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Order on Motions for Summary Judgment (MIRKO DI GIACOMANTONIO AND ROSA INC.)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
MAR 13 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

MIRKO DI GIACOMANTONIO and ROSA INC.,	)
Plaintiff,	)
v.	) Civil Action File No. : 2007CV133477
SANDRO ROMAGNOLI, ET AL.,	)
Defendants,	)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case is before the Court on Defendants' Motion for Summary Judgment for Specific Performance, and Plaintiffs' Motion for Partial Summary Judgment. The parties asked the Court to rule on the briefs they filed in connection with these motions, and so the hearing of their oral arguments scheduled for February 29, 2008, was cancelled. The Court has read the briefs submitted by the parties and rules as follows:

FACTUAL BACKGROUND

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. Hereinafter the Plaintiffs will be designated as Di Giacomantonio unless otherwise specified. Defendant Sandro Romagnoli conducted business through his company, Defendant The Emilio Civeli Group, Inc. These Defendants will be referred to hereafter as Romagnoli unless otherwise specified.

Defendant Irven B. Penn conducted business through his companies, Defendants LJ Hooker Corporation (Worldwide), Inc. and IB Penn, Ltd. These Defendants will be designated as Penn hereinafter unless otherwise noted.

Figo Pasta, LLC, a Georgia Limited Liability Company, was organized in 2002 to own and operate Figo Pasta on Collier Road, the first Figo restaurant. Pursuant to the company's operating agreement, Di Giacomantonio and Romagnoli each owned 50% of this company. In 2003 and 2004, the operating agreement was amended, both times granting an ownership interest but not voting rights to Penn.

In January 2003, Certo, LLC, a Georgia Limited Liability Company ("Certo"), was created to own and operate Osteria Del Figo restaurant on Howell Mill Road, the second Figo restaurant. The operating agreement governing this company was amended one year later. The operating agreement and the amendment to it specified various percentages of ownership by the parties. Voting rights for this company were 50% for Di Giacomantonio, 50% for Romagnoli, and 0% for Penn.

Spiga, LLC, a Georgia Limited Liability Company ("Spiga"), was created in May 2003 to operate the Figo central kitchen commissary. Again, the parties had varying percentages of ownership pursuant to the operating agreement for Spiga, and its amendment the following year, but voting rights remained equally divided between Di Giacomantonio and Romagnoli.

Pursuant to the terms of a loan agreement, Di Giacomantonio's interest in Certo and Spiga was bought out by Defendants in 2004. Defendants thereafter formed three additional LLCs to construct and own three more Figo restaurants (numbers 3, 4, and 5)

in which Plaintiffs had no interest. There are no issues with regard to any of the aforementioned agreements among the parties.

In early 2007, the parties entered into several new operating agreements creating three holding companies to own all five of the Figo restaurants and the central commissary. These agreements form the basis of this law suit, and are referred to hereafter as the restructuring agreements. Plaintiffs contend that the restructuring agreements are unenforceable because of Defendants' tortious actions, while Defendants contend that they are enforceable. Defendants move the Court to order specific performance of the restructuring agreements by the Plaintiffs. Plaintiffs move for partial summary judgment, contending that there are no issues of fact with regard to whether an event triggering Plaintiffs' involuntary withdrawal from ownership of the Figo entities has occurred.

Both of these motions raise the issue of whether any basis exists for the involuntary withdrawal provision of the restructuring agreements to apply. While the Complaint alleges fraud, negligent misrepresentation, breaches of fiduciary duty and conspiracy, all of which if proved would void the contracts, Plaintiffs argue that, even if the Court finds the restructuring agreements to be enforceable, no involuntary withdrawal events occurred, and thus, Defendants had no basis to force Di Giacomantonio's withdrawal from the enterprise.

CONCLUSIONS OF LAW

As all parties appear to agree, the restructuring agreements at issue in this case were signed by the parties after a certain amount of negotiations and review. Thus, the

restructuring agreements are enforceable, as a matter of law, unless Plaintiffs can successfully establish a defense or challenge to the contracts.

The facts show that Di Giacomantonio had adequate time to read and review the restructuring agreements he signed in 2007, and that he consulted his attorney before he signed them. Therefore, the Court finds that there are no issues of fact with regard to Di Giacomantonio's allegations that he didn't understand the restructuring contracts. See Hovendick v. Presidential Fin. Corp., 230 Ga. App. 502 (1998)

Di Giacomantonio also argues that he was fraudulently induced to sign the restructuring agreements because Defendants owed him a fiduciary duty to disclose material terms (i.e., the effect of the involuntary withdrawal provisions). The party asserting a confidential relationship bears the burden of establishing it. Parello v. Maio, 268 Ga. 852, 853 (1998). Confidential relationships can be established by demonstrating a contractual, statutory or fiduciary duty to act in a certain manner. Neither Section 5.4 of the restructuring agreements, nor O.C.G.A. § 14-11-305 obligates Defendants to provide such information to Di Giacomantonio. Plaintiff, therefore, failed to establish the existence of a confidential relationship necessary to prevail on his claim that he was fraudulently induced to sign the restructuring agreements. See Parello v. Maio, 268 Ga. 852 (1998); Ledford v. Smith, 274 Ga. App. 714 (2005); Hovendick v. Presidential Fin. Corp., 230 Ga. App. 502 (1998).

The restructuring agreements described events that, if they occurred, would force Di Giacomantonio's involuntary withdrawal from ownership in the various holding companies at issue. In general, these events have to do with potential claims of interest in the Figo entities caused by the divorce of any of the owners, and certain behaviors by

the owners. Romagnoli and Penn contend that at least one of these events has occurred, and seek summary judgment ordering Di Giacomantonio's specific performance of the restructuring agreements by his involuntary withdrawal from ownership in the LLCs involved. Di Giacomantonio seeks summary judgment in his favor as to whether any event triggering his involuntary withdrawal from the several LLCs involved in the restructuring agreements has occurred. The heart of the parties' dispute revolves around the meaning of the phrase "if...a final order of a court in a divorce proceeding... **is entered**... ." (emphasis added).

Contract construction is a matter of law. Glisson v. IRHA of Loganville, Inc., __ S.E.2d ___, 2008 WL204624 *1 (Jan. 25, 2008). First, a court must determine whether the contract is clear or ambiguous. If a court finds that an ambiguity exists, then the rules of contract construction found in O.C.G.A. §§ 13-2-2 and 13-2-3 are applied to resolve the ambiguity. These construction rules include ascertaining the intent of the parties, giving words their plain meaning, and construing the contract to uphold it in whole. O.C.G.A. §§ 13-2-2, 13-2-3. If, after applying these rules, the ambiguity is not resolved, then the question of interpretation is one of fact not appropriate for determination on summary judgment. Magnetic Resonance Plus, Inc., v. Imaging Systems Internat'l, 273 Ga. 525, 526 (2001).

The Court finds that whether the involuntary withdrawal provision language "is entered" is retrospective or prospective is an ambiguity and thus will apply the rules of contract construction. The language of other involuntary withdrawal triggering provisions focus on future events with phrases such as

"makes an assignment" and "ceases to perform." The Court, however, is sensitive to the need for LLC members to protect their investment by shielding themselves from the unwanted transfer of shares and is cautious in reading a strict temporal requirement (future actions only) into this provision.

Both Plaintiff and Defendants, however, acknowledge that the purpose of the restructuring agreements, in part, was to grant ownership interests to Di Giacomantonio. In addition, all of the parties were aware of the 2003 divorce settlement in question. To interpret the provision as Defendants request would create an illogical result and render the provisions granting Di Giacomantonio ownership interests without meaning. Therefore, consistent with O.C.G.A. §§ 13-2-2 and 13-2-3, the Court finds that the involuntary withdrawal provision is prospective and therefore not triggered by Di Giacomantonio's 2003 divorce settlement.

Defendants' Motion for Summary Judgment for Specific Performance is **GRANTED IN PART** and **DENIED IN PART**: their Motion for the specific performance of involuntary withdrawal is hereby **DENIED;** however, to the extent that they seek summary judgment that the restructuring agreements are valid and enforceable, implicit in the motion for specific performance, their Motion is hereby **GRANTED.** Plaintiffs' Motion for Partial Summary Judgment is hereby **GRANTED.**

SO ORDERED this 13 day of March, 2008.

Alice D. Bonner

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

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