STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2022-CP-10-02589

John Kachmarsky, Individually, as Manager of K&T Group, LLC, and as Trustee of the Revocable Trust of John Kachmarsky dated November 30, 2007, as Member of K&T Group, LLC,

Plaintiffs,

v.

David G. Taylor, Individually and as Manager of K&T Group, LLC; Taylor Capital, LLC, as Member of K&T Group, LLC; and K&T Group, LLC,

Defendants.

ORDER

On September 17, 2024, this Court held a bench trial in the matter between Plaintiffs John Kachmarsky, Individually, as Manager of K&T Group, LLC, and as Trustee of the Revocable Trust of John Kachmarsky dated November 30, 2007, as Member of K&T Group, LLC ("Plaintiffs") and Defendants David G. Taylor, Individually and as Manager of K&T Group, LLC; Taylor Capital, LLC, as Member of K&T Group, LLC; and K&T Group, LLC ("Defendants"). Having considered all matters of record and the evidence and arguments presented at trial, the Court finds that Plaintiffs did not satisfy their burden of proof for the claims asserted in their Complaint and dismisses those claims with prejudice. The Court further finds that Defendants satisfied their burden of proof for their counterclaim and enters judgment in Defendants' favor on that claim.

A. Facts

This dispute involves the interests of a limited liability company formed in 2003: K&T Group, LLC ("K&T" or the "Company"). K&T's interests are owned in equal halves by Plaintiff the Revocable Trust of John Kachmarsky dated November 30, 2007 (the "Kachmarsky Trust"), and Defendant Taylor Capital, LLC ("Taylor Capital"). The respective principals of those member entities are John Kachmarsky (Trustee) and David Taylor, who are also the managers of K&T. The primary asset of the Company is a commercial office known as Suite 330 of the Franke Building at 171 Church Street in Charleston.

Under the Company's Operating Agreement, K&T is a Term company. Under the South Carolina Uniform Limited Liability Act (the "LLC Act"), a Term company like K&T has limited rights of transfer and exit. *See* S.C. Code Ann. § 33-44-101(19) ("Term company means a limited liability company in which its members have agreed to remain members until the expiration of a term specified in the articles of organization."); Trial Tr. 104:20 – 105:4. According to the Operating Agreement, the stated purpose of the Company is "to hold and manage Company Property." (Defs' Ex. 1, § 1.10.) Kachmarsky and Taylor operate different commercial entities (law firms) within Suite 330, and K&T rents the remaining office space in Suite 330 to third parties. For the last several years, Suite 330 has been occupied by rent-paying tenants, save for infrequent vacancies. (Trial Tr. 100:21–101:9.)

Plaintiffs presented evidence of payment disputes having arisen a few times during the more than twenty years of company operations. One such disagreement led the parties to a common understanding to address significantly different expectations for use of the property. In 2014, Kachmarsky and Taylor addressed their respective law firms' use of additional office space in Suite 330 and whether such use of unoccupied office space obligated that firm to make additional

rental payments to K&T. (Defs' Ex. 2.) The parties brought that issue to a trusted third party. (Defs' Ex. 4.) With the third party's guidance, the parties agreed that a law firm's sustained use of vacant office space would require that firm to make additional rent payments. The parties moved forward, however, allowing the firms to use additional space without payment when each firm used an equivalent amount of additional space. (Trial Tr. 102:16 – 104:3.) And K&T permitted temporary use of empty office space by a law firm without additional payment as long as the temporary use did not preclude rental of the space to interested third parties. (Trial Tr. 84:18 – 85:23; 155:2-13.) In light of Kachmarsky's resistance, K&T did not follow the third party's suggestion to enter lease agreements with the law firm occupants in Suite 330. (Trial Tr. 80:1–23; 110:3 - 111:16; 104:4–10; 154:9–23.)

The disagreements raised by Plaintiffs occurred prior to the statutory period, that is, more than three years before the filing of this action, save one. (Trial Tr. 82:3 – 83:11.) That one disagreement that occurred during the statutory period involves the Taylor Foley law firm's use of an otherwise vacant office in Suite 330 for the firm's summer intern in 2021.

During trial, Taylor testified that the summer intern used an available office on a part-time basis and only in the summer months of May, June, and July. (Trial Tr. 159:15–20; 160:14–164:9.) Defendants presented documents demonstrating that a summer intern began working for Taylor Foley in May and that the summer intern was paid by Taylor Foley only for the months of May, June and July 2021. (Defs' Exs. 22, 23, and 24; Trial Tr. 160:14– 162:21.) In fact, the evidence was clear that Kachmarsky knew that the firm's intern started in May. (Defs' Exs. 24, 25.) Taylor testified that no other person associated with Taylor Foley used vacant office space in Suite 330 during that time, that Taylor Foley had no records of any female that might have utilized that space

prior to May, and that Taylor's investigation into the matter confirmed that no Taylor Foley employee utilized vacant office space prior to May 2021. (Trial Tr. 163:22–164:9.)

There is no credible evidence of an additional Taylor Foley employee having been hired and placed in that (otherwise unoccupied) office before May 2021. Indeed, although an employee of Kachmarsky's law firm testified that he remembered a female using the subject vacant office in February 2021, he could recall little detail from that time years ago except that only one female had occupied the subject office in 2021, until the male associate took the office in August. (Trial Tr. 138:20 –139:3; 142:21 –143:12.)

In early 2022, rent payments due to the Company from Taylor Foley were delayed. Taylor Foley's longtime bookkeeper—who had historically handled rent payments to K&T—exited, and the firm had difficulty finding a replacement. (Trial Tr. 156:14–157:6.) When the matter of rental payments was brought to Taylor's attention, he sought information from Kachmarsky -- a more detailed statement as to what Kachmarsky said was owed. (*Id.* at 156:25–159:2.) In April of 2022, following email exchanges between Taylor and Kachmarsky and Kachmarsky's counsel threatening litigation as to K&T and its members, Taylor Foley paid rent for the use of the additional office starting in August of 2021 when its full-time associate attorney started work. (Defs' Ex. 9.) Kachmarsky contends that rent remains due for the months of January through July of 2021.

Plaintiffs filed this lawsuit in June 2022.

B. Procedural History

In this action, Plaintiffs assert three claims against Defendants: (1) breach of contract, (2) judicial expulsion under S.C. Code Ann. § 33-44-601, and (3) judicial dissolution under S.C. Code Ann. § 33-44-801. On August 19, 2022, Defendants filed an answer and asserted a counterclaim

for breach of the Operating Agreement. On September 16, 2024, Defendants filed a motion to amend their answer and counterclaim, attaching a proposed amended answer and counterclaim as an exhibit to the motion. The Court granted that motion during a pre-trial hearing on September 17, 2024. The Court then held a non-jury trial on Plaintiffs' claims and Defendants' counterclaim on September 17, 2024.

C. Discussion

Having considered the evidence and arguments presented at trial and all matters of record, the Court addresses the parties' claims below.

1. Plaintiffs' Claim for Breach of Contract

As an initial matter, the Court declines to consider any alleged breach which occurred prior to the statutory period, that is, more than three years before the initiation of this action. *See Maher v. Tietex Corp.*, 331 S.C. 371, 376, 500 S.E.2d 204, 207 (Ct. App. 1998) ("An action for breach of contract must be brought within three years from the date the action accrues.") (citing S.C. Code Ann. § 15-3-530(1)). Although Kachmarsky presented evidence to demonstrate why he would prefer that his Trust be permitted to exit the term company K&T after twenty years, he concedes that the dispute over eight months of rent he says Taylor Foley should pay K&T "is the amount that is arguably in dispute at the moment." (Trial Tr. 83:4 – 11.) Plaintiffs are correct that what is in dispute is whether Taylor Foley must pay for alleged use of one office for seven months of 2021, prior to its full-time employee occupying that office in August of that year. Plaintiffs are incorrect, however, in pressing that claim for $8,750.00 in rent against the Defendants.

The party that rents space from the Company, and which temporarily used and ultimately rented the specific office at issue, is the law firm Taylor Foley. (Trial Tr. 102:16 – 23; 78:20 – 79:10.) Kachmarsky communicated with Taylor Foley employees about office space and rent

generally and specifically owed in this instance. (Defs' Exs. 24, 9, 7.) Kachmarsky acknowledged that his law firm, not the Plaintiff Trust, rents other space in Suite 330. In fact, Kachmarsky acknowledged that the payments K&T receives for the respective law firms' rentals come from the law firms. (Trial Tr. 125:2 - 9.) To the extent there was any remaining rental obligation at issue, that obligation belonged to Taylor Foley, LLC. (Trial Tr. 116:19 – 117:4; 108:2 – 7; 119:3 - 5.)

Taylor Foley is not a party to the Operating Agreement. At Kachmarsky's insistence, there is no written lease agreement between K&T and Taylor Foley. (Trial Tr. 80:1 – 23; 154:18 - 23.) And, of course, Taylor Foley is not a party to this suit; no plaintiff here brought a claim against Taylor Foley, LLC.

Moreover, to the extent that Plaintiffs complain about actions of K&T Manager David Taylor, those actions all relate to whether rent was being paid on time or in the correct amount by the law firm—not by K&T member Defendant Taylor Capital LLC and not by K&T manager Taylor. Those complaints are not complaints of David Taylor acting as a manager of K&T. In fact, Taylor testified that Taylor Foley employees have handled rental duties for years. (Trial Tr. 156:14 – 158:2; 191:13 - 18.) Not surprisingly, no Plaintiff sent notice of any default of obligations or duties to Taylor Capital per section 12.2 of the K&T Operating Agreement. (Defs' Ex. 8; Trial Tr. 107:1–11.) Kachmarsky's Trust did not call a member meeting per section 4.2 of the Operating Agreement. Kachmarsky as manager did not call a Management Committee meeting per section 5.5, or seek to make a capital call per section 3.8. (Trial Tr. 107:12–108:16.)

Accordingly, Plaintiffs have failed to demonstrate that Defendants breached any contract. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015) ("The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach.").

2. Plaintiffs' Claim for Judicial Expulsion

The Court finds that Plaintiffs have failed to justify expelling Taylor Capital, LLC from the Company. A Court may judicially expel a member from a limited liability company if the member:

> (i) engaged in wrongful conduct that adversely and materially affected the company's business;
>
> (ii) wilfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 33-44-409; or
>
> (iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member[.]

S.C. Code Ann. § 33-44-601(6). The South Carolina Court of Appeals has recently recognized that:

> [Limited liability company] members seeking to expel a fellow member . . . are required to clear a high bar" and a court may not order disassociation "merely because there is a conflict." "[D]isagreements and disputes among [limited liability company] members that bear no nexus to the [limited liability company's] business" do not justify a member's expulsion, and "it must be unfeasible, despite reasonable efforts, to keep the [limited liability company] operating while the disputed member remains affiliated with it.

Boathouse at Breach Inlet, LLC by & through Stoney v. Stoney, 442 S.C. 633, 652, 900 S.E.2d 483, 493 (Ct. App. 2024), *reh'g denied* (Apr. 29, 2024) (quoting *IE Test, LLC v. Carroll*, 226 N.J. 166, 140 A.3d 1268, 1279 (2016)) (alterations in original).

At trial, Plaintiffs failed to clear this "high bar" for three reasons. As an initial matter, just as the Court cannot consider stale alleged breaches, it cannot consider allegedly wrongful conduct that occurred more than three years prior to the filing of this action in determining whether expulsion is warranted. *See Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009), *aff'd*, 392 S.C. 403, 709 S.E.2d 661 (2011) (finding that claims asserted under the

South Carolina Limited Liability Act are subject to a three-year limitations period) (citing S.C. Code Ann. § 33-44-410)). Accordingly, the Court considers only circumstances that occurred within the statutory period, that is, from June 2019 to June 2022.[1]

Plaintiffs' request for expulsion relies upon the same conduct as their breach of contract claim—the non-payment of rent based on Taylor Foley's alleged use of vacant office space in 2021. (Trial Tr. 73:20 - 25.) That conduct does not justify Talyor Capital's expulsion from K&T. For one, for the same reasons explained above, the Court cannot expel Taylor Capital from the Company based on the alleged misconduct of Taylor Foley. If any obligation to pay rent was in fact owed, it was owed by Taylor Foley, and not by Taylor Capital.

Second, as a factual matter, the Court has determined that no additional rent payments were owed. As explained in greater depth above, the evidence demonstrates that the subject office was not in use from January through April. And the Court finds that the temporary use of the office by Taylor Foley's intern from May through July did not give rise to any rental obligations. (*See, e.g.*, Trial Tr. 84:18 – 85:23; 87:14 – 88:12.)

Third, even if additional rent payments had been owed for three months of temporary use, an outstanding receivable of $3750 in no way makes it "unfeasible, despite reasonable efforts, to keep the [limited liability company] operating[.]" *Boathouse,* 442 S.C. at 652, 900 S.E.2d at 493. In fact, Plaintiffs agreed that no Defendant is frustrating the operation of K&T. (Trial Tr. 101:22 – 102:15.) Indeed, the evidence demonstrates that Taylor Foley pays rent for the office space it utilizes, and K&T continues to fulfill its purpose "to hold and manage Company Property."

[1] Moreover, even if the Court were to consider the full record of complaints lodged by Plaintiffs, these few disagreements over a twenty-year lifespan are not sufficiently material or injurious to the continued operation of the company for its intended purpose. Nearly all were resolved without incident.

While Kachmarsky testified that this lawsuit arises from "[n]ot paying rent for space being used," (Trial Tr. 112:17–113:12), he acknowledged that the rent he sought from Taylor Foley would change depending on his law firm's use of space; there was no set lease amount. (Trial Tr. 102:16 – 104:3.) Nevertheless, aside from the months of 2021 at issue, there is no dispute that Taylor Foley has paid any rent Plaintiffs consider to have been due. The core of the dispute here is whether temporary use of a vacant office for three months by a summer intern triggers obligations for Taylor Foley to pay rent for that space. As the Plaintiffs have known and resisted for years, one solution to any guesswork about what is due from each firm and when, and how to enforce that obligation, is **to have the Company enter written leases with the law firms**. That is one reasonable and practicable way for the members to carry on the Company's business.

The issues presented by Plaintiffs are more aptly categorized as "disagreements and disputes among members" that do not justify judicial intervention. *Boathouse*, 442 S.C. at 652, 900 S.E.2d at 493. Even viewing the evidence in the light most favorable to Kachmarsky, the total amount in dispute at the time that this lawsuit was filed was $8,750. (*Id.* at 113:13 – 114:17.) That amount-in-controversy pales in comparison to the value of the Suite 330, the Company's primary asset, which Kachmarsky testified is worth well over $1.5 million. (*Id.* at 113:13–115:6.) An $8,750-dollar rent dispute does not clear the "high bar" required to justify expulsion, and there is no evidence in the record indicating that the continued operation of K&T would be "unfeasible" if Taylor Capital were not expelled. *Boathouse at Breach Inlet*, 442 S.C. at 652, 900 S.E.2d at 493.

Accordingly, the Court finds that the circumstances do not warrant judicial expulsion under S.C. Code Ann. § 33-44-601.

3. Plaintiff's Claim for Judicial Dissolution

Plaintiffs seek judicial dissolution of K&T pursuant to subsections (a), (b), and (e) of S.C. Code Ann. § 33-44-801(4), which permit a Court to dissolve a limited liability company if its finds that: (a) the economic purpose of the company is likely to be unreasonably frustrated; (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member; or (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner. For the same reasons discussed above with respect to Plaintiffs' claim for judicial expulsion, the Court finds that Plaintiffs have failed to demonstrate that judicial dissolution is appropriate here.

In addition, as to the claim under subsection (e), the Plaintiff has failed to demonstrate that Taylor Capital or manager Taylor is in control of the Company. In fact, the evidence demonstrates that, if any member or manager is in control of the Company, it is Kachmarsky as Trustee or as Manager. For nearly twenty years and for all times relevant here, Kachmarsky has managed the operations and the money. He handles advertising, rentals, and banking. (Trial Tr. 48:10 – 49:5; 80:24 – 82:2.) In fact, he acknowledges that Taylor has no more control than he has. (Trial Tr. 111:17 – 20.)

Accordingly, the Court dismisses Plaintiffs' claim for judicial dissolution.

4. Defendants' Counterclaim for Breach of Contract

Defendants assert a counterclaim for breach of the Operating Agreement. Defendants contend that Plaintiffs' actions in pursuing claims against them for payments owed, if at all, by another party constitute breaches of the Operating Agreement's duties of care and of good faith and fair dealing. Moreover, Defendants contend, Plaintiffs' effort to dissolve the Company in this

misguided lawsuit violates these duties as well as the duty of loyalty. And Defendants contend that seeking the result of, or leverage from, a claim to expel Taylor Capital and impose the penalties of wrongful dissociation further violates these duties.

The K&T Operating Agreement establishes duties that the managers owe to the Company and to the Members. Specifically, section 6.2(a) of the Company's Operating Agreement imposes upon the Managers a duty of loyalty: "[t]o refrain from dealing with the Company in the conduct or winding up of the business as or on behalf of a party having an interest adverse to the Company." Section 6.3 imposes upon the Managers a duty of care "to refrain[] from engaging in grossly negligent or reckless conduct …." And section 6.4 of the Operating Agreement demands that "[e]ach Manager shall discharge his duties and exercise any of his rights consistently with the obligation of good faith and fair dealing which he owes to the Company and the Members."

Kachmarsky, in his capacity as Manager of the Company,[2] breached the Operating Agreement's duties of loyalty, care, and good faith and fair dealing owed to Taylor Capital by seeking to dissolve the company over $8,750 in rental payments allegedly owed, and when any such obligation clearly belonged to a third party. Moreover, any reasonable inquiry into the matter by Manager Kachmarsky would have demonstrated that the most money even arguably at issue was $3750 for three months of use. To the extent Kachmarsky wished to address issues within K&T, he could have availed himself of any of several other less drastic alternatives, such as (a) sending notice of any alleged default of obligations to Taylor Capital per section 12.2 of the Operating Agreement, (b) calling a member meeting per section 4.2, (c) calling a Management Committee meeting per section 5.5, or (d) pursuing a capital call per section 3.8.

[2] The applicable duties of the Company's Operating Agreement apply to Managers and generally not to Members. Accordingly, the Court analyzes this claim as to the acts of Kachmarsky as Manager and not as to the Kachmarsky Trust.

The fact that Kachmarsky sought to expel Taylor Capital under these circumstances and thereby impose drastic financial penalties through the Operating Agreement's provisions for wrongful dissociation violates his duty of good faith and fair dealing to Taylor Capital. (*See, e.g.*, Trial Tr. 116:2 – 117:4.)

The Court agrees that the conduct outlined above constitutes a breach of duties owed under the Operating Agreement and awards judgment in favor of Defendants against Kachmarsky. "The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Hotel & Motel Holdings*, 414 S.C. at 650, 780 S.E.2d at 272 (quoting *Kemper*, 399 S.C. at 492, 732 S.E.2d at 209). Here, the natural consequence of any one or all of Kachmarsky's breaches of duties is Defendants' obligation to defend this lawsuit. Therefore, the proper measure of damages are the reasonable costs and attorneys' fees that Defendants have expended defending this matter.

For these reasons, the Court enters judgment for Defendants on their counterclaim and awards Defendants their reasonable costs and attorneys' fees for the defense of claims in this matter to be determined in a subsequent hearing after submission of affidavits in support thereof.

D. Conclusion

THEREFORE, it is hereby ordered that:

(1) Plaintiffs' claims be dismissed with prejudice, and

(2) Judgment be entered on Defendants' counterclaim in favor of Defendants against Kachmarsky only.

Within fifteen days of entry of this Order, Defendants shall file an affidavit of the reasonable costs and attorneys' fees that they have incurred in defending the claims in this action and a hearing thereon.

AND IT IS SO ORDERED.

_____
Mikell R. Scarborough
Master In Equity, Charleston County

_____ ____, 2024
Charleston, South Carolina

Charleston Common Pleas

Case Caption: John Kachmarsky , plaintiff, et al VS David G Taylor , defendant, et al

Case Number: 2022CP1002589

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062