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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
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Re: *Elaine Mickman v. American International Processing, L.L.C. and LFF, L.L.C.*, Civil Action No. 3869-VCP

Dear Counsel:

This is an action for inspection of books and records of a Delaware limited liability company under 6 *Del. C.* § 18-305. Defendant LFF, L.L.C. ("LFF") moved for summary judgment that Plaintiff, Elaine Mickman, is not entitled to records of LFF because she is not a member or manager of LFF.[1] Mickman opposes that motion and has cross moved for summary judgment in her favor that she is a member of LFF. This action is scheduled to be tried on June 8 and 9, 2009.

Having considered the briefing on the parties' motions for summary judgment and heard oral argument on March 23, 2009, I deny LFF's motion for summary judgment and

[1] There is one other Defendant, American International Processing, L.L.C. ("AIP"). Defendants concede Mickman is a member of AIP.

take under advisement Mickman's cross motion. The following is a brief summary of my reasons for denying LFF's motion.

STANDARD FOR SUMMARY JUDGMENT

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[3] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[4] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[5] The burden is on the moving party to show the absence of any genuine issue of material fact.[6]

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2 *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

3 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

4 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

5 *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

6 *Quereguan v. New Castle Cty.*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).

THE PARTIES' CONTENTIONS

Under 6 *Del. C.* § 18-305, "[e]ach *member* of a limited liability company has the right . . . to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the [LLC] . . . [various records of the LLC]."[7] A manager of an LLC has similar rights,[8] but Mickman does not allege that she is a manager of LFF, the LLC at issue here. Defendant LFF contends that none of the company documents indicate that Plaintiff has any interest in LFF, and that the inclusion of Plaintiff's name on the tax return of LFF for 2001 was in error. Hence, according to LFF, Plaintiff is not a member of LFF and, therefore, has no right to inspection under Section 18-305.

Elaine Mickman argues that certain documents her husband, Richard Mickman, filed with the Internal Revenue Service before the divorce proceedings between them began conclusively establish that she is a member of LFF, notwithstanding the omission of her name from the list of members in the operating agreement.[9] Indeed, Plaintiff urges the Court to grant summary judgment in her favor on that basis. At a minimum,

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[7] 6 *Del. C.* § 18-305(a)(1) (emphasis added).

[8] 6 *Del. C.* § 18-305(b).

[9] According to the operating agreement, Richard Mickman and Howard L. Gleit were the initial members of LFF. The agreement further provides that Richard Mickman is the manager of LFF. Def.'s Opening Br. in Supp. of Its Mot. for Summ. J. Ex. D, § 3.1.

Mickman asserts that those documents and other evidence create a genuine issue of material fact as to LFF's defense that she was not a member of the LLC. Finally, Plaintiff contends that Defendants' refusal to provide certain discovery she requested on the ownership defense makes LFF's motion for summary judgment premature under Court of Chancery Rule 56(f).

ANALYSIS

Because Plaintiff's motion for summary judgment raises, among other things, certain issues of law regarding the preclusive effect, if any, that should be given to Richard Mickman's statements to the IRS contradicting the position LFF espouses in this proceeding, I have taken that motion under advisement. If the motion ultimately is granted, LFF's motion would have to be denied. Even if Plaintiff's motion were denied, however, there would be disputed issues of material fact regarding the question of Plaintiff's ownership of an interest in LFF that would require denial of LFF's motion for summary judgment. The reasons for this conclusion include the following.

The linchpin of LFF's argument is that it has a formal operating agreement and that neither that agreement nor any amendments to it list Plaintiff as a member of LFF. In that regard, LFF urges this Court to treat an LLC in the same way as a corporation in connection with a demand for inspection of books and records. Specifically, LFF notes that, in the case of a corporation, only stockholders listed in the stock ledger are recognized as holders of record of stock for purposes of a request for books and records

under Section 220 of the Delaware General Corporation Law.[10] Using similar reasoning, LFF argues that only members listed in an LLC's operating agreement, where a written agreement exists, should be recognized as members with a right to inspect books and records under Section 18-305.

In making its argument, LFF relies heavily on *Shaw v. Agri-Mark, Inc.*[11] That case, however, provides a very slim reed to support the proposition that the operating agreement of an LLC should be the sole evidence admissible to prove membership in that entity for purposes of a books and records demand. In *Shaw*, the Delaware Supreme Court, on certification of questions of law posed by the United States Court of Appeals for the Second Circuit, held in 1995 that a party who supplied equity to a stock corporation, but who was not a stockholder of record, had no right to inspect the corporation's books and records under Delaware common law or under Section 220, as it existed at that time. Specifically, the Court found that a "corporation may look to its

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[10] 8 *Del. C.* § 220. Until the amendment of Section 220 in 2003, the statute limited inspection rights to stockholders of record. 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 7.40, at 7-86 n.465.1 (3d ed. Supp. 2009). The 2003 amendment to Section 220 permitted beneficial holders to demand inspection, as well. *Id.* § 7.41, at 7-88. There is no similar provision in the statute providing for inspection of the books and records of an LLC, 8 *Del. C.* § 18-305.

[11] 663 A.2d 464 (Del. 1995).

stock ledger as the sole evidence in identifying those shareholders of record who are entitled to inspection" under Section 220.[12]

Yet, nothing in the *Shaw* case suggests, by analogy or otherwise, that the inspection rights of members of an LLC under Section 18-305 should be limited strictly to persons named as members in the operating agreement. In fact, the *Shaw* court declined to decide whether a member of a Delaware nonstock corporation has a right to inspection under either statutory or common law. Thus, the holding of *Shaw* is limited to stock corporations.

The policy considerations underlying the decision in the *Shaw* case do not translate readily to the circumstances of this case. LLCs generally are created on a less formal basis than corporations and are basically creatures of contract.[13] Based on the flexible and less formal nature of LLCs, it is reasonable to consider evidence beyond the four corners of the operating agreement, where, as here, the plaintiff has presented admissible evidence that, notwithstanding the language of the operating agreement, suggests the parties to that agreement intended to make, and believed they had made, the plaintiff a member of the LLC. There is no dispute that LFF's operating agreement does

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12 *Id.* at 468.

13 The policy of freedom of contract underlies the LLC Act. *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999). In addition, "[t]he LLC is an attractive form of business entity because it combines corporate-type limited liability with partnership-type flexibility and tax advantages." *Id.*

not list Plaintiff as a member. Nevertheless, there are contemporaneous documents signed by Richard Mickman and Howard Gleit, the only two members of LFF listed in the operating agreement initially, that support a reasonable inference that Plaintiff was a member. For example, the 2001 tax return for LFF, which includes a Schedule K-1 for each member, lists the members as Howard Gleit and Richard and Elaine Mickman.[14] In addition, Richard Mickman signed under penalty of perjury an Offer in Compromise to the IRS on or about February 9, 2002, in which he stated that his "only assets are his house . . . and stock in a number of closely held companies owned jointly by Taxpayer and his wife."[15]

LFF urges this Court to discount these documents, alleging that the representations therein about Plaintiff's membership are simply mistakes. That argument, however, raises factual issues that cannot be determined on a motion for summary judgment. In addition, LFF's apparent failure to provide appropriate discovery on their defense that Plaintiff lacks a membership interest further undermines their motion for summary judgment. Such discovery could lead to facts that support Plaintiff's position that she is a member of LFF.

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[14] *See* Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. and in Supp. of Pl.'s Cross-Mot. for Summ. J. ("PAB") Ex. J at 16.

[15] PAB Ex. D at 3.

CONCLUSION

For the foregoing reasons, I deny Defendant LFF's motion for summary judgment in its favor based on its contention that Plaintiff is not a member of LFF.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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