

Majority Opinion >

SUPREME COURT OF NEW YORK, NEW YORK  
COUNTY

ATLANTIS MANAGEMENT GROUP II LLC, Plaintiff, -  
v - RAJAN NABE, RAHUL NABE, FARMERS  
PETROLEUM LLC, BRUCKNER PETROLEUM LLC,  
10TH AVENUE PETROLEUM LLC, 138 PETROLEUM  
LLC, Defendants. INDEX NO. 651598/2017

651598/2017

October 1, 2018, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT  
BE PUBLISHED IN THE PRINTED OFFICIAL  
REPORTS.

HON. SALIANN SCARPULLA, J.S.C.

SALIANN SCARPULLA

**DECISION AND ORDER**

HON. SALIANN SCARPULLA:

In this profit distribution dispute, plaintiff Atlantis Management Group II LLC ("Atlantis") moves for partial summary judgment on its first cause of action for an accounting. Defendants Rajan Nabe, Rahul Nabe, Farmers Petroleum LLC, Bruckner Petroleum LLC, 10th Avenue Petroleum LLC, and 138 Petroleum LLC oppose and cross move for a default judgment on their counterclaims and for an order compelling Atlantis to respond to discovery requests.

***Background***

Defendants Farmers Petroleum LLC, Bruckner Petroleum LLC, 10th Avenue Petroleum LLC, and 138 Petroleum LLC (collectively, "LLC Defendants") are New York limited liability companies. The LLC Defendants each operate a gasoline service station business in the City of New York. Atlantis is an investor

member in each of the LLC Defendants. Defendants Rajan Nabe and Rahul Nabe ("Managing Members") serve as the managing members in each of the LLC Defendants.

In October 2008, Atlantis and the Managing Members executed operating agreements for each of the LLC Defendants ("Operating Agreements"). The parties do not dispute that the material terms of the Operating Agreements for each of the LLC Defendants are identical.

Under the terms of the Operating Agreements, Atlantis and the Managing Members share in the LLC Defendants' profits and losses. Pursuant to section 13.3 of the Operating Agreements, the Managing Members are obligated to provide Atlantis with "annual statements of the Company's gross receipts and operating expenses, and the capital account of each Member; and [] a report . . . indicating the Member's share of the Company's profit or loss for that year and the Member's allocable share of all items of income, gain, loss, deduction, and credit, for Federal income tax purposes."

Atlantis contends that the Managing Members initially had difficulty accounting for profits. Consequently, Atlantis accepted \$10,000 per month as an approximation of the profit distribution it would receive from LLC Defendants while Managing Members improved their accounting methodology. Atlantis asserts, however, that it neither agreed to fix its profit distributions into perpetuity nor forego the Managing Members' obligations to provide it with financials in the future.

Atlantis further alleges, on information and belief, that the gross receipts and profits of one of the LLC Defendants materially increased after the closure of a nearby gasoline service station. Defendants allegedly did not inform Atlantis of any increase in their gross receipts and profits, did not report any increase in gross receipts and profits to tax authorities, and did not [\*2] increase Atlantis's monthly profit distribution.

Atlantis subsequently made written and verbal demands for an accounting. Pursuant to section 13.1(D), Atlantis has the "the right [to] examine and/or audit the books and records of the Company . . . , and the Managing Members will make such books and records and information available for such examination

and/or audits." Atlantis alleges that despite its written and verbal demands, Managing Members continue to deny it any corporate records.

Defendants deny the allegations of the complaint and assert several affirmative defenses in addition to two counterclaims for declaratory judgment. In their counterclaims, defendants seek a declaration that the parties amended the Operating Agreements in 2011. Under the amended Operating Agreements, Atlantis is entitled to a fixed sum of \$10,000 per month in lieu of profit distributions based on monthly profit and loss statements. Additionally, according to defendants, the Managing Members no longer have a duty to provide Atlantis with financial statements or information. In support, defendants submit monthly checks that the LLC Defendants sent Atlantis totaling \$10,000.00 per month since 2012.

Atlantis now seeks partial summary judgment on its first cause of action for an accounting. Defendants assert that Atlantis's motion must be denied because questions of material fact exist as to whether the parties amended the Operating Agreements. Defendants additionally cross move for, among other things, a default judgment because Atlantis failed to timely answer defendants' counterclaims.

### ***Discussion***

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Grob v. Kings Realty Assocs.*, 4 A.D.3d 394, 395, 771 NYS2d 384 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

#### **I. Atlantis's Summary Judgment Motion**

Atlantis moves for partial summary judgment on its first cause of action, seeking an accounting of the LLC Defendants. Atlantis has demonstrated that it is an investor member of the LLC Defendants by submitting copies of the LLC Defendants' Operating Agreements. Moreover, Atlantis submits evidence demonstrating that a demand for books and records was made, and

Atlantis avers that defendants refuse to comply with the demand. Atlantis asserts that it is entitled to corporate records pursuant to its statutory right under Limited Liability Company Law 1102, its contractual right under LLC Defendants' Operating Agreements, and its equitable right under common law.

Atlantis, "as a member of the LLC [Defendants], has an independent statutory right to conduct an inspection." *Gartner v Cardio Ventures, LLC*, 121 A.D.3d 609, 610, 995 N.Y.S.2d 557 (1st Dep't 2014). Limited Liability Company Law 1102 provides that

"[a]ny member may . . . inspect and copy . . . , for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, [\*3] any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable."

Moreover, the Operating Agreements reinforce Atlantis's statutory right to an inspection of books and records. Section 13.1(D) of the Operating Agreements provide that

"[a]ny Member shall have the right, at any time and at its expense, to have its accountants and representatives examine and/or audit the books and records of the Company and the information referred in this Section, and the Managing Members will make such books and records available for such examinations and/or audits"

Defendants, nevertheless claim that they do not need to produce the books and records, pursuant to either statutory or contractual law, because issues of fact preclude summary judgment on Atlantis's cause of action for an accounting. According to defendants, the parties orally amended the Operating Agreements, and Atlantis waived its right to receive any financial information through its course of conduct. Under the purported amended Operating Agreements, Atlantis would receive a fixed monthly payment, irrespective of the LLC Defendants' financials, in lieu of defendants accounting of any profits.

Defendants have shown that there is an issue of fact regarding the distribution of profits under the LLC

Agreements. However, even if the parties modified the LLC Agreements as to profit distributions, that does not undermine Atlantis's unconditional and distinct right to books and records. *See RMP Capital Corp. v Victory Jet, LLC*, 139 A.D.3d 836, 838-39, 32 N.Y.S.3d 231 (2d Dep't 2016) ("A court should not imply a term which the parties themselves failed to include"). That defendants stopped providing Atlantis with financial information pursuant to section 13.3 of the Operating Agreements does not demonstrate Atlantis waived its right to books and records under section 13.1 of the Operating Agreement. Therefore, Atlantis is entitled to a copy of the books and records referred to in Limited Liability Company Law 1102 and Article 13 of the LLC Defendants' Operating Agreements.

Moreover, as a member of a limited liability company, Atlantis may seek an equitable accounting under common law. *See Gottlieb v Northriver Trading Co. LLC*, 58 A.D.3d 550, 551, 872 N.Y.S.2d 46 (1st Dep't 2009). That right "is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" *Ctr. for Rehabilitation and Nursing at Birchwood, LLC v S & L Birchwood, LLC*, 92 A.D.3d 711, 713, 939 N.Y.S.2d 78 (2d Dep't 2012).

Here, as the managing members of the LLC Defendants, Managing Members owe Atlantis a fiduciary duty. *See Pokoik Pokoik*, 115 A.D.3d 428, 429, 982 N.Y.S.2d 67 (1st Dep't 2014). Defendants do not dispute that they owe Atlantis a fiduciary duty, yet defendants continue to deny Atlantis access to the books and records after demand was made. Defendants refusal to authorize access to the books and records is inconsistent with their fiduciary duties, and Atlantis is entitled to an equitable [\*4] accounting. *See Morgulas v J. Yudell Realty, Inc.*, 161 A.D.2d 211, 213-14, 554 N.Y.S.2d 597 (1st Dep't 1990) ("An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship . . . [and the fiduciary] wrongfully refused to authorize access to the corporate records."). Accordingly, I grant Atlantis's motion for partial summary judgment on its first cause of action.

Atlantis additionally seeks reimbursement of its legal costs and expenses with respect to enforcing its rights herein. Pursuant to section 6.4.5 of the Operating

Agreements, "[t]he Managing Members agree to pay . . . all expenses of enforcing the provisions of this Operating Agreement and the Investor Members' rights against any of the Managing Members, including, without limitation, expenses and fees of legal counsel, court costs and the cost of appellate proceedings."<sup>1</sup> Pursuant to this section of the LLC Agreements, Atlantis is entitled to recover from Managing Members such expenses incurred, including attorneys fees, in enforcing its right to inspect books and records and to an accounting. However, I defer determination of the amount of attorneys' fee due to the time of the trial of this action.

## II. Defendants' Cross-Motion for Summary Judgment and to Compel

Defendants cross move for a default judgment on their counterclaims. Defendants served and filed their verified answer with counterclaims on June 29, 2017. Atlantis served and filed its verified answer to defendants' counterclaims on September 8, 2017, which is the same day it filed its motion for partial summary judgment.

The parties subsequently stipulated to adjourn the motion on October 3, 2017, and defendants filed their opposition and cross motion for a default judgment with respect to their counterclaims on October 30, 2017. Defendants cross move for default judgment based on plaintiff's failure to answer their counterclaims within the time permitted pursuant to CPLR 3012 (a).

Considering this timeline, I deny defendants' motion for a default judgment because defendants retained Atlantis's late-served answer to their counterclaims for more than seven weeks before moving for default. *See Lehrer McGovern Bovis, Inc. v Component Assembly Sys.*, 266 A.D.2d 94, 95, 698 N.Y.S.2d 648 (1st Dep't 1999) (affirming denial of default judgment where plaintiffs retained defendants' late answer without moving for about five weeks).

Defendants also seek an order, pursuant to CPLR 3124, compelling Atlantis to respond to certain discovery requests. This part of defendants' cross motion is denied as moot by the preliminary conference order of May 2, 2018 and status conference order of July 11, 2018. To the extent discovery disputes remain outstanding, the parties should be prepared to discuss the issues at the next status conference scheduled

herein.

In accordance with the foregoing, it is

ORDERED that plaintiff Atlantis Management Group II LLC's motion for partial summary judgment on its first cause of action for an accounting as to: (1) Farmers Petroleum LLC; (2) Bruckner Petroleum LLC; (3) 10th Avenue Petroleum LLC; and (4) 138 Petroleum [\*5] LLC, is granted; and it is further

ORDERED that defendants are directed to provide plaintiff Atlantis Management Group II LLC with copies and reasonable access to all books and records of: (1) Farmers Petroleum LLC; (2) Bruckner Petroleum LLC; (3) 10th Avenue Petroleum LLC; and (4) 138 Petroleum LLC, to the extent such books and records relate to plaintiffs interest as a member, within 20 days of entry of this order; and it is further

ORDERED and ADJUDGED that defendants are required to provide a full accounting of: (1) Farmers Petroleum LLC; (2) Bruckner Petroleum LLC; (3) 10th Avenue Petroleum LLC; and (4) 138 Petroleum LLC, for the fiscal years 2014 - 2017, to the extent such books and records relate to plaintiffs interest as a member, including, but not limited to, all records described in Limited Liability Company Law § 1102 (a) , all records described in the operating agreement that governs the respective limited liability companies named herein as applied to each, and other information regarding the affairs of each limited liability company named herein, within 60 day of entry of this order; and it is further

ORDERED that the amount of costs and reasonable attorneys' fees owed plaintiff Atlantis Management Group II LLC in seeking to enforce its rights herein shall be determined at the time of trial of this action; and it is further

ORDERED that the action shall continue as to plaintiff Atlantis Management Group II LLC's second through sixth causes of action;

ORDERED that defendants' cross motion for default judgment on its counterclaims and for an order to compel discovery is denied; and it is further

ORDERED that the action shall continue as to defendants' first and second counterclaim;

ORDERED that counsel are directed to appear for a conference in room 208, 60 Centre Street, on December 5, 2018, at 2:15 PM.

This constitutes the decision and order of the court.

10/1/18

DATE

/s/ Saliann Scarpulla

**SALIANN SCARPULLA, J.S.C.**

fn 1

Additionally, pursuant to section 6.8.2, the Managing Members are obligated "to indemnify and save the Investor Members . . . harmless against all claims, casualties and costs (including attorney's fees, expert witness fees, costs and disbursements) of whatever nature and from whatever cause, [including] . . . the act or failure to act of the Managing Members[.]"