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**Gordon Jones, II Order on Plaintiff's Motion for Partial Judgment
on the Pleadings and for a More Definite Statement of the law**

Elizabeth E. Long
Fulton County Superior Court

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

GORDON JONES, II,)	
)	
Plaintiff,)	Civil Action
)	File No. 2017CV294369
v.)	
)	
IRONWOOD CAPITAL PARTNERS,LLC,)	
TIMBERVEST, LLC,)	Bus. Case Div. 2
TEP INVESTORS, LLC,)	
IRONWOOD HOLDINGS, LLC,)	
JOEL BARTH SHAPIRO,)	
WALTER WILLIAM)	
ANTHONY BODEN, III, and)	
DONALD DAVID ZELL, JR.,)	
)	
Defendants.)	

**ORDER ON PLAINTIFF’S MOTION FOR PARTIAL JUDGMENT ON THE
PLEADINGS AND FOR A MORE DEFINITE STATEMENT**

This action comes before the Court on Plaintiff’s Motion for Partial Judgment on the Pleadings and for a More Definite Statement. Having considered the pleadings, the parties’ memoranda in support of and opposition to the motion, and argument of counsel during an October 4, 2018 hearing in this matter, the Court finds as follows:

SUMMARY OF PLEADINGS

This litigation involves a number of disputes between current and former co-members of various limited liability companies. Plaintiff Gordon Jones, II (“Jones”) and Defendants Joel Barth Shapiro (“Shapiro”), Walter William Anthony Boden, III (“Boden”), and Donald David Zell, Jr. (“Zell”) (collectively “Individual Defendants”) are current and former members of several corporate entities through which the four carried out their business.¹ Jones and the

¹ Plaintiff’s Complaint for Declaratory Judgment and Other Relief (“Complaint”), ¶1.

Individual Defendants are members of Defendant TEP Investors (“TEPI”) with each holding a 21.75% interest.² Jones was a manager and officer of Ironwood Capital Partners, LLC (“Ironwood”) and was also a member of Ironwood until December 2013 when he allegedly sold his 25% interest to Shapiro in exchange for cash as well as a promissory note for \$425,000 that remains outstanding.³ Finally, Jones was an officer of Timbervest, LLC (“Timbervest”) until he was terminated in December 2015.

AT&T Litigation and Settlement

In May 2015, non-party AT&T and related entities (collectively “AT&T”) filed suit against Timbervest, Jones, and the Individual Defendants in the U.S. District Court for the Northern District of Texas (“AT&T Litigation”).⁴ The plaintiffs in that case sought relief for the named defendants’ alleged “pattern of fraud and concealment, including [d]efendants’ blatantly improper and unlawful use of the assets of [plaintiffs’ benefit plans] for [d]efendants’ own personal interests.”⁵ The parties to the AT&T Litigation discussed settlement during the fall and winter of 2015. According to Jones, throughout this settlement negotiation period, he “made clear” to the Individual Defendants and Timbervest that he was not willing to pay a pro rata share of any settlement and that he did not waive his rights to indemnification, stating so in an email Jones sent to the Individual Defendants on Dec. 17, 2015.⁶

² Complaint, ¶5.

³ Complaint, ¶6.

⁴ Complaint, ¶18. *See AT&T Services, Inc., in its capacity as named fiduciary of the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan 1, the AT&T Umbrella Benefit Plan 2, and New Forestry, LLC v. Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones, II*, United States District Court for the Northern District of Texas, Dallas Division, No. 3:15-cv-01454-D.

⁵ Defendants’ Second Amended Defenses, Answer, and Counterclaims to Plaintiff’s Complaint for Declaratory Judgment and Other Relief (“Defs’ Second Amended Answer and Counterclaim”), Ex. A (“AT&T Litigation Complaint”) at ¶1.

⁶ Complaint, ¶19.

The following day, the parties to the AT&T Litigation signed a confidential settlement agreement which Jones asserts he signed “at Timbervest’s request” (“AT&T Settlement”).⁷ Pursuant to the AT&T Settlement, Plaintiff, the Individual Defendants and Timbervest agreed to make a \$6 million settlement payment. It is undisputed that the settlement payment was made. However, Jones to date has refused to pay any portion of the settlement. Timbervest and the Individual Defendants have demanded that Jones pay his portion of the AT&T Settlement and have allegedly threatened to “claw-back” attorney’s fees and expenses paid on Jones’ behalf in connection with the AT&T Litigation.

Current Litigation

On Aug. 21, 2017, Plaintiffs Jones initiated this action seeking a declaration that he is entitled to indemnification for any attorneys’ fees, expenses, or settlement-payment obligations arising from the AT&T Litigation (count I). Jones also asserts claims for: breach of the TEPI Operating Agreement and conversion, asserted against TEPI and its managers (Ironwood Holdings and the Individual Defendants) for withholding from Jones a distribution that was paid to all other TEPI members (counts II and III); breach of fiduciary duty asserted against Ironwood Holdings and the Individual Defendants (count IV); breach of contract asserted against Shapiro for failing to pay the promissory note he executed in relation to his purchase of Jones’ membership interest in Ironwood (count V); conversion asserted against Timbervest for refusing to return two paintings that allegedly belong to Jones (count VI); and attorneys’ fees and expenses of litigation (count VII).

The Individual Defendants have asserted counterclaims against Jones, including a claim for a declaration that Jones is not entitled to indemnification and is obligated to pay his share of the AT&T Settlement payment (count I). Defendants also assert the following claims arising

⁷ Complaint, ¶20.

from Jones' failure to pay any portion of the AT&T Settlement: breach of contract (count II); promissory estoppel (count III); unjust enrichment (count IV); quantum meruit (count V); fraud based upon Jones' alleged misrepresentations regarding his intent to pay his share of the AT&T Settlement (count VI); and attorneys' fees and expenses under O.C.G.A. §13-6-11 (count VII).

On Dec. 13, 2017, Jones filed his Motion for Partial Judgment on the Pleadings as to both parties' declaratory judgment actions, which also included a Motion for More Definite Statement as to Defendants' fraud counterclaim. The parties appeared for a hearing on Jones' motions on Oct. 4, 2018, whereupon the Court heard argument from both sides.

ANALYSIS

I. Standard on a Motion for Judgment on the Pleadings

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." O.C.G.A. § 9-11-12(c). "[W]hen deciding a motion for judgment on the pleadings, the issue is whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law." Southwest Health & Wellness, L.L.C. v. Work, 282 Ga. App. 619, 623, 639 S.E.2d 570, 575 (2006) (citing Holsapple v. Smith, 267 Ga. App. 17, 20(1), 599 S.E.2d 28 (2004)). Thus, "[t]he grant of [such a motion] under O.C.G.A. § 9-11-12(c) is proper only where there is a complete failure to state a cause of action or defense." Schumacher v. City of Roswell, 344 Ga. App. 135, 138, 809 S.E.2d 262, 265 (2017) (quoting Caldwell v. Church, 341 Ga. App. 852, 855-856 (2), 857 (2) (a), 802 S.E.2d 835 (2017)).

A complaint fails to state a claim upon which relief can be granted and warrants... judgment on the pleadings "only if ... its allegations 'disclose with certainty' that no set of facts consistent with the allegations could be proved that would entitle the plaintiff to the relief he seeks." Benedict v. State Farm Bank, FSB, 309 Ga. App. 133, 134(1), 709 S.E.2d 314 (2011) (citation omitted). "Put another way, 'if, within the framework of the

[pleading], evidence may be introduced which will sustain a grant of relief...the [pleading] is sufficient.” Id.

Bush v. Bank of New York Mellon, 313 Ga. App. 84, 89, 720 S.E.2d 370, 374 (2011). If the pleadings raise “material issues of fact”, the motion for judgment on the pleadings must be denied. Smith v. Wheeler, 233 Ga. 166, 167, 210 S.E.2d 702, 704 (1974).

For purposes of the motion, “all well-pleaded material allegations by the nonmovant are taken as true, and all denials by the movant are taken as false. But the trial court need not adopt a party's legal conclusions based on these facts.” Southwest Health & Wellness, L.L.C., 282 Ga. App. at 623 (citation omitted). “[I]n considering a motion for judgment on the pleadings, a trial court may consider exhibits attached to and incorporated into the pleadings, including exhibits attached to the complaint or the answer.” Schumacher v. City of Roswell, 344 Ga. App. at 138 (citing Caldwell, 341 Ga. App. at 857(2)(a)).

II. Discussion and Conclusions of Law

A. Claim and counterclaim seeking declaratory relief

With respect to his claim seeking a declaratory judgment, Jones asserts he is entitled to indemnification from Defendants Timbervest and Ironwood for any fees, expenses, or settlement amounts he may be obligated to pay in connection with the AT&T Litigation.⁸ Defendants, in turn, seek a declaration that Jones is not entitled to any indemnification and that he, therefore, is “obligated to pay his share of the settlement payment, as well as other damages suffered as a result of his refusal to pay.”⁹

The indemnification provision in the Timbervest Operating Agreement states in pertinent part:

⁸ Complaint, ¶¶ 26, 36.

⁹ Defs’ Second Amended Answer and Counterclaim, ¶17.

4.08 Indemnification

(a) Right to Indemnification. Subject to the limitations and conditions provided in this Section 4.08, the Company shall indemnify, defend and hold harmless, to the fullest extent permitted by the Act^[10], each Person who was or is made a party...or is involved in any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrate, or investigative, and whether formal or informal (hereinafter a "Proceeding"), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that such Person... is or was a Manager, Member, or officer of the Company...(any such Person entitled to indemnification under this Section 4.08 referred to as an "Indemnified Person"), against judgments, penalties (including, without limitation, excise and similar taxes and punitive damages), fines, settlements, and reasonable expenses (including, without limitation, costs of suit and reasonable expert witness and attorneys' fees and expenses) actually incurred by such Indemnified Person in connection with a Proceeding. The indemnification under this Section 4.08 shall continue as to an Indemnified Person who has ceased to be a Manager, Member or officer of the Company...The rights granted pursuant to this Section 4.08 shall be deemed contract rights, and no amendment, modification, or repeal of this Section 4.08 shall have the effect of limiting or denying such rights with respect to actions taken or Proceedings arising prior to any such amendment, modification, or repeal. It is expressly acknowledged that the indemnification provided in this Section 4.08 could involve indemnification for negligence or under theories of strict liability; provided, however, that notwithstanding any other provision of this Agreement to the contrary, *a Person shall not be indemnified by the Company against any judgments, penalties, fines, settlements, and expenses incurred by such Person that arises in connection with or as a result of intentional misconduct or knowing violation of law by such Person or from any transaction in violation or breach by such Person of any provision of this Agreement.*

(Emphasis in italics added).

The indemnification provisions in the Ironwood Operating Agreement state in pertinent part:

Section 5.10 Indemnity of the Managers, Employees, and Other Agents. To the fullest extent permitted by the Georgia Act^[11], the

¹⁰ Under the Timbervest Operating Agreement, the "Act" means the Georgia Limited Liability Company Act. *See* Timbervest Operating Agreement, §1.01.

¹¹ Under the Ironwood Operating Agreement, the "Georgia Act" means the Georgia Limited Liability Company Act. *See* Ironwood Operating Agreement, Art. 1 at p. 3.

Company shall indemnify the Managers and its officers, if any, from and against all costs of defense (including reasonable fees), judgments, fines, and amounts paid in settlement *suffered by a Manager because a Manager was made a party to an action because the Manager is or was a Manager or an Officer of the Company* or an officer, director, partner, or manager of another Person at the request of the Company, and make advances for expenses to such Managers and officers with respect to such matters to the maximum extent permitted under applicable law.

(Emphasis in italics added).

Moreover, the indemnification provisions summarized above expressly reference and are governed by the Georgia Limited Liability Company Act (hereinafter “Georgia LLC Act”). Under the Georgia LLC Act, subject to the standards and restrictions, if any, set forth in an LLC’s articles of organization or written operating agreement, an LLC may “indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever arising in connection with the [LLC].” O.C.G.A. §14-11-306. However, “no limited liability company shall have the power to indemnify any member or manager for any liability that may not be eliminated or limited by the articles of organization or a written operating agreement by reason of division (4)(A)(i) or (ii) of Code Section 14-11-305.” *Id.* Code section 14-11-305(4)(A)(i) and (ii), in turn, precludes an LLC from eliminating or limiting the liability of a member or manager “[f]or intentional misconduct or a knowing violation of law” or “[f]or any transaction for which the person received a personal benefit in violation or breach of any provision of a written operating agreement.”

In this action, at the time of the AT&T Litigation, Jones was an officer of Timbervest and a manager and officer of Ironwood. Thus, Jones contends that he is entitled to indemnification under both the Timbervest and Ironwood Operating Agreements because he was an officer or a manager at the time of the relevant events and the reason that he was “made a party” to the AT&T Litigation was because of his work as an officer or manager.

Defendants on the other hand argue that under the Timbervest indemnification provision there is an exception for settlements and expenses incurred that “arises in connection with or as a result of intentional misconduct or knowing violation of law by such Person.” The Ironwood indemnification provision has similar limiting language. Further, both Operating Agreements are subject to the Georgia LLC Act which precludes indemnification for a member or manager’s “intentional misconduct or a knowing violation of law.”

In the AT&T Litigation, Jones was named and charged in his individual capacity as a defendant for allegedly defrauding AT&T. Pursuant to the AT&T Litigation Complaint, the action

[sought] relief for Defendants’ pattern of fraud and concealment, including Defendants’ blatantly improper and unlawful use of the assets of the AT&T Pension Benefit Plan, the AT&T Umbrella Benefit Plan I, and the AT&T Umbrella Benefit Plan 2 (collectively, the “Plans”), for Defendants’ own personal interests. Defendants’ actions were undertaken in breach of their fiduciary duties pursuant to ERISA and the agreement between Timbervest and AT&T Services regarding the management of the Plans’ assets, and in contravention of the provisions of ERISA regarding prohibited transactions.¹²

Notably, AT&T alleged that Jones participated in the wrongdoing. Specifically, AT&T alleged that the named defendants orchestrated a “sale/re-purchase scheme” whereby property of the AT&T Plans was “land bank[ed]” and purchased by a Timbervest related fund at less than market value,¹³ a transaction that allegedly was “reviewed and approved” by Jones and others.¹⁴ AT&T also alleged the defendants received and fraudulently concealed unauthorized real estate commissions related to the sale of assets of the Plans¹⁵ and shared in the proceeds received

¹² AT&T Litigation Complaint, ¶1.

¹³ Id. at ¶¶ 26-40.

¹⁴ Id. at ¶32.

¹⁵ Id. at ¶¶ 43-54

therefrom.¹⁶ Further, the defendants allegedly used assets of the Plans held in various trusts to build a hunting lodge and make other improvements to property owned by the Plan and then used those improvements “for their own personal enjoyment and benefit.”¹⁷

Additionally, the AT&T Litigation Complaint references an administrative enforcement action before the United States Securities and Exchange Commission.¹⁸ In the enforcement action an administrative law judge found all the defendants guilty of gross misconduct, finding that each of the Defendants intentionally defrauded AT&T in connection with the management of assets that belong to retirement plans governed by ERISA and breached fiduciary duties owed to AT&T.¹⁹

Although Plaintiff Jones asserts there has not been any conclusive finding that he engaged in intentional misconduct or a knowing violation of law, the pleadings present a dispute of material facts regarding the allegations made in the AT&T Litigation and ultimately with respect to Plaintiff’s rights to indemnification. Further, in their Second Amended Answer and Counterclaims, Defendants assert defenses of waiver and estoppel based upon Jones’ alleged promises to pay a 25% portion of the AT&T settlement payment—representations which Jones denies making.²⁰ Given all of the above, the Court finds there are disputes of material facts that cannot be resolved as a matter of law based solely on the pleadings. Thus, the Court hereby DENIES Plaintiff’s Motion for Partial Judgment on the Pleadings with respect to the parties’ claims for declaratory relief (count I of Plaintiff’s Complaint and count I of Defendants’ Second Amended Answer and Counterclaim).

¹⁶ *Id.* at ¶51.

¹⁷ *Id.* at ¶ 64.

¹⁸ Defs’ Second Amended Answer and Counterclaim, ¶2.

¹⁹ Defs’ Second Amended Answer and Counterclaim, ¶2, Ex. A. *See In the Matter of Timbervest, LLC, Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr. and Gordon Jones, II*, United States of America before the Securities and Exchange Commission, Administrative Proceeding File No. 3-15519.

²⁰ *See* Second Amended Answer, Second Defense; Jones’ Motion for Partial Judgment on the Pleadings, p. 8, n. 4.

B. Fraud claim

Plaintiff Jones has also moved for a more definite statement with respect to Defendants' counterclaim asserting fraud (count VI). "In order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017), cert. denied (Aug. 14, 2017) (citation omitted). "[A]lthough most elements of most claims can be pled in general terms, so long as they give fair notice of the nature of the claims to the defendant, all allegations of fraud "shall be stated with particularity." Bush v. Bank of New York Mellon, 313 Ga. App. 84, 90, 720 S.E.2d 370, 374 (2011) (quoting O.C.G.A. §9-11-9(b)).

Here, Defendants allege that during the negotiations related to the AT&T Settlement Jones misled Defendants to think he would pay his share of the settlement despite knowing he was not going to pay and knowing that Defendants would rely on his misrepresentations in agreeing to the settlement. Defendants assert they in fact relied on Jones' assurances during the negotiations, including his assurance that he planned to contribute to the settlement, and in reliance thereon Defendants agreed to the settlement and paid Jones' share to complete the AT&T Settlement.²¹ According to Defendants, "Jones secured commitments from [them] to settle based on Jones' assurance that he would pay his share, and only after all were committed to complete the settlement, did Jones announce his refusal to pay."²² The Court finds Defendants' allegations of fraud have been pled with sufficient particularity to state a claim for relief. Thus, Plaintiff's Motion for a More Definite Statement with respect to Defendants/Counterclaimants' fraud claim is also DENIED.

²¹ Defs' Second Amended Answer and Counterclaim, ¶¶ 27-30.

²² Id. at ¶31.

CONCLUSION

Based upon the foregoing, Plaintiff's Motion for Partial Judgment on the Pleadings and Motion for a More Definite Statement are hereby DENIED.

SO ORDERED this 11 day of October, 2018.



ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division
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Atlanta Judicial Circuit

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