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Spring 5-8-2013

Order on Defendants' Motion to Dismiss (Zelby)

Elizabeth E. Long
Fulton County Superior Court

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Long, Elizabeth E., "Order on Defendants' Motion to Dismiss (Zelby)" (2013). *Georgia Business Court Opinions*. Paper 267.
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It is not clear if only a portion of Plaintiff's initial investment of \$500,000 has been paid out, or if he has received everything he is entitled to under the Operating Agreement.

In 2005, Plaintiff contributed an additional \$250,000 to TUG on behalf of his daughter. Plaintiff did not execute any additional agreements at that time to govern the investment. The \$250,000 sum was transferred, along with additional TUG assets, to Appling Timber Company, LLC ("Appling"). TUG received a 15.52% membership interest in Appling. Appling used these funds as part of a down payment for the purchase of approximately 3,400 acres of land in Appling County, Georgia, and the balance of the purchase price was financed by a loan in the amount of \$5.2 million from PrimeSouth Bank.

In 2008, a promissory note was executed in favor of TUG by an entity other than Appling, which obligated the payor to repay \$575,000 plus 12% annual interest in one lump sum on September 30, 2009. The payor defaulted on the note. In 2009, Defendant Michael Thomas created an entity by the name of Blackwater Appling USAF Partnership, LLC, into which he transferred TUG's interest in the note, as well as the 15.52% interest in Appling, in order to "write off" the failed investment for tax purposes. As a result of the failure of the Appling investment project, Plaintiff lost the entire investment of \$250,000.

Plaintiff asserts claims against TUG, TBNI, and Michael Thomas for breach of contract, breach of fiduciary duty and an accounting. Defendants have filed a motion to dismiss, seeking the dismissal of all but the claim for breach of contract against TUG associated with the \$500,000 investment.

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).

1. Breach of Contract

Plaintiff asserts a claim for breach of contract against all three Defendants due to the alleged failure to pay Plaintiff's proportionate share of profits generated from the first investment of \$500,000.

Defendants concede that the claim should go forward against TUG. Defendants argue that TBNI and Michael Thomas do not owe any contractual duties under the Operating Agreement and should be dismissed from this claim. To the extent Plaintiff is asserting a breach of contract claim against entities who do not owe a contractual duty under the Operating Agreement, the Court agrees with Defendants. Accordingly, Defendants' motion is **GRANTED** as to any breach of contract claim against TBNI and Michael Thomas.

Defendants further seek dismissal of the breach of contract claim against TUG associated with the loss of Plaintiffs' \$250,000 investment because under the Operating Agreement, which would govern the terms of the \$250,000 investment if it was subject to it, there is no "guarantee" of a return on the investment. Construing the allegations in favor of Plaintiff, the Court finds some contentions in the pleadings to support a breach of contract claim against TUG. Accordingly, Defendants' motion is **DENIED** with respect to the breach of contract claim against TUG, but **GRANTED** as to TBNI and Michael Thomas.

2. Breach of Fiduciary Duty

Plaintiff asserts breach of fiduciary duty claims against all three Defendants for alleged misconduct in managing both investments. The Court **GRANTS** Defendants' motion as to the

breach of fiduciary duty claims associated with the \$500,000 investment to the extent the First Amended Complaint still asserts these claims. The alleged duty to pay any return on the \$500,000 is a contractual right which Plaintiff can pursue in his breach of contract claim against TUG. “A plaintiff in a contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law.” See ServiceMaster Co., LP v. Martin, 252 Ga. App. 751, 754 (2001).

With respect to the breach of fiduciary duty claims concerning the \$250,000 investment against the three Defendants, the Court finds insufficient and conflicting allegations in the pleadings (the Amended Complaint, the Answer, the Amended Answer filed six days after the oral argument and the oral argument of counsel) to make a determination as to whether the \$250,000 investment was under the Operating Agreement or was to be treated separately. Therefore, at this point, the breach of fiduciary duty claims against all three Defendants shall remain. Motion to dismiss is **DENIED**.

3. Statute of Limitations

Defendants also seek dismissal of the breach of fiduciary duty claims, contending that such claims are barred by the statute of limitations. O.C.G.A. § 9-3-31 provides that “actions for injuries to personalty shall be brought within four years after the right of action accrues.” Plaintiff concedes that his breach of fiduciary duty claims are governed by this statute. However, he argues that his claim did not accrue until September 30, 2009, when the payor on the Appling note defaulted.

“A motion to dismiss is an anomalistic vehicle by which to assert an action as time-barred by a statute of limitation... . Generally a motion for summary judgment is the appropriate

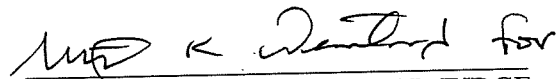
vehicle by which to establish a running of the statute of limitation.” Goldston v. Bank of America Corp., 259 Ga. App. 690, 690-691, n.1 (2003).

In view of this authority, the Court finds it premature to undertake the analysis at the pleading stage necessary to determine when the cause of action for the breach of fiduciary duty claim accrued. Accordingly, Defendants’ motion is **DENIED** as to the breach of fiduciary duty claim associated with the \$250,000 investment on this basis.

4. Accounting

Defendants seek dismissal of Plaintiffs’ accounting claim to the extent he seeks accountings of entities over which Defendants have no control and information regarding the accounts of other investors in TUG. In the First Amended Complaint, Plaintiff limits the request for an accounting to TUG and to Blackwater Appling USAF Partnership, one of which is a party to this case and the other which is purportedly controlled by a party. Because Plaintiff alleges membership or partnership status in both entities, the Court finds no basis to dismiss the claim for an accounting. Accordingly, Defendants’ motion is **DENIED**.

SO ORDERED this 8th day of May, 2013.


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

Copies to:

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