

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

NOV 01 2019

PHIL B. ALBERT,)
)
 Plaintiff,)
)
 v.)
)
 PELCO STRUCTURAL, L.L.C.; PELCO)
 INVESTMENTS, L.L.C.; PI REALTY, LLC;)
 PELCO LIMITED, L.L.C.; PELCO)
 INDUSTRIES, INC; MATHEW KASEY)
 SCOTT; AND JAMES R. SUTPHEN,)
)
 Defendants.)

CATHY EDWARDS, COURT CLERK

 LEWIS

Case No. CS-19-439
 Hon. _____

PETITION

Plaintiff, Phil B. Albert for his Petition and causes of action against the above-named Defendants, alleges and states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Phil B. Albert ("Albert") is an individual who has business and personal property interests in Rogers County and is a resident of Tulsa County, Oklahoma.
2. Pelco Structural, L.L.C. ("Structural") is an Oklahoma limited liability company with its principal place of business in Rogers County, Oklahoma, and more specifically at 1501 Industrial Blvd., Claremore, Oklahoma 74017.
3. Pelco Investments, L.L.C. ("Pelco Investments") is an Oklahoma limited liability company with its principal place of business in Edmond, Oklahoma.
4. Pelco Industries, Inc., formerly Par 5 Products, Inc. ("Pelco Industries"), is an Oklahoma corporation with its principal place of business in Edmond, Oklahoma.

5. PI Realty, L.L.C. ("PI Realty") is an Oklahoma limited liability company that owns the real property where Structural's business operations are located in Rogers County, Oklahoma, and conducts business in Rogers County, Oklahoma.

6. Pelco Limited, LLC ("Pelco Limited") is an Oklahoma limited liability company with principal place of business in Rogers County, Oklahoma.

7. Mathew Kasey Scott ("Scott") is an individual who is employed in Rogers County by Structural and resides in Tulsa County, Oklahoma.

8. James R. Sutphen ("Sutphen") is an individual who is employed by Structural in Rogers County and resides in Tulsa County, Oklahoma.

9. The claims and causes of action that are the subject of this action occurred, whether in whole or in part, in Rogers County; some or all of the property at issue in this Petition is located in Rogers County; some or all of the contractual obligations of the parties named herein were made and executed in or originated from Rogers County; and some or all of the amounts due and payable, as alleged herein, were contracted in Rogers County and/or are due to be paid in Rogers County.

10. Venue is properly in Rogers County pursuant to OKLA. STAT. tit. 12 §§ 133, 134, 142 and 143 and this Court has jurisdiction over the parties and the subject matter of this action pursuant to OKLA. STAT. tit. 12 § 2004(f).

BACKGROUND AND ALLEGATIONS

11. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 10 all as set forth above.

12. Effective January 1, 2005, Albert and Pelco Industries executed that certain Operating Agreement of Pelco Structural, L.L.C. ("2005 Structural Operating Agreement").

13. Pursuant to the 2005 Structural Operating Agreement, Albert was a profits interest member and manager of Structural and the President of Structural.

14. After its formation and organization, Structural commenced and continues to this day its business in Claremore as a manufacturer of steel poles for utility, traffic and lighting, sports lighting, and communication industries.

15. On or about March 1, 2005, Albert and Structural entered into that certain employment agreement ("2005 Employment Agreement").

16. In addition to the 2005 Structural Operating Agreement, the 2005 Employment Agreement made Albert the President of Structural, which according to the terms of the 2005 Employment Agreement included:

- a. Albert exercising general management supervision over the business of Structural and manage its day-to-day business and internal affairs;
- b. Albert being responsible for hiring, promoting, demoting and dismissing other employees as the best interests of Structural require and determine from time to time the compensation and benefits of Structural's employees;
- c. Allowing Albert to be associated with New Dominion, LLC and being a member of the Claremore Chamber of Commerce and such other professional organizations that further the business of Structural;
- d. Structural promptly reimbursing Albert expenses he incurs in performing his functions as President; and
- e. Albert being entitled to vacation and leave as stated in Structural's employee manual, and all other leave required by applicable law.

17. Effective January 1, 2005, that certain Operating Agreement of PI Realty, L.L.C. ("PI Realty Operating Agreement") was duly executed by the members and mangers of PI Realty and by PI Realty.

18. Pursuant to Exhibit "A" to the PI Realty Operating Agreement, Albert owns a twenty-five percent (25%) membership interest in PI Realty and Pelco Investments is the other member owning the remaining seventy-five percent (75%) membership interest.

19. Pursuant to that certain Lease Agreement dated November 1, 2005, Structural, as lessee, leases from PI Realty, as lessor, the real estate upon which Structural's Claremore manufacturing facility sits.

20. PI Realty's sole asset is the real estate upon which Structural's business operates and PI Realty's sole source of income is the rental payments paid by Structural for leasing the manufacturing real estate in Claremore.

21. The real estate owned by PI Realty is more particularly described in Exhibit "A" attached hereto and made a part hereof by reference.

22. As the majority owner, Pelco Investments is in control, whether directly or through its appointed manager(s), of the day-to-day business and financial affairs of PI Realty, including determining whether and when distributions are to be made to Albert and/or Pelco Investments.

23. From its formation until approximately April 2019, PI Realty made regular annual or semi-annual distributions to Albert and Pelco Investments on account of their respective membership interests in PI Realty.

24. Effective as of January 1, 2013, Structural's operating agreement was amended and restated by that certain First Amended and Restated Operating Agreement ("2013 Amended and Restated Structural Operating Agreement").

25. Pursuant to the 2013 Amended and Restated Structural Operating Agreement, Pelco Limited possesses a twenty-five percent (25%) profits interest in Structural.

26. On or about January 1, 2013, Structural and Albert entered into negotiations related to a new employment agreement to replace the 2005 Structural Operating Agreement and Albert was presented with a new, proposed employment agreement ("2013 Employment Agreement").

27. The 2013 Amended and Restated Structural Operating Agreement and the 2013 Employment Agreement were prepared, negotiated and agreed upon nearly contemporaneously with each other.

28. Albert executed and delivered his signature page to the 2013 Employment Agreement to Structural and the parties to the 2013 Employment Agreement operated under and performed certain terms contemplated by it or the parties, including the execution of the 2013 Amended and Restated Structural Operating Agreement.

29. On May 3, 2013, Pelco Limited was organized and formed.

30. On or about January 3, 2015, Albert entered into that certain Operating Agreement of Pelco Limited, LLC ("Pelco Limited Operating Agreement") with, among others at that time, Scott and Sutphen.

31. Pursuant to the Pelco Limited Operating Agreement and amendments thereto, Scott and Sutphen may claim, assert, or own some (i) membership interest in and to Pelco Limited and/or (ii) some membership or profits interest in and to Structural, whether directly or through the Pelco Limited Operating Agreement.

32. In January 2018, NextEra Energy ("NextEra") reported to Structural a product failure manufactured by Structural for a NextEra project in Texas.

33. Upon Albert learning of such concerns and claims by NextEra, Albert communicated this to senior management at Structural and the other principals of Structural.

34. Within weeks of Structural learning of NextEra's concerns and claims, Albert caused Structural to manufacture and deliver certain replacement products to NextEra in an effort to mitigate and address claims relating to NextEra's claimed failure of certain of the poles manufactured by Structural.

35. In or about the weeks of March 25 or April 1, 2019, Albert, in his capacity as President of Structural, was requested by NextEra to travel to Florida to discuss with NextEra its continued concern of alleged failures of Structural's steel poles on the NextEra Energy project and the potential of future failures.

36. During the meeting in Florida with NextEra, Albert was advised by NextEra that NextEra had material concerns as to the additional potential failures of Structural's products and also advised Albert that NextEra estimated the liability to be approximately \$15,000,000 to \$20,000,000.

37. Upon Albert's return to Structural's facility in Claremore from his meeting with NextEra in Florida, Albert advised Scott of this potential liability and told or attempted to advise the other principals of Structural of the informal, contingent products liability claim asserted by NextEra (collectively, the "NextEra Claim"). Albert further advised that he believed Structural had not met elements of the specification as it related to post-galvanizing inspections that should identify the likelihood that these failures may occur.

38. On or about April 11, 2019, Structural, through Pelco Industries, wrongfully terminated Albert's employment due to his reporting of the NextEra Claim.

39. Structural's termination of Albert's employment was pursuant to an undescribed and unidentified employment agreement, which would have to be the 2005 Employment Agreement or the 2013 Employment Agreement.

40. On that same date, Structural also gave notice to Albert that he was being removed as a manager and President of Structural, pursuant to a purported Consent To Action Without A Meeting Of the Members of Pelco Structural, L.L.C. effective April 5, 2019.

41. On October 7, 2019, Albert made demand upon PI Realty and Pelco Investments to remit all past and future distributions (including distributions due Albert for 2019) to Albert.

42. PI Realty and Pelco Investments have failed and refused to pay any such distributions to Albert (or its undersigned counsel).

CAUSES OF ACTION

Count I – Conversion of Personal Property

43. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 42 all as set forth above.

44. As the President of Structural, Albert maintained certain personal property owned by him at Structural's offices and manufacturing facility in Claremore, Oklahoma.

45. After the wrongful termination of Albert, Albert made demand upon Structural for the return of his personal property.

46. To date, Structural and/or Pelco Industries maintain and exercise control and use of certain personal property that Albert was not permitted to remove or otherwise recover from Structural's offices, including business records of Pelco Limited, personal documents and records, autographed books, art work, decorative bowls, coffee table, vases, and sculptures.

47. Structural and/or Pelco Industries' continued control and use of such personal property deprives Albert from his personal property.

48. Structural and/or Pelco Industries have failed and refused to return to Albert such personal property and such failure and refusal to turn over the personal property constitutes

conversion and Structural and/or Pelco Industries are liable to Albert for the damages he has incurred as a result of these actions.

WHEREFORE, Albert prays for judgment in his favor and against Structural and Pelco Industries for conversion in an amount equal to the damage sustained by Albert, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count II – Declaratory Judgment (Non-Competes)

49. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 48 all as set forth above.

50. Each of the 2005 Employment Agreement and the 2013 Employment Agreement contains non-compete provisions prohibiting Albert from being an employee or otherwise being engaged by a business that competes with Structural.

51. The non-compete provisions in the 2005 Employment Agreement and the 2013 Employment Agreement restrict Albert from earning a fair wage to provide for himself and his family.

52. A justifiable controversy exists between Albert, Structural and/or Pelco Industries which the Court may determine.

WHEREFORE, Albert prays for judgment in his favor and against Structural and Pelco Industries for a determination that the non-compete provisions in the 2005 Employment Agreement and the 2013 Employment are unenforceable under Oklahoma law, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count III – Accounting PI Realty

53. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 52 all as set forth above.

54. Albert, as twenty-five percent (25%) membership owner of PI Realty, has never received any financial information pertaining to PI Realty.

55. Albert, as a member of PI Realty, is entitled to an accounting from PI Realty and Pelco Investments of all (i) assets and liabilities of PI Realty, (ii) sums and amounts received by PI Realty, and (iii) amounts paid or distributed by PI Realty for all time periods from its formation through the pendency of this action.

WHEREFORE, Albert prays for judgment in his favor and against PI Realty and Pelco Investments ordering PI Realty and Pelco Investments to provide an accounting of all (i) assets and liabilities of PI Realty, (ii) sums and amounts received by PI Realty, and (iii) amounts paid or distributed by PI Realty for all time periods from its formation through the pendency of this action, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count IV – Appointment of Receiver for PI Realty

56. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 55 all as set forth above.

57. Pursuant to Oklahoma law, including Okla. Stat. tit. 12 § 1551(1) and (6), the appointment of a receiver is necessary to take control of and manage the assets and affairs of PI Realty in order to avoid PI Realty and/or Pelco Investments, as the seventy-five percent (75%) owner, from taking action adverse to the interests of Albert.

WHEREFORE, Albert prays for judgment in his favor and against PI Realty and Pelco Investments for the appointment of a receiver over the property and business of PI Realty, plus the

costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

***Count V – Temporary and Permanent Injunctions Against
PI Realty and Pelco Investments***

58. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 57 all as set forth above.

59. There is a substantial likelihood of success on the part of Albert that he, as twenty-five percent (25%) member of PI Realty, is entitled to receive his proportionate share of all distributions that have been or will be declared or paid to the other member of PI Realty.

60. Albert has suffered and will suffer immediate and irreparable injury if PI Realty and Pelco Investments are permitted to withhold distributions that Albert is entitled.

61. A temporary injunction and permanent injunction need to be issued because injury or loss will occur to Albert if such an Order is not entered.

62. Albert seeks to enjoin PI Realty and Pelco Investments from withholding from Albert any and all distributions he is entitled as a member of PI Realty.

WHEREFORE, Albert prays for judgment in his favor and against PI Realty and Pelco Investments for the entry of a temporary injunction and permanent injunction prohibiting PI Realty and Pelco Investments from withholding from Albert any and all distributions he is entitled as a member of PI Realty, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count VI – Declaratory Judgment (PI Realty and Structural)

63. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 62 all as set forth above.

64. Albert is owed money on account of his ownership interest in PI Realty, whether distributions that have yet to be made to him, distributions to be made in the future, or on account of the valuation and liquidation of his membership interest in PI Realty.

65. Albert may owe Structural money based upon various business dealings between Albert and Structural.

66. A justifiable controversy exists between Albert, Structural and PI Realty which the Court may determine.

WHEREFORE, Albert prays for (i) judgment in his favor and against PI Realty and Pelco Investments for a determination of all amounts due and owing Albert on account of his membership interest in PI Realty and (ii) a judgment determining the amounts, if any, Albert may owe Structural based upon his business dealings with Structural, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count VII – Declaratory Judgment (Employment Agreements)

67. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 66 all as set forth above.

68. Either the 2005 Employment Agreement or the 2013 Employment Agreement govern the terms of Albert's employment with Structural.

69. Albert and Structural dispute which of the two agreements control.

70. A justifiable controversy exists between Albert and Structural which the Court may determine.

WHEREFORE, Albert prays for judgment determining which employment agreement was and is binding upon Albert and Structural, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count VIII – Declaratory Judgment (Structural Operating Agreements)

71. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 70 all as set forth above.

72. Either the 2005 Structural Operating Agreement or the 2013 Amended and Restated Structural Operating Agreement govern, including who are the members and managers of Structural.

73. Albert, Pelco Limited, Structural, and Pelco Industries dispute which of the two operating agreements control.

74. A justifiable controversy exists between Albert, Structural and Pelco Industries which the Court may determine.

WHEREFORE, Albert prays for judgment determining which operating agreement is binding upon Albert, Pelco Limited, Structural, and Pelco Industries, plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Count IX – Declaratory Judgment (Structural Interests)

75. Albert adopts and re-alleges the allegations contained in numbered paragraphs 1 through 74 all as set forth above.

76. Scott and Sutphen may claim, assert or own some (i) membership interest in and to Pelco Limited and/or (ii) some membership or profits interest in and to Structural.

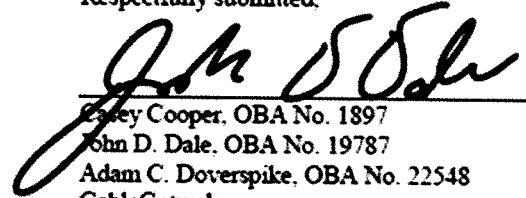
77. The basis, validity, type and extent of any interest asserted, claimed or owned by Scott and Sutphen in Structural, whether directly or indirectly through Pelco Limited, is unknown.

78. A justifiable controversy exists between Albert, Scott, Sutphen, Structural, and Pelco Industries which the Court may determine.

WHEREFORE, Albert prays for judgment determining the basis, validity, type and extent of any interest asserted, claimed or owned by Scott and Sutphen in Pelco Limited and Structural,

plus the costs of this action, reasonable attorneys' fees and costs and such other relief as the Court may deem just and proper.

Respectfully submitted,



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Exhibit "A"

Three tracts of land in the SW/4 of Section 4, Township 21 North, Range 16 East of the I. B. & M., Rogers County, Oklahoma, according to the U. S. Government Survey thereof, more particularly described as follows:

Beginning at the Southwest corner of said Section, thence East 794.8 feet to the center line of the St. Louis & San Francisco Railroad, thence N 26°55' E 237.1 feet, thence N 63°05' W 100 feet to the Westerly right-of-way line of said railroad, thence N 26°55' E along said right-of-way, 966.86 feet to the true point of beginning; thence N 89°54' W 785.86 feet, more or less, to the East boundary line of County Road, thence N 5°15' W along East boundary line of County Road 472.16 feet to a point, thence S 89°54' E 1067.52 feet, more or less, to the Westerly boundary line of railroad, thence Southwesterly along the right-of-way of said St. Louis and San Francisco Railroad 526.75 feet to the point of beginning.

AND

Beginning on the South line of Section 4, 794.8 East of the Southwest corner and on the center line of St. Louis & San Francisco Railroad, thence Northeast along the center line of railroad 1730.71 feet; thence N 63°05' W 100 feet to point of beginning; thence N 26°55' E, parallel to center line of railroad, 766.99 feet; thence N 89°54' W, 1477.64 feet to the Easterly right-of-way line of County Road; thence S 5°15' E along said County Road 687.49 feet; thence S 89°54' E 1067.52 feet to the point of beginning.

AND

Beginning at the intersection of the South line of said Section 4 and the center line of the St. Louis & San Francisco Railroad right-of-way, thence N 26°55' E along said center line 2497.7 feet; thence N 63°05' W 100 feet to the Westerly right-of-way line of said railroad and the point of beginning; N 26°55' E along said railroad right-of-way 308.73 feet more or less to a point 87 feet South of the North line of the SW/4 of Section 4; thence N 89°54' W parallel to and 87 feet South of said North line 1641.11 feet more or less to the East line of the County Road; thence Southeasterly along said East line 2766 feet; thence S 89°54' E 1477.64 feet more or less to the point of beginning. LESS AND EXCEPT two strips of land as described in Warranty Deeds filed in Book 834, Page 125 and Book 1094, Page 864, records of the County Clerk of Rogers County, Oklahoma.