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Order on Nov. 1, 2013 Hearing (Michael D. Sullivan)

Elizabeth E. Long

Fulton County Superior Court, Judge

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

MICHAEL D. SULLIVAN,)

Plaintiff,)

v.)

**JAMES A. TORCHIA, MARC A. CELELLO,
CELELLO 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 LLC, STONE MOUNTAIN
SETTLEMENTS, LLC, CARS 1ST, LLC, SIXES
TAVERN, LLC, SPAGHETTI JUNCTION, LLC,
and JOHN DOES 1-5,**)

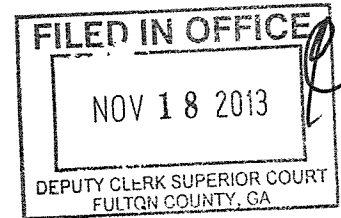
Defendants/Third-Party Plaintiffs,)

v.)

**SULLIVAN PROPERTIES, LP and BMLS
CORPORATION,**)

Proposed Third-Party Defendants.)

**Civil Action File No.
2013CV229283**



ORDER ON NOVEMBER 1, 2013 HEARING

On November 1, 2013, counsel appeared before the Court to present oral argument on all motions currently pending in this matter. Upon consideration of the arguments of counsel, the briefs submitted on the motions and the record of the case, this Court finds as follows:

This case arises from a dispute between former business partners, Michael D. Sullivan (“Sullivan”), James A. Torchia (“Torchia”) and Marc A. Celello (“Celello”). At issue is Sullivan’s ownership interest in National Viatical, Inc. (“NVI”), a company formed in 2000 that is engaged in the business of viatical settlements. NVI purchases, on behalf of itself and investors, life insurance policies from terminally ill patients at below face value and recovers the

full amount of the policy at the death of the policy holder. It splits the difference between the purchase price and the policy proceeds with its investors.

Apparently, NVI is a lucrative company, and, according to Plaintiff, proceeds from NVI were used to finance other ventures, some of which are also named as Defendants. Both sides agree that Plaintiff served as CFO of NVI and performed marketing services for the company, as well as raising capital. However, the parties dispute Plaintiff's status as part-owner of NVI. Plaintiff contends that he had equal ownership of NVI with Torchia, but the ownership interest was not documented to protect the owners from liability. On the other hand, Torchia contends that Plaintiff never had an ownership interest in NVI and was fired for misconduct in allegedly entering into side deals with NVI investors. Plaintiff claims, among other claims, that Ceello, an attorney, breached his fiduciary duties to Plaintiff.

Defendants assert counterclaims based on Plaintiff's alleged misconduct while at NVI by misappropriating business opportunities, disclosing confidential information, defrauding customers, forgery and defamation. They also seek the repayment of loans made to Plaintiff.

A. DEFENDANTS' MOTION TO DISMISS

1. Count 6

Defendants argue that Plaintiff's claim for breach of contract in Count 6 concerning the proceeds of the sale of Synergy Acceptance Corporation ("Synergy") falls outside the statute of limitations. The statute of limitations for a breach of contract is four years. O.C.G.A. § 9-3-25. In Count 6, Plaintiff claims that Defendant Torchia failed to pay Plaintiff the remaining \$385,000 of a \$1,000,000 agreement from the sale of Synergy. As support, Defendants argue that a complaint from an adversary proceeding in a California bankruptcy case, which is attached to

Plaintiff's Complaint in this case, establishes that Defendants' alleged defaults occurred over four years before this case was initiated.

A court should grant a motion to dismiss when a plaintiff "would not be entitled to relief under any state of facts that could be proven in support of his claim." Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 29 (2009). In ruling on such a motion, the Court must accept as true all of plaintiff's well-pleaded factual allegations, and draw all reasonable inferences in plaintiff's favor. Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003).

While it is true that a court is required to construe all allegations in plaintiff's favor, the Court finds Defendants' reliance on the allegations in the attachment to be misplaced. The allegations in the attachment merely set forth the dates on which Synergy made payments to Torchia. This information does not show that Torchia failed to pay Plaintiff on these dates or that these dates were the dates on which Plaintiff should have been paid. Accordingly, motion is **DENIED** as to Count 6.

2. Count 1

Defendants argue that Count 1 is, in fact, a corporate derivative claim and that the claim must be brought in the name of NVI. A derivative claim is one "founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff... [A] derivative action allows a stockholder to step into the corporation's shoes and to seek in its right the restitution he could not demand on his own..." Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 528 (1984).

Defendants also argue that Plaintiff must first send a written demand to NVI. O.C.G.A. § 14-2-742. Plaintiff counters that he is a co-owner of NVI, but that shares were never issued to him, and therefore, he is not bound by the corporate restraints on direct actions. He contends that his claim arises from his partnership agreement with Torchia and Torchia's breach of that agreement.

Plaintiff has chosen to plead count 1 as a breach of a partnership agreement; thus, the Court cannot construe his choice as a derivative claim. Defendants' motion is **DENIED** as to Count 1.

3. Counts 2, 3, 5, 7, 9, 10, 11, 12 and 13

Defendants contend that Counts 2, 3, 5, 7, 9, 10, 11, 12 and 13 should be dismissed because they all flow from Count 1, which fails because it really is a derivative claim and therefore required a written demand on NVI before it could proceed. Since Count 1 is not dismissed on this ground, Counts 2, 3, 5, 7, 9, 10, 11, 12 and 13 will not be dismissed at this time. Defendants' motion is **DENIED** as to these claims.

4. Count 5

Defendants seek dismissal of Plaintiff's claim for conversion against Torchia and Ceello on the basis that the allegations fail to establish that they possessed property belonging to Plaintiff.

Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion.

Glisson v. Freeman, 243 Ga.App. 92, 104-105, (2000).

Construing the pleadings in favor of Plaintiff, the Court finds that Plaintiff has adequately pled a conversion claim. Plaintiff alleges that Defendants Torchia and Colello exercised dominion over profits from NVI to which Plaintiff claims to be entitled by transferring such funds to another entity that Plaintiff does not own. Accordingly, Defendants' motion is **DENIED**.

5. Count 9

Defendants argue that Count 9 should be dismissed because in order "to state an UFTA claim to set aside transfers from Synergy, [he]... must allege facts that (1) Synergy is a debtor as to him and (2) he is a creditor of Synergy."

Plaintiff contends that Defendants misread Count 9; he is not alleging that Synergy is a debtor, nor that he is a creditor of Synergy. Rather, he is claiming that Torchia and Celello are the debtors and that he is their creditor. Motion to dismiss Count 9 is **DENIED**.

6. Counts 4 and 8

Counts 4 and 8 have not been challenged and therefore will not be dismissed.

B. DEFENDANTS' MOTION FOR LEAVE OF COURT TO FILE THIRD PARTY COMPLAINT

Defendant seeks leave of court to file and serve a third-party complaint on Sullivan Properties, LP and BMLS Corporation, who Defendants claim are in possession of profits and compensation paid to Sullivan. Upon Plaintiff's declaration in open court that he does not oppose this motion, Defendants' motion is **GRANTED**.

C. PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' PURPORTED COUNTERCLAIMS

Plaintiff seeks dismissal of Counts II, III, V, VI, IX and X of Defendants' counterclaims, arguing that they do not arise out of the same transaction or occurrence as Plaintiff's claims. Accordingly, Plaintiff seeks dismissal of these claims or, alternatively, that they be considered permissive rather than compulsory and separated for purposes of trial.

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading, the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim." O.C.G.A. § 9-11-13(a).

The Court finds that Counts II and III arise out of the same transactions and occurrences as Plaintiff's claims and therefore, Plaintiff's motion is **DENIED** as to these counts. However, Plaintiff's motion is **GRANTED** with respect to Counts V, VI and XI, which the Court finds to be permissive counterclaims. Counts V, VI and XI all center around Plaintiff's conduct in sending emails in the name of Defendant Torchia to Defendants' customers, investors, and business relations disclosing the allegations in this case. These allegations obviously occurred following the filing of the instant litigation and therefore cannot be considered arising out of the same transaction or occurrence as Plaintiff's underlying claims. Accordingly, these counts will be separated for purposes of trial, unless the parties agree otherwise. See O.C.G.A. § 9-11-13(b).

D. PLAINTIFF'S MOTION TO STRIKE SCANDALOUS AND IMPERTINENT MATTERS FROM DEFENDANTS' COUNTERCLAIM

Plaintiff asks the Court to strike portions of Defendants' counterclaim that reference: 1) Plaintiff's past criminal history involving arrests for rape and witness tampering; 2) Defendants' past financial assistance; 3) Statements made by Plaintiff to Defendant Torchia that Torchia

owed him “nothing;” and 4) Statements that this lawsuit is “another fraudulent sales job” like Plaintiff has masterminded in the past to “bilk” elderly investors.

Under Georgia law, the Court may strike from any pleading any insufficient defense or redundant, immaterial, impertinent or scandalous matter. O.C.G.A. § 9-11-12(f). To determine whether it is appropriate to strike matters in pleadings, the Court should compare the allegations’ relevance to the scope of issues in the proceeding. The Court should also consider whether evidence in support of the issue would be admissible. Schaefer v. Athens, 120 Ga. App. 301 (1969).

The Court **GRANTS** Plaintiff’s motion regarding the references to Plaintiff’s past criminal history. However, Plaintiff’s motion is **DENIED** as to the allegations referencing Plaintiff’s jail time, which he himself mentions in his own Complaint, as well as Plaintiffs’ alleged statements regarding what Defendant Torchia “owes” or does not owe Plaintiff. The parties’ financial relationship and the existence of any agreements between the parties regarding financial obligations are directly relevant to the issues in dispute.


E. PLAINTIFF’S MOTION FOR A MORE DEFINITE STATEMENT

Plaintiff seeks a more definite statement regarding certain allegations made in Defendants’ counterclaim. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, the party must nevertheless answer or respond to the best of the party’s ability, and he may move for a more definite statement. O.C.G.A. § 9-11-12(e). “Motions for more definite statement are not favored inasmuch as discovery procedures should be used extensively to obtain such information. Unless the pleadings are so vague and ambiguous that the defendant could not

frame the proper responsive pleadings thereto the motion should not be granted.” Moultrie v. Atlanta Federal Sav. & Loan Ass’n, 148 Ga. App. 650 (1979).

Upon review of Defendants’ pleadings, the Court is satisfied that the allegations are sufficient to meet the requirements notice pleading. Furthermore, the Court is not persuaded that the contentions against Plaintiff are so vague as to make re-pleading a more efficient tool to flesh out the finer points of Defendants’ claims than discovery. Accordingly, Plaintiff’s motion is **DENIED**.

SO ORDERED this 14 day of November, 2013.


ELIZABETH E. LONG, Senior Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiffs	Attorneys for Defendants
<p><i>Attorneys for Michael D. Sullivan</i></p> <p>James M. Johnson KNIGHT JOHNSON One Midtown Plaza 1360 Peachtree Street, N.E. Suite 1201 Atlanta, GA 30309 jjohnson@knightjohnson.com</p>	<p><i>Attorneys for James A. Torchia, Marc A. Ceello and the individual corporations and business entities</i></p> <p>Jason W. Graham GRAHAM & PENMAN, LLP 17 Executive Park Drive Suite 115 Atlanta, GA 30329 Tel: (404) 842-9380 jason@grahamandpenman.com brandon@grahamandpenman.com</p>