

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

RESIDENTIAL FUND 69, LLC,  
Plaintiff,

Case No. 2015-146857-CB  
Hon. Wendy Potts

v

AMSG, INC. and JAY OFFEN,  
Defendants.

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**OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY  
DISPOSITION PURSUANT TO MCR 2.116(C)(5), (C)(7), and/or (C)(10), ETC.**

At a session of Court  
Held in Pontiac, Michigan

On  
JAN 21 2016

This matter is before the Court on:

- (1) Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(5), (C)(7), and/or (C)(10);
- (2) Defendants' Ex Parte Motion to Accept 2-Page Supplemental Brief in Support of Motion for Summary Disposition; and
- (3) Plaintiff's Motion to Compel Arbitration.

By way of background, Defendant AMSG, Inc. ("AMSG") entered into an Operating Agreement with TANE, LLC ("TANE") as equal members of Residential Fund 69, LLC ("RF69"). Upon allegations that AMSG misappropriated RF69 funds while manager of the company, TANE and certain individuals unilaterally determined that Portfolio One, LLC would take over as the new manager of RF69. AMSG subsequently filed a lawsuit, namely 14-138680-CB, against TANE, Portfolio One, LLC, and the afore-mentioned individuals on February 3, 2014. Plaintiff's present action is derivative of that earlier case.

In their Motion for Summary Disposition, Defendants argue that Plaintiff's Complaint should be dismissed under MCR 2.116(C)(5) for the reason that Plaintiff Residential Fund 69, LLC ("RF69") lacks the legal capacity to sue AMMSG and Jay Offen. Defendants contend that the RF69 Operating Agreement requires both members, AMMSG and TANE, to review, vote on, and approve of the initiation and financing of any lawsuit by RF69 and this did not occur. According to Defendants, Michael Freedman of TANE unilaterally authorized the litigation herein in violation of the Operating Agreement.

In response, Plaintiff defers to AMMSG's position that its membership interests were converted by TANE to conclude that AMMSG is no longer a member of RF69. Based upon its conclusion that AMMSG is no longer a member, Plaintiff asserts that AMMSG's consent to file a lawsuit is not required. Plaintiff also argues that AMMSG has been involuntarily removed as a member of RF69 under the Operating Agreement. In contrast, Defendants maintain that while AMMSG has been involuntarily deprived of its membership rights in RF69 since December 2012/January 2013, AMMSG continues to have a 50% membership interest in RF69. Moreover, AMMSG has never been removed as a member.

Should the Court find that RF69 lacks standing to pursue claims against AMMSG under the Operating Agreement, Plaintiff argues that it will be left without a remedy against AMMSG's alleged wrongful conduct. As an alternative, Plaintiff relies on MCL 450.4409 to argue that AMMSG holds an interest in this lawsuit and as a result, AMMSG cannot vote on whether or not a lawsuit should be filed against it. Plaintiff defers to MCL 450.4409(2), which states: "[e]xcept as otherwise provided in the articles of organization or an operating agreement, a transaction is authorized, approved, or ratified for purposes of subsection (1)(b) if it receives the affirmative vote of a majority of the managers that have no interest in the transaction. The presence of, or a

vote cast by, a manager with an interest in the transaction does not affect the validity of an action taken under subsection (1)(b).” In opposition, Defendants distinguish MCL 450.4409 as applicable to managers and not members and therefore, that statute is not relevant to the matter herein. Defendants also address the Operating Agreement, which provides that in cases where the voting results in a tie, binding mediation – as a remedy - shall be utilized by its members.

Review of a motion under MCR 2.116(C)(5), which asserts a party's lack of capacity to sue, requires consideration of “the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.” *Wortelboer v Benzie Co.*, 212 Mich App 208, 213, 537 NW2d 603 (1995); *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

As a preliminary matter, the Court shall address Plaintiff's contention that AMMSG is no longer a member of RF69. During the July 28, 2015 deposition of Francis A. Crowley of Portfolio One, LLC<sup>1</sup>, Mr. Crowley refers to both TANE and AMMSG as members of RF69. See Defendants' Exhibit Thirteen. While Plaintiffs attempt to “correct” Francis Crowley's deposition testimony via his October 9, 2015 Affidavit<sup>2</sup>, the Court finds that this Affidavit was not properly executed and therefore, shall not be considered. That is, Sara Bell admitted in her deposition, attached as Exhibit C to Defendants' Reply Brief, that Francis Crowley never appeared before her to sign the Affidavit, nor did she provide him with an oath or affidavit prior to her notarization of the document. As such, the Affidavit is invalid pursuant to MCR 2.114(B)(2), which requires verification by an oath or affirmation of the party.

Defendants also attach as Exhibit A to their Reply Brief - an email, dated August 6, 2015, from Plaintiff's counsel that represents there are two members of RF69. Moreover, Defendants

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<sup>1</sup> Portfolio One, LLC is currently the acting manager of RF69.

<sup>2</sup> See Plaintiff's Exhibit B.

submit copies of the Partnership Form 1065 Schedule K-1 documents that have been sent to AMMSG annually through 2014. See Exhibit Seven of Defendants' Motion.

Accordingly, the Court finds that Plaintiff has failed to provide any documentary evidence to support its claim that AMMSG is no longer a member of RF69. To the contrary, the documentary evidence provided by Defendants indicates that AMMSG continues to be a member of RF69. The Court also notes that Paragraph Eight of Plaintiff's May 1, 2015 Complaint identifies both AMMSG and TANE as the sole members of RF69.

Next, the Court defers to the subject RF69 Operating Agreement as Exhibit One of Defendants' Motion, which provides in pertinent part as follows:

13a. "Each Member will have a single equal vote on any matter. In cases where voting results in a tie, binding mediation shall be used."

34. "All matters outside the day-to-day business of the Company will be decided by the Members as outlined elsewhere in this Agreement."

39. "Only the following individuals have authority to bind the Company in contract: managing partner, but subject to Member approval, in writing, if such expenditure is not a day to day business operation, or such expenditure is in excess of \$2,500.00."

42d. "There must be at least 100% of the Members present at a meeting for any decisions to be binding."

In accordance with the RF69 Operating Agreement, both members - AMMSG and TANE - shall decide all matters outside of the day-to-day business of RF69. The Court observes from the July 28, 2015 deposition of Francis A. Crowley that he categorizes the filing of the present lawsuit as "not a standard operational activity" that would fall within the day-to-day business activity. Clearly, initiating and financing litigation would require both members' approval pursuant to the RF69 Operating Agreement. It is undisputed that AMMSG did not review, vote on, or approve the filing of this lawsuit, nor did AMMSG review, vote on, or authorize the retention of Plaintiff's counsel. It appears that Michael Freedman of TANE authorized the litigation and expenses in violation of the subject Operating Agreement. Thus, the Court finds that Plaintiff

RF69 lacks capacity and authorization to file the present action and accordingly, the Court grants Defendants' summary disposition motion pursuant to MCR 2.116(C)(5).

With respect to Plaintiff's contention that there is no remedy against AMMSG's alleged wrongful conduct, the Court refers to provision 13a of the Operating Agreement, which provides the remedy of binding mediation for its members in cases of a voting tie.

Considering Plaintiff's reliance on MCL 450.4409(2), the Court agrees with Defendants' assessment that the provision applies to managers and not members. Since the RF69 Operating Agreement requires voting by members and not managers, MCL 450.4409(2) is not relevant to this matter.

Defendants next assert that Plaintiff's Count One, Breach of Fiduciary Duty, is time-barred under the two year Statute of Limitations and should be dismissed pursuant to MCR 2.116(C)(7) and/or (C)(10). Likewise, Count One should be dismissed since Jay Offen was never a "manager" of RF69 as required by MCL 450.4404.

In response, Plaintiff maintains that the commencement of this lawsuit was timely in light of the circumstances. Plaintiff argues that confusion was created when the Court entered the April 22, 2015 Order in the related case, namely 2014-138680-CB, wherein RF69 was required to file its complaint within 10 days. When Plaintiff's counsel attempted to file a complaint in the related action, the Clerk of Court would not accept the filing of the "Complaint" and allegedly instructed counsel to initiate a new action. Plaintiff maintains that it should not now be barred by the Statute of Limitations if the claims asserted in the related case expired. Plaintiff also contends that Jay Offen is an agent of AMMSG and thus, is personally liable for the tortious actions of AMMSG.

In reply, Defendants continue to argue that Plaintiff's breach of fiduciary duty claim is time-barred and there is no tolling or relation back argument that can save that claim. Defendants assert, and this Court agrees, that Plaintiff has provided no precedential legal authority to support its judicial tolling or relation back arguments. "It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

MCR 2.116(C)(7) permits summary disposition where the claim is barred by the Statute of Limitations. "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered." *Maiden v Rozwood*, 461 Mich 109, 118-19; 597 NW2d 817 (1999). Notwithstanding, "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996).

Pursuant to MCL 450.4404(6), "[a]n action against a manager for failure to perform the duties imposed by this act shall be commenced within 3 years after the cause of action has

accrued or within 2 years after the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first.” The Court finds that MCL 450.4404(6) applies only to managers, which would include Defendant AMMSG, but not Defendant Jay Offen.

The Court is persuaded by Defendants’ argument that RF69 and TANE first discovered the alleged misconduct in either July 2012 or on March 1, 2013, when TANE drafted a letter to RF69, outlining the allegations of Defendants’ misappropriation of funds. See Exhibit 5 of Defendants’ Motion. In view of either the July 2012 or March 1, 2013 date, the Court finds that Plaintiff did not initiate this action until May 1, 2015, which is beyond the two year Statute of Limitations.

Plaintiff defends against the time-barred action by arguing that the doctrine of judicial tolling applies on account of the confusion created by the Court’s orders on April 22, 2015. The transcript of the April 22, 2015 hearing from the earlier case, i.e., Plaintiff’s Exhibit G, evidences this Court’s ruling wherein Plaintiff’s motion to intervene was granted conditionally and RF69 was provided with 10 days to file an intervening complaint in that case. While the Court’s order provides that Plaintiff shall file a complaint, it was clear that Plaintiff was required to file an intervening complaint in the earlier action. The Court never intended for Plaintiff to initiate a new lawsuit. Contrary to the Court’s ruling, Plaintiff filed an entirely separate lawsuit against AMMSG, Inc. and Jay Offen on May 1, 2015 on the following counts of: breach of fiduciary duty; breach of contract; gross negligence, fraud, and wrongful conduct; alter ego; declaratory judgment; and demand for arbitration. The Court finds that there has been no confusion that would warrant any judicial tolling or suspension of the Statute of Limitations.

Next, Plaintiff claims that it stepped into the shoes of TANE in the related case in order to utilize the commencement date - within the Statute of Limitations - of that earlier action. The

Court agrees with Defendants' argument, however, that there can be no relation back to the earlier case with respect to Plaintiff. The Court is mindful of the Court of Appeals' decision in *Miller*, which provides that the "[t]he relation-back doctrine does not apply to the addition of new parties." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007). Plaintiff, as a new party, is subject to the Statute of Limitations two year time frame and as a result, is time-barred from pursuing its breach of fiduciary duty claim against Defendants. Therefore, Defendants are entitled to summary disposition under MCR 2.116(C)(7) and (C)(10).

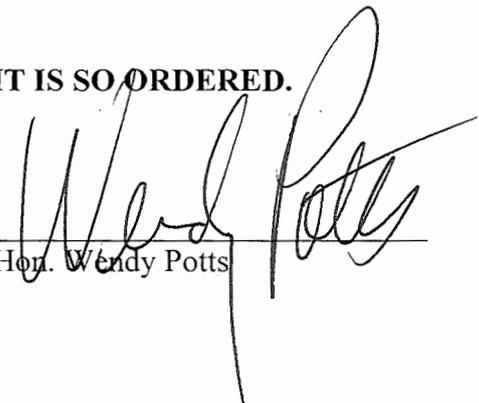
For all of these reasons, the Court grants Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(5), (C)(7), and (C)(10) and dismisses Plaintiff's claims with prejudice.

The Court hereby denies Defendants' Ex Parte Motion to Accept 2-Page Supplemental Brief in Support of Motion for Summary Disposition as untimely and effectively inconsequential to the disposition of Defendants' Motion for Summary Disposition.

The Court further denies Plaintiff's Motion to Compel Arbitration as a moot issue.

This Opinion and Order resolves the last pending claim and hereby closes the case.

**IT IS SO ORDERED.**

  
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Hon. Wendy Potts

Dated:

JAN 21 2016