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Michael D. Sullivan Order on Defendants' Motion for Summary Judgment

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



MICHAEL D. SULLIVAN,)
)
 Plaintiff,)
)
 v.)
 JAMES A. TORCHIA, et al.,)
)
 Defendants/Third-Party Plaintiffs,)
)
 v.)
 SULLIVAN PROPERTIES, LP and BMLS)
 CORPORATION,)
)
 Third-Party Defendants.)

Civil Action File No.
2013CV229283

COPY

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On June 25, 2014, the parties appeared before the Court to present oral argument on the Defendants' Motion for Summary Judgment¹. Upon consideration of the parties' oral arguments, briefs and the record in this case, the Court finds as follows:

National Viatical, Inc. ("NVI") is a Georgia corporation formed no later than the year 2000 to engage in the business of viatical settlements. Viatical settlement companies purchase insurance policies from individuals for less than the face value of the policy in the form of lump-sum cash settlements. Plaintiff Michael D. Sullivan was the Chief Financial Officer of NVI. Sullivan asserts that he and Defendant James Torchia agreed to be partners and joint owners of NVI and they agreed to share all profits and assets equally. Sullivan does not claim that he was ever a shareholder of NVI. Instead, Sullivan claims there were no shareholders, and that as CFO

¹ The movants include James A. Torchia, Marc A. Ceello, Ceello Law Group, LLC, National Viatical, Inc., Credit Nation Lending Services, LLC, Credit Nation Auto Sales, LLC, The Clear Skies Holding Company, LLC, Columbus Capital, LLC, River Green Group, LLC, River Green Investment Management, LLC, River Green, LLC, Stone Mountain Settlements, LLC, Cars 1st, LLC, Sixes Tavern, LLC, Spaghetti Junction, LLC, hereinafter referred to as "Defendants."

of NVI he caused NVI to make equal distributions to himself and Torchia as partners. In addition, Sullivan claims he and Torchia had joint control over all investment funds, and that marketing materials and other NVI documents approved by Torchia named Sullivan as “co-founder” and “principal.”

Contrary to his current claims of ownership of NVI, Sullivan previously denied having an ownership interest in NVI under oath in unrelated court matters. In his 2002 divorce, he failed to disclose any ownership interest in NVI in his discovery responses, in his Domestic Relations Financial Affidavit, or in his separation agreement and he warranted that all of his assets had been identified. In 2005, in a post-judgment deposition, Sullivan denied forming NVI with Torchia and denied having an ownership interest in NVI. This deposition was taken as part of the collection efforts of judgment creditors who had obtained a judgment against Sullivan and his separate company, Senior Care Plus. In the ensuing collection action, Sullivan’s salary at NVI was garnished, but no partnership profits were garnished.

Likewise, Torchia, who now denies that Sullivan has any ownership interest in NVI, testified under oath at Sullivan’s January 2009 bond modification hearing that Sullivan was a part-owner of NVI so that Sullivan could travel on NVI international business trips.

Defendants seek partial summary judgment on the claims that rely on Sullivan holding an ownership interest in NVI.² A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant,

² The challenged counts are Count 1 Breach of Partnership Agreement, Count 2 Breach of Fiduciary Duty against Defendant Torchia, Count 3 Breach of Fiduciary Duty against Defendants Ceello and Ceello Law Group, Count 5 Conversion, Count 7 Fraud, Count 9 Fraudulent Transfers under Georgia common law and The Uniform Fraudulent Transfers Act, Count 10 Accounting, Count 11 Imposition of a Constructive Trust, Count 12 Appointment of a Receiver, and Count 13 Petition for Emergency Injunctive Relief.

warrant summary judgment as a matter of law. *Lau's Corp., Inc. v. Haskins*, 261 Ga. 491, 491 (1991).

Defendants first argue that Sullivan has no interest in NVI as a matter of law because he was never a shareholder of NVI. Although shareholders are generally the owners of Georgia corporations, an ownership interest can exist in a corporation even when one has not received stock certificates. *Contract Furniture Refinishing & Maintenance Corp. of Georgia v. Remanufacturing & Design Group, LLC*, 317 Ga. App. 47, 51 (2012) (quoting *Kueffer Crane & Hoist Serv. v. Passarella*, 247 Ga. App. 327, 329(2) (2000)). A breach in an ownership agreement can occur when one party refuses to pay the other party's share, with or without holding stock certificates. *Id.*

Sullivan acknowledges he was never a shareholder of NVI, but asserts that he and Torchia had a partnership agreement to split all profits equally and that NVI operated as a partnership for nine years. Therefore, Sullivan's lack of stock certificates is not dispositive as to Sullivan's ownership interest in NVI.

Next, Defendants argue that Sullivan has not presented sufficient evidence to prove the existence of a partnership. "A partnership is an association of two or more persons to carry on as co-owners [of] a business for profits..." O.C.G.A. § 14-8-6(a). Factors indicating the existence of a partnership include, "a common enterprise, the sharing of risk, the sharing of expenses, the sharing of profits and losses, a joint right of control over the business, and a joint ownership of capital." *Aaron Rents, Inc. v. Fourteenth Street Venture, L.P.*, 243 Ga. App. 746, 747 (2000). Receipt of a share of profits is considered prima-facie evidence that the person is a partner. O.C.G.A. §14-8-7. The true test of partnership formation is the intent of the parties. *Aaron Rents, Inc.*, 243 Ga. App. at 747-48.

Sullivan's affidavit asserts that he and Torchia agreed to be partners and co-owners who would split profits and assets evenly, and Sullivan identifies NVI documents consistently identifying Sullivan as a co-founder and principal. Sullivan's affidavit, along with Torchia's sworn testimony at Sullivan's bond modification hearing that Sullivan was a part-owner is sufficient evidence to create a genuine issue of material fact as to the existence of a partnership.

Lastly, Defendants argue that Sullivan should be barred from asserting any ownership interest in NVI through the equitable doctrine of judicial estoppel. Judicial estoppel works to preserve the integrity of judicial proceedings by precluding a party from presenting a legal position which is inconsistent with a position previously and successfully asserted in a prior proceeding. *Chicon v. Carter*, 258 Ga. App. 164, 165 (2002); *Zahabiun v. Automotive Finance Corp.*, 281 Ga. App. 55, 56-57 (2006).

In this case, both Sullivan and Torchia have asserted inconsistent positions under oath in prior court proceedings that contradict their current positions as to Sullivan's ownership interest in NVI. Therefore, the Court will not apply judicial estoppel in favor of either party, but instead will allow a fact finder to determine whether Sullivan had an ownership interest in NVI.

Accordingly, the Defendants' partial motion for summary judgment is **DENIED**.

SO ORDERED this 24th day of July, 2014.


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

Copies to:

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