STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 10612
NANCY WRIGHT; GREG WRIGHT; and JODY STANSELL, individually and as members of LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Plaintiffs, v. KRISTA LORUSSO, individually and as a member-manager of LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Defendant, v. LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Nominal Defendant.	**ORDER AND OPINION ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Law Office of Matthew I. Van Horn, PLLC, by Matthew I. Van Horn, for Plaintiffs Nancy Wright, Greg Wright, and Jody Stansell.

Leonard G. Kornberg, P.A., by Leonard G. Kornberg, for Defendant Krista LoRusso.

Higgins & Owens, PLLC, by Sara W. Higgins, for Nominal Defendant LoRusso Ventures, LLC.

Conrad, Judge.

1. This case arises from a dispute among the members of a company called Cinch.Skirt. Plaintiffs Nancy Wright, Greg Wright, and Jody Stansell are Cinch.Skirt's minority members. They accuse Defendant Krista LoRusso of abusing her position as the majority member and have asserted more than a dozen direct and

derivative claims against her. Before the end of discovery, the Wrights and Stansell moved for partial summary judgment on their eleventh claim, which is a direct claim for declaratory judgment. (*See* Pls.' Mot. Partial Summ. J., ECF No. 149; *see also* 2d Am. Compl. ¶¶ 202–05, ECF No. 65.) In its discretion, the Court elects to decide the motion on the briefs and without a hearing. *See* BCR 7.4.

2. In short, the Wrights and Stansell argue that LoRusso has improperly distributed Cinch.Skirt's cash to herself while withholding distributions from them. This misconduct, they contend, triggered a buy-sell event under Cinch.Skirt's operating agreement, either because it is a breach of the agreement or because it is an act of fraud, theft, or embezzlement against the company. Determining that a buy-sell event occurred would have far-reaching consequences, potentially requiring LoRusso to withdraw as a member of Cinch.Skirt and to sell her membership interest back to the company. In support, the Wrights and Stansell have tendered affidavits from themselves, along with an unsworn letter from their expert, R. Wayne Hutchins. (*See* Pls.' Exs. A–D, ECF No. 151.)

3. Right from the start, this motion faces serious headwinds. Courts rarely enter summary judgment before the end of discovery. A basic premise of modern civil litigation is that all parties deserve a full and fair opportunity to pursue discovery that is germane to the dispute. A motion for summary judgment is premature "when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512 (1979); *see also Watson v. Watson*,

2023 N.C. App. LEXIS 158, at *8–9 (N.C. Ct. App. Apr. 4, 2023) (vacating order that granted motion for summary judgment filed before close of discovery).

4. Likewise, courts rarely "enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984). This is especially true when the party's credibility is at issue because credibility determinations are for a jury, not for the Court. Thus, entry of summary judgment "for a party with the burden of proof" based on "his own affidavits" is permitted "when there are only latent doubts as to the affiant's credibility," when the nonmoving party has not offered any materials in opposition, and "when summary judgment is otherwise appropriate." *Kidd v. Early*, 289 N.C. 343, 370 (1976). The moving party must satisfy not only the usual burden to show "that there are no genuine issues of fact" but also "that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from the evidence; and that there is no standard that must be applied to the facts by the jury." *Id.* Even then, the trial court has discretion to deny the motion "if the affidavits seem inherently incredible" or "if the need for cross-examination appears." *Id.*

5. These standards impose a heavy burden—one that the Wrights and Stansell wholly ignore. They say nothing about the differences between offensive and defensive motions for summary judgment. And they simply have not put forward the kind of airtight case that could support entry of summary judgment in these circumstances.

6. To start, their featured evidence—Hutchins's expert opinion that LoRusso received over $100,000 in excess distributions—isn't even admissible. Hutchins expressed his opinion in the form of a two-page letter, not an affidavit. The letter is unsworn, inadmissible, and cannot be considered for summary judgment. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218 (2011); *see also Carter v. Clement Walker PLLC*, 2014 NCBC LEXIS 1, at *16–17 (N.C. Super. Ct. Jan. 10, 2014) ("All testimony, including opinion testimony, must be made under oath or affirmation to be admissible.").

7. The affidavit testimony of the Wrights and Stansell, while admissible for Rule 56 purposes, is hardly compelling. They say that LoRusso has taken cash "distributions" but concede that they do not know "the amounts or dates" of those distributions—highlighting the gaps in their proof. (Pls.' Ex. A ¶ 13; Pls.' Ex. B ¶ 12; Pls.' Ex. C ¶ 12.) Moreover, it is impossible to overlook the credibility issues that naturally arise from testimony given by interested parties who stand to gain from LoRusso's expulsion from Cinch.Skirt. Cross-examination will be essential here. And in any event, the facts are disputed. In opposing the motion, LoRusso offers her own affidavit to show that she has received only legitimate compensation and reimbursements from the company, which the Wrights and Stansell knew about and approved. (*See generally* LoRusso Aff., ECF No. 169.)

8. These are not the motion's only shortcomings. As a final example, the Wrights and Stansell accuse LoRusso of fraud, theft, and embezzlement without

reciting the elements of those claims or making any effort to explain how LoRusso's actions measure up.

9. In an attempt to cure these defects, the Wrights and Stansell pad their reply brief—which they called a "Supplemental Brief"—with new arguments and new evidence learned during discovery conducted while the motion was pending. (*See* Pls.' Suppl. Br., ECF No. 170.) These new matters, if anything, confirm that the motion was premature. The Court declines to consider the reply brief and the untimely arguments and evidence within it. *See* BCR 7.7 ("[T]he Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief.").

10. For all these reasons, the Court **DENIES** Plaintiffs' motion for partial summary judgment.

SO ORDERED, this the 4th day of May, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases