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Order on Defendants' Motions to Dismiss
(ESTATE OF JOY W. O'BRIEN)

Elizabeth E. Long
Superior Court of Fulton County

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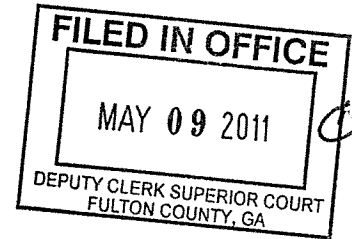
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**



ESTATE OF JOY W. O'BRIEN, as)
 Executrix of the estate of Randy Pirotin,)
)
 Plaintiff,)
)
 v.)
)
)
)
 JOSEPH CONZA, PAUL GWIN,)
 GEORGIA ENTERPRISES, INC., FINNA,)
 LP, NICKCO GENERAL, INC., and)
 PEACH STATE FRANCHISE)
 CONCEPTS, LP,)
)
 Defendants.)

**Civil Action File No.
2010-CV-188721**

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Counsel appeared before Judge Marvin Arrington on March 7, 2011, to present oral argument on Defendants' Motions to Dismiss Plaintiff's Complaint¹ (collectively, the "Motion"). After reviewing the record of the case, the briefs submitted on the Motion, and the transcript of the hearing before Judge Arrington, this Court finds as follows:

Defendant Joseph Conza, Defendant Paul Gwin and Randy Pirotin, now deceased, owned, collectively and individually, several entities through which they developed and supported the operations of various Blimpie franchises. Prior to Pirotin's death in 2008, Statewide Development, Inc. ("SWDI"), an entity solely owned by the Pirotin, entered into an Independent Contractor Agreement with Georgia Enterprises, Inc. ("GEI"), an entity solely

¹ Defendants Paul Gwin, Georgia Enterprises, Inc., Finna, L.P., Nicko General, Inc., and Peach State Franchise Concepts, L.P. filed their Motion to Dismiss on September 17, 2010, followed by Joseph Conza, who filed his Motion to Dismiss on November 17, 2010. Given that the motions are identical, this Order will be dispositive of both.

owned by Conza, to furnish certain services to Blimpie franchises in Georgia. Joy W. O'Brien, sister of Pirotin and executrix of his Estate, alleges that GEI failed to reimburse SWDI for certain expenses as required under the terms of the Independent Contractor Agreement. She also alleges that, following Pirotin's death in 2008, Conza and Gwin committed other improprieties with respect to Pirotin's interest in entities in which he jointly owned with Conza and Gwin. Among other allegations, she contends that Defendants failed to provide the Estate with an accounting of any revenue generated by the entities jointly owned by Conza, Gwin and Pirotin, failed to purchase his ownership interest in Defendant Finna, LP ("Finna") as required under an Equityholders Agreement, and misappropriated all the assets of SWDI and continued its operations without turning over any profits to the Estate. On the basis of these allegations, Pirotin's Estate has made claims against Defendants for civil RICO violations, breaches of fiduciary duty, conversion, punitive damages, and attorneys' fees, among other claims.

Defendants have moved to dismiss Plaintiff's Complaint on five grounds. "A motion to dismiss for failure to state a claim upon which relief can be granted should not be sustained unless: (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." Sherman v. Fulton County Bd. of Assessors, 288 Ga. 88 (2010).

First, Defendants contend that the Plaintiff, identified as the "Estate of Joy W. O'Brien, as Executrix of the Estate of Randy Pirotin" in the caption, lacks standing to bring claims in this civil action. In response, Plaintiff argues that the words "Estate of" in the caption are due to an unintentional typographical error as evidenced by the fact that the title of the Complaint reads

“Complaint of Joy W. O’Brien, as Executrix of the Estate of Randy Pirotin.” The Court is content that the words “Estate of” in the caption are merely the result of an inadvertent error and do not evidence any deficiency with respect to Plaintiff’s capacity to assert claims on behalf of the Estate. Accordingly, Defendants’ Motion as to this issue is **DENIED**. But to avoid confusion, Plaintiff is directed to amend the caption of the Complaint to correct the error.

Second, Defendants argue that Count I fails to clearly specify the nature of the claims being asserted and therefore is subject to dismissal. O.C.G.A. § 9-11-8 calls for a “short and plain statement of the claims showing that the pleader is entitled to relief.” Courts are further directed to construe all pleadings so as to do substantial justice. O.C.G.A. § 9-11-8(f). Applying these standards to Count I of Plaintiff’s Complaint, the Court finds that the Plaintiff has satisfied this threshold. As Defendants managed to identify in their Motion, Count I includes a breach of contract claim against GEI for failure to reimburse SWDI \$22,791.09 as required under the Independent Contractor Agreement (paragraph 10), a breach of contract claim against Conza for failure to purchase Pirotin’s interest in Finna as required by the parties’ Equityholders Agreement (paragraphs 11, 13), a claim for conversion against Conza and Gwin for wrongfully appropriating the assets of SWDI and an accounting of the financial condition of such assets (paragraph 12), and a claim for appointment of a receiver to inquire into the financial affairs of Finna, Nicko General, Inc., and Peach State Franchise Concepts, L.P. to determine what amount the Estate is owed, if any, from any profits realized following Pirotin’s death in 2008, until the present. At paragraph 13, Plaintiff seeks the Estate’s proportional share of net profits of Finna, which Plaintiff claims Conza has failed to turn over due to the fact that he unlawfully assumed ownership of the Estate’s 38% interest (paragraphs 11, 13, and 14). Although a claim for conversion does not lie “with respect to intangible property representing an interest in a

business” under Georgia law, Georgia recognizes a claim based on tortious deprivation of a business. See Monterey Mexican Restaurant of Wise, Inc. v. Leon, 282 Ga. App. 439, 445-446 (2006). Accordingly, construing the pleadings to do “substantial justice,” Plaintiff has adequately set forth identifiable claims for relief against Defendants in Count I. Defendants’ Motion with respect to Count I is **DENIED**.

Next, Defendants allege that the civil RICO claim is deficient in that it omits certain necessary elements. Specifically, Defendants argue that Plaintiff has failed to allege the predicate acts committed by the Defendants, the existence of a pattern of racketeering activity, and the existence of an enterprise. Defendants further challenge this claim to the extent it is premised on fraud, which Defendants contend has not been pled with particularity as required by O.C.G.A. § 9-11-9(b). As an initial matter, a civil RICO claim under Georgia law does not require a party to allege the existence of an enterprise. Dover v. State, 192 Ga. App. 429 (1989). With respect to Defendant Gwin, the Court agrees with Defendants and finds that Plaintiff’s claim lacks the necessary showing that Gwin participated in a pattern of racketeering activity since the only predicate act involving Gwin involves the alleged conversion of the assets of SWDI. See Rohm & Haas Co. v. Gainesville Paint & Supply Co., 225 Ga. App. 441, 446 (1997) (“[T]he conduct prohibited by [Georgia RICO statute] is the acquisition of ... money through a ‘pattern of racketeering activity’... and ‘pattern’ means engaging in at least two incidents of racketeering activity [or predicate offenses].”) On the other hand, Plaintiff identifies two potential predicate acts committed by Conza—conversion of SWDI’s assets and unlawful appropriation of the Estate’s interest in Finna—which, together, satisfy the baseline showing of a “pattern of racketeering activity.” But to the extent the claim against Conza is premised on fraud, the Court finds that Plaintiff has failed to state a claim for fraud against Conza. See Id. at

445 (defining elements of a fraud claim as “a false representation . . ., scienter, an intention to induce [Plaintiff] to act in reliance, justifiable reliance and damages”). As such, the only RICO claim that may proceed is the claim against Conza to the extent it is not predicated on fraud. Defendants’ Motion is **GRANTED** with respect to RICO claims against Gwin and RICO claims against Conza premised on fraud. Defendants’ Motion is **DENIED** as to RICO claims against Conza not predicated on fraud.

Defendants next argue that Plaintiff’s claim for breach of fiduciary duty fails to state a claim, in part, because it fails to specify the basis of any duty that Defendants owed to Plaintiff. In Count III of the Complaint, Plaintiff asserts a breach of fiduciary duty claim against Gwin and Conza by virtue of their “relationship established through various business enterprises.” Upon a review of the allegations in the Complaint, the Court finds that Plaintiff has only alleged facts sufficient to establish a fiduciary duty owed by Conza. As majority shareholder in Nicko and managing partner of Finna, Conza owed a fiduciary duty to Pirotin by virtue of his minority ownership interest in Nicko and as a limited partner of Finna. See Marshall v. W.E. Marshall Co., 189 Ga. App. 510, 512 (1989) (a majority shareholder owes a fiduciary duty to a minority shareholder); Hendry v. Wells, 286 Ga. App. 774, 783 (2007) (“In addition to a limited partner's enumerated statutory and contractual rights, partners owe fiduciary duties directly to one another, including a duty to act in the utmost good faith, and with the finest loyalty.”). With regard to Gwin, the Complaint fails to provide any grounds upon which to hinge any liability on the basis of a fiduciary relationship. Accordingly, Defendants’ Motion is **GRANTED** with respect to Plaintiff’s claim against Gwin for breach of fiduciary duty. With respect to breach of fiduciary duty claims against Conza, Defendants’ Motion is **DENIED**.

Finally, Defendants argue that Plaintiff's conversion claim fails to identify the property allegedly converted. At the very least, the Plaintiff alleges that Gwin and Conza wrongfully took possession of the assets of SWDI, including office furniture, fixtures, a computer, and various bank accounts, among other assets. Defendants' Motion with respect to Plaintiff's claim of conversion is **DENIED**.

Therefore, as stated above, Defendants' Motion is **DENIED** with respect to 1) Plaintiff's standing, 2) Count I, 3) RICO claims against Conza not predicated on fraud, 4) breach of fiduciary duty claims against Conza; and 5) the conversion claim. Defendants' Motion is **GRANTED** with respect to 1) RICO claims against Gwin; 2) RICO claims against Conza premised on fraud; and 3) breach of fiduciary duty claim against Gwin. Plaintiff is further directed to amend the caption of the Complaint to correct the misnomer.

SO ORDERED this 9th day of May, 2011.


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

Copies sent electronically to:

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