

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

RAUSTIN MORTGAGE SERVICES, LLC;
and KEVIN VINK,

Plaintiffs,

Case No. 13-05938-CKB

vs.

HON. CHRISTOPHER P. YATES

STEVEN L. HOEZEE,

Defendant.

_____ /

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Just as engaged couples rarely anticipate divorce, members of closely held companies rarely foresee dissolution when embarking upon business ventures. And in the same manner as couples that take actions during marriage that they later come to regret during divorce, the two remaining members of Plaintiff Raustin Mortgage Services, LLC (“Raustin”) – Plaintiff Kevin Vink and Defendant Steven Hoezee – now have misgivings about the informal fashion in which they operated their business.

On February 1, 2006, Plaintiff Vink and Defendant Hoezee joined Raustin as members and employees. Vink and Hoezee became friends over the next several years, and together they survived the Great Recession despite their work as mortgage originators. But by March of 2013, the two men could no longer agree about Raustin’s operations. Therefore, Hoezee terminated his employment with Raustin and submitted a proposed membership resignation on March 21, 2013. But Vink refused to accept the membership resignation, so Hoezee remains a member of Raustin despite the fact that he is now working for a competing company. Vink also began to investigate Raustin’s financial affairs and found what he regarded as improper distributions to Hoezee over the years. Thus, Vink and Raustin filed this action against Hoezee requesting damages related to alleged breaches of fiduciary duties. In

addition, both sides have asked for the Court's guidance in terminating Hoezee's membership interest. The dispute came into sharp focus at the bench trial on July 2, 2014. Now, based upon the evidence adduced at that trial, the Court must resolve the parties' competing claims.

I. Findings of Fact

According to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." In this regard, the Court must state "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of "a written opinion." See MCR 2.517(A)(2) & (3). Thus, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict regarding the terms of dissolution.

On February 1, 2006, Plaintiff Kevin Vink and Defendant Steven Hoezee joined Raustin, a group of individual mortgage originators who had decided to team up to reduce their overhead costs. At that time, Raustin was a five-member limited liability company with each member holding a 20-percent membership interest. See Trial Exhibit 1. Pursuant to the members' agreement, each member was to receive a salary predicated upon the revenue that the member generated, and each member was also entitled to distributions based upon that member's capital units. See id. (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 4.1). But during the housing crisis that began in 2008, several members of Raustin abandoned the mortgage-originating business, leaving Vink and Hoezee as the remaining members with 50 capital units each. See Trial Exhibit 2. Vink and Hoezee continued to operate Raustin together until March 2013, when Hoezee submitted his proposed membership resignation to Vink. See Trial Exhibit 7. Vink, however, refused to accept Hoezee's membership resignation because of unsettled issues regarding alleged breaches of fiduciary duties. In particular, Vink insists that Hoezee received unequal distributions in 2011 and 2012, see Trial Exhibits

3-6, took unauthorized distributions in 2013, see Trial Exhibit 9, and wrongfully retained the proceeds from three loans that closed in 2013. See Trial Exhibit 12. Hoezee does not dispute taking the extra distributions, but he contends that he was entitled to those additional distributions as reimbursement for business expenses that he did not run through Raustin.

II. Conclusions of Law

Plaintiffs Raustin and Vink initially advanced four claims against Defendant Hoezee, but the plaintiffs relied only on their claim for breach of fiduciary duty at trial. Thus, the Court shall consider that theory alone. The Raustin operating agreement imposes a fiduciary obligation upon its managers, see Trial Exhibit 1 (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 5.5, stating that “[t]he Managers shall perform its managerial duties in good faith, in a manner it reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.”),¹ but a Raustin manager is liable to the company for a breach of that fiduciary duty only if “the loss or damage [was] the result of fraud, deceit, gross negligence, willful misconduct, or a wrongful taking by the Managers.” Id. Here, Vink and Hoezee were both managers of Raustin during the time period at issue, see Trial Exhibit 2 (Special Resolution of the Members of Raustin Mortgage Services, LLC, dated August 1, 2008), and both men owned 50 capital units. See id. (Exhibit A to Operating Agreement of Raustin Mortgage). Thus, they were entitled to receive equal membership distributions from Raustin. See Trial Exhibit 1 (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 4.1).

The plaintiffs argue that Defendant Hoezee breached his fiduciary duties as a Raustin manager by making additional distributions to himself in 2011 and 2012, by taking extra distributions from the Chemical Bank account that Hoezee set up in Raustin’s name, and by retaining proceeds from loan

¹ The Michigan Limited Liability Company Act, MCL 450.4101, *et seq.*, also imposes fiduciary duties upon managers of a limited liability company. See MCL 450.4404(1).

originations of Raustin clients after he left Raustin. Hoezee does not dispute these facts. He admits that he took disproportionate distributions from Raustin in 2011 and 2012 even though he and Vink each owned 50 capital units. See Trial Exhibits 3-6. He also admits that he took extra distributions in 2013 *via* a Chemical Bank account that he set up in the name of Raustin without Vink's knowledge. See Trial Exhibit 9. Further, he admits that he retained the proceeds from four real-estate closings for Raustin clients that were completed after he left Raustin. See Trial Exhibit 12.

Despite his admissions, Defendant Hoezee claims that he was entitled to the extra distributions as reimbursement for business expenses that he did not run through the company. Hoezee admits that, with the wisdom of hindsight, this practice may not have been the soundest course of action, see Trial Transcript at 87, and the Court concludes that these activities constitute wrongful takings of Raustin's assets in contravention of Raustin's operating agreement and in violation of Hoezee's fiduciary duties to Raustin. See Trial Exhibit 1 (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 5.5). Therefore, the Court must find in favor of Raustin on its claim for breach of fiduciary duties against Hoezee.²

In light of the finding that Defendant Hoezee breached his fiduciary duties to Plaintiff Raustin, the Court must determine the measure of damages Raustin is entitled to receive as compensation for Hoezee's breach of his fiduciary duties. First, the evidence establishes that Hoezee took an additional member distribution of \$14,375 in 2011, see Trial Exhibits 3 & 4, and an extra member distribution of \$25,188 in 2012, see Trial Exhibits 5 & 6, which Hoezee must return to Raustin for distribution in equal amounts to Hoezee and Plaintiff Vink. Second, the evidence establishes that Hoezee took an extra member distribution of \$6,700 from the Chemical Bank account in 2013. See Trial Exhibit 9.

² The Court cannot find in favor of Vink, however, because in limited liability companies, the managers' fiduciary duty is owed to the company, not to individual members. See Dawson v DeLisle, No 283195, slip op at 4 (Mich App July 21, 2009) (unpublished decision).

That amount must also be returned to Raustin for distribution in equal shares to Hoezee and Vink. Third, the evidence establishes that Hoezee improperly retained loan-closing proceeds related to four Raustin clients after leaving the company. Those loans totaled \$950,253, see Trial Exhibit 12, which should have yielded loan-origination fees of \$10,000 to \$15,000. See Trial Transcript at 30-31. The plaintiffs concede that Hoezee is entitled to half of those loan-origination fees, but they assert that the other half of those fees belongs to Raustin. See id. at 31. Because Vink's testimony on this point gave the Court a range of \$10,000 to \$15,000, the Court shall conservatively presume that a fee of \$10,000 for Raustin should have been generated from those closings, so Hoezee must return \$5,000 to Raustin for distribution in equal measure to Hoezee and Vink. In total, Hoezee must return \$51,263 to Raustin to be equally divided between himself and Vink.³

III. Verdict

Based upon the Court's findings of fact and conclusions of law, Plaintiff Raustin is entitled to \$51,263 from Defendant Hoezee to compensate for Hoezee's breach of his fiduciary duties. Pursuant to the Raustin operating agreement, those funds must then be distributed in equal amounts to Hoezee and Vink based upon each one's ownership of 50 capital units of the company. See Trial Exhibit 1 (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 4.1); see also Trial Exhibit 2 (Exhibit A to Operating Agreement of Raustin Mortgage). But because the Court shall exercise its equitable power to terminate Hoezee's membership interest in Raustin, see Trial Exhibit 1 (Second Amendment to Operating Agreement of Raustin Mortgage Services, LLC, Section 9.1(b)(i)), Hoezee shall be responsible to pay only \$25,631.50, which is one-half of the obligation to Raustin for damages resulting from his breach of fiduciary duties. Accordingly, Plaintiffs Raustin and Vink are invited to submit to the Court, under the seven-day rule, see MCR 2.602(B)(3), a proposed

³ The Court has considered Hoezee's testimony regarding debts that he assumed on behalf of Raustin, but concludes that those debts have no bearing on the damages analysis in this case.

judgment that memorializes the verdict, resolves the last pending claim between the parties, and closes the case.

IT IS SO ORDERED.

Dated: July 21, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge