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Order on Various Motions (JESSEE MAHOE,
LLC)

Alice D. Bonner
Superior Court of Fulton County

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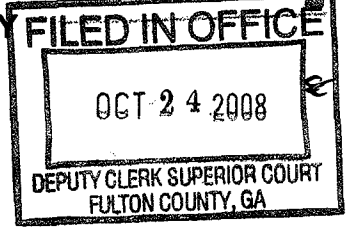
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



JESSEE MAHONE, LLC,

Plaintiff,

v.

PAUL E. VIERA, JR., individually and as
Managing Member of Earnest Holdings,
LLC, and **EARNEST HOLDINGS, LLC,**
MATTHEW BRONFMAN; BRONFMAN
ASSOCIATES III; EP PARTNER POOL,
LLC.

Defendants,

Civil Action File No. 2007CV138625

ORDER ON VARIOUS MOTIONS

This case is before the Court on two motions: (1) Plaintiff's Motion for Relief, filed August 18, 2008, and (2) Paul E. Viera Jr.'s Motion for Leave to File Amended Counterclaim to Add Defendant in Counterclaim, filed August 15, 2008. After reviewing the briefs filed by the parties in connection with these motions and the record of the case, the Court finds as follows:

MOTION FOR RELIEF:

On June 18, 2008, this Court issued an Order on various motions (the "June Order"), which required, among other things, that Defendants provide Plaintiff Jessee Mahone, LLC ("Jessee Mahone") with certain discovery responses within thirty (30) days. In response to the ordered discovery, Jessee Mahone filed its Certification of Request No. 4 and Motion notifying the Court that certain documents had not been produced and requesting relief. Jessee Mahone alleges that Defendants failed to provide complete responses to subparts (a) through (e) of Request No. 4 addressed in the June Order.

In subpart (a) Jessee Mahone asserts that Defendants failed to provide documentation regarding certain assets listed on the tax return (Form 1065) of Earnest Holdings, LLC (“Earnest Holdings”). Those assets however are held by non-party Earnest Partners, LLC (“Earnest Partners”) even though they are reported on the tax return of Earnest Holdings.¹ In ruling on Jessee Mahone’s motion to compel, the Court specifically denied Jessee Mahone’s request to produce Earnest Partners’ tax returns and preparation materials. Therefore, consistent with its earlier ruling, the Court hereby **DENIES** Jessee Mahone’s request with respect to Request No. 4(a).

Under subpart (b) of Request No. 4, Defendants were ordered to produce documents relating to their ownership percentages in entities identified in various documents. Defendants produced the operating agreements of such entities, but Jessee Mahone complains that it is insufficient to demonstrate Earnest Holdings’ **current** ownership percentage. Defendants are hereby **ORDERED** to produce additional documentation reflecting Earnest Holdings’ **current** ownership percentage in any such entity where Earnest Holdings’ current percentage is different from that reflected in the operating agreements produced to Jessee Mahone.

Under subpart (c), Jessee Mahone suspects that Defendants have not produced all documents provided to accountants in preparing 2006 draft tax returns and K-1 statements. Defendants contend that they have produced all such requested documents. Within five (5) days of the date of the Order, Defendants are hereby

¹ Defendants’ reply brief states that “Under applicable Treasury Regulations, an LLC with a single member is disregarded as an entity separate from its owners for federal income tax purposes unless it elects to be taxed as a corporation.[t]he practical effect of Partner’s federal income tax status as a disregarded entity is that Holdings reports the income, gain, losses, deductions, and credits of Partners and does not, as a general rule, hold or have in its possession, the underlying documents or information on which Partners bases the tax and financial information it reports to Holdings.”

ORDERED to supplement their production or provide certification to the Court that all such responsive documents have been produced to Jessee Mahone.

Under subparts (d) and (e), Jessee Mahone seeks an Order compelling Defendants to produce additional documents regarding expenses, salaries, and other tax preparation documents. Defendants contend that Earnest Holdings does not have employees and that any salaries reflected on the tax returns were those of Earnest Partners only. In addition, the Court previously ordered that the compensation and salary of Messrs. Viera, Conner, and Bronfman be produced but declined to require additional salary information to be produced. Consistent with this Court's June, 2008 ruling, Plaintiff's request to compel production of additional salary information is **DENIED**. With regard to the remaining requests under subpart (e), Jessee Mahone merely suspects that documents are missing. Therefore, within five (5) days of the date of this Order, Defendants are hereby **ORDERED** to supplement their production under Request No. 4 (e) or provide the Court with Certification that it is produced all responsive documents.

MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIM TO ADD DEFENDANT IN COUNTERCLAIM

Defendant Viera petitions the Court for leave to file an amended counterclaim naming Wendell Starke as a counterclaim defendant pursuant to O.C.G.A. § 9-11-15(a)²

2. O.C.G.A. § 9-11-15(a) provides that "[a] party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders."

and O.C.G.A. § 9-11-13(h).³ Mr. Starke acted as Jessee Mahone's representative throughout the business relationship between Mr. Viera, Earnest Holdings, and Jessee Mahone. Specifically, Defendant Viera alleges that Mr. Starke fraudulently or negligently held himself out to be the sole-member and/or managing-member of Jessee Mahone. Defendant Viera alleges that he was injured as a result of these misrepresentations when he agreed to increase the share price and decrease the number of shares that he repurchased (contrary to his obligations and rights under the Operating Agreement) based on his belief that Mr. Starke was the managing-member of Jessee Mahone. Defendant Viera points to evidence in the record which demonstrates that Mr. Starke was neither the sole member nor the managing-member and that Jessee Mahone's individual owners transferred their ownership interests to another Starke-controlled entity (thus, Mr. Starke was no longer a direct interest holder).

Defendant Viera argues that his counterclaim against Mr. Starke arises out of the same transaction(s) as the main action, will not result in prejudice to Mr. Starke who has been involved in the main case, and will prevent the need for a second trial on similar facts and issues. Jessee Mahone, however, asserts that the main action involves alleged breaches of the Earnest Holdings Operating Agreement through various amendments and transfers occurring between 2001 through 2007 and an attempt to trace the proceeds of Plaintiff's initial investment. Plaintiff distinguishes the proposed counterclaim on the facts and the timing. In the proposed counterclaim Mr. Viera alleges fraud and/or negligence as a result of statements made by Mr. Starke before Jessee

³ O.C.G.A. § 9-11-13(h) provides that "[a]dditional parties may be brought in. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in this chapter, if jurisdiction of them can be obtained."

Mahone's initial investment in Earnest Holdings, and statements (or omissions) made in 2000 when Defendant Viera repurchased some (but not all) of Earnest Holdings shares from Jesse Mahone. Additionally, Plaintiff argues that Defendant Viera was aware of the facts giving rise to these counterclaims in 2006, thus his delay in bringing this counterclaim results in prejudice and should prevent the addition of the claim.

In reviewing the facts underlying the main case and the proposed counterclaim as well as the stage of litigation in the main case, the Court finds that the addition of Mr. Starke is not required for complete relief. Cf. Stein v. Begrime, 150 Ga. App. 860 (1979). In Stein, a case cited by Defendant Viera, a bank brought an action against Mr. Stein who was a guarantor on a defaulted loan. Id. at 860. Mr. Stein counterclaimed against the bank and moved to add Mr. Burgamy, whom Stein alleged made fraudulent misrepresentations of the financial condition of the principal debtor that lead to the guaranty. Id. In the case before this Court, however, events between Messrs. Viera and Starke that occurred in 1998 and 2000 form the basis of Defendant's counterclaim, whereas the facts giving rise to the Complaint occurred between 2001 and 2007 and involve the rights of Jesse Mahone as an investor in Earnest Holdings. Unlike in Stein, where the Georgia Court of Appeals found that the new counterclaim defendant was necessary for "complete relief," the facts giving rise to the proposed counterclaims in this case are substantially different from the facts forming the basis of the Complaint.

Additionally, while the proposed counterclaim challenges the conditions under which Jesse Mahone became an investor, Defendant Viera alleges no harm as a result of that misrepresentation. Defendant Viera only claims injury as a result of the renegotiation of the buy-back rights/obligations. Further, the allegation that Jesse

Mahone violated the Operating Agreement because of Mr. Starke's competing business is a claim that can be added to the main action and litigated without the addition of Mr. Starke. Thus, the only actionable claim that the Court declines to add to this action is Mr. Viera's claim against Mr. Starke regarding their renegotiation of terms under which Mr. Viera repurchased Earnest Holdings' shares. Accordingly, the Court hereby **DENIES** Defendant Viera's Motion for Leave to File Add Defendant in Counterclaim.

SO ORDERED this _____ day of _____, 2008.

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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