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Order on Motions for Partial Summary Judgment (RICHARD W. MCWHORTER)

Elizabeth E. Long
Superior Court of Fulton County

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FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RICHARD W. MCWHORTER,	)	
	)	Civil Action No.: 2006CV118867
Plaintiff,	)	
	)	
v.	)	
	)	
J. ROBERT WARD,	)	
	)	
Defendant.	)	

ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Counsel for both parties appeared before the Court on December 10, 2007, to present oral argument on Defendant's Motion for Partial Summary Judgment on Counts III and Counts IV of the Counterclaim, filed September 20, 2006; Defendants Motion for Summary Judgment on Plaintiff's Claims for Injunctive Relief, Usurpation of Business Opportunities, and Imposition of a Constructive Trust, filed April 30, 2007; and Plaintiff's Motion for Partial Summary Judgment on Count II, filed April 30, 2007. After reviewing the record of the case, the briefs submitted on the motions, and the parties' arguments, the Court finds as follows:

FACTS

In April, 2004, Plaintiff and Defendant formed Far Horizons LLC ("FH") for the purpose of purchasing Cumberland, Georgia, lots, selling them, and splitting the profits. Plaintiff and Defendant executed Articles of Organization, but no Operating Agreement.

On May 19, 2004, FH purchased two (2) lots (collectively referred to herein as the "Lots") with a promissory note on each from BB&T Bank ("BB&T"). Each note required a balloon principal payment on May 7, 2006.

To obtain the loans, Plaintiff and Defendant each signed personal guarantees on the principal of the loans (individually, the "Guaranty"). Each party paid approximately $20,000 in closing costs. When BB&T requested additional collateral, Plaintiff offered Lot 66, which he owned individually.

Plaintiff alleges that in exchange for offering Lot 66 as collateral, the Defendant agreed to pay all costs associated with the loans such as the quarterly interest payments, taxes, insurance, etc. Defendant was to be reimbursed for fifty percent (50%) of his out-of-pocket, post-closing costs from the sale proceeds on the Lots before the profit distribution to the two members.

Defendant acknowledges that he and Plaintiff entered into an oral agreement, but dispute the terms. Defendant asserts that Plaintiff pledged Lot 66 as collateral because Plaintiff initiated this investment opportunity and Defendant did not want to infuse cash into the deal. Defendant alleges that he and Plaintiff agreed to split all out-of-pocket, post-closing costs on a 50-50 basis. Additionally, Defendant highlights that the security interest granted in Plaintiff's Lot 66 was never perfected due to a complication arising from Plaintiff's sale of a fifty percent (50%) interest in Lot 66 post-closing.

Defendant paid the first quarterly interest payment due on the Lots, but later in August, 2005, sought a fifty percent (50%) contribution from Plaintiff.

Sometime during the summer of 2005, Defendant began pursuing the purchase of the BB&T loans. In October 2005, Plaintiff's counsel received an email communication informing them of Defendant's desire to purchase the BB&T loans and requesting Plaintiff's signature to consent. Plaintiff inquired about Defendant's intent with regard to the loans/property. Thereafter, communications went no further between Plaintiff and

Defendant. Eventually Defendant purchased FH's loans from BB&T in December 2005, although Plaintiff did not consent to the assignment and no notice of the sale was provided to him.

On May 7, 2006, the balloon payment on both FH Loans became due. On May 8, 2006, Defendant sent a demand notice to Plaintiff requesting payment within ten (10) days. No payment was received and Defendant initiated foreclosure proceedings, which were stayed by various injunctions and finally by a lis pendens filed on the properties. Plaintiff initiated this suit against Defendant alleging, among other things, breach of fiduciary duties and damages related to Defendant's purchase of the FH Loans from BB&T.

STANDARD

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable to the non-moving party, to warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).

I. Defendant's Motion for Partial Summary Judgment on Counterclaim Counts III (Enforce the Guaranty that II signed) and Counts IV (Contribution)

Defendant urges this Court to enforce the Guaranty signed by Plaintiff. Defendant seeks fifty percent (50%) of the principal due on the FH loans, plus interest and fees/costs. The issue of the Guaranty and its enforceability, however, is inextricably intertwined with questions of whether any fiduciary duties were breached in Defendant's acquisition of the loans, the consequences of such breaches, if any, and damages. Therefore, while there is no dispute that Plaintiff signed the Guaranty with Defendant for

both FH Loans, Plaintiff's obligations thereunder in light of the questions surrounding Defendant's acquisition of the FH Loans cannot be determined at this time.

Similarly, Defendant requests summary judgment on its counterclaim for Contribution to recoup one half of his post-closing, out-of-pocket expenses on the FH loans.

Plaintiff and Defendant admit to making an oral agreement regarding post-closing, out-of-pocket expenses on the FH loans. In exchange for Plaintiff's provision of additional collateral (Lot 66), Plaintiff claims that Defendant agreed to pay all costs upfront and to be reimbursed out of sale proceeds.

Defendant, however, argues that the parties agreed to share all expenses at the time they came due. Defendant also argues, in his briefs submitted on the issue, that if there was an oral agreement, it was invalid under the Statute of Frauds because the two (2) year term of the loan prevented it from being performed in less than one (1) year. O.C.G.A. § 13-5-30.

While Plaintiff acknowledges that the security interest offered to BB&T on Lot 66 was never perfected, Plaintiff argues that he performed, or at least has partially performed, by offering the collateral to BB&T, which is sufficient to cure any Statute of Frauds defects in the alleged oral agreement. O.C.G.A. § 13-5-31 (the statute of frauds does not extend to cases "where there has been performance on one side, accepted by the other in accordance with the contract…" or "where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance.").

By offering Lot 66 to secure the FH loans and working with BB&T to provide the additional collateral required under the loans, Plaintiff may have partially performed sufficient to overcome any Statute of Frauds defect in the alleged oral agreement. Thus, there remains a question of fact appropriate for a jury to determine.

In accordance with the foregoing, Defendant's Motion for Summary Judgment on Counterclaim Counts III (Guaranty) and IV (Contribution) is **DENIED**.

II. Defendant's Motion for Summary Judgment on Plaintiff's Claims for Injunctive Relief for Usurpation of a Business Opportunity and Imposition of a Constructive Trust.

Plaintiff seeks a permanent injunction to prevent Defendant's foreclosure on the land and for the FH loans and guarantees to be placed in a constructive trust as a result of the alleged breached fiduciary duties, usurped business opportunities, and unjust enrichment resulting from Defendant's acquisition and enforcement of the FH loans.

First, Defendant petitions the Court to grant him summary judgment on Count IV of Plaintiff's complaint seeking a permanent injunction on the enforcement of the FH Loans. As a basis for such injunctive relief, Plaintiff cites Defendant's allege breach of fiduciary duties owed to FH and breach of the oral agreement between the members.

Defendant argues that Plaintiff has an adequate remedy at law for the wrongs alleged in this case. Plaintiff counters that because waterfront property is the subject of the disputes between the parties, that the unique nature of land automatically satisfies the requirements for an equitable remedy pursuant to O.C.G.A. § 23-1-4. This Court disagrees. What is fundamentally at issue between the parties is a monetary investment, which was nevertheless in the form of property. Thus, this case is not automatically appropriate for equitable remedies by virtue of the property in question.

However, before the issue of injunctive relief can be properly before this Court, a determination must be made on the underlying questions of breach of fiduciary duty and the alleged oral agreement, whatever its terms were, which are reserved for determination by a jury.

Second, Defendant petitions the Court for summary judgment on Count III of Plaintiff's Complaint for unjust enrichment and the imposition of a constructive trust.

Constructive trusts are imposed under O.C.G.A. § 53-12-93 "whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." A constructive trust may be imposed where one is unjustly enriched as a result of breaching fiduciary duties owed to another. See, e.g., Lane Co. v. Taylor, 174 Ga. App. 356 (1985).

Without resolving the threshold question of whether Defendant was unjustly enriched as a result of purchasing the FH loans, however, a decision on the imposition of a constructive trust is premature. Thus, Defendant's Motion for Summary Judgment is **DENIED**.

III. Plaintiff's Motion for Partial Summary Judgment on Count V (Dissolution of Far Horizons LLC) of Complaint

Plaintiff petitions this Court to grant summary judgment on Count V of his complaint seeking a decree of judicial dissolution of FH.

Under O.C.G.A. § 14-11-603, a member of, or the LLC itself, may petition the Court for a decree dissolving the company "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or a written operating agreement." Plaintiff seeks summary judgment on this Count pursuant to O.C.G.A. § 14-

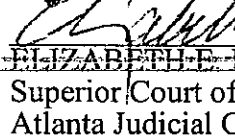
11-601.1(b)(5), which states that a person ceases to be a member of an LLC whenever enumerated events occur, including an unresolved petition (after 120 days) for dissolution. After reviewing the statutes implicated and the case law interpreting the limited liability code of Georgia, it is not clear to this Court that these two statutes may be used as a vehicle to remove a member and dissolve the company in a suit where the LLC in question is not a party to the action.

In accordance with the foregoing reasons, Plaintiff's Motion for Summary Judgment on Count V is **DENIED**.

CONCLUSION

As stated above, Defendant's Motion for Partial Summary Judgment on Counts III and Counts IV of the Counterclaim, filed September 20, 2006, is hereby **DENIED**; Defendants Motion for Summary Judgment on Plaintiff's Claims for Injunctive Relief, Usurpation of Business Opportunities, and Imposition of a Constructive Trust, filed April 30, 2007, is hereby **DENIED**; and Plaintiff's Motion for Partial Summary Judgment on Count II, filed April 30, 2007, is hereby **DENIED**.

SO ORDERED this 20th day of December, 2007.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:
James Sherrian, Esq.
Margaret G. Geer, Esq.
RAY & SHERMAN LLC
One Securities Centre
3490 Piedmont Road, Suite 700
Atlanta, GA 30305

Richard Gerakitis, Esq.
Lindsay Marks, Esq.
TROUTMAN SANDERS LLP
600 Peachtree Street, NE Suite 5200
Atlanta, GA 30308

Candace Smith, Esq.
Patrick R. Costello, Esq.
Rhonda Paterson, Esq.
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309