

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

RANDALL V. TALASKI,

Plaintiff/Counter-Defendant,

v

Case No. 14-138663-CK

Hon. Wendy Potts

KARSON L. CARPENTER, et al,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER RE: COUNTER-DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On
OCT 09 2014

Plaintiff/Counter-Defendant Randall Talaski's trust holds a 50% membership interest in Compliance Training Partners, LLC (CTP). The trusts of Defendants/Counter-Plaintiffs Karson and Alma Carpenter each hold a 25% membership interest in CTP. Under a 2011 operating agreement, Karson and Alma Carpenter have exclusive control over all financial decisions of CTP and manage its daily affairs. Talaski filed this action in February 2014 claiming that the Carpenters financially mismanaged CTP and breached contractual and fiduciary obligations. Talaski also alleges claims for member oppression and usurpation of business opportunity. The Carpenters filed a counter-complaint seeking dissolution of CTP, an accounting, injunctive relief, and a receiver, alleging minority oppression and derivative claims, and asserting a claim for unpaid wages.

Talaski now moves for summary disposition of the Carpenters' counter-claims under MCR 2.116(C)(8), which tests the legal sufficiency of the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Talaski first asserts that the Carpenters' oppression claim fails because they have not and cannot assert that Talaski is CTP's manager or is in control of CTP. The Limited Liability Company Act allows an LLC member to bring an action "to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." MCL 450.4515(1). The Carpenters claim that Talaski is in "effective" control because he can block any vote with his 50% interest. They further note that the LLCA does not define what it means to "control" an LLC. However, the Carpenters have not alleged that Talaski is in control nor have they alleged any facts that would show that he is in control. Thus, Talaski is entitled to dismissal of Count II, the minority oppression claim.

Talaski next asserts that the Carpenters' derivative claim fails because they did not make a written demand on CTP as required by MCL 450.4510(b). However, the Carpenters assert that the demand requirement is unnecessary because it would be futile, citing *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990) and *Kimball v Bangs*, 321 Mich 394, 418; 32 NW2d 831 (1948). Although *Campau* and *Kimball* involve provisions of the Business Corporation Act, the futility principal is equally applicable here. "The law does not require a useless formality." *Swain v Kayko*, 44 Mich App 496, 501; 205 NW2d 621 (1973). Thus, the Carpenters are not required to make a demand on Talaski if it is futile. Because the Carpenters pleaded futility, Talaski is not entitled to summary disposition on this ground.

Talaski also asserts that the derivative claim fails because it is premised on the assertion that Talaski breached fiduciary duties owed to CTP or the Carpenters. Talaski argues that a

member of an LLC does not owe fiduciary duties to other LLC members. “Limited liability companies involve fiduciary relationships. . . . The LLCA's requirement that a manager discharge duties ‘in the best interests of the limited liability company,’ MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members.” See *Dawson v Delisle*, unpublished opinion of the Court of Appeals, decided July 21, 2009 (Docket No. 283195). Although *Dawson* is not binding on this Court, its analysis is persuasive. Talaski owed no fiduciary duties to the Carpenters and because he was not the managing member he owed no fiduciary duties to CTP. Because the Carpenters’ derivative claim is premised solely on the breach of fiduciary duties, it fails as a matter of law and Talaski is entitled to summary disposition of Count III of the Carpenters’ counterclaim.

Talaski also argues that the Carpenters’ dissolution claim and request for a receiver fail because CTP is not a party to this action. As for the dissolution claim, Talaski cites no authority that requires an LLC to be named as a party in a claim for dissolution. The LLCA states only that an LLC member can apply for dissolution with the circuit court “whenever the company is unable to carry on business in conformity with the articles of organization or operating agreements.” MCL 450.4802. Because there is no requirement in LLCA that CTP be a party to a dissolution action, the Court will not dismiss the Carpenters’ dissolution claim on this ground.

However, there is authority for Talaski’s claim that the LLC has to be a party before the Court can appoint a receiver over it. This Court cannot issue an order affecting the rights of a person or entity who is not a party to the case. See *Shouneyia v Shouneyia*, 291 Mich App 318, 323; 807 NW2d 48 (2011). Because appointment of a receiver would implicate CTP due process rights, and the Carpenters have not named CTP as a party, Talaksi is entitled to dismissal of the receiver claim.

Talaski next argues that the Carpenters' accounting claim fails because an accounting is allowed only if there is no adequate remedy at law and if discovery will not reveal the information sought through an accounting. See *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 779; 348 NW2d 25 (1984). Because the Carpenters concede that an accounting is barred where they have access to the information through discovery, and they have not claimed that they cannot obtain the necessary information through discovery, the Court dismisses the accounting claim.

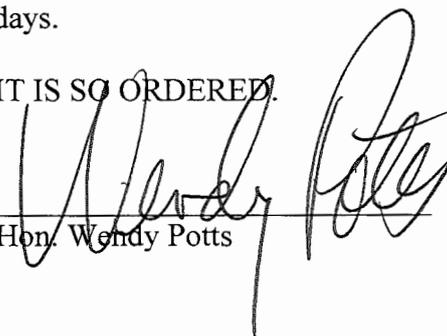
In his final argument, Talaski asserts that the Carpenters' claim for unpaid wages fails because the LLC, not Talaski, is the employer. Although the Carpenters correctly note that the definition of an employer can encompass an individual acting on behalf of the LLC, see MCL 408.471(d), the Carpenters have not alleged that Talaski was acting as their employer. In fact, the Carpenters alleged in paragraph 8 of their counter-complaint that CTP was their employer and has not paid wages. Because the Carpenters' wage claim is legally insufficient as pleaded, the Court dismisses the claim.

In sum, the Court grants Talaski summary disposition of the Carpenters' counterclaims for a derivative action (Count III), an accounting (Count IV), the receiver request in Count V, and the unnumbered wage claim. Because Talaski's motion was brought under (C)(8), the Court must allow the Carpenters an opportunity to amend their claims. See MCR 2.116(I)(5). The Carpenters may file an amended pleading within 14 days.

Dated:

OCT 09 2014

IT IS SO ORDERED.


Hon. Wendy Potts