12-20-2007

Order on Defendant's Motion to Strike Plaintiff's Response Brief, Motion to Strike Certain Affidavits, and Motion for Summary Judgment (MARTIN D. MARCHMAN)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MARTIN D. MARCHMAN,	)	
	)	Civil Action No.: 2005CV101076
Plaintiff,	)	
	)	
v.	)	
	)	
JACK FISHER,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S RESPONSE BRIEF, MOTION TO STRIKE CERTAIN AFFIDAVITS, AND MOTION FOR SUMMARY JUDGMENT

On November 20, 2007, counsel appeared to present oral argument on Defendant's Motion to Strike the Affidavit of Martin D. Marchman and Elda N. Fox and the Exhibits Thereto, filed November 15, 2007; Defendant's Motion to Strike Portions of Plaintiff's Response Brief and for Sanctions, filed November 15, 2007; and Defendants' Motion for Summary Judgment, filed February 1, 2007. After reviewing the briefs, the arguments presented, and the record of the case, the Court finds as follows:

I. Facts:

This case involves the acrimonious termination of a business relationship between Plaintiff and Defendant. At the heart of the controversies in this case, are Plaintiff's claims that he and Defendant were partners in their real estate development endeavors.

Plaintiff and Defendant, an accountant, had a working relationship for twenty years prior to their collaboration in real estate development, which began in 1997.

Defendant, through his company Castle Communities, LLC, formed Glass-Moore, LLC ("GM"). Plaintiff was never a shareholder of GM.

On October 14, 1997, GM entered into a purchase and sale agreement ("PSA") with Plaintiff to acquire from Plaintiff a package of real estate assets including contracts, subdivisions, options, land, and developments. As a condition of the PSA, Plaintiff and GM entered into a renewable, 2-year term, employment agreement ("EA"). Under the EA, Plaintiff was named the VP of Land Acquisitions for GM, paid an annual salary, received discretionary bonuses, and charged significant personal expenses to GM. Plaintiff asserts that prior to entering into the PSA and the EA, he and Defendant agreed to operate as partners, essentially through GM, as real estate developers. Defendant denies that he and Plaintiff had any agreement outside of the PSA and EA between Plaintiff and GM.

Plaintiff and Defendant worked closely together on several real estate projects between 1997 and 2001. As GM finished one project, Defendant and Plaintiff would identify and start another development project so that at the end of the relationship there were several developments which GM had facilitated.

II. Evidentiary Motions

As a preliminary matter, the Court must address Defendant's challenges to Plaintiff's response brief and supporting documents to the Motion for Summary Judgment.

A. Motion to Strike Portions of Plaintiff's Response Brief and for Sanctions

Defendant requests that the Johnson Memo, which is defined in, and which is the subject of an earlier Court Order, dated October 15, 2007, and all references to it be

stricken from Plaintiff's response brief to Defendant's Motion for Summary Judgment. In the previous Order, this Court found that Defendant's statements in the Johnson Memo did not rise to the level of perjury or fraud at the time so as to warrant the application of the crime/fraud exception to the attorney client privilege. The circumstances here remain the same, thus, the Johnson Memo and all references to it shall be stricken from Plaintiff's response brief.

B. Motion to Strike the Affidavits of Martin D. Marchman and Elda N. Fox and Exhibits Thereto

Defendant petitions this Court to strike two of Plaintiff's affidavits—the affidavits of Plaintiff Marchman and of Ms. Fox—submitted in opposition to Defendant's Motion for Summary Judgment. Defendant claims that the affidavits and the attached exhibits failed to meet the standards established in O.C.G.A. § 9-11-56(e), which describes the type and form of evidence appropriate to be considered on a motion for summary judgment.

To summarize the numerous objections, Defendant challenges Ms. Fox's affidavit and the exhibits to both her affidavit and Plaintiff's affidavit as not having a proper foundation or authentication and for containing inadmissible statements of hearsay or opinion. In addition, Defendant challenges Plaintiff Marchman's affidavit as being self-contradictory testimony which warrants being struck under Prophecy Corp. v. Charles Rossignol, Inc., 256 Ga. 27, 28 (1986). Prophecy holds that, on a motion for summary judgment, the trial court must construct self-contradictory testimony against the party offering it, if such testimony is the only evidence in his favor on the dispositive issue of the case. Defendant contends that the Marchman affidavit directly contradicts his earlier

deposition testimony, and is the only evidence in the record that speaks to the terms of the alleged partnership agreement between Defendant and Plaintiff.

On the other hand, Plaintiff argues that each exhibit attached to the challenged affidavits, with the exception of Exhibit V & W, were exhibits to discovery, previously entered into the record. "(T)he court is obliged to take account of the entire setting of the case on a Rule 56 motion. In addition to the pleadings, it will consider *all papers of record,* as well as any material prepared for the motion that meets the standard prescribed in Rule 56(e)." Glisson v. Morton, 203, Ga. App. 77, 77 (1992) (emphasis in original) (upholding a trial court's consideration of unsworn documents and hearsay-challenged testimony on a motion for summary judgment, which were produced in the course of discovery).

Plaintiff also insists that the affidavits did not contain inadmissible statements of hearsay or opinion, but were based on personal knowledge. O.C.G.A. § 9-11-56(e) requires that evidence in the record contain personal knowledge and be based upon admissible facts. Affidavits must set forth facts that would be admissible at trial and may not include hearsay, opinions, or conclusions. Langley v. National Labor Group, Inc., 262 Ga. App. 749, 751 (2003). A statement in the affidavit that it is based upon personal knowledge "is generally sufficient to meet the requirement that affidavits be made upon such knowledge." Id.

The Court agrees that the exhibits attached to the affidavits, with the exception of Exhibits V and W, were a part of the discovery record in the case and therefore should be considered. Additionally, the Marchman and the Fox affidavits contain statements that the contents are based upon their "personal knowledge and information."

Paragraph 9, however, of the Fox affidavit contains inadmissible hearsay statements and shall be stricken from the record. Id. ("[i]f it appears that any portion of the affidavit was not made upon the affiant's personal knowledge...that portion is to be disregarded in considering the affidavit in connection with the motion for summary judgment.)

Thus, Defendants' Motion to Strike the Fox Affidavit and Exhibits Thereto is **DENIED IN PART and GRANTED IN PART. Paragraph 9 of the Fox affidavit and Exhibits V and W are stricken from the record, everything else remains.**

In addition, the Marchman affidavit is not contradictory to Plaintiff's earlier deposition testimony when read in its entirety rather than just the few passages highlighted by Defendant. Nor is it the only evidence purporting to establish the terms of the alleged oral partnership between Plaintiff and Defendant. There is some other, although slim, evidence in the record. Thus, the stringent standard of Prophecy has not been met in this case, and the evidence is sufficient to raise a credibility question best determined by a jury. Defendant's Motion to Strike the Marchman Affidavit is **DENIED.**

III. Defendant's Motion for Summary Judgment

To prevail on his motion for summary judgment, Defendant must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable" to Plaintiff, "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).

A. Oral Contract for Partnership

The threshold question in Defendant's Motion for Summary Judgment is whether Plaintiff and Defendant entered into an enforceable oral partnership agreement.

"A partnership results from a contract, either express or implied." Waugh v. Waugh, 265 Ga. App. 799, 801 (2004), citing, Clark v. Schwartz, 210 Ga. App. 678 (1993). Plaintiff alleges that he and Defendant entered into an oral partnership agreement to invest in and develop real estate and to share the profits.

Whether a partnership has been formed can be evaluated from several factors such as whether the parties held themselves out as partners, engaged in a common enterprise, shared risk, shared loss, shared profits, or shared control. O.C.G.A. § 14-8-7; Aaron Rents Inc. v. Fourteenth Street Venture LP, 243 Ga. App. 746 (2000); Vitner v. Funk, 182 Ga. App. 39 (1987). Determining the existence of a partnership involves a review of the parties' course of dealing and the totality of circumstances. Vitner v. Funk, 182 Ga. App. 39, 43; Hayes v. Irwin, 541 F. Supp. 397, 415 -416 (N.D.Ga., 1982).

In addition to challenging the existence of an oral partnership agreement, Defendant challenges the enforceability of such an alleged agreement on the grounds that any agreement between parties was void for vagueness and too indefinite to enforce.

"Parties must agree to all material terms for a contract to be enforceable." O.C.G.A. § 13-3-2; Burns v. Dees, 252 Ga. App. 598, 601-602 (2001) ("A contract cannot be enforced if its terms are incomplete, vague, indefinite or uncertain."). Failing to determine the length, scope, or structure of an oral partnership can be fatal to enforcing an oral partnership agreement. See e.g., Razavi v. Shackelford, 260 Ga. App. 603 (2003) (refusing to enforce an oral partnership agreement because it was too indefinite with

regard to duration, payment and subject matter, which part performance could not cure); Cherokee Falls Investments v. Smith, 213 Ga. App. 603 (1994) (refusing to enforce a joint venture as evidenced by a purchase/sale agreement because without determining the timing, the cost or the performance, the oral agreement was too indefinite).

Defendant also challenges the alleged oral partnership agreement under the statute of frauds, which requires, among other things, that oral contracts must be capable of performance within one year. O.C.G.A. § 13-5-30. See e.g., Lemming v. Morgan, 228 Ga. App. 763, 764 (1998) (affirming the grant of summary judgment for defendant on an oral partnership agreement to develop real estate and in which the plaintiff claimed a 50% interest because the contract was unenforceable under the statue of frauds).

The alleged partnership between Plaintiff and Defendant extended from 1997 through 2001. Defendant asserts that the four year duration of the partnership violates the one year rule under the statute of frauds. Plaintiff, instead, directs the Court to the holding that the statute of frauds is inapplicable to "an agreement for an indefinite period terminable at will." Vitner v. Funk, 182 Ga. App. 39, 43 (1987). Thus, Plaintiff argues there was no writing requirement for their partnership agreement.

In addition, Plaintiff argues that if this Court were to hold that a written contract was required under the statute of frauds, that Plaintiff's performance (i.e., his sweat equity) cures any statute of frauds defects. Defendant, however, counters that even performance cannot cure an indefinite contract. See, e.g., Razavi v. Shackelford, 260 Ga. App. 603 (2005).

Despite having an employer/employee relationship, Plaintiff presented deposition testimony of other co-workers and colleagues who "understood" Plaintiff and Defendant

to be "partners". Plaintiff alleges that his partnership agreement with Defendant was for an indefinite period of time, terminable at will, with net profits to be shared 50/50. Plaintiff alleges that the partnership was a rolling investment scheme where the profits of one project would be rolled into the next, with final reconciliations/distributions to be made whenever they separated as partners. Plaintiff contends that he and Defendant shared expenses, that he received a portion of profits through the use of GM's credit card, periodic cash divisions, and a share of the profits from the Peachtree Powers project.

To establish these terms, Plaintiff points to his deposition testimony, his supplemental affidavit, Exhibit B to his affidavit which references a 50% profit split between Plaintiff and Defendant, and Elda Fox's deposition and affidavit statements. This evidence, however thin, creates a valid question of credibility and fact appropriate for a jury to determine. In addition, there may be evidence sufficient to take the agreement out of the statute of frauds

Finally, Defendant challenges the finding of an oral partnership agreement between the parties because Plaintiff and GM entered into the PSA and EA, which contain a merger clause. Defendant urges this Court to define Plaintiff's legal relationship and rights with respect to Defendant according to the terms of PSA and EA. This argument, however, overlooks that Plaintiff contracted with Defendant's company, GM, not with Defendant himself. Thus, these agreements are determinative with respect to Plaintiffs' rights and causes of action against GM, but not Defendant individually.

In accordance with the above-stated reasoning, Defendant's Motion for Summary Judgment on Breach of Contract, is **DENIED**.

B. Misrepresentation and Fraud

Defendant moves for Summary Judgment on Plaintiff's misrepresentation and fraud allegations. Plaintiff alleges that Defendant's statements regarding the splitting of future profits were fraudulent. To establish a claim for fraud, Plaintiff must demonstrate that (1) Defendant made false representations of fact with scienter, and intent to induce him to act or refrain from acting, (2) that Plaintiff justifiably relied upon such statements, and (3) that damages flowed there from. Pyle v. City of Cedartown, 240 Ga. App. 445 (1999); Reeves v. Edge, 225 Ga. App. 615 (1997). Similarly, to establish a claim for negligent misrepresentation, Plaintiff must establish that (1) Defendant supplied false information to him, (2) Plaintiff reasonably relied upon such false information, and (3) economic injury resulted there from. Marquis Towers, Inc. v. Highland Group, 265 Ga. App, 343 (2004). Plaintiff failed to support his allegations of false information or inducement sufficient to survive Defendant's motion. Thus, Defendant's Motion for Summary Judgment on Plaintiff's allegations of Misrepresentation and Fraud is **GRANTED**.

C. Unjust Enrichment and Implied Trust

Plaintiff pleas in the alternative that if there is no oral partnership agreement between him and Defendant, then Plaintiff is owed money under a theory of unjust enrichment requiring the partnership proceeds to be held in an implied trust. Because the underlying issue of whether or not the parties entered into an enforceable oral contract has been reserved for a jury determination, so too must the issue of unjust enrichment and an implied trust. Razavi v. Shackelford, 260 Ga. App. 603 (2003) (holding that the claim of quantum meruit raised questions of fact that survived summary judgment). Therefore,

Defendant's Motion for Summary Judgment on Plaintiff's claims of Unjust Enrichment and Implied Trust is **DENIED**.

D. Remaining Counts

The remaining counts on Defendant's Motion for Summary Judgment are all related to the central question of whether or not an oral partnership agreement was formed between the parties. Thus, without resolving that threshold question, Plaintiff's remaining counts also survive Defendant's motion. Thus, Defendant's Motion for Summary Judgment on Misappropriation of Corporate Opportunity, Breach of Fiduciary Duty, and Conversion is **DENIED**.

IV. Conclusion

For the above-stated reasons, Defendant's Motion for Summary Judgment is **DENIED,** but **GRANTED** as to misrepresentation and fraud. In reaching its conclusion, the Court did not consider the Johnson Memo, or any references thereto, Exhibits V and W to the Marchman and Fox Affidavits, or Paragraph 9 of the Fox Affidavit.

SO ORDERED this 20th day of December, 2007.

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

Copies to:

Rosemary S. Armstrong, Esq.
BURTON & ARMSTRONG LLP
Two Ravinia Drive, Suite 1750
Atlanta, GA 30346

Kelley Amanda Lee, Esq,.
John G. Perry, Esq.
WOMBLE CARLYLE SANDRIDGE & RICE PC
1201 West Peachtree Street, Suite 3500
Atlanta, Georgia 30309