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Order on Defendants' Motion for Summary Judgment (IH RIVERDALE, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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Recommended Citation
Long, Elizabeth E., "Order on Defendants' Motion for Summary Judgment (IH RIVERDALE, LLC)" (2009). *Georgia Business Court Opinions*. Paper 96.
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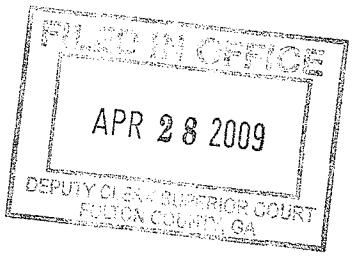
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IH RIVERDALE, LLC and GEOFFREY NOLAN, Plaintiffs, v. MCCHESNEY CAPITAL PARTNERS, LLC, RIVERDALE CAPITAL INVESTMENTS, LLC, GEORGE MCCHESNEY, NICHOLAS WALLDORFF, MEADOW SPRINGS, LLC, G&I DEVELOPMENT CO., LLC, MCCHESNEY INVESTMENT ADVISORS, LLC, and HOMESTEAD CONSTRUCTION, Defendants, McCHESNEY CAPITAL PARTNERS, LLC; RIVERDALE CAPITAL INVESTMENTS, LLC; GEORGE McCHESNEY; and NICHOLAS WALLDORFF, Counterclaim Plaintiffs, v. IH RIVERDALE, LLC; GEOFFREY NOLAN; WILSON & NOLAN SOUTHEAST, INC.; and TAYLOR WILLIAMS, Counterclaim Defendants.	)	Civil Action No.: 2003CV73603



MICHAEL MCCHESNEY, Plaintiff, v. IH RIVERDALE, LLC and GEOFFREY NOLAN, Defendants, Third-Party Plaintiffs v. MCCHESNEY CAPITAL PARTNERS, LLC	)	Civil Action No.: 2004CV83192

GEORGE MCCHESNEY and NICK WALDORFF, Third-Party Defendants	)	
MEADOW SPRINGS, LLC, Plaintiff, v. IH RIVERDALE, LLC and GEOFFREY NOLAN, Defendants, Third-Party Plaintiffs v. MCCHESNEY CAPITAL PARTNERS, LLC GEORGE MCCHESNEY and NICK WALDORFF, Third-Party Defendants	)	Civil Action No.: 2007CV143869
IH RIVERDALE, LLC, & GEOFFREY NOLAN Plaintiffs, v. FOUNDRY PARTNERS, LLC, FOUNDRY HOSPITALITY, LLC, & FOUNDRY ENTERTAINMENT, LLC, Defendants.	)	Civil Action No.: 2006CV122675
McCHESNEY CAPITAL PARTNERS, LLC, Plaintiff, v. IH RIVERDALE, LLC	)	Civil Action No.: 2006CV114780

Defendant and Third-Party Plaintiff	)
v.	)
RIVERDALE CAPITAL INVESTMENTS, LLC., MICHAEL McCHESNEY, GEORGE McCHESNEY and NICHOLAS WALLDORFF	)
Third-Party Defendants	)

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 15, 2009, counsel appeared before the Court to present oral argument on Motions for Summary Judgment brought by McChesney Capital Partners LLC ("MCP"), Riverdale Capital Investments LLC ("RCI"), George McChesney, Michael McChesney, Nicholas Walldorff, G&I Development Co. LLC, McChesney Investment Advisors LLC, Foundry Partners LLC, Foundry Hospitality LLC, Foundry Entertainment LLC, Meadow Springs LLC, and Homestead Construction (collectively referred to herein as "Defendants").[1] After reviewing the record of the case, the briefs submitted by the parties, and the arguments of counsel, the Court finds as follows:

These cases arise out of a series of disputes among former business partners that have resulted in five separate lawsuits, all of which are now before this Court. Defendants seek Summary Judgment on all pending counts in all the pending cases.

Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that

[1] Despite the label of "Defendants," Meadow Springs is the Plaintiff in civil action number 2007CV143869, Michael McChesney is the Plaintiff in civil action number 2004CV83192, and McChesney Capital Partners, LLC is the Plaintiff in civil action number 2006CV114780.

the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

RCI Operating Agreement

Defendants seek Summary Judgment on claims brought by Geoff Nolan ("Nolan") and/or IH Riverdale Inc., ("IH" or collectively "IH/Nolan") pertaining to certain "loans"[2] that MCP received from RCI, an entity in which IH and MCP were members. Defendants argue that all of the loans were repaid and did not violate the terms of First Amended and Restated Operating Agreement of RCI (the "Operating Agreement"). Defendants rely upon Section 5.04 of the Operating Agreement that acknowledges and authorizes its members to engage in other businesses. Defendants argue that they did not breach the terms of the Operating Agreement or any fiduciary duties flowing to IH as a member of RCI. The Court finds that Section 5.04 does not specifically authorize the loans. The Court finds that questions of fact exist. See e.g., Mon Ami International Inc., v. Gale, 264 Ga. App. 739, 743 (2003). Therefore, Defendants' Motion for Summary Judgment is **DENIED** on all of the related breach of contract and breach of fiduciary duty claims.

Profits of Secondary Investments

Plaintiffs seek to recoup a portion of the profits made by Defendants' investments in construction projects other than Phase I. Plaintiffs claim that Defendants were unjustly enriched by the misappropriation of RCI's money and seek a constructive trust to recoup their share of the profits on these investments. The Court finds that if Plaintiffs prevail on their claims, they may be able to obtain damages against Defendants for unjust enrichment and that they may seek to

[2] MCP took advances in the amounts of $175,000, $100,000, and $5,000 on future distributions from RCI and recorded them as short-term loans to MCP. When RCI distributions were finally made, the amount of the loan was deducted from MCP's distribution and thus the accounts were reconciled and the loans satisfied.

impose a constructive trust. Plaintiffs may not, however, claim an ownership interest in the secondary investments. Plaintiffs' potential recovery is limited to equitable and monetary relief from the Defendants named in the appropriate cases.

RCI/MCP Overpayment

Defendants seek Summary Judgment on all claims brought by IH/Nolan related to a debt owed to RCI in the amount of approximately $252,000. The debt resulted from a "computer glitch" which occurred in 2002 causing an overpayment to a MCP-related entity (Homestead). Defendants argue that RCI was repaid in full in 2006, with documented distributions to Plaintiffs. Questions of fact, however, remain with regard to the interest paid on the "glitch," as well as the circumstances giving rise to it. Summary Judgment is therefore **DENIED** on this issue.

RCI Loan Increase

Plaintiffs' allege that Defendants fraudulently and/or negligently mislead Plaintiffs regarding the cost of RCI's Phase I development. Plaintiffs allege that in 2002, Nick Walldorff and George McChesney represented to Nolan that the Phase I project was $500,000 over budget and required an increase in RCI's bank loan, for which Nolan was a personal guarantor. The loan was increased, but the Phase I project was completed under-budget by approximately $750,000. The over-budgeted amount had already been paid to Homestead before the completion of Phase I, and was not repaid to RCI until 2006. Defendants assert that at the time of the representations, they believed that unforeseen rock bed issues would significantly increase construction costs. Plaintiffs allege that Defendants had a duty to inform their business partner of the savings once they knew of them. The Court finds that questions of fact remain regarding

the circumstances of the loan increase and the interest due on the delayed repayment. The Court therefore **DENIES** Summary Judgment.

RCI Loan Fees

Plaintiffs' allege that IH was owed an increased guarantee fee pursuant to Section 5.11(f) as a result of the increased loan amount and suffered damages from exposure to the additional risk. Defendants argue that the fees owed to IH were changed by the Amendment to the RCI Operating Agreement (the "Amendment"). Defendants argue that the Georgia Court of Appeals[3] affirmed the enforceability of the Amendment, and that all fees due to IH were paid. Defendants also argue that Nolan's guaranty was released without any claim made against him, and therefore, Plaintiffs suffered no damages. The Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion for Summary Judgment finding that questions of fact remain regarding whether the loan fees were paid in full to Plaintiffs.[4]

Value of Phase I

In 2006 the Meadow Springs Apartments (Phase I) were sold along with three other properties. The profits from the sale were distributed to the members in accordance with their ownership. Defendants seek Summary Judgment on the grounds that Plaintiffs have received all that they are entitled for under the Phase I property and therefore cannot establish any damages on their claims relating to Phase I. Plaintiffs oppose Defendants' Motion and challenge the apportioned value of the Phase I property in the group sale. Nick Walldorff's deposition testimony, however, is uncontroverted that MCP relied upon GE Capital's "valuations and/or

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[3] IH Riverdale, LLC, v. McChesney Capital Partners LLC, 292 Ga. App. 841 (2008).

[4] The January 28, 2009 Deposition Testimony of Nick Walldorff is not sufficiently definite for the Court to award Defendants Summary Judgment as there are questions of fact whether all distributions and fees were fully tendered and paid.

appraisals" to set the apportioned property price for Phase I. (Walldorff Jan. 28, 2009 Depo. p. 72). Therefore, the Court **GRANTS** Defendants' Motion for Summary Judgment on this issue.

Deal Points Term Sheet

Plaintiffs allege various counts related to the Deal Points Term Sheet executed by Nolan and George McChesney on September 17, 2002, claiming that the document created an enforceable contract between the parties for the development of Phase II. Defendants seek Summary Judgment asserting that the Deal Points Terms Sheet is not an enforceable contract. Relying upon the language at the end of the signed memorandum from Nolan to George McChesney that the parties would "move forward towards the final partnership agreements," Defendants argue that the Deal Points Terms Sheet is merely an agreement to agree. The Court is unable to rule at this point that the Deal Points Term Sheet is not an enforceable contract and, therefore, **DENIES** Defendants' Motion for Summary Judgment on all counts involving the Deal Points Term Sheet.

Right of First Refusal

Plaintiffs allege that they were prevented from exercising their right of first refusal in the Phase II project. Defendants assert that IH/Nolan were given the opportunity to exercise the right of first refusal, but chose not to do so. This issue has been previously addressed by the Georgia Court of Appeals which found that questions of fact remain regarding the circumstances of and terms of the offer to invest and the requirements to exercise the right of first refusal as established in the Operating Agreement. The Court of Appeals has found that a question of fact exists regarding the right of first refusal, and absent new evidence, this Court will not find otherwise. Accordingly, the Court hereby **DENIES** Defendants' Motion for Summary Judgment. Henderson v. Justice, 237 Ga. App. 284, 288 (1999).

Identified Parties

As an additional argument in support of their Motion for Summary Judgment, Defendants argue that Plaintiffs' claims do not adequately identify the party that was harmed (IH or Nolan) and do not adequately identify the alleged wrong-doer with each count. In response, Plaintiffs' counsel at oral argument represented that unless otherwise specifically stated in the various Complaints and Counterclaims, that IH is the primary party that suffered damages. Plaintiffs' counsel also represented that the main tort feasors are MCP and Michael McChesney.

Cases on Appeal

Defendants' seek Summary Judgment on all counts of McChesney v. IH Riverdale LLC, civil action number *2004CV83192*, and IH Riverdale, LLC, v. McChesney Capital Partners LLC, civil action number *2007CV143869*. Those cases are on appeal,[5] and therefore, this Court has no jurisdiction over the claims in question. The Court defers ruling on the pending Motions for Summary Judgment on these counts until after the appeals processes are completed.

Access to Books and Records

Plaintiffs allege that they were prevented from exercising their rights of access to and the inspection of corporate records and accounts. Additionally, Plaintiffs seek an accounting of RCI and the related projects. It is uncontroverted that, on the date of the oral argument on these Motions, Defendants have provided Plaintiffs with access to books and records, as well as with an accounting of the 2006 sale of the Phase I property. Therefore, the Court finds that Plaintiffs' claims seeking such relief are moot.

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[5] McChesney v. IH Riverdale LLC, civil action number *2004CV83192*, is currently pending before the Georgia Court of Appeals. The Georgia Court of Appeals affirmed the trial court in IH Riverdale, LLC, v. McChesney Capital Partners LLC, civil action number *2007CV143869*, and Defendants sought certiorari with the Georgia Supreme Court.

Additional Moot and/or Abandoned Counts

Plaintiffs concede in their briefs that the following claims are either moot or abandoned:

(1) Wilson & Nolan claims (Count XIII of the Complaint in 2003CV73603; Count I of the Counterclaim in 2006CV114780)

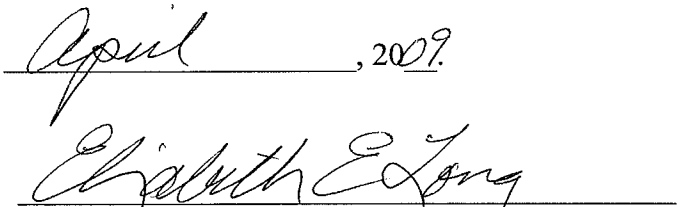
(2) MCP breach of the RCI Operating Agreement for continued membership (Count II of the Counterclaim in 2006CV114780).

(3) All claims premised on the argument that the Amendment to the RCI Operating Agreement was invalid, unenforceable, and/or a breach of contract.

Remaining Claims

The Court finds that all other claims raised by Plaintiff involve questions of fact. Therefore, Defendants' Motion for Summary Judgment on all remaining counts is hereby **DENIED**.

SO ORDERED this 28th day of April, 2009.



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

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