Christopher GERMANO, Appellee
v.
John BEAUJEAN, Appellant.

No. WD-12-032.

Court of Appeals of Ohio, Sixth District, Wood County.

August 30, 2013.

*1239 Eugene F. Canestraro, Toledo, for appellee.

Thomas A. Matuszak and Gregory R. Elder, for appellant.

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Wood County Court of Common Pleas ordering the return of monies paid by the operating member of a limited liability company to himself and a business owned by him. Because we conclude appellant improperly diverted company funds to himself, we affirm.

{¶ 2} Appellant, John Beaujean, is the uncle of appellee Christopher Germano's now former wife Renae, nka Hottle. Appellant owns a restaurant supply company, Restaurant Mega Mart.

{¶ 3} In 2007, appellant came to appellee with the proposition that the two men obtain a pizza franchise in Perrysburg, Ohio, near appellant's home. Appellee, who lives in Michigan, would provide financing for the venture; appellant would provide on-site supervision of the store. Ownership would be equally divided between appellant and appellee.

{¶ 4} On August 17, 2007, appellant and appellee obtained a franchise for a Vito's Pizza store from Vito's Franchising, Inc. In October, appellant and appellee formed an Ohio Limited Liability Company, Vito's Pizza #9, L.L.C., to operate the store. Appellant and appellee were listed as the only members of the L.L.C. Appellee provided a $280,000, interest-only for five years, loan to the operating company to cover the start-up.

{¶ 5} In 2009, appellee and his wife divorced in Michigan. In the final decree, appellee was awarded half of Renae's shares in a Michigan title company; Renae was awarded half of appellee's membership in Vito's Pizza. Proceeds from interest and principal derived from the $280,000 note to Vito's Pizza #9 was also to be divided equally. The decree was subsequently amended to provide that Renae retain all interest in the title company and appellant be permitted to buy out any interest Renae may claim in his share of Vito's Pizza #9, L.L.C.

{¶ 6} In 2010, appellant began to pay himself a management fee, made retroactive to the beginning of the venture. He also began to pay a bookkeeping fee to Restaurant Mega Mart at the rate of $45 per hour. Appellant also transferred funds from Vito's business account to a separate Vito's account, accessible only to him. Appellee contends these expenditures were without his consent and that, when he asked appellant to return the money, appellant refused.

{¶ 7} On March 2, 2011, appellee filed a verified complaint, alleging that appellant's acts breached a statutory duty of good faith and fair dealing, violated his fiduciary duty and constituted conversion. Appellant sought preliminary and permanent injunctive relief barring appellant from making further transactions, an accounting, *1240 imposition of a constructive trust, a money judgment and punitive damages.

{¶ 8} Appellant answered, denying wrongdoing and raising several counterclaims, including accusing appellee of theft, multiple instances of perjury in his verified complaint, falsification, tampering with evidence, and breach of fiduciary duty. Appellant asked for a declaratory judgment stating that appellee's ownership of the L.L.C. was only 25 percent after the divorce, the $280,000 promissory note did not constitute a capital contribution by appellee and appellant was the only member of the L.L.C. to have management authority.

{¶ 9} The trial court held a hearing on appellee's request for injunctive relief, but concluded that appellee had failed to establish by clear and convincing evidence that he would suffer irreparable harm if relief was not granted. The matter subsequently went on to a full bench trial on the remaining issues.

{¶ 10} At trial, the parties agreed that it was their original intent that each of them would be 50 percent owners of Vito's Pizza #9, L.L.C. Appellee was to finance the franchise and appellant would earn his half through "sweat equity." Appellee and appellant disagreed about the nature of the arrangement. Appellee insisted that appellant's compensation was to come through a distributive share of the profits and any value the company might accrue. Appellant maintained that it was never part of the agreement that he would manage the store without pay in perpetuity. Both parties agreed that, other than the L.L.C. filing, there was no written operating agreement between them.

{¶ 11} Renae Hottle confirmed the understanding of the parties that the original intent was a 50/50 partnership in the franchise. She also testified that, by the time of the trial, appellee had completed the repurchase of any interest in appellee's 50 percent membership in Vito's #9 that may have been awarded in their divorce. She denied she ever held a membership interest in the company.

{¶ 12} Following the trial, the court found that appellant was unauthorized to transfer funds to accounts outside the reach of appellee. The court ordered appellant to return all funds to accounts accessible to appellee. The court found that the parties had a prior agreement that appellant not charge management fees and ordered him to reimburse the company for $97,353.16 taken out since 2010. The court also ordered appellant to stop paying bookkeeping fees to anyone without appellee's consent and ordered him to return bookkeeping fees paid to Restaurant Mega Mart in excess of a $15 per hour fair market value for such services. The court ordered appellant to provide financial records for the period from 2008 through 2012 to the extent accounts had not already been turned over. The court denied punitive damages and attorney fees to appellee.

{¶ 13} The court denied appellant's counterclaims and issued a declaration that both parties were and are 50 percent owners of Vito's Pizza #9. The court also declared that Renae Hottle does not now, nor has she ever held any membership interest in Vito's Pizza #9.

{¶ 14} From this judgment, appellant now brings this appeal. Appellant sets forth six assignments of error;

First Assignment of Error: The trial court committed reversible error when it ruled against

Appellant and for Appellee on Appellant's Fourteenth Counterclaim for declaratory judgment, regarding contributions to Vito's #9.

Second Assignment of Error: The trial court committed reversible error when it ruled against Appellant and for Appellee on Appellant's claim for declaratory judgment (Counterclaim Thirteen), regarding Appellee's and Appellant [sic] *1241 respective membership interests in Vito's #9.

Third Assignment of Error: The trial court committed reversible error when it ruled against Appellant and for Appellee on Appellant's claim for declaratory judgment (Counterclaim Fifteen), regarding Appellee's and Appellant's respective management authority over Vito's #9, LLC.

Fourth Assignment of Error: The trial court committed reversible error when it granted judgment in favor of Appellee on his second claim for breach of common-law fiduciary duty.

Fifth Assignment of Error: The trial court committed reversible error when it granted judgment in favor of Appellee on his first claim for statutory breach of fiduciary duty.

Sixth Assignment of Error: The trial court committed reversible error when it implicitly granted judgment in favor of Appellee on his claim for an accounting.

Limited Liability Company

{¶ 15} An Ohio limited liability company is neither a corporation nor a partnership, but hybrid containing attributes of each. *Dexxon Digital Storage, Inc. v. Haenszel,* 161 Ohio App.3d 747, 2005-Ohio-3187, 832 N.E.2d 62, ¶ 64 (5th Dist.). Ownership of the L.L.C. rests not in partners or shareholders, but with members. A "member" is statutorily defined as one whose name appears on the records of the L.L.C. as an owner of a membership interest in the company. R.C. 1705.01(G). A "membership interest" in an L.L.C. is a member's share of the profits and losses of the company and the right to receive distributions from that company. R.C. 1705.01(H).

{¶ 16} Members may enter into an operating agreement that defines the agreement of the members with respect to the conduct of the business of the company. R.C. 1705.01(J). Absent an operating agreement, however, certain statutory provisions govern the relationship between the members and the operation of the company. *See, e.g.,* R.C. 1705.03(B), 1705.09(C)(D), 1705.12, 1705.13, 1705.14(A)(1), 1705.16(C); *Matthews v. D'Amore,* 10th Dist. Franklin No. 05AP-1318, 2006-Ohio-5745, 2006 WL 3095817, ¶ 37. In this matter, it is undisputed that no operating agreement was created for Vito's Pizza #9, L.L.C.

I. Contribution

{¶ 17} In his first and third assignments of error, appellant asserts that the trial court erred in denying his fourteenth and fifteenth counterclaims. Appellant sought declarations that the $280,000 loan appellee granted to the company did not constitute a capital contribution, that appellee never made a capital contribution and the only capital contribution to the company was from appellant through his management of the store. Appellant asked the trial court to declare that appellee "has never had, and continues to have no, management authority" in the business and appellant is the sole management authority. This proposition is also premised on appellee's purported failure to contribute to the L.L.C.

{¶ 18} R.C. 1705.09(A) provides:

The contributions of a member may be made in cash, property, *services rendered,* a promissory note, or any other binding obligation to

contribute cash or property or to perform services; *by providing any other benefit* to the limited liability company; or by any combination of these. (Emphasis added.)

{¶ 19} Appellant sees clearly that his operation of Vito's Pizza #9 creates sweat equity; he is purchasing his membership in the L.L.C. through services rendered. He is more myopic when it comes to his *1242 view of appellee's contribution. Appellee has obtained financing for the venture.

{¶ 20} There was some testimony at trial that initially the parties sought to finance the enterprise with bank financing. It was later decided, for a reason not apparent from the testimony, that appellee would loan his own money to the L.L.C. There is no legal difference in these approaches. In both instances, the L.L.C. is liable to the lender. In both instances, the members of the L.L.C. have money at risk subject to loss should the company be unable to meet the terms of the loan. Absent evidence of some sort of overreaching not present here, the source of the loan is not relevant.

{¶ 21} If the company was completely dependent on borrowed money, a bank or other traditional lending institution would be likely to insist on personal guarantees or other restriction before lending to a wholly leveraged entity. This may be the reason for the need of appellee to loan his own money. In any event, it was undisputed that the intent of the parties at the beginning was that each be a 50 percent member of the L.L.C. At the outset, then, appellant found appellee's services rendered sufficient contribution to the company. The trial court did not err when it chose to recognize that fact. Appellant's first and third assignments of error are not well-taken.

II. Effect of Divorce

{¶ 22} In his second assignment of error, appellant maintains that the trial court erred in overruling his counterclaim requesting a declaration that the result of appellee's Michigan divorce decree, dividing appellee's membership in the company equally with his former wife, was the reduction of appellee's interest in the whole company to 25 percent.

{¶ 23} In material part, R.C. 1705.14 provides:

(B) After the filing of the articles of organization of a limited liability company, a person may be admitted as an additional member in either of the following ways:

(1) If he acquires an interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the written consent of all of the members;

(2) If he is an assignee of the interest of a member who has the power as provided in writing in the operating agreement to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.

{¶ 24} It is undisputed that there was no written operating agreement for Vito's Pizza #9, L.L.C. Similarly, there was no written consent from all members of the company that Renae Hottle was a member. As a result, Renae Hottle could not have become a member of the company pursuant to R.C. 1705.14. Moreover, her name does not appear in the records of the company as having a membership interest, so she could not have acquired a membership in that manner. *See* R.C. 1705.01(G), (H), *Matthews,* 10th Dist. Franklin No. 05AP-1318, 2006-Ohio-5745, 2006 WL 3095817, at ¶ 33.

{¶ 25} It is clear that appellant's insistence that appellee's Michigan division of property divested him of half of his interest is not well-founded. Michigan law does not supersede Ohio business organizations law concerning Ohio business organizations. While the decree undoubtedly gives rise to a claim in favor of Hottle, the identification of that claim or interest is unnecessary here. Absent satisfaction of one of the statutory methods, Hottle never became any part of a member of *1243 Vito's Pizza #9 L.L.C. Concomitantly, appellee's membership was never diluted as appellant claimed. Accordingly, appellant's second assignment of error is not well-taken.

III. Fiduciary Duty

{¶ 26} In his fourth and fifth assignments of error, appellant suggests that the trial court erred in finding him in breach of his common law and statutory fiduciary duties to the company.

{¶ 27} R.C. 1705.281 defines the fiduciary duties of loyalty and care a member owes to a limited liability company, including discharging "duties to the limited liability company and the other members pursuant to this chapter or under the operating agreement and exercise[ing] any rights consistent with the obligation of good faith and fair dealing." R.C. 1705.281(D).

{¶ 28} R.C. 1705.25 states the authority of members in the management of a limited liability company. Whether the management of the company is reserved to its members or, by authority of an operating agreement, vested in a manager, a member or manager may act as an agent of the company. If, however, the member's act "is not apparently for the carrying on the business of a limited liability company in the usual way," the act must be authorized by the other members or it is not binding. R.C. 1705.25(A)(2), (B)(2).

{¶ 29} Appellant misconstrues the trial court's judgment. There was no express finding that appellant breached any fiduciary duty. Rather, the court found, as a matter of fact, that appellant had agreed to manage the business without a management fee. The court found that appellant was not authorized to open bank accounts to which appellee had no access. The court found that the bookkeeping fees appellant paid to his wholly owned Restaurant Mega Mart exceeded the fair market value of those services as established during trial and, inferentially, unauthorized in the amount paid.

{¶ 30} Crediting appellee's trial testimony that appellant agreed to oversee the operation of the store in return for a sweat equity half interest in the business and nothing more, there is evidentiary support for the court's finding that a management fee was unauthorized. Moreover, appellee testified that he did not authorize excessive bookkeeping fees or any rearrangement of bank accounts. This is testimony by which the court, as trier of fact could have found these acts were unauthorized. *See* *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-21. Additionally, since these acts were patent departures from prior practice, the court could reasonably conclude that appellant was not carrying on the business of the company in the usual way. Since appellant was enriched due to acts antithetical to the statute, the trial court could properly order the return of the money derived from the breach. Appellant's fourth and fifth assignments of error are not well-taken.

IV. Accounting

{¶ 31} In his remaining assignment of error, appellant claims the court erred in ordering appellant to provide an accounting for the business. Appellant insists that appellee did not have standing to bring such an action and the

proper claim should have been a derivative action against the company.

{¶ 32} The company in this instance is the members of the L.L.C.: appellant and appellee. Each member has a statutory right to obtain, inter alia, "[t]rue and full information regarding the status of the business and the financial condition of the company." R.C. 1705.22(A)(1)(a). Thus, the trial court properly found that appellant was "entitled to an accounting of business expenditures for the years 2008-2012" *1244 and properly ordered that, to the extent appellant had not received such information, it should be provided to him.

{¶ 33} Whether the claim or the determination was an "accounting" in the corporate sense is immaterial. Appellee is statutorily entitled to this information and appellant has it. Irrespective of the label associated with such disclosure, appellant is required to provide such information to any member. Accordingly, if there was a semantic error, appellant was not prejudiced by it, *see* App.R. 12(D), and appellant's final assignment of error is not well-taken.

{¶ 34} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

MARK L. PIETRYKOWSKI, J., and THOMAS J. OSOWIK, J., concur.