

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA**SHAFER DEVELOPMENT, LLC,
a Nebraska Limited Liability Company,****Plaintiff,****CASE NO. CI 07-57****vs.****JOURNAL ENTRY****PETER BRISTOL,****Defendant.**

On November 20, 2007, this matter came on to be heard before the Court upon a Motion to Dismiss filed by the Defendant under date of September 25, 2007.

Patrick Heng appeared on behalf of the Plaintiff and Patrick Cooper appeared on behalf of the Defendant. Both appeared telephonically.

No evidence was presented and counsel stipulated to a briefing schedule with the Plaintiff given until December 3, 2007, to file a brief and the Defendant given until December 10, 2007, to reply.

Now on December 14, 2007, this matter comes on for decision. The Court having received no briefs from the parties.

The Court, having reviewed the pleadings, hereby **FINDS AND ORDERS:**

1. The motion of the Defendant pursuant to Rule 12(b)(6) of the Nebraska Rules of Pleadings is treated as a Motion to Dismiss as no extrinsic evidence was presented.
2. That the Plaintiff's Amended Complaint alleges in the First Cause of Action that the Defendant breached the operating agreement, attached to the Amended Complaint; in its Second Cause of Action the Plaintiff alleges that the Defendant breached the operating agreement and further did not deal in good faith and fairly in violation of a fiduciary obligation

to the LLC and its members; in a Third Cause of Action the Plaintiff alleges that the Defendant committed a fraud upon the LLC.

3. The Plaintiff is the LLC. The agreement under which the Plaintiff claims his First and Second Causes of Action is an agreement between an individual, Joel Shafer, and the Defendant in which it is clearly stated that the agreement is between members of the LLC and not between the Defendant and the LLC. Because the agreement does not include the Plaintiff as one of the parties to the agreement on its face the Plaintiff cannot bring a cause of action for the Defendant's breach of an agreement with a third party.

4. Concerning the claim of some breach of fiduciary duty contained in the Second Cause of Action this is a restatement of the initial Complaint and the ruling of the Court of August 13, 2007, is maintained. An LLC is created by statute, §21-2601 et seq. NEB. REV. STAT. Nebraska statute gives no basis to impose a fiduciary duty upon members of an LLC to an LLC and because there is no statutory duty there is no legal duty.

5. The Third Cause of Action alleging a fraud has to do with factual allegations that the Defendant defrauded the LLC by foreclosing wrongfully and fraudulently because the Defendant had not given consideration for the mortgages that the Defendant possessed and foreclosed upon property of the LLC. This may or may not have been a defense raised in the foreclosure proceedings but by the reading of the Third Cause of Action the Defendant did foreclose upon the LLC's property and the matter of the legitimacy of the LLC's indebtedness to the Defendant needed to be, and perhaps was, raised in the foreclosure proceedings. This would appear to be an attempt, after the foreclosure proceedings, to raise a defense of lack of consideration to the foreclosure proceedings.

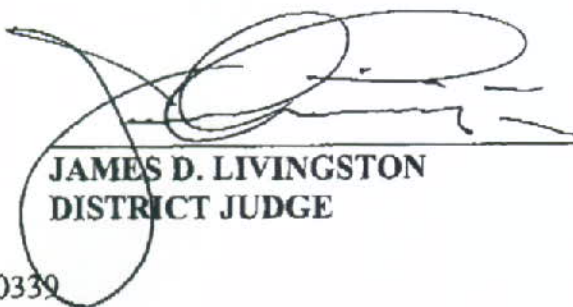
To maintain an action for fraud the Plaintiff must allege (1) that representations were made, (2) that representations were false, (3) that when made, representation was known to be false or made recklessly without knowledge of its truth and as positive assertion, (4) that it was made with intention that Plaintiff should rely upon it, (5) that Plaintiff reasonably did so rely, and (6) that Plaintiff suffered damage as the result. Four R Cattle Co., v. Mullins, 253 Neb. 133.

The Plaintiff does not allege in any way that it relied upon any representations of the Defendant or that reliance upon such claims caused the Plaintiff any damage.

6. The Motion to Dismiss filed by the Defendant pursuant to Rule 12(b)(6) of the Nebraska Rules of Pleadings is sustained for failure to state a claim upon which relief may be granted to this Plaintiff.

7. Costs of this action are taxed to the Plaintiff.

BY THE COURT:



JAMES D. LIVINGSTON
DISTRICT JUDGE

FAX: Patrick Heng 402-498-0339
Patrick Cooper 402-978-5200