract right to access of books and records but also the statutory right. Under the law stated in *Brungard*, while it is the case that the Defendant is not in breach of contract because he is not a signatory to the contract, the violation of the statutory duties is akin to a commission of tort. Thus, as the agent of the Partnership who allegedly committed the wrong, the Defendant is a proper party and liable under such a theory. Under the *Brungard* ruling, the Plaintiff has stated a claim to sue the Defendant as a party for the alleged wrongs.¹ The Motion challenging the Defendant being a proper party is denied.

Mootness

Turning to the next ground of the Motion, the Court concludes that even though the Defendant is a proper party, the Plaintiff’s Complaint is moot.

¹Whether the Defendant has a right against the Partnership for indemnity is not before the Court.

The Court determines that with respect to paragraph 2 of the Prayer for Relief of the Complaint, seeking for the Court to order the Defendant to provide access to Partnership books, records, information and accountings, that relief has been obtained. This ruling is based upon the Notices filed with the Court from February 16, 2016, through August 3, 2016, and the affidavits. Through that exchange, the Plaintiff has been provided the information sought in the Complaint. In particular in deciding that the relief has been granted and there no longer is a claim for access, the Court notes that the deficiencies stated by the Plaintiff in its notice of February 16, 2016, pertained to bank accounts which are not maintained by the Partnership and, therefore, do not constitute Partnership records. It is clear from the filings that the Plaintiff has been provided the access it sought in filing the Complaint. The Court additionally concludes that the Plaintiff's claim to copy information does not come within either the contract or statutory duty of the Partnership to provide access. For these reasons, the Court grants the Motion for Judgment on the Pleadings as moot.

Attorneys Fees and Prejudgment Interest Claims Dismissed

The Court also grants the motion for judgment on the pleadings with respect to dismissal of the Plaintiff's claim for attorneys fees and prejudgment interest. As stated in the Memorandum of the Defendant, Tennessee adheres to the American Rule and absent a specific statutory or contractual authorization each party bears its own attorneys fees and is precluded from recovering them. *Cracker Barrel Old County Store, Inc. v. Epperson*, 284 S.W.3d 303, 305-09 (Tenn. 2009). Neither Tennessee Code Annotated section 61-1-403 nor

the Partnership Agreement provide for an award of attorneys fees with respect to filing a lawsuit to inspect Partnership books and records. For the same reason prejudgment interest is not to be awarded.

Counterclaim for Unjust Enrichment—Motion Denied

Lastly, the Court denies the Defendant's motion for partial judgment on its counterclaim that the Plaintiff has been unjustly enriched by the Defendant having to defend against this lawsuit. The Defendant's theory is that the wrong in issue is a business expense of the Partnership, and that the Plaintiff is jointly and severally liable for liabilities of the Partnership and has appreciated the benefits provided by the Defendant. At the outset, of its brief, the Defendant asserts that the premise of the unjust enrichment is that the Defendant "is an improper Defendant to this suit." Because the Court determined above that the Defendant is a proper party, there has been no unjust enrichment on that basis, and therefore, the Court denies granting the partial motion for judgment on the pleadings with respect to the unjust enrichment claim of the counterclaim. As observed in footnote 1, *supra*, whether, alternatively, Defendant has a right of indemnity from the Partnership for his defense of this case is not before the Court.

It is therefore ORDERED that the Court rules upon the Defendant's Motion for Judgment on the Pleadings as follows:


1. The Defendant is a proper party to the lawsuit.

2. The Plaintiff's claim for access to books and records is dismissed as moot along with his claim for attorneys fees and prejudgment interest.

3. The Defendant's motion for judgment on the pleadings on its counterclaim of unjust enrichment is denied.

Additionally, the Court shall conduct a Rule 16 Conference to determine what issues remain to be litigated and to establish a plan to complete that litigation. It is ORDERED that on or before October 7, 2016, Counsel shall notify the Docket Clerk, Mrs. Smith (615-862-5719), of their availability for a Rule 16 Conference on the following dates and times:

October 19, 2016, at 1:00
October 24, 2016, at 1:00
October 26, 2016, at 11:00



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Brian Cummings
Brian Manookian
Mark Hammervold
Rob McGuire
Gayle I. Malone
Charles I. Malone
Beau C. Creson
Paige M. Ayres



MAILED + faxed
9-29-16