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Order on Motions for Partial Summary Judgment (SCOTT TOBERMAN)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SCOTT TOBERMAN, Plaintiff v. LAROSE LIMITED PARTNERSHIP, et al. Defendants LAROSE LIMITED PARNTERSHIP, et al. Counterclaim Plaintiffs v. SCOTT TOBERMAN, et al. Counterclaim Defendants	*	Civil Action File No. 2007-CV- 131894 (Business Division Two—EL)

FILED IN OFFICE
MAY 24 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The above-styled case is before the Court on Counterclaim Defendants' Motion for Judgment on the Pleadings as to Count XV of the First Amended Counterclaim, Counterclaim Plaintiffs' Motion for Partial Summary Judgment on Count XV of the First Amended Counterclaim, and Defendants' Motion for Partial Summary Judgment on Counts I-III, V-XVII, XIX and XX of the Amended and Restated Complaint. The Court has considered the oral argument of the parties, the briefs filed on behalf of the Motions, and the file in this case, and finds as follows:

I. FACTS

Austerlitz Partners, LLC; Batard Partners, LLC; Charlemagne Partners, LLC; Chevalier Partners, LLC; EAR 250 Wacker, Inc.; EAR Clairmont, Inc.; EAR Crescent, Inc.; EAR Crescent Centre, LLC; EAR Gage, Inc.; EAR Georgia, INC.; EAR Hartsfield, Inc.; EAR Larose, Inc.; EAR Lasalle, Inc.; EAR Leoville, Inc.; EAR Northside, Inc.; EAR Summer, LLC; EAR Trafalgar, LLC; Esplendido Partners, LLC; European American Realty, Ltd.; Gloucester Construction Management Co.; Lafayette Real Estate Services, Inc.; Les Fort Partners, LLC; Montrachet Partners, LLC; Southeast Funding Associates, LLC; Southeast Realty Partners, LLC; Southeast Funding Title, LLC;

and Trafalgar Partners LLC (collectively, the **"Toberman Entities"**) are, together with Scott Toberman (the **"Plaintiff"**) and Beth Toberman, the Counterclaim Defendants (collectively, **"Toberman"**). Harold Gootrad, Jerome Engerman and Gerald Frishman (the **"Individual GEF Defendants"**) along with Chamberlain Limited Partnership; Chambertin Limited Partnership; Cheval Limited Partnership; Corton Limited Partnership; Ducru Limited Partnership; Ducru SPE, LLC; Echezeaux Limited Partnership; Lafite Limited Partnership; Larose Limited Partnership; Leoville Limited Partnership; Longstreet Partners, LLC; Margaux Partners, LLC; Mouton Limited Partnership; OMIC Partners, LLC; St. Vivant Limited Partnership; and 250 Wacker Limited Partnership are the Defendants/Counterclaim Plaintiffs (collectively, the **"GEF Partnerships"**).

The GEF Partnerships are a collection of various business entities with real estate projects and holdings in several major United States cities. Scott Toberman, a long time business partner of Harold Gootrad, created the Toberman Entities to serve as the property and asset managers for various GEF Partnerships.

On April 25, 2005, the Individual GEF Defendants confronted Scott Toberman with accusations of mismanagement and misappropriation of business funds in excess of $10 million. On that same day, and as a result of the confrontation, Scott Toberman and the GEF Partnerships entered into an agreement (the **"Letter Agreement"**) outlining the framework of a future settlement.

After further negotiations, the parties entered into a Binding Term Sheet Agreement (the **"BTS"**) signed by Scott Toberman, Beth Toberman, and by the Individual GEF Defendants on behalf of the GEF Partnerships on July 14, 2005. In exchange for a release of Scott Toberman, the BTS established a $7.5 million settlement amount (the "**Settlement Amount**"), the payment terms, and mechanisms for Scott Toberman and the Toberman Entities to turn over certain assets to the GEF Partnerships in return for credits against the Settlement Amount. Such assets included a Fulton County residence (the **"Home"**), a Raburn County farm (the **"Farm"**), a wine collection (the **"Wine"**), certain

condominium conversion proceeds, and partnerships interests (the **"Partnership Interests"**). Under the BTS, Scott Toberman was to make an initial cash payment of $375,000 at the time of signing the BTS, a subsequent cash payment due sixty (60) days after signing the BTS, and a final payment within six (6) months after signing a global settlement agreement (a **"GSA"**). In accordance with the BTS, Scott Toberman provided the GEF Partnerships with $375,000 upon executing the BTS, warranty deeds to the Home and the Farm, and later turned over the Wine and signed a series of related documents such as releases and consents.

Some time after the execution of the BTS, Scott Toberman, Beth Toberman and the GEF Partnerships entered into an agreement regarding the Home (the **"Home Agreement"**) giving Scott and Beth Toberman thirty (30) days to exercise an option for a return of the warranty deed. After further negotiations, the GEF Partnerships tendered a final draft of a GSA for Scott Toberman's signature, which was never signed. Negotiations ceased and the GEF Partnerships, relying upon the BTS and the Home Agreement, recorded the deeds to the Home and the Farm, sold the Wine, and assumed the Partnership Interests. Shortly thereafter, Scott Toberman filed suit in Cobb Superior Court to regain possession of the Wine and to quiet title to the Home and Farm, which later was expanded through amendments and counterclaims. This case has been transferred to Fulton Superior Court where five (5) related cases are pending.

II. COUNT XV: BINDING TERM SHEET/BREACH OF CONTRACT

Toberman's Motion for Judgment on the Pleadings as to Count XV of the First Amended Counterclaim as well as the GEF Partnerships' Motion for Partial Summary Judgment on the same Count address the enforceability of the BTS.

Summary judgment is appropriate only where there is "no genuine issue of material fact". O.C.G.A. § 9-11-56(c). In deciding a motion for summary judgment, the Court must construe the evidence in the light most favorable to the non-moving party. Collins v. Newman Machine Co., Inc.,

190 Ga. App. 879, 882 (1989). "The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact and if the trial court is presented with a choice of inferences to be drawn from the facts, all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." Stephens v. Gwinnett County, 175 Ga. App. 379, 382 (1985).

In their briefs, Toberman asserts that the BTS is an agreement to agree which is unenforceable under Georgia law because it does not contain all the essential terms of an agreement. Toberman also points to the fact that paragraph 4(a) of the BTS specifically contemplates future negotiations between the parties and the execution of a GSA. Toberman contends that key elements such as choice of law and acceleration of payment are not contained in the BTS. Additionally, Toberman argues that the transfer of the Partnership Interests contemplated in paragraph 4(e) and the $7.5 million Settlement Amount established in paragraph 4(d) are contingent upon entering into a GSA; thus they are unenforceable obligations in the absence of a GSA.

The GEF Partnerships, on the other hand, contend that the entire BTS is a binding and enforceable agreement with all material terms sufficiently defined. To support their argument, the GEF Partnerships rely upon paragraph 6 of the BTS which states that the BTS is "binding." The GEF Partnerships also point to email communications from Scott Toberman's counsel during negotiations of the BTS requesting that the BTS be "binding" on all parties, agreeing to the Settlement Amount, and agreeing to transfer the Partnership Interests in exchange for a $1 million credit. Finally, the GEF Partnerships also argue that Toberman's substantial part performance of the BTS (transfer of deeds to the Home and Farm, transfer of the Wine, cash payment, and transfer of the condominium conversion proceeds) supports a finding that the BTS is enforceable.

A. Enforceability of the BTS

1. Agreement to Agree

Under Georgia law, agreements to agree are unenforceable. "Unless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect." Coldmatic Refrigeration of Canada, Ltd. v. Hess, 257 Ga. App. 753, 754 (2002); see also, Se. Underwriters, Inc. v. AFLAC, Inc., 210 Ga. App. 444, 446 (1993). In order to determine whether or not an agreement is sufficiently definite as to all material terms, the courts look to whether or not the writing "will enable the courts, under proper rules of construction, to ascertain the terms and conditions on which the parties intended to bind themselves." Davidson Mineral Prop., Inc., v. Baird, 260 Ga. 75, 78 (1990). Mere contemplation of more formal documentation of already agreed to terms does not invalidate or hold unenforceable an earlier, informal agreement. Pourreza v. Teel Appraisals & Advisory, Inc., 273 Ga. App. 880 (2005); see also, T.C. V'Soske v. E.T. Barwick, 404 F.2d 495 (1968).

The Court of Appeals in Pourreza v. Teel Appraisals & Advisory, Inc., 273 Ga. App. 880, upheld a letter as an enforceable settlement agreement. In Pourreza, the defendant memorialized the basic terms of a settlement agreement where one party agreed to drop complaints in exchange for waiving attorneys' fees. The letter offered to put the terms into a more formal document if the parties desired. Id. at 881. Pourreza did not object to the settlement terms but requested further documentation, and while the formal settlement agreement was being finalized, Pourreza withdrew the settlement. Id. at 881-82. The Court of Appeals found the original letter to be a "mutual, binding agreement" despite the fact that it contained little more than the scope of the settlement. Id. at 883. The Court of Appeals concluded that this was "simply a case where an agreement as to terms was clearly made and then someone changed her mind and no longer wanted to settle the case." Id., citations omitted; see also, Goobich v. Waters, 283 Ga. App. 53 (2006) (holding a letter of intent for a

real estate sale enforceable because it defined the purchase price, property to be sold, and the closing date in addition to an expressed intent to be bound).

Conversely, the Court of Appeals has refused to enforce an agreement where material terms to the contract were left unresolved. In Coldmatic Refrigeration, the Court of Appeals refused to enforce an agreement where the language read that it was a "basis of understanding" to be used as "guide" and for "direction" by the parties and left issues such as noncompete provision, governing corporate law, and shareholder approval rights uncertain. 257 Ga. App. 753, 755; see also, Miami Heights LT, LLC v. Home Depot U.S.A., Inc., 283 Ga. App. 779 (2007) (holding a letter of intent unenforceable because the unresolved restrictive covenant was an essential term in a real estate lease/sale).

Toberman argues that because the BTS specifically contemplated further negotiations which were to be culminated in a GSA and because certain terms such as a choice of law provision were not provided for, the BTS is an unenforceable agreement to agree. Toberman submitted supplemental authority to support the position that choice of law is a material provision and that the failure to address this term is grounds for holding the BTS unenforceable.

The BTS entered into by the GEF Partnerships and Scott Toberman contained a "binding" provision clearly stating the parties' intent to be bound by the BTS. Cf., Overton Apparel Inc., v. Russell Corp., 264 Ga. App. 306, 307 (2003) (holding a letter of intent unenforceable, in part, because it contained the phrase "nonbinding"); Coldmatic Refrigeration of Canada, Ltd. v. Hess, 257 Ga. App. at 755. The BTS defined material terms such as payment and release obligations, scope of the agreement, and performance timeframes. Even the issue of final payment was sufficiently definite because it was due within six (6) months after entering into a GSA, which was to be entered within fourteen (14) days after the BTS. While Toberman contends that choice of law is a material provision that should render the agreement unenforceable, the settlement agreement upheld in Pourezza did not contain a choice of law provision. Additionally, the cases cited by Toberman's counsel are not

factually similar and there is no indication in the record that a choice of law provision was discussed by the parties prior to signing the BTS.

2. Part Performance

While this Court finds that the BTS is an enforceable agreement, Toberman's performance of several obligations under the BTS provides further grounds to hold the BTS enforceable. Roberson v. Eichholz, 217 Ga. App. 511, 513 (1995); Pine Valley Apartments Ltd. P'ship v. First State Bank, 143 Ga. App. 242, 245 (1977) ("A contract which is originally and inherently too indefinite may later acquire precision and become enforceable by virtue of the subsequent acts ...Thus the objection of indefiniteness may be obviated by performance..."). Specifically, Toberman paid $375,000 in cash, transferred the deeds to the Home and Farm, transferred ownership of the Wine, and assigned the condominium conversion proceeds to the GEF Partnerships.

This Court finds the BTS to be a binding contract and **GRANTS** the GEF Partnerships' Motion for Partial Summary Judgment on Count XV of the First Amended Counterclaim.

B. Breach of the BTS

Count XV of the Counterclaim alleges that Toberman breached the BTS by failing to pay the balance due, by refusing to execute a GSA, by failing to assign the Partnership Interests, by selling assets in violation of the asset pledge, by continuing misappropriations, by removing assets and by dispossessing the Wine.

1. Settlement Amount

Rules of contract interpretation, provided in O.C.G.A. § 13-2-2, require, among other things, for the court to read the contract "in whole" and that the entire contract should be "looked to in arriving at the construction of any part." Additionally, the "cardinal rule" of contract construction is to ascertain the intent of the parties. O.C.G.A. § 13-2-3.

Paragraph 4(d) of the BTS states that the "Toberman Entities will pay $7.5 million ... to the

GEF Partnerships." Toberman contends that executing a GSA is a condition precedent to the Settlement Amount being binding. The Settlement Amount, however, is the backbone of the BTS and the starting point for all other obligations under paragraph 4 which details the settlement between the parties. The BTS, read as a whole, is an agreement for Toberman to pay $7.5 million (through a series of different transfers and payments) to the GEF Partnerships in exchange for a release of Scott Toberman by the GEF Partnerships. The record is clear that Toberman has not paid the $7.5 million due under the BTS, thus the BTS has been breached.

2. Partnership Interests

Under paragraph 4(e) of the BTS, Toberman was obligated to transfer Partnership Interests to the GEF Partnerships. The paragraph states, "Upon entering into the Global Settlement Agreement, the Toberman Entities will transfer to the GEF Partnerships the interests they possess in the entities listed on Exhibit A attached hereto and release all claims for amounts due or alleged to due… ." As with the Settlement Amount, execution of the GSA was not a condition precedent to Toberman's obligation to transfer the Partnership Interests.

Limited partnership interests are personal property and must be affirmatively transferred from an old to a new owner. O.C.G.A. § 14-9-701. The BTS provided that the transfer would take place upon execution of a GSA. The BTS did not provide language for an assignment of the Partnership Interests in the absence of a GSA as it did in paragraphs 4 (j) and (k) for the condominium conversion proceeds, which stated "[u]nless and until the Global Settlement Agreement is executed, this Term Sheet shall serve as such assignment…" Because the parties never entered into a GSA, there was no effective transfer of the Partnership Interests from Toberman to the GEF Partnerships, even though they were obligated to do so. Accordingly, the failure to transfer the Partnership Interests, as required under the BTS, is a breach for which the GEF Partnerships are entitled to damages.

3. Remaining Breach Claims

Paragraph 6 of the BTS, in addition to providing that the BTS was a binding obligation of the parties, stated:

> ... The Toberman Entities and the GEF Partnerships agree to negotiate in good faith the terms of the Global Settlement Agreement (and related Release Agreement, Confidentiality Agreement and Global Escrow) and will use their best efforts to cause the Global Settlement Agreement and related documents) to be entered into within 14 days of the date hereof... .

The GEF Partnerships contend that Scott Toberman's refusal to sign a GSA constituted a breach of the obligation to negotiate in good faith the terms of a GSA since he has not provided "good" reasons for his refusal. The BTS only obligated the parties to negotiate in good faith; it did not obligate them to execute a GSA. The GEF partnerships have not satisfied their burden of showing that the failure to execute a GSA was a breach of the BTS.

During oral argument, counsel for the GEF Partnerships stated that the Wine was sold and that an accounting had been made and distributed to Toberman. Similarly, the deeds for the Home and the Farm have been recorded by the GEF Partnerships. Therefore, claims of breach relating to these issues are moot. The remaining claims of breach of Count XV are outside of the scope of issues briefed and argued.

C. Motion for Judgment on the Pleadings

Toberman moved this Court for judgment on the pleadings on Count XV of the First Amended Counterclaim. Judgment on the pleadings is appropriate where the pleadings affirmatively show that no claim exists where the party would not be entitled to relief under any state of provable facts. See, Frady v. Irvin, 245 Ga. 307 (1980). Accordingly, this Court **DENIES** Toberman's Motion for Judgment on the Pleadings as to Count XV of the First Amended Counterclaim.

III. SCOTT TOBERMAN'S COMPLAINT

The GEF Partnerships moved for summary judgment on Counts I-III, V-XII, XIX and XX of

Scott Toberman's Amended and Restated Complaint.[1]

Summary judgment is appropriate only where there is "no genuine issue of material fact". O.C.G.A. § 9-11-56(c). As stated above, the Court construes evidence in the light most favorable to the non-moving party. Collins v. Newman Machine Co., Inc., 190 Ga. App. 879, 882 (1989); see also, Stephens v. Gwinnett County, 175 Ga. App. 379, 382 (1985). "Under OCGA § 9-11-56, once a movant supports his motion for summary judgment, the opponent cannot rest upon the mere allegations of his complaint, but must come forth with affidavits or other evidence setting forth specific facts showing that a genuine issue exists for trial." Parker v. Silviano, No. A06A1829, 2007 WL 805821, *3 (Ga. App. March 19, 2007).

1. Fraudulent Inducement: Counts I & XI

Scott Toberman alleges that he was fraudulently induced to enter into the Letter Agreement, the BTS, and the Home Agreement (collectively, the **"Agreements"**) because of statements made by the Individual GEF Defendants relating to the confidentiality of the Agreements, the ability of Scott Toberman and/or the Toberman Entities to be reimbursed for ongoing operational costs, and the scope of documents to be transferred to the GEF Partnerships under the terms of the Agreements. Scott Toberman alleges fraudulent inducement to enter into the Agreements in Count I and civil conspiracy to fraudulently induce him to enter into the Agreements in Count XI of Scott Toberman's Amended and Restated Complaint.

Fraudulent inducement requires five elements to be established: (1) a false representation of fact, (2) known by the speaker to be false at the time stated, (3) spoken with the intent to deceive the listener (*i.e.*, scienter), (4) justifiable reliance by the listener upon the false statements, and (5) damages proximately caused by the representations. Todd v. Martinez Paint & Body, Inc., 238 Ga. App. 128,

1. The GEF Partnerships did not move for summary judgment on Count IV (Tortious & Malicious Interference with Business and Contractual Relations). The Complaint was incorrectly numbered; there is no count XVIII. Additionally, because the parties briefed and presented oral argument on Counts XIII-XVIII, they are addressed in this Order.

128 (1999). To successfully move for summary judgment, a party must show that the evidence in the record is insufficient to create a jury issue on at least one essential element of the other party's case. JarAllah v. Schoen, 243 Ga. App. 402, 403 (2000); see also, OCGA § 9-11-56(e). Thereafter, "the plaintiff must come forward with some evidence from which a jury could find each of the ... elements... ." JarAllah, 243 Ga. App. at 403-404.

The GEF Partnerships point to Scott Toberman's deposition testimony indicating that, prior to entering into the BTS, he knew of the GEF Partnerships' intention to disclose the terms of the Agreements to certain parties. He also knew before signing the BTS that he would not be reimbursed for certain costs. Additionally, Scott Toberman was unable to identify any document taken by the GEF Partnerships in breach of the parties' Agreements. Thus, Scott Toberman failed to identify "specific evidence giving rise to a triable issue." Id. at 403. Relying upon Scott Toberman's deposition testimony, the GEF Partnerships have sufficiently established that there is no triable issue of fact involved in the claim of fraudulent inducement, thus summary judgment is justified.

Summary judgment on a civil conspiracy claim is appropriate if there is no underlying tort. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 832 (2007) (holding that there can be no liability for civil conspiracy if there is no underlying tort). Since the alleged tort is fraudulent inducement, this Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count I** (Fraudulent Inducement) and **Count XI** (Civil Conspiracy).

2. Enforceability of Agreements: Count II

Scott Toberman seeks a declaratory judgment pursuant to O.C.G.A. § 9-4-1 that the Agreements are not enforceable, that Toberman is under no obligation to perform, that Toberman is entitled to a return of all property, and that the GEF Partnerships' attempts to collect assets amounted to pre-judgment garnishments in violation of Georgia law.

Scott Toberman presented no evidence or arguments supporting the unenforceability of the

Letter Agreement. The enforceability of the BTS has been previously addressed in this Order and held to be an enforceable agreement. During oral argument, Scott Toberman's counsel withdrew the argument as it related to the Home Agreement.

Scott Toberman alleges that the GEF Partnerships' actions of taking possession of property, filing the deeds to the Home and Farm, *etc.* amounted to prejudgment garnishment outside of the circumstances permitted under O.C.G.A. § 18-4-40. Garnishment is a judicial proceeding whereby a third party or obligor is ordered to turn over property to the obligee. Black's Law Dictionary 689 (7th ed. 1999). Here Scott Toberman and his wife voluntarily transferred title to the Home, Farm, and Wine to the GEF Partnerships in part performance of the BTS. Accordingly, this Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count II** (Enforceability of Agreements).

3. Breach of Contract: Count III

Count III seeks a ruling that, if the Court finds that Agreements to be binding, the GEF Partnerships breached the inherent duty of good faith in those Agreements.

Implied covenants of good faith and fair dealing are not independent causes of action apart from the breach of an express term. Morrell v. Wellstar Health Sys., Inc., 280 Ga. App. 1, 5-6 (2006) (upholding a trial court's grant of summary judgment on breach of implied covenant of good faith where there was no independent breach of the agreement); see also, Stuart Enter. Int'l. v. Peykan, Inc., 252 Ga. App. 231, 234 (2001).

At oral argument, Scott Toberman's counsel contended that the GEF Partnerships improperly took the Partnership Interests. However, under paragraph 5(c) of the BTS, the GEF Partnerships were entitled to the right to receive any monies due to the Toberman Entities as part of the pledge agreement. Because there is no underlying breach of the Agreements, this Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count III** (Breach of contract).

4. Partnership Interests: Counts V-VIII

Scott Toberman's complaint alleges conversion of monies due and wrongful denial of access to financial information under certain limited partnership agreements (Counts V and VII) including St. Vivant, LaRose, Leoville, Chambertin and Ducru Limited Partnerships, and requests an accounting for payment due under such agreements (Count VI). In relation to such actions, Scott Toberman alleges that the GEF Partnerships also breached fiduciary duties owed to him under the various partnership agreements (Count VIII).

The Court has already concluded that the BTS is an enforceable agreement, including the pledge of all Toberman assets under paragraph 5(c) which included Toberman's rights to monies and distributions under the partnership agreements. The pledge of assets under paragraph 5(c) was effective upon execution of the BTS, but Toberman has not transferred the Partnerships Interests to the GEF Partnerships as required under paragraph 4(e) of the BTS. Toberman still retains at least the title to the Partnership Interests, and thus its status as a limited partner. Therefore, Toberman may be entitled to access to the financial records and an accounting for the limited partnerships. On the other hand, Toberman has failed to demonstrate that there is any question of fact related to the alleged breach of fiduciary duties owed to Toberman under these limited partnership agreements. Accordingly, this Court **GRANTS** the GEF Partnership's Motion for Summary Judgment on **Count V** (Money Due) and **Count VIII** (Breach of Fiduciary Duty) and **DENIES** the GEF Partnerships' Motion for Summary Judgment on **Count VI** (Accounting for Partnerships) and **Count VII** (Breach of Limited Partnership Agreements).

5. Wine: Counts IX & X

Scott Toberman alleges that the GEF Partnerships' taking and selling of the Wine amounted to conversion (Count IX) and entitles him to an accounting of the proceeds of the sale (Count X). The BTS is enforceable, including the obligation for Scott Toberman to transfer the Wine to the GEF

Partnerships. At oral argument, the GEF Partnerships' counsel indicated that an accounting of the sale of the Wine had occurred and been distributed to Scott Toberman. This Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count IX** (Conversion of Wine) and **Count XX** (Accounting for Wine). However, if the accounting provided is insufficient or incomplete, Scott Toberman may petition this Court for a supplemental accounting.

6. Home & Farm: Counts XIII-XVI

Scott Toberman seeks the reformation of deeds, conventional quia timet, unjust enrichment and constructive trusts for the Home and Farm. The BTS is a binding agreement, including the obligation to tender to the GEF Partnerships the deeds to the Home and Farm. In light of this ruling by the Court, the Court finds these Counts to be moot. This Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count XIII** (Reformation of Deeds), **Count XIV** (Conventional Quia Timet), **Count XV** (Unjust Enrichment), and **Count XVI** (Unjust Enrichment and Constructive Trust).

7. Money Damages: Counts XII & XVII

Scott Toberman seeks money damages alleging that the GEF Partnerships improperly withheld monies due to him under the Partnership Interests and other assets transferred to the GEF Partnerships making the GEF Partnerships liable to Scott Toberman for setoff/recoupment (Count XII) and money had and received (Count XVII). The BTS is a binding agreement including the pledge of all assets under paragraph 5(c) granting the GEF Partnerships the right to receive monies due to Toberman. This Court **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count XII** (Money had and received) and **Count XVII** (Setoff/recoupment).

8. Attorneys' Fees & Punitive Damages: Counts XIX & XX

The Court in this Order is granting summary judgment to the GEF Partnerships on several, but not all, Counts of the Complaint. Thus, a ruling on attorneys' fees and punitive damages is not

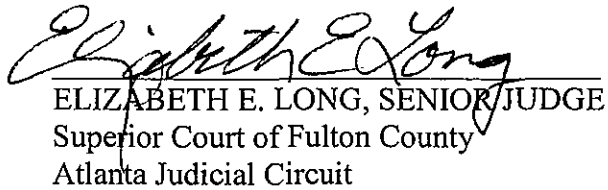
appropriate at this time. This Court **DENIES** the GEF Partnerships' Motion for Summary Judgment on **Count XIX** (Attorneys' Fees) and **Count XX** (Punitive Damages).

V. SUMMARY

This Court hereby **GRANTS** the GEF Partnerships' Motion for Partial Summary Judgment on Count XV of the First Amended Counterclaim by declaring the BTS to be an enforceable, binding agreement and finds that Toberman's failure to pay the Settlement Amount and failure to transfer the Partnership Interests to be breaches of the BTS. This Court hereby **DENIES** Toberman's Motion for Judgment on the Pleadings as to Count XV of the First Amended Counterclaim.

In light of the binding nature of the BTS, this Court hereby **GRANTS** the GEF Partnerships' Motion for Summary Judgment on **Count I** (Fraudulent Inducement), **Count II** (Enforceability of Agreements), **Count III** (Breach of Contract- Inherent Duty of Good Faith), **Count V** (Money Due), **Count VIII** (Breach of Fiduciary Duty), **Count IX** (Conversion of Wine), **Count X** (Accounting for Wine), **Count XI** (Civil Conspiracy), **XII** (Money Had and Received), **Count XIII** (Reformation of Deeds), **Count XIV** (Conventional Quia Timet), **Count XV** (Unjust Enrichment), **Count XVI** (Unjust Enrichment and Constructive Trust), and **Count XVII** (Setoff/Recoupment) and **DENIES** the GEF Partnerships' Motion for Summary Judgment on **Count VI** (Breach of Limited Partnership Agreements), **Count VII** (Accounting for Partnership Interests), **Count XIX** (Attorneys' Fees), and **Count XX** (Punitive Damages) of Scott Toberman's Amended and Restated Complaint.

SO ORDERED this 24th day of May, 2007.



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

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