

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 2227

ELIZABETH C. DONOVAN)
)
 PLAINTIFF)
)
 v.)
)
 JEFFREY SCOTT HUFFMAN,)
 CHARLOTTE INTERNET, LLC,)
 and BANK OF AMERICA)
 CORPORATION)
)
 DEFENDANTS.)

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
HUFFMAN'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

NOW COMES Plaintiff, by and through counsel, and sets forth the following factual allegations and argument in opposition to Defendant Huffman's Motion to Dismiss:

STATEMENT OF FACTS

Plaintiff ("Donovan") filed her Complaint in January 2009, alleging unauthorized conduct by Defendant Huffman ("Huffman") causing Defendant Charlotte Internet, LLC ("Charlotte Internet") to terminate Donovan, as well as personally engaging in other actions against Donovan. Some of the facts alleged in Donovan's Complaint address actions undertaken by Huffman as an individual, acting outside the scope of his authority as a manager of Charlotte Internet. Donovan's Complaint further alleges a dispute as to Donovan's membership interest in Charlotte Internet, as well as whether Donovan is a managing member. Specifically, Donovan alleges, *inter alia*, that,

1. Huffman has refused to allow Plaintiff equal rights and authority to participate in the Management of Charlotte Internet, in violation of N.C.G.S. Section 57C-3-20.

2. Huffman has failed to discharge his duties as Manager in good faith, and failed to act in a prudent manner, in derogation of the best interests of Charlotte Internet.
3. Huffman has failed to account to Plaintiff and Charlotte Internet, and failed to hold, as trustee, Charlotte Internet Profits, all without the informed consent of the Members. Huffman has breached his fiduciary duty to Plaintiff and Flake by making personal use of Charlotte Internet property and profits.
4. [Huffman] [h]as improperly assumed all control of Charlotte Internet affairs, with no authorization to do so.
5. [Huffman] [i]ssued unreasonable and excessive payments to himself from Charlotte Internet funds without approval from Members.
6. [Huffman] [c]ontacted Charlotte Internet clients and made derogatory and untrue statements about the Plaintiff, which is defamatory behavior.
7. Huffman assumed control of the Plaintiff's company email account, reading and using personal information contained within, without [Donovan's] consent or prior knowledge.

Further, Donovan seeks judicial dissolution of Charlotte Internet. Dissolution of Charlotte Internet without Huffman's presence in the action would prejudice his rights, whether Huffman has a 45% membership, 50% membership interest, or an 85% membership interest.

ARGUMENT

- I. **The Complaint Alleges Sufficient Facts To State A Claim For Relief Against Huffman.**

Based on the allegations in Donovan's Complaint, there exists sufficient notice to Huffman of the "transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to Relief" as required by N.C.G.S. 1A-1, Rule 8(a). Huffman improperly utilizes a narrow reading of this Rule. Holloway v. Wachovia Bank & Trust Company, N.A., 339 N.C. 338 at 345, 346, provides the proper reading of Rule 8 when read *in pari materia* with N.C.G.S. 1A-1, Rule 54(c):

"Rules 8(a) and 54(c), when read together, reject any strict rule that a certain measure of damages must be specifically sought in the prayer for relief. Rule 54(c) clearly contemplates that a party may recover damages which are not expressly requested. Even where a party requests the wrong measure of damages, the court may grant relief to the party entitled regardless of the error in the pleading. Port Authority v. Roofing Co., 32 N.C.App. 400, 407-08, 232 S.E.2d 846, 852 (1977), *aff'd*, 294 N.C. 73, 240 S.E.2d 345 (1978) (plaintiff obtains relief even though complaint sought wrong measure of damages). The purpose of Rule 8(a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint; the purpose of Rule 54(c) is to provide plaintiff with whatever relief is supported by the complaint's factual allegations and proof at trial.

Further, as our rules are derived from the federal rules, which have been adopted by several other states as well, we look for guidance to authorities on the federal rules and decisions from other jurisdictions using the same rules. *See Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975). One authority has stated:

'Because of the second sentence of Rule 54(c), the demand for judgment required by Rule 8(a)(3) loses much of its significance once a case is at issue. If defendant has appeared and begun defending the action, adherence to the particular legal theories of counsel that may have been suggested by the pleadings is subordinated to the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not.'" (citation omitted).

Donovan's Complaint provides sufficient notice to Huffman of the causes of action and claims for relief against Huffman as provided in the notice pleading statutes.

II. Huffman's Reliance On Sections 57C-3-22 and 57C-3-30 Ignores A Plain Reading Of The Limited Liability Act.

Huffman properly cites Sections 57C-3-22 and 57C-3-30 as the protections provided to Members of a Limited Liability Company. However, Donovan alleges in her Complaint that Huffman actions exceeded the authority permitted by said statutory provisions. The relevant provisions of 57C-3-22 relied upon by Donovan state:

- (c) A manager is not acting in good faith if the manager has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted;
- (d) A manager is not liable for any action taken as a manager, or any failure to take any action, *if the manager performs the duties of his office in compliance with this section*; (emphasis added)
- (e) Except as otherwise provided...every manager must account to the limited liability company and hold as trustee for it any profit or benefit derived without the informed consent of the members.

N.C.G.S. Section 57C-3-22. Donovan's allegations specifically state that Huffman exceeded the bounds of his authority provided by this section and therefore Huffman is not protected from individual liability as set forth in the act. Huffman further cites 57C-3-30:

- (a) A persona who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. *A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.* (emphasis added)

Again, Donovan's allegations against Huffman stem from Huffman recklessly exceeding his authority as a Member of Charlotte Internet, which gives rise to his personal liability, as provided for in the last sentence of this section. Huffman cannot escape liability for his actions that are undertaken in violation of this section.

III. Denial Of Huffman's Motion To Dismiss Is Proper As Donovan's Complaint Sufficiently States A Claim Upon Which Relief Can Be Granted Against Huffman.

The treatment of Rule 12(b)(6) is properly summarized by Huffman in his Motion. Should all of the allegations in Donovan's Complaint be construed liberally in her favor, and all the allegations be deemed true, Donovan will have properly stated a claim for individual and personal relief against Huffman due to his failure to comply with the provisions of the Limited Liability Act.

IV. Huffman Is A Necessary Party As Any Ruling May Prejudice Huffman's Rights.

Rule 19(b) of the North Carolina Rules of Civil Procedure states that:

“the court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.”

Huffman admittedly has some level of membership in Charlotte Internet, although the Court must still make a determination of his membership interest as well as Donovan's. Donovan seeks, *inter alia*, a judicial dissolution of Charlotte Internet. Dissolution of Charlotte Internet without Huffman's presence in this action will prejudice Huffman's rights as a member of Charlotte Internet. Even if the Court determines that Huffman is not a “necessary party”, supporting case law still permits Huffman as a Defendant due to being a “proper party”. The distinction between the types of parties is provided in Karner v. Roy White Flowers, Inc., 351 N.C. 433 at 438, 439:

“Necessary parties must be joined in an action. Proper parties may be joined.” Booker v. Everhart, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978). A necessary party is one who “is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.” Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968). A proper party is “a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be

affected by a decree or judgment which does complete justice between the other parties.’
” *Id.* (quoting 67 C.J.S. Parties § 1 (1950)).

Section 57C-3-30(b) additionally permits inclusion of Huffman as a proper party, as “[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member’s right against or liability to the limited liability company.” The action filed by Donovan is specifically against Charlotte Internet to enforce Donovan’s rights, so Huffman’s presence as a party is permissible.

CONCLUSION

For all the foregoing reasons, the Court should deny Huffman’s Motion to Dismiss Plaintiff’s Complaint.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the **PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT HUFFMAN’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT** has a word count of less than 7,500 words which complies with North Carolina Business Court, Rule 15.8.

This, the 4th day of August, 2009.

/s/ Kenneth T. Davies
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached **Plaintiff's Memorandum in Opposition to Defendant Huffman's Motion to Dismiss Plaintiff's Complaint** was duly served on **August 4, 2009**, in accordance with the provisions of Rule 5(b) of the North Carolina Rule of Civil Procedure, to all parties or their attorney by the method indicated below, to the following address(es) or telefacsimile number(s):

Dennis M. O'Dea, Esq.
The Dennis O'Dea Law Firm, PC
2617 Cadagon Court
Charlotte, NC 28270
Fax: (704) 814-6157
*Attorney for Jeffrey Scott Huffman and
Charlotte Internet, LLC*

- _____ By deposit thereof, enclosed in a post-paid, properly addressed wrapper, in a post office or an official depository under the exclusive care and custody of the United States Postal Service, to the address(es) as set forth above.
- _____ By hand delivery by handing it to each attorney or party or by leaving it at the attorney's office with a partner or employee at the office address(es) set forth above to Dennis O'Dea, Esq.
- X By confirmed telefacsimile transmittal received at the telefacsimile number(s) set forth above prior to 5:00 p.m. this date, as evidenced by a telefacsimile transaction report.
- _____ By deposit with a designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2), addressed to each party or its attorney at the address(es) set forth above, for which a delivery receipt will be obtained.

THIS, the 4th day of August, 2009.

 /s/ Kenneth T. Davies
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