

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bismarck Financial Group, LLC; Gary)	Supreme Court
Berube, in his capacity as a Member of)	Case No: 20200005
Bismarck Financial Group, LLC; Doug)	
Buehler, in his capacity as a Member of)	
Bismarck Financial Group, LLC; Bob)	
Johnson, in his capacity as a Member of)	
Bismarck Financial Group, LLC; Matt)	
Puetz, in his capacity as a Member of)	
Bismarck Financial Group, LLC; and Larry)	
Souther, in his capacity as a Member of)	
Bismarck Financial Group, LLC)	
)	
Plaintiffs,)	
)	
vs.)	
)	
James "Jay" Caldwell,)	
)	
Defendant.)	

APPEAL FROM ORDER GRANTING DEFENDANT’S MOTION TO DISMISS
ENTERED DECEMBER 4, 2019,
IN THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
THE HONORABLE DAVID REICH,
CIVIL NO. 08-2019-CV-01793

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. **BFG and BFG Members Have Not Abandoned Their Arguments in Relation To The Requirement Under the Operating Agreement that Net Profits and Net Losses Be Allocated To The Members According To Their Percentage Interests In BFG**

[¶ 1] Caldwell's assertion BFG and BFG Members have abandoned their "allocation" theory and instead focus on their "wrongful-dissociation" theory mischaracterizes BFG and BFG Members' argument as the allocation issue is connected with the wrongful dissociation issue.

[¶ 2] At issue is Section 3.03 of the Operating Agreement, which provides as follows:

Allocation of Net Income and Net Losses. Net Income and Net Losses shall be allocated annually among the Members based on their Percentage interests as reflected in Schedule A.

(App. 76 at § 3.03; App. 10 [Complaint] at ¶ XVII.) It is not in dispute that Caldwell and each of the other members of BFG held an equal 1/6 interest in BFG prior to Caldwell's wrongful dissociation from BFG. Although BFG and BFG Members concede Section 3.03 did not contractually obligate Caldwell to contribute additional funds to BFG, in relation to BFG and BFG Member's wrongful dissociation claim, Section 3.03 establishes one means by which BFG Members were damaged by Caldwell's wrongful dissociation. Specifically, through Caldwell's abandonment of his member interests in BFG, the remaining five BFG Members each suffered actual damages as their percentage share of BFG's expenses at issue (i.e. long term lease payments and payroll, etc.) increased, resulting in either a diminishment in net profits or increase in net losses allocated to each member pursuant to Section 3.03. The issue of damages caused by Caldwell's wrongful dissociation is discussed in further detail in the following section.

II. BFG and BFG Members Have Alleged Damages Caused By Caldwell's Admitted Wrongful Dissociation

[¶ 3] Caldwell concedes his dissociation from BFG was wrongful, as defined under N.D.C.C. § 10-32.1-47. However, Caldwell argues that as he was not contractually obligated to contribute additional capital to BFG, neither BFG nor BFG Members could have incurred any damages resulting from his wrongful dissociation. Caldwell relies upon Section 3.08 of the Operating Agreement which provides as follows:

Section 3.08 Additional Capital Contributions. No Member shall have any obligation to make additional capital contributions to the Company or to fund, advance, or loan monies which may be necessary to pay deficits, if any, incurred by the Company during the term hereof. Members may make loans to the Company from time to time, as authorized by the Board. Any payment or transfer accepted by the Company from a Member which is not a capital contribution complying with Section 3.01 shall be deemed a loan and shall neither be treated as a contribution of capital of the Company for any purpose hereunder, nor entitle such member (as such) to any increase in such Member's Percentage Interest. Any such loan shall be repaid at such times and with such interest (at rates not to exceed the maximum permitted by law) as the Board and the lending Member shall reasonably agree.

(App. 77-78.) There are several problems with Caldwell's argument.

[¶ 4] First, BFG and BFG Members wrongful dissociation claim is not based upon Caldwell having any contractual obligation to make additional capital contributions to BFG or to fund, advance, or loan monies which may be necessary to pay deficits incurred by BFG. Instead, BFG and BFG Members simply contend that pursuant to N.D.C.C. § 10-32.1-47(3), they are statutorily entitled to recovery of damages they sustained as a result of Caldwell's admitted wrongful dissociation. As explained in BFG and BFG Member's principal brief, damages recoverable under N.D.C.C. § 10-32-47(3) include all damages resulting from the wrongful dissociation and are not dependent upon any contractual obligation owed by Caldwell. Section 10-32.1-47(3) provides as follows:

A person that wrongfully dissociates as a member is liable to the limited liability

company, and subject to section 10-32.1-33 [not applicable], to the other members for damages caused by the dissociation. The liability **is in addition to** any other debt, obligation, or other liability of the member to the company or the other members.

N.D.C.C. § 10-32.1-47(3)(bold and parenthetical added). By statute, Caldwell is responsible for any damages resulting to BFG and/or BFG Members as a result of his admitted wrongful dissociation. Recoverable damages are not dependent upon any breach of the Operating Agreement or other contractual agreement. In fact, Section 10-32.1-47(2) expressly defines a dissociation as being wrongful if either such dissociation was in violation of the operating agreement, OR such dissociation occurs prior to termination of the company and pursuant to the express will of the member. This case involves a wrongful dissociation under both scenarios. Under either scenario, the company and remaining members are entitled to all damages caused by the dissociation.

[¶ 5] Second, Caldwell's abandonment of his member interests in BFG itself constituted a breach of the Operating Agreement. Transfers of member interests in BFG are governed by Section 6.01 of the Operating Agreement, which provides as follows:

Section 6.01 Transfers. A Member may assign the Member's full Membership Interest only by assigning all of the Member's Governance Rights coupled with a simultaneous assignment to the same assignee of all of the Member's Financial Rights. A Member's Governance Rights may be assigned, without the consent of any other Member, in whole or in part, to another person already a Member at the time of the assignment. Any other assignment of any Governance Rights is effective only if (i) all the Members, other than the Member seeking to make the assignment, approve the assignment by unanimous written consent, which consent may be given or withheld, conditioned or delayed as the remaining Members may determine in their sole discretion, and (ii) if the assignee executes this Agreement, as amended, to reflect such assignee's interest in the Company and any other instrument or instruments that the Board may deem necessary or desirable to effect such assignment. A Member's Financial Rights may be transferred, in whole or in part, without the consent of the Board or any other Member.

(App. 79 at § 6.01.) The Operating Agreement does not provide for any outright

abandonment of member interests – it only contemplates transfers of those interests. Although the Operating Agreement would have permitted Caldwell to assign his interests to any another existing member of BFG, or to a third party upon unanimous consent of BFG Members, no such assignment occurred, was attempted, or was accepted by any the remaining BFG Members. Caldwell’s abandonment of his member interests in BFG was in breach of the Operating Agreement.

[¶ 6] Caldwell essentially argues the only damages which could potentially have been sustained by BFG and BFG Members must have derived from a breach of the Operating Agreement or other written agreement. As discussed above, Caldwell’s abandonment of his member interests was in breach of the Operating Agreement. In addition, BFG and BFG Members have also alleged Caldwell breached his statutory duties of care and loyalty, and other fiduciary duties owed them (app. 15-17 at ¶¶ XLIV – L), claims not addressed by the District Court (discussed in the section below). Regardless, damages recoverable for wrongful dissociation under N.D.C.C. § 10-32.1-47(3) are not dependent upon any breach of any sort of contractual debt, obligation or other liability owed them by Caldwell. Although Section 10-32.1-47 afforded Caldwell the statutory right to dissociate, rightfully or wrongfully, the statutory right to wrongfully dissociate carried with it his obligation to compensate BFG and BFG Members for any damages caused thereby.

[¶ 7] Had Caldwell assigned his interests in BFG to another member or third party as contemplated under Section 6.01 of the Operating Agreement, the 1/6 share of the expenses at issue would not have been allocated to the remaining BFG Members. Instead, the 1/6 share of expenses would have been allocated to the person to which Caldwell

assigned his member interests, as discussed above. Such a transfer of member interests contemplated under the Operating Agreement would have left the remaining BFG Members in the same position they were in prior to the transfer. By not transferring his interests, and simply walking away, Caldwell caused significant actual damages to the remaining five BFG Members by immediately increasing the amount of expenses ultimately allocated to them under Section 3.03 of the Operating Agreement, without their consent. This includes, relative to this lawsuit, with respect to long-term contractual lease obligations, other lease related expenses (office overhead), and staff salary obligations, without any corresponding increase in revenues as Caldwell took the desirable portions of his Book of Business with him when he left BFG. Caldwell's assertion his wrongful dissociation did not result in any damages to the BFG Members is incorrect. Ultimately, whether BFG and the remaining BFG Members have suffered any such damages involves a question of fact not properly addressed on a motion to dismiss under Rule 12. The District Court failed to give BFG and the BFG Members the benefit of all favorable inferences in this regard as required in considering a motion to dismiss under North Dakota Rule of Civil Procedure 12(b)(6).

[¶ 8] Caldwell's reliance upon the New Hampshire federal case of *Beane v Beane*, 856 F.Supp.2d 280 (D.N.H. 2012), is misplaced. The New Hampshire wrongful dissociation statute at issue in *Beane* was materially different from North Dakota's wrongful dissociation statute. The New Hampshire statute at issue in *Beane* provided that if a member's "withdrawal is a breach of the limited liability company agreement . . . the company may recover from the withdrawing member damages for breach of the limited liability company agreement . . . , including the costs of any services the withdrawn member

was obligated to perform. *Id.* at 312, *quoting* N.H. Rev. Stat. Ann. § 304-C:27. In *Beane*, the federal district court concluded the plaintiff had failed to identify any damages recoverable under the New Hampshire statute as no specific provision of the limited liability company agreement had been identified as being breached. Notably, the New Hampshire statute only allowed for recovery of damages for breach of the limited liability company agreement, and only if the withdrawal itself was in breach of the limited liability company agreement. Neither such requirement exists under North Dakota's wrongful dissociation statute since its effective date of July 1, 2015, as explained in paragraph 25 of Brief of Appellants. Under N.D.C.C. § 10-32.1-47, any and all damages caused by a wrongful dissociation are recoverable and a dissociation need not be in breach of an operating agreement to be wrongful. *Beane* simply has no application to the present case.

[¶ 9] Caldwell's assertion in footnote 5 of his brief that BFG and BFG Members could have avoided their claimed damages by adding another member to BFG misses the point. First, whether and when any such replacement member could have been located and added to BFG involves a question of fact for the jury. Second, as discussed, the Operating Agreement only authorizes transfers of member interests, not outright abandonment of member interests. It was Caldwell's responsibility to effectuate a transfer of his member interests if he wanted to avoid liability for damages resulting from his wrongful dissociation.

[¶ 10] As discussed, BFG and BFG Member's damages resulting from Caldwell's wrongful dissociation are not premised upon the theory that BFG's debts, obligations, or other liabilities are the debts, liabilities or other obligations of Caldwell. Instead, the statutory remedy provided by Section 10-32.1-47 is broader than that and serves to

compensate companies and members who have suffered any type of damages resulting from the wrongful dissociation, which is a “liability . . . in addition to any other debt, obligation, or other liability of the member to the company or the other members.” If a member wrongfully dissociates, the company and the remaining members are entitled to recovery of any damages they sustain as a result of the wrongful dissociation, regardless of whether the dissociating member had any contractual or other obligation to be responsible for the damages at issue.

III. The Statute of Frauds Has No Application Outside Of Contract

[¶ 11] BFG and BFG’s Members’ wrongful dissociation and breach of fiduciary duty claims are not premised upon any sort of agreement by Caldwell to be responsible for payment of the expenses at issue. BFG and BFG Members are not claiming Caldwell had any contractual obligation to pay the expenses at issue following his dissociation from BFG. Instead, as explained above, the damages claimed by BFG and BFG Members are those caused by Caldwell’s wrongful dissociation – the increased allocations of expenses to the remaining BFG Members resulting from Caldwell’s wrongful dissociation which would not have occurred had Caldwell properly dissociated by transferring his member interests in accordance with Section 6.01 of the Operating Agreement. Damages for wrongful dissociation are a liability established by statute, not contract, and is therefore not governed by the statute of frauds, codified at N.D.C.C. § 9-06-04. No written agreement by Caldwell to be responsible for the damages claimed by BFG and BFG Members in this action was necessary for liability to be imposed for wrongful dissociation under N.D.C.C. § 10-32.1-47.

IV. The District Court Erred In Dismissing Bismarck Financial Group, LLC's And Its Members' Claims Against Caldwell For Breach Of Statutory Duties Under N.D.C.C. § 10-32.1-41.

[¶ 12] Caldwell's assertion BFG and BFG Members did not allege a breach of statutory duties under N.D.C.C. § 10-32.1-41 is incorrect. BFG and BFG Members alleged breach of duties of care and loyalty, as well as other fiduciary duties in paragraphs XLVI ("As a Member of BFG, Caldwell owed BFG and his fellow Members certain statutory and contractual duties, including but not limited to paying his share of BFG's allocation of net losses, duties of care and loyalty, as well as other fiduciary duties"), XLIX ("Caldwell breached and continues to be in breach of his Member and fiduciary duties as well as his contractual and statutory obligations to BFG and to his fellow Members, which has directly harmed BFG and his fellow Members."), and otherwise in Count I of the Complaint. (App. 15-17 at ¶¶ XLV – L.) Throughout their Complaint, and in briefing before the district court on Caldwell's motion to dismiss, BFG and BFG Members argued entitlement to damages resulting from Caldwell's wrongful dissociation and breach of duties owed, and pointed out "section 10-32.1-41 lays out the standards of conduct for members, managers, and governors (which standards of conduct Caldwell breached). The Complaint asserts and the evidence will show failures by Caldwell to perform his obligations and duties to his former fellow members and to BFG," (*Plaintiffs' Brief In Opposition to Defendant's Motion to Dismiss* [doc. #21] at ¶ 16.) The district court's *Order Granting Defendants' Motion to Dismiss* did not address or explain its reasoning for dismissing BFG and BFG Member's statutory duty claims against Caldwell and simply focused upon an alleged lack of written agreement by Caldwell to be responsible for the damages being claimed by BFG and BFG Members as its basis for dismissing all claims.

[¶ 13] Caldwell’s assertion BFG and BFG Member’s breach of duty claims are an attempt to get around the statute of frauds makes no sense. As discussed above, the statute of frauds only has application in the context of claims based upon contract. Claims for breach of statutory and other fiduciary duties owed by Caldwell to BFG and the other BFG Members are not necessarily contract dependent. Regardless, as discussed, the Operating Agreement only provides for transfers of member interests – not abandonment thereof. The expectations and agreement of the parties in relation to member transfers is in the Operating Agreement itself. Caldwell’s abandonment of his member interests was in breach of the Operating Agreement, and was not fair and reasonable under the circumstances. Damages for wrongful dissociation under Section 10-32.1-47 are intended to make the company and remaining members whole when a member wrongfully dissociates.

[¶ 14] Whether Caldwell breached his member statutory duties under Section 10-32.1-41 is a question of fact for the jury to decide.

CONCLUSION

[¶ 15] For the foregoing reasons, Caldwell failed to establish with certainty the impossibility of BFG and BFG Members proving a claim upon which relief can be granted. The district court’s dismissal of the wrongful dissociation claims against Caldwell should be reversed and this case remanded to the district court for further proceedings, consistent with this Court’s decision.

[¶ 16] Dated this 27th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 17] The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 12 pages.

[¶ 18] Dated this 27th day of May, 2020.

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