

IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE

SALEM POINTE CAPITAL PARTNERS, now)
 known as RARITY BAY PARTNERS,)
)
 Plaintiff/Counter-Defendant,)
)
 vs.)
)
 SALEM POINTE CAPITAL, LLC,)
)
 Defendant/Counter-Plaintiff,)

Docket No. 19,943

FILED

FEB 22 2023

TIME 6:52 p.m.

TERESA A. GHOATE
CLERK & MASTER MONROE CTY.

JOINT STATEMENT OF ISSUES OUTSTANDING FOR TRIAL

The parties, Rarity Bay Partners f/k/a Salem Pointe Capital Partners (“Partners”) and Salem Pointe Capital, LLC (“LLC”), by and through counsel, submit this Joint Statement of Issues Outstanding for Trial pursuant to this Honorable Court’s directive to provide the Court a document titled “Issues Outstanding” in the above styled case.

The parties submit the following issues are jointly agreed to as issues for trial:

1. Whether, pursuant to Count 1 and Count 3 of the Second Amended Verified Complaint for Declaratory, Injunctive and Monetary Relief, Partners is entitled to a declaration that LLC breached the Partnership Agreement dated January 16, 2016, by its actions with respect to the Declarant Rights under the Partnership Agreement, and its termination under paragraph 9 of the Partnership Agreement.¹
2. Whether Partners is entitled to any portion of the value of the Declarant Rights from LLC, and if so, what is the amount to which it is entitled.

¹ Following the hearing, as counsel for the parties were exchanging drafts of an order to submit to the Court, counsel for Partners withdrew and a proposed order was never submitted. At paragraph 37, line 24 of the transcript, counsel for Partners states what it is seeking in Court 1, and the Court then rules that paragraphs 40 and 52 are moot but denies the motion as to paragraphs 41 and 53 (Transcript, pp. 51-53). The parties will provide the complete transcript for the Court if the Court thinks it would be helpful.

3. Whether any assets were ever assigned by either Partners or LLC to the Salem Pointe Holdings Partnership ("**Holdings Partnership**").
4. Whether any liabilities were ever undertaken by the Holdings Partnership during its existence.
5. Whether the Holdings Partnership, during its existence, was involved in a venture from which it could have generated a profit or sustained a loss.
6. Whether the Assignment of Right to Purchase Real Property creates a specifically enforceable right in Partners to require LLC to assign to it the Declarant Rights which are personalty under Tennessee law, and if so, whether LLC's failure to assign the Declarant Rights to Partners was a breach of the Assignment of Right, and if so, whether Partners is entitled to specific performance:

Assignment of Right to Purchase Property. Subject to the terms and conditions hereof, Assignor [LLC] hereby assigns to Buyer [Partners] and Buyer hereby accepts from Assignor [LLC] all of Assignor's [LLC] rights to purchase and accept from Seller [Partners] at Closing the Property, together with any and all improvements, buildings and structures owned by Seller [Receiver] located on the Property (collectively, the "Improvements), and the rights, entitlement, privileges and easements, rights of way, and other appurtenances used or connected with the beneficial use or enjoyment of such Property owned and enjoyed by Seller [Receiver]. Assignment of right to purchase real property, paragraph 1.)

7. Whether LLC qualifies as or has standing to be the Declarant, and if not, when did LLC become unqualified or lose such standing.
8. Whether LLC has waived or agreed to divide or reduced certain country club fees for members of the Rarity Bay Golf & Country Club, and if so, the calculation of Partners damages.
9. Whether LLC has breached the Assignment of Right by allowing and/or compelling the Rarity Bay Community Association Board to initiate Monroe Chancery Case 20489 and

- attempt to force Partners to pay assessments or other payments to Rarity Bay Community Association, Inc., and if so, the calculation of any damages, if any, therefrom.
10. Whether Partners is entitled to an award for attorney fees from LLC's breach of the Assignment of Right, giving consideration to the LLC's position that Partners is estopped from claiming such attorney's fees for its claims pursuant to Count V of the Second Amended Verified Complaint filed August 29, 2019 by its insistence on making the judgment final and by levying on LLC's accounts to satisfy said sums, and the fact that there is no demand for attorney's fees in the Second Amended Verified Complaint.
 11. Whether LLC is prohibited from annexing purported Phases 16 and 17 as amendments to the Master Declarations or Bylaws, which requires written approval by Partners pursuant to 8(d) of the Assignment of Right.
 12. Whether Partners is entitled to an award of any actual, compensatory, consequential, and/or special damages from LLC.
 13. Whether LLC is entitled to a declaration and injunctive relief enjoining Partners from using the words "Rarity Bay" in its name for any purpose as such use is prohibited by the Master Declaration without the prior written consent of LLC. (Master Declaration, § 13.7).
 14. Whether Partners or LLC is entitled to an award of court costs.
 15. Whether Partners is entitled to further relief, both general and specific, that the Court deems just and equitable.

Statement of additional issues that Partners believes are appropriately pled and are issues to be decided at trial.

1. Whether LLC has taken action to wind up the business and affairs of the Holdings

Partnership and if it has failed to make distributions to Partners regarding the liquidation of the partnership.

LLC's Comment: LLC contends that the undisputed facts are that the Holdings Partnership held no assets, had no liabilities, conducted no business nor engaged in any activity from which a profit or loss could be incurred. As the Court has found, the Declarant rights were not conveyed to the Partnership and the Partnership was properly terminated. Thus, there was nothing to wind up.

Partners' Comment: Partners' position is that regardless of what LLC contends, this is still an issue that remains outstanding that the Court has not addressed. The language above comes straight from the Third Cause of Action in the Second Amended Verified Complaint.

2. Whether LLC's failure to wind up the business and affairs of the partnership has directly and proximately caused damage to Partners.

See comments of LLC to Item 1.

See comments of Partners to Item 1.

3. The amount of the damages to Partners for the termination of the Holdings Partnership by LLC.

See comments of LLC to Item 1 and 2.

See comments of Partners to Item 1 and 2.

4. Whether LLC has breached its duty of loyalty and duty of care to Partners pursuant to Tenn. Code Ann. §§61-1-401, 403, and 404.

LLC's Comment: LLC contends that on their face Tenn. Code Ann. §§61-1-401 and 403 do not apply. LLC's Statement of the fiduciary breach with respect to §61-1-404 is set forth below.

Partners' Comment: Partners' position is that regardless of what LLC contends, this is still an issue that remains outstanding that the Court has not addressed. The language above comes straight from the Fifth Cause of Action in the Second Amended Verified Complaint.

5. Whether LLC's failure to pay Partners for its 50% interest in the ownership of the declarant rights is a breach of its fiduciary duty to Partners.

LLC's Comment: LLC contends this is not pled in the Second Amended Verified Complaint. The only allegation of a fiduciary breach asserted by the Complaint is paragraph 55 which states:

55. SPC's willful and intentional concealment of pledging Holdings' Partnership. Declarant Rights and its willful and intentional breach of its duties as General Managing Partner and Tax Matters Partner by failing to provide an accounting, and its attempted termination of the Holdings' Partnership breached its duty of loyalty and duty of care to RBP pursuant to Tenn. Code Ann. §§61-1-401, 403 and 404.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. In paragraph 44 of the Second Amended Verified Complaint, partners allege that LLC failed to pay Partner for its 50% interest in the declarant rights.

Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

6. Whether LLC's failure to wind up the business and affairs of the partnership is a breach of its fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. In paragraph 53 of the Second Amended Verified Complaint, partners allege that LLC failed to wind up the business and affairs of the partnership.

Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

7. Whether removing representatives of Partners on the Board of Directors of the Rarity Bay Community Association, Inc. and appointing itself and controlling majority of members of the Board of Directors is a breach of its fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. In paragraph 36 and 37 of the Second Amended Verified Complaint, partners allege that LLC removed Partners from the Board of Directors of the Rarity Bay Community Association, Inc. and appointed itself a controlling majority of members of the Board of Directors. Partners argued as to the additional breaches of

fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

8. Whether LLC orchestrating and attempting to bring apartments, an assisted living facility to the entrance of Rarity Bay, or any other development into Rarity Bay is a breach of its fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. In paragraph 30 of the Second Amended Verified Complaint, partners allege that LLC orchestrated and attempted to bring apartments and an assisted living facility to the entrance of Rarity Bay. Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

9. Whether LLC controlling the Rarity Bay Community Association, Inc Board of Directors to initiate the Monroe Chancery Court Case 20489 to collect and foreclose upon purported liens filed against properties of Partners for non-payment of alleged assessments that are not authorized by the governing documents is a breach of LLC's fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a

breach of fiduciary duty. In paragraph 37 of the Second Amended Verified Complaint, Partners allege that an LLC controlled board voted to proceed with a lawsuit to collect and foreclose upon purported liens filed against properties of Partners for non-payment of alleged assessments that are not authorized by the governing documents. Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

10. Whether LLC waiving or agreeing to divide or reducing certain club fees for members of the Rarity Bay Golf & Country Club is a breach of LLC's fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. Partners allege at ¶ 14 that LLC agreed to divide the mandatory club fees and in ¶ 44 that LLC agreed not to reduce established initiation fees. In paragraph 56, Partners again incorporates and re-alleged all preceding paragraphs, then in ¶¶ 58 and 59 alleges that LLC failed and refused to pay Partners its portion of initiation fees and reduced established initiation fees in breach of the Assignment of Right. Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

11. Whether LLC refusing to pay Partners for its portion of club fees from members as agreed in the Assignment of Right is a breach of LLC's fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. Partners allege at ¶ 14 that LLC agreed to divide the mandatory club fees and in ¶ 44 that LLC agreed not to reduce established initiation fees. In paragraph 56, Partners again incorporates and re-alleged all preceding paragraphs, then in ¶¶ 58 and 59 alleges that LLC failed and refused to pay Partners its portion of initiation fees and reduced established initiation fees in breach of the Assignment of Right. Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

12. Whether LLC's failure to transfer the legal title to the declarant rights into the Holdings Partnership is a breach of fiduciary duty to Partners.

LLC's Comment: See comment to 5.

Partners' Comment: Partners' position is that in the Fourth Cause of Action, paragraph 54, all preceding paragraphs of the Second Amended Verified Complaint are incorporated and re-alleged therefore any preceding paragraphs could be alleged to be a breach of fiduciary duty. Partners alleges at ¶¶ 18, 19 and 20 the parties agreed to jointly manage and execute the declarant rights and did so from the time assets were acquired from the Receiver; at ¶ 23 that they subsequently executed the Holdings Agreement that stipulated that title to the declarant rights would be held in the partnerships' name and for the sole purpose to hold, manage using the declarant rights; at ¶ 44 that LLC's dissolution of the partnership deprives Partners of certain interests, and LLC has failed to pay Partners for its 50% interest in the ownership of the declarant rights; and in ¶ 53 that

LLC has filed to wind up. In paragraph 64, Partners again incorporates and re-alleged all preceding paragraphs, then in ¶¶ 64 through 69 seeks specific performance under the Assignment of Right to exercise the declarant rights. Partners argued as to the additional breaches of fiduciary duty during the November 29, 2021 hearing referenced in footnotes 1 and 2, and the Court has not ruled these out.

Statement of additional issues that LLC believes are appropriately pled and are issues to be decided at trial:

1. Whether LLC's failure to provide Partners an accounting or its termination of the Holdings Partnership as contemplated by paragraph 9 of the Partnership Agreement constituted a breach of its fiduciary duty of loyalty pursuant to T.C.A. § 61-1-404(b) and fiduciary duty of care pursuant to T.C.A. § 61-1-404(c) owed to Partners.
 - a. Whether the conduct of LLC as alleged by Partners violated its duty of loyalty by failing "to account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the Partnership business or derived from a use by the partner of partnership property..." Tenn. Code Ann. § 61-1-404(b)(1).
 - b. Whether the conduct of LLC as alleged by Partners violated its "duty of care to the partnership and the other partners in the conduct and winding up of the partnership business" in that LLC engaged in "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." Tenn. Code Ann. § 61-1-404(c).²

² Also, at the hearing on November 29, 2021 the Court requested the parties (Transcript, pp. 65-66) to submit legal authority with respect to Court 4 alleging breach of fiduciary duty. Counsel for both parties filed submissions for the benefit of the Court.

Partners' Comment: Partners believes its issues relating to the breach of fiduciary duty above are better stated to help the Court determine the remaining issues as it relates to Count 4 of the Second Amended Verified Complaint.

2. Whether Partners is estopped from contesting that LLC meets the qualifications to be the Declarant by reason of the numerous acknowledgments, both by communications of and by the conduct of its representatives and agents since May 18, 2015, indicating that LLC was, in fact, the Declarant pursuant to the Master Declaration, as amended.

Partners' Comment: Partners' position is that this is the first time this argument has been raised and has not been pled in this case.

3. Whether Partners is barred from contesting LLC's standing to be the holder of the Declarant Rights as a result of the Order of April 17, 2015 of the United States District Court for the Eastern District of Tennessee directing the receiver to assign the Declarant Rights to LLC and to execute the Fifth Amendment of Master Declaration of covenants, conditions and restrictions for Rarity Bay, and place the same of record, designating LLC as the Declarant.

Partners' Comment: Partners' position is that this is the first time this argument has been raised and has not been pled in this case.

This 22nd day of February, 2023.

RARITY BAY PARTNERS, formerly known as SALEM POINTE CAPITAL PARTNERS

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