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# Order (JOHN BEASLEY)

Alice D. Bonner
*Superior Court of Fulton County*

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN BEASLEY, DANIEL CLAY, TED FELDMAN, HENRY R. HILLENMEYER, RAGWEED CORPORATION, a Louisiana Corporation, TOM R. STEELE, ANNE H. ZELLE, ROBERT K. ZELLE, individually and as Trustee For ROBERT K. ZELLE TRUST, and JEFF A. PERIN, for himself and on Behalf of all similarly situated former Salaried employees of Cooker Restaurant Corporation,

Plaintiffs,

v.

JERRY D. WETHINGTON, RIVER CAPITALPARTNERS IV, L.P., RIVER CAPITAL INVESTORS IV, L.P., RIVER GENERAL PARTNERS IV, LLC, and WAYNE N. BRADLEY,

Defendants.

FILED IN OFFICE

DEC 1 1 2006

Deputy Clerk Superior Court
Fulton County, Georgia

Civil Action File No. 2005-CV-105368
(Business Case Division 1— ADB)

**ORDER**

This case is before the Court on the Motions for Judgment on the Pleadings of Defendants. Having reviewed the pleadings of the parties and the briefs submitted by counsel, the Court finds as follows:

When deciding a motion for judgment on the pleadings under O.C.G.A. § 9-11-12(c), the issue before the Court is "whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law." Harper v. Patterson, 270 Ga. App. 437, 439, 606 S.E.2d 887, 891 (2004). The pleadings are reviewed in the light most favorable to the non-moving party.

In Georgia the lex loci delictis choice of law doctrine applies. IBM Corp. v. Kemp, 244 Ga. App. 638, 640, 536 S.E.2d 303, 306 (2000). "Under the rule of lex loci delictis, tort

cases are generally governed by the substantive law of the place where the tort or wrong occurred." Id. For torts, the wrong occurs wherever the injury is sustained. Id. at 641, 536 S.E.2d at 306. Contracts, however, are governed by the laws of the state in which they were made. Id. at 641, 536 S.E.2d at 307. Additionally, with internal corporate affairs, such as disputes among shareholders, the local laws of the state of incorporation govern such disputes. Diedrich v. Miller & Meier & Assoc., Architects and Planners, Inc., 254 Ga. App. 734, 736, 334 S.E.2d 308, 310 (1985). Accordingly, the Court and the parties are in agreement that Counts One, Four, Five, Six, and Seven are governed by Ohio law and Counts Two, Three, Eight, Nine, Ten, and Eleven are governed by the laws of Tennessee.

Judgment on the pleadings for Count One of the complaint, breach of contract, is hereby **GRANTED** for River Capital Partners, IV, L.P., River Capital Investors IV, L.P., and River General Partners IV, LLC (hereinafter "River Capital Defendants"). Closing the operations of Cooker Restaurant Corporation (hereinafter "Cooker") without a shareholder vote was not in violation of the terms of Section 5 of the Shareholder Agreement dated October 1, 2002 (hereinafter "Shareholder Agreement") between the River Capital Defendants and Plaintiffs. The Shareholder Agreement required the approval of two-thirds of the outstanding shares to sell, transfer, lease or otherwise dispose of substantially all of the assets of Cooker. The decision to close the operations of Cooker does not invoke shareholder approval rights provided under section 5 of the Shareholder Agreement.

Judgment on the pleadings for Count Two of the complaint, interference with contract, against Defendants Jerry D. Wethington (hereinafter "Wethington") and Wayne N. Bradley (hereinafter "Bradley") is hereby **GRANTED**. The Court concluded above that the

Shareholder Agreement giving rise to this claim was never breached and thus the action for interference with such contract cannot not stand.

Judgment on the pleadings for Count Three, interference with business relationships, against Wethington and Bradley is hereby **GRANTED**. The Plaintiffs have failed to allege any business relationship existing between them and the River Capital Defendants outside of the Shareholder Agreement. While Tennessee courts recognize the tort of intentional interference with business relationships, if such a relationship is governed by a contract and such contract has not been breached then there is so basis for the claim. Trau-Med of America, Inc. v. Allstate Ins. Co. 71 S.W.3d 691, 701 (Tenn. 2002); *see also* Strategic Capital Resources, Inc. v. Dylan Tire Indus., LLC, 102 S.W.3d 603, 610 n.2 (Tenn. Ct. App. 2002).

Judgment on the pleadings for Counts Four, Five, and Six—negligence and breach of fiduciary duty by Wethington acting as a director of Cooker and as an agent of River Capital Defendants—is hereby **GRANTED**. Plaintiffs' claims of negligence and breach of fiduciary duty are brought individually and not derivatively on behalf of Cooker. Derivative actions are the proper mechanism to remedy harm done to a corporation for the failed duty of a board member and are an exception to the general rule that the board of directors have the authority to manage and supervise a corporation. Crosby v. Beam, 548 N.E.2d 217, 219 (Ohio 1989). A minority shareholder in a close corporation may bring a direct action against controlling shareholders who utilize "their majority control of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit..." if such actions were taken without a legitimate business purpose. Id. at 221.

"A court must preliminarily determine if the pleadings state an injury to the plaintiff upon an individual claim as distinguished from an injury that indirectly affects shareholders or affects them as a whole." Carlson v. Rabkin, 789 N.E.2d 1122, (Ohio Ct. App. 2003).

Assuming, as Plaintiffs assert, that Cooker qualifies as a close corporation under Ohio law and that River Capital Defendants were the controlling shareholders, the Plaintiffs fail to state in the Complaint any individual harm suffered as a result of Wethington's alleged negligence. Additionally, Plaintiffs fail to state how the decision to cease all Cooker operations in the face of a bankruptcy order violation uniquely benefited Defendants to the exclusion of Plaintiffs. Specifically with regards to Count Six, alleged solely against Wethington, Wethington was not a shareholder of Cooker and thus no direct action against Wethington can stand under the minority shareholder exception. Accordingly, Counts Four, Five, and Six may not be asserted as direct actions by Plaintiffs.

Judgment on the pleadings for Count Seven, negligent misrepresentation, against Wethington, the River Capital Defendants, and Bradley is hereby **GRANTED**. Negligent misrepresentation involves an affirmative false statement of fact made in the course of one's business or profession for the guidance of others where such information is reasonably relied upon and was not obtained through the exercise of reasonable care or competence. Veterinary Dermatology, Inc. v. Bruner, 2005 WL 2679628, at 6 (Ohio Ct. App. 2005). The basis of the negligent misrepresentation claim against Bradley rests on his advice to Cooker board members that he "did not **think** the directors' and officers' insurance policy would cover any claims brought relating to the unsecured creditors' fund..." (Complaint, ¶ 58, emphasis added). Plaintiffs fail to state a false affirmative

statement upon which to base the claim of negligent misrepresentation against Bradley. Similarly, the Complaint fails to allege any false statements of fact made by Wethington or the River Capital Defendants upon which to base the claim of negligent misrepresentation.

Judgment on the pleadings for Count Eight, breach of fiduciary duty, against Bradley is hereby **GRANTED**. In order to state a claim for breach of fiduciary duty, the Plaintiffs must allege the existence of a duty, breach of the duty, and resulting injury. Smith v. Futris, 2001 WL 432497, at 8 (Tenn. Ct. App. 2001). Tennessee courts recognize an exception to the rule that attorney is generally not liable for negligence to non-clients if (1) the attorney was so involved as to be representing multiple parties, (2) the attorney charged or intended to charge all the parties involved, and (3) the non-client(s) justifiably and foreseeably relied upon the information supplied. Id.

Plaintiffs' Complaint quotes the board of director meeting minutes where Bradley was identified as "counsel to director Wethington, at Director Wethington's request." (Complaint, ¶ 64; *see also* Complaint ¶¶ 78, 79, and 84). Additionally, there is no indication that Bradley charged or intended to charge Cooker or the other directors for the representation provided to Wethington during the course of the board meetings. Finally, any representations that Bradley made were to the directors of Cooker, not to Plaintiffs, so Plaintiffs have no basis upon which to assert reasonable and foreseeable reliance upon any statements made by Bradley. Accordingly, the pleadings are insufficient to establish a non-client claim of breach of fiduciary duty on behalf of Bradley.

Judgment on the pleadings for Counts Nine and Ten, tortuous interference with employment contracts, against Bradley, Wethington, and the River Capital Defendants is

hereby **GRANTED**. Tortious interference requires (1) the existence of a legal contract, (2) awareness by the tortfeasor of the contracts, (3)malicious intent to induce a breach of the contract, (4) a breached contract proximately caused by the tortfeasor's acts, and (5) injury to the plaintiff as a result of such breach. Forrester v Stockstill, 869 S.W.2d 328, 330 (Tenn.1994). Corporate agents, however, are protected from torts of interference if such acts are done on behalf of the corporation and within the scope of the agent's duties rather than for strictly personal, malicious motives. Id. at 335. Wethington, acting as a director of Cooker and in an effort to preserve the unsecured creditors' funds supported a board decision to close the Cooker operations and to terminate Hillenmeyer's employment. As such Wethington's actions were within his authority as a corporate director and were "substantially motivated by a intent to further the interest of the corporation... ." Id. Thus Wethington is entitled to immunity from liability and so are the River Capital Defendants, on whose behalf Wethington was acting as an agent. Similarly, Bradley's involvement with the decision was limited to his role as counsel to Director Wethington and is also shielded from personal liability. The Defendants must stand as third parties to the employment contracts at issue in order for a claim of tortious interference to move forward. The relationships of director, shareholders and counsel to the director have a unity of interest with Cooker and thus are not third parties to the contracts at issue.

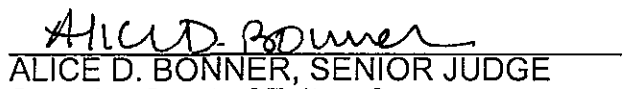
Judgment on the pleadings for Count Eleven, concert of action, is hereby **GRANTED**. A civil conspiracy is "a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." Levy v. Franks, 159 S.W.3d 66, 82 (Tenn. Ct. App. 2004),

*citations omitted*. Therefore, if the underlying tort fails, then the conspiracy claim must also fail. Id.; Forrester v. Stockstill, 869 S.W.2d 328, 330 (Tenn.1994). As this Court has found reason to grant Defendants judgment on the pleadings for all other counts, so too must the Court grant judgment on the pleadings for concert of action.

The Court also finds reason to address previous motions to withdraw made by Plaintiffs' counsel Mr. Nebel and Mr. Cook. All outstanding motions to withdraw as counsel to Plaintiffs not previously granted by this Court are hereby **GRANTED**.

This Order is a Final Order, judgment on the pleadings on all counts of this Complaint having been granted to Defendants. This file should be closed.

**So Ordered** this 8 day of December, 2006.



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

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