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STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

PLAMEN PETROV, and
PDP TRANS, LLC,

Plaintiffs/counter-defendants,

vs.

Case No. 16-4247-CB

BG Trans, LLC and
ANTOANETA TCHARDAKOVA,

Defendants/counter-plaintiffs.

OPINION AND ORDER

BG Trans, LLC ("BG Trans") and Antoaneta Tchardakova ("Ms. Tchardakova" or together as Defendants") filed a motion for a new trial. For the reasons stated below, Defendants' motion is denied.

I. Factual and Procedural Background

Following a bench trial, this Court issued an *Opinion and Order* on July 24, 2018 finding in favor of Plaintiff Plamen Petrov ("Mr. Petrov"). The Court hereby incorporates by reference the facts more fully stated in that *Opinion and Order*.

Essentially though, in 2013, Mr. Petrov and Ms. Tchardakova discussed starting a trucking dispatch company together. Subsequently, Ms. Tchardakova filed Articles of Organization incorporating BG Trans, LLC as a single member entity. After the formation of BG Trans, Mr. Petrov advanced payments of insurance premiums on behalf of BG Trans. The parties met with an attorney and signed several documents in connection with an assignment of membership of BG Trans. Ms. Tchardakova assigned 49% of her membership interest in BG Trans as well as 50% of the profits to

Mr. Petrov through the execution of a "Partial Assignment of Membership Interest." ("Partial Assignment"). Ms. Tchardakova also executed a "Joinder in Operating Agreement of BG Trans."

BG Trans held out Mr. Petrov as a co-owner. Yet Mr. Petrov never received any profits from BG Trans. Ms. Tchardakova's income tax returns revealed net profits for BG Trans of \$15,277, \$16,029, and \$10,964 for 2014, 2015 and 2016. The Court concluded that Mr. Petrov holds a valid 49% interest in BG Trans and that Ms. Tchardakova breached the Partial Assignment to Mr. Petrov for unpaid profits in the amount of \$16,042.50. The Court also found that BG Trans owed Mr. Petrov \$21,631.10 for unpaid insurance advances.

II. Standard of Review

MCR 2.611(1) provides that a "new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected" for enumerated reasons which include an "abuse of discretion which denied the moving party a fair trial", a "decision against the great weight of the evidence or contrary to law" or an "error of law occurring in the proceedings or a mistake of fact by the court." MCR 2.611(1)(a-h).

MCR 2.611 further authorizes the Court, on a motion for a new trial in an action tried without a jury, to set aside the judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions and enter a new judgment. MCR 2.611(2)(a-d). The decision to grant or deny a motion for new trial is within the sound discretion of the trial court. *Denha v Jacob*, 179 Mich App 545, 549; 446 NW2d 303 (1989).

III. Arguments and Analysis

Defendants argue that the Court erred in finding Ms. Tchardakova personally liable because at all relevant times she acted on behalf of BG Trans. Defendants maintain that as a shareholder, Ms. Tchardakova is not personally liable for the acts or debts of a corporation unless the Court pierces the corporate veil, which it had no basis to do.

Defendants misread the Court's *Opinion*. The Court did not pierce the corporate veil and at no time did Defendants raise the issue of immunity for personal liability at trial. Despite Defendants' assertion that "at all times" Ms. Tchardakova acted on behalf of BG Trans, Ms. Tchardakova personally transferred her membership interest to Mr. Petrov. That is, BG Trans did not convey a percentage of its own shares to Mr. Petrov. Instead, the Partial Assignment existed between Mr. Petrov and Ms. Tchardakova personally who agreed to assign a percentage of her interest in BG Trans. Consequently, to enforce the Partial Assignment, the Court concluded that Ms. Tchardakova, as opposed to BG Trans, breached the Partial Assignment. In calculation of damages from unpaid distributions, the Court awarded damages to Mr. Petrov from Ms. Tchardakova personally because BG Trans had already paid and Ms. Tchardakova received and retained 100% of the distributions on the belief that the Partial Assignment was ineffective.

Defendants next argue that the Court erred in concluding that a signature on the Joinder in Operating Agreement document satisfied the signature requirement in the Partial Assignment regarding the operating agreement. Defendants assert that the Partial Assignment unambiguously requires the execution of an operating agreement in

order to become effective. Because no party produced an operating agreement, Defendants contend that the Partial Assignment never took effect and Mr. Petrov never became a member of BG Trans.

The Court need not respond at length again to this argument regarding the operating agreement because, as Defendants' central contention both in pre-trial motions and at trial, those claims have been thoroughly briefed, considered and addressed. In short, the Court decided that while the parties never directly executed an operating agreement, they did execute a Joinder in Operating Agreement. The signature of a joinder satisfied the requirement of a signature on the operating agreement.

Defendant responds that no operating agreement actually existed, therefore the joinder was ineffective. However, because Ms. Tchardakova testified that she knew that no such agreement existed at the time she signed the Joinder in Operating Agreement, and that she never intended for the documents to take effect, the requirement of a signature on the operating agreement became an impossible condition for the sake of the Court's analysis. The Court concluded that Ms. Tchardakova could not rely on an unfulfilled condition precedent that she knew was not possible when she entered the contract.

Ms. Tchardakova now argues that the signature requirement was not an impossible condition precedent but rather a condition that Mr. Petrov failed to satisfy because he could have drafted an operating agreement. Such a conclusion is contrary to the testimony and actions of the parties. Specifically, Ms. Tchardakova testified that she knew no operating agreement existed at the time she signed the Partial

Assignment; in the Court's view, she intended to mislead Mr. Petrov regarding the effectiveness of Partial Assignment. The joinder in operating agreement presupposes the existence of an operating agreement. It would make no sense to draft a joinder agreement if both parties knew that no operating agreement existed or if they intended to create an operating agreement. Any contention that the parties intended to jointly draft an operating agreement at some later date also fails to persuade because the Partial Assignment required execution of the operating agreement "of even date herewith." Therefore, the entire process would be an exercise in futility or a ruse if not completed on the same date.

Further, the evidence showed that Mr. Petrov believed that he became a member of BG Trans upon the execution of the documents. In addition, BG Trans subsequently held Mr. Petrov out as a member. The Court remains convinced that Ms. Tchardakova desired to give Mr. Petrov the impression that she assigned to him a percentage of her interest in BG Trans. If she subjectively believed that the assignment would fail because she did not have an existing operating agreement, then she knew the condition was impossible—that is, there was no operating agreement that could be signed and therefore the condition could not be satisfied. As the sole member of BG Trans at the time of the assignment, Ms. Tchardakova was in a position to know that no operating agreement existed. Therefore, for the reasons more fully explained in its *Opinion and Order*, the Court concluded: that the parties entered a valid and enforceable assignment of membership interest, that the Joinder in Operating Agreement satisfied the signing requirement, and that the impossible condition requiring the existence of an operating agreement should be stricken from the Partial Assignment of Membership Interest.

Defendants next argue that the Court erred by not recognizing that Mr. Petrov hired the attorney who drafted the transfer documents. According to Defendants, the Court ignored testimony from Ms. Tchardakova that Mr. Petrov obtained the name and business card of an attorney from his accountant. Ms. Tchardakova argues that the Court gives Mr. Petrov "a pass" for not drafting an operating agreement despite the fact that the parties stood on equal footing when signing the documents. The Plaintiffs have the burden of proof to produce an operating agreement but instead the Court placed the burden on Defendants to produce it according to Defendants. To the extent that the documents required the existence or creation of an Operating Agreement, Defendants maintain that Mr. Petrov is responsible for reading and understanding the contents of the documents he signed. Therefore, Defendants conclude, the parties actually only entered into a contract to make a contract.

The Court heard and considered the evidence, weighed the credibility of the witnesses, and, in its discretion, determined that while both parties went to the attorney, the evidence did not clearly show who hired the attorney. While the parties may have stood on equal footing in terms of entering the agreement, they did not stand on equal footing in terms of knowledge of BG Trans. Ms. Tchardakova would have known as the sole member of BG Trans at the time whether she had an operating document in place. Mr. Petrov satisfied his burden of proof regarding the Partial Assignment's signature requirement when he showed that he signed the Joinder in Operating Agreement. Nothing in the parties' documents indicates or supports that they made a contract to contract. While parties are responsible for what they sign, the Court concluded that Ms.

Tchardakova intended to mislead Mr. Petrov. The Court declined to enforce such an arrangement.

Finally, Defendants argue that the Court erroneously considered Ms. Tchardakova's wages as profits for BG Trans, which robs her of 50% of her employment income. As discussed in the Court's *Opinion and Order*, no evidence showed that the profit distributions that Ms. Tchardakova received were wages. She did not receive a W2 or pay employment taxes for those payments. The Court may not rewrite the financial decisions of BG Trans. Ms. Tchardakova could have paid herself a wage from her work at BG Trans but no evidence in the record supports that she did so. Consequently, the Court concluded that the payments she received amounted to profit distributions, to which Mr. Petrov was entitled to his contractual share.

For these reasons, the Court remains convinced that the parties entered into a valid and enforceable agreement to assign a membership interest in BG Trans to Mr. Petrov. The Court remains persuaded that the agreement should be enforced. Defendants' motion will be denied.

IV. Conclusion

For the reasons set forth above, Defendants' motion for a new trial is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and the case remains closed.

IT IS SO ORDERED.



RICHARD L. CARETTI
Circuit Court Judge

Dated: November 20, 2018

cc: Robert J. Gavin, Attorney for Plaintiffs
Gad L. Holland, Attorney for Defendants