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Final Order and Judgment (MIRKO DI GIACOMANTONIO AND ROSA INC.)

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Superior Court of Fulton County

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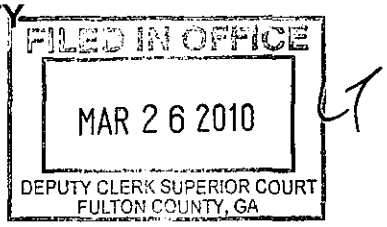
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



MIRKO DI GIACOMANTONIO and ROSA, INC.,

Plaintiffs,

vs.

SANDRO ROMAGNOLI, IRVEN B. PENN, THE EMILIO CIVELI GROUP, INC., LJ HOOKER CORPORATION (WORLDWIDE), INC. and IB PENN, LTD.,

Defendants.

Civil Action No. 2007-CV-133477

FINAL ORDER AND JUDGMENT

This case is before the Court on Defendants' Motion for Entry of Final Judgment, and Plaintiffs' Renewed Motion for Injunctive Relief. At a hearing on January 13, 2010, the parties asked the Court to rule on the papers they filed in connection with these motions and stipulated that the matter was ripe for adjudication. The Court has read the briefs and materials submitted by the parties in connection with their motions and rules as follows.

The parties were owners of a chain of five Figo restaurants in the Atlanta area from 2002 until 2007 when the events giving rise to this law suit occurred. They conducted their business through several interrelated limited liability corporations. Plaintiff Mirko Di Giacomantonio generally conducted business through his company, Plaintiff Rosa, Inc. (collectively, "Di Giacomantonio"). Defendant Sandro Romagnoli conducted business through his company, Defendant The Emilio Civeli Group, Inc. (collectively, "Romagnoli"). Defendant Irven B. Penn conducted business through his

companies, Defendants LJ Hooker Corporation (Worldwide), Inc. and IB Penn, Ltd. (collectively, "Penn").

In early 2007, the parties entered into several new operating agreements creating three holding companies to own five of the Figo restaurants and the central commissary (the "Operating Agreements"). The Court has previously ruled that the Operating Agreements are valid and enforceable. (See Order on Motions for Summary Judgment, entered March 13, 2008.)[1]

After ruling on the parties' motions for summary judgment, this case was set for trial in April, 2008. Before the trial began, however, a stipulated settlement agreement was reached where the parties agreed to abide by the withdrawal and valuation provisions of the Operating Agreements of Figo Pasta, LLC, Certo, LLC, and Spiga LLC, as well as the entities formed underneath these holding companies (hereinafter collectively referred to herein as the "Figo Companies"), to determine the amount of Di Giacomantonio's interest in the Figo Companies as of April 9, 2007 (the "Withdrawal Date"). The Court retained authority to determine not only whether the valuation process conformed to the Operating Agreements but also whether the terms of the proposed payout complied with the contract.

The Operating Agreements provide different valuation procedures depending upon the event that triggered the involuntary withdrawal. In the event of a non-divorce/support involuntary withdrawal (as is applicable to the instant case), the withdrawing member (Di Giacomantonio) and the remaining members (Defendants)

[1] In connection with its ruling on the parties' motions for summary judgment, the Court additionally ruled that Di Giacomantonio's tort claims were foreclosed by its decision that the Operating Agreements were enforceable. (See March 31, 2008 Tr. at 5:11-16.)

each select an appraiser "to determine the undiscounted 'going concern' value of the Company." If the two appraisers cannot agree upon a valuation, then the appraisers shall select a third appraiser to perform the final valuation. The initial appraisals, however, set the ceiling (high) and floor (low) of the range for the third valuation.

Pursuant to the Operating Agreements, and by stipulation, the parties each selected an appraiser to determine the value of Di Giacomantonio's interest in the Figo Companies. Di Giacomantonio selected Michael S. Blake, CFA, of Adams Capital Inc., and Defendants selected Michael M. Beeghley, ASA, of Applied Economics. The parties' respective appraisers were unable to agree upon a valuation, and the Court selected Curtis R. Kimball of Williamette Management Associates as the third appraiser from a list compiled by the parties' appraisers. Mr. Kimball submitted his final appraisal report on September 8, 2009 (the "Kimball Report"), in which he determined the value of Di Giacomantonio's interest in the Figo Companies to be $429,893.71. This amount included as an asset of the Figo Companies debts owed by Di Giacomantonio to the respective entities of $59,763.81.

With respect to the manner of payment of the amount of the withdrawing member's interest (the "Withdrawal Price"), the Operating Agreements provide:

> 6.7 If the Company or the Remaining members, as the case may be ("the "Purchaser"), elect to pay the Withdrawal Price (the "Indebtedness") on an installment basis, the Purchaser shall evidence the obligation to pay the Indebtedness by executing and delivering its or their commercially reasonable promissory note, in the form reasonably acceptable to the Remaining Members, to the withdrawn Member or the Transferor (the "Payee"). Such promissory note shall[, at] a minimum, provide[:] (a) no pre-payment penalty, (b) a stated interest rate of seven percent (7%), and (c) a term of no less than ten (10) years or such other period deemed to be in the best interest of the Company.

Following receipt of the Kimball Report, Defendants elected to pay the Withdrawal Price on an installment basis and informed Di Giacomantonio of their proposal of payment on October 5, 2009, as follows:

> . . . The respective LLC's are electing to pay the total amount of $370,129.90 (which is the $429,893.71, as broken down in the appraisal for Certo, Flusso and Spiga, less debts owed by [Di Giacomantonio] to the respective entities of $59,763.81) in promissory notes, as provided by Article 6.7, containing the following terms:
>
> Interest only at 7% for the first 36 months, paid annually in arrears at the anniversary of the note; then equal monthly payments of principal and interest beginning on the first of the 37th month in an amount sufficient to fully amortize the principal balance over the following 144 months.

(See Motion for Entry of Final Judgment ¶ 4.)

Di Giacomantonio did not respond to this proposal, and on October 30, 2009, Defendants moved for the entry of final judgment, seeking an order that Defendants' proposal of payment (as outlined above) is commercially reasonable and in accordance with the terms of the Operating Agreements. Implicit in Defendants' motion is the request that Di Giacomantonio be ordered to specifically perform his obligation to accept payment of the Withdrawal Price as proposed by Defendants.

On December 3, 2009, Di Giacomantonio filed a renewed motion for injunctive relief and opposition to Defendants' motion for entry of final judgment. In his renewed motion, Di Giacomantonio requests an equitable accounting or, in the alternative, the appointment of a receiver with subpoena powers.

Plaintiffs' renewed request for equitable relief flows not from an inadequacy of any remedy at law, but rather because Di Giacomantonio is dissatisfied with the results of such remedy – namely, the value placed on his interest in the Figo Companies, as determined by the process mandated by the Operating Agreements and the findings of the court-selected appraiser as set forth in the Kimball Report. Under O.C.G.A. § 9-8-1, a receiver is appointed only under narrow circumstances upon a showing that the rights of the parties could not be protected otherwise by presenting evidence of waste, insolvency, mismanagement, or misappropriation of assets. Patel v. Patel, 280 Ga. 292 (2006). Di Giacomantonio has, again, failed to present any credible evidence of insolvency, waste, mismanagement, or any concrete danger of loss or injury that will occur should the Court fail to appoint a receiver. Indeed, Di Giacomantonio has failed to make a showing that any of the Figo Companies are insolvent, or that he will not be able to ultimately gain his appropriate share of the corporations' value. As in Patel, unsupported allegations of poor management are entirely insufficient to justify the imposition of one of the harshest remedies the law provides for the enforcement of rights. See also Treu v. Humanism Investment, Inc., 284 Ga. 657, 659-660 (2008).

Equitable accountings are available under O.C.G.A. § 23-2-70 for complicated and intricate accounts or for accounts between partners when there is no adequate remedy at law. Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 262 (1977); Faircloth v. A.L. Williams & Assoc., Inc., 219 Ga. App. 560, 560 (1995). The party seeking the accounting must demonstrate why the remedy at law is inadequate. Peeples v. Peeples, 193 Ga. 358 (1942). Di Giacomantonio put forth no credible

evidence of why his remedy at law is inadequate. The Figo Companies have been subjected to not one but three separate appraisals by certified appraisers – one of whom was specifically appointed by the Court and who met with Di Giacomantonio, his counsel, and several representatives from the Figo Companies. Di Giacomantonio has not previously objected to the validity of any of the financial data produced in discovery or relied on by the appraisers, or to the conclusions set forth in the Kimball Report. Indeed, it appears that only upon Defendants' efforts to enforce the provisions of the Operating Agreements has Di Giacomantonio questioned the accuracy of the financial data. Di Giacomantonio has failed to demonstrate that an equitable accounting available under O.C.G.A. § 23-2-70 is required in this case or how the substantial discovery into and appraisals of the Figo Companies were inadequate.

Accordingly, Plaintiffs' Renewed Motion for Injunctive Relief is hereby **DENIED**.

The Operating Agreements of the Figo Companies permit the payment of the Withdrawal Price on an installment basis, setting the interest rate at seven percent and providing for a term of not less than ten years or such other period deemed to be in the best interest of the Company. Pursuant to such agreements, Defendants proposed to payout the Withdrawal Price by paying interest only at 7% for the first 36 months, paid annually in arrears at the anniversary of the note; then equal monthly payments of principal and interest beginning on the first of the 37th month in an amount sufficient to fully amortize the principal balance over the following 144 months. Di Giacomantonio argues that the contractual provisions regarding payment are inapplicable, and contends that Defendants' acceptance of the withdrawal occurred outside the 180 day

period permitted by the contract. Alternatively, Di Giacomantonio requests a lump sum judgment for $429,893.71.

Turning to Di Giacomantonio's first argument, the Court finds that the parties stipulated to the amount due Di Giacomantonio being "paid pursuant to the contract" and agreed that the Court would determine whether the terms of the payment were in compliance with the Operating Agreements. Further, the Court finds that Defendants timely accepted the contractual withdrawal offer, so as to trigger the payment provision under Section 6.7 of the Operating Agreements. The Court finds that Di Giacomantonio was notified of an involuntary withdrawal on April 9, 2007 and that Defendants sent notice to him of their acceptance of the withdrawal offer on October 8, 2007. The Court takes judicial notice of the fact that the 180th day of the period within which Defendants could exercise their rights to accept the withdrawal offer under the Operating Agreements fell on a Saturday, and that Defendants' acceptance was sent on the next business day: Monday, October 8, 2007. As Georgia courts have consistently held, if the time for the exercise of rights or performance of an act under a contract falls on a weekend or holiday, it may be legally performed on the next succeeding business day. See Brooks v. Hicks, 230 Ga. 500, 501 (1973); Target Properties, Inc. v. Gilbert, 192 Ga. App. 161, 162 (1989); O.C.G.A. § 1-3-1(d)(3). As Defendants' acceptance of the withdrawal offer was timely, the provisions of the Operating Agreements govern how payment may be made and provide the basis for a deviation from an ordinary lump sum judgment as requested by Di Giacomantonio.

The Court is well aware of the effect the recent economic downturn has had on businesses throughout this State, including the restaurant industry. While the Court

finds a majority of Defendants' proposed terms of payment of the Withdrawal Price by promissory note as commercially reasonable, the Court finds that buyouts such as this normally span five-ten years. See, e.g., Kaplan v. First Hartford Corp., 671 F. Supp. 2d 187, 192 (D. Me. 2009). As such, the Court finds that the terms of payment proposed by Defendants are commercially reasonable, except that the total payout should be completed within 10 years. The Court further finds that the proposed payment amount of $370,129.90 (which is the $429,893.71, as broken down in the Kimball Report for Certo, Flusso and Spiga, less debts owed by Di Giacomantonio to the respective entities of $59,763.81) is the proper Withdrawal Price. To find otherwise would permit a double recovery by Di Giacomantonio.

Accordingly, the Court **GRANTS** Defendants' Motion for Entry of Final Judgment on the following terms. The Figo Companies are to provide fully executed promissory notes to Di Giacomantonio in the total amount of $370,129.90, to be paid on the following terms:

> Interest only at 7% for the first 36 months, paid annually in arrears at the anniversary of the note; then equal monthly payments of principal and interest beginning on the first of the 37th month in an amount sufficient to fully amortize the principal balance over the following 84 months.

Di Giacomantonio is ordered to specifically perform his obligations under the Operating Agreements and accept the proposal of payment as described above.

SO ORDERED this 26th day of March, 2010.

Judge Melvin K. Westmoreland for

Alice D. Bonner, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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