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Order on Motion to Dismiss (IH RIVERDALE, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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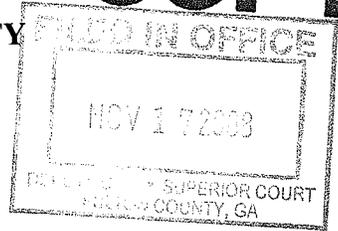
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**



IH RIVERDALE, LLC, &
GEOFFREY NOLAN

Plaintiffs,

v.

FOUNDRY PARTNERS, LLC, FOUNDRY
HOSPITALITY, LLC, & FOUNDRY
ENTERTAINMENT, LLC,

Defendants.

Civil Action No.: 2006CV122675

ORDER ON MOTION TO DISMISS

This case is before the Court on Defendants' Motion to Dismiss, filed on February 2, 2006, and argued before the Honorable Penny Brown Reynolds of Fulton County State Court on May 16, 2006. On August 30, 2007, the case transferred to Fulton County Superior Court and was assigned to the Business Court. The motion remains open and the parties requested that the Court issue a ruling based upon the motion, briefs, transcript of the oral argument, and record of the case. The Court finds as follows:

Plaintiffs seek \$1,013,127.00 as unjust enrichment from Defendants for allegedly receiving funds belonging to Riverdale Capital Investment, LLC ("RCI") that were diverted by McChesney Capital Partners, LLC ("MCP"), Homestead Construction, Inc., Michael McChesney, George McChesney, and Nicholas Walldorff. IH Riverdale, Inc., ("IH Riverdale") and MCP, whose members are George and Michael McChesney and Nick Walldorff, created Riverdale Capital Investment Inc., ("RCI") to develop the

Meadow View Apartment complex. Plaintiff Geoff Nolan is the sole shareholder of IH Riverdale.

Defendants seek dismissal of Plaintiffs' Complaint on the following grounds: (1) IH Riverdale does not have standing to sue to recover RCI funds; (2) Nolan has no standing or claims in equity against Defendants; and (3) Foundry does not owe monies to Plaintiffs under an equitable claim.

Standing of IH Riverdale

Defendants contend that IH Riverdale's claims against Defendants must be plead as a derivative suit on behalf of RCI because the action seeks monies diverted from RCI, and IH Riverdale is a member of RCI. Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 822 (2005) (rev'd on other grounds by Bellemead, LLC v. Stoker, 280 Ga. 635 (2006)) ("The general rule in the corporate context is that a shareholder suit seeking to recover damages for breach of fiduciary duties owed to the corporation must be brought as a derivative suit on behalf of the corporation.") IH Riverdale contends, however, that it has suffered a special and distinct injury from that suffered by the other members which creates standing to bring a direct action. Stoker v. Bellemeade, LLC, 272 Ga. App. at 822.

IH Riverdale alleges that MCP transferred monies of RCI to fund the Foundry Park Inn Project ("Foundry Project"), developed and operated by Defendants. MCP's members, the McChesneys and Nick Walldorff, own and operate the Foundry Project through Defendants. Therefore, Plaintiff argues that it has suffered a special and distinct injury from MCP, the other RCI member, since MCP's members, the McChesneys and Nick Walldorff, benefited from the transfer of the RCI funds.

On a motion to dismiss, the court construes the Complaint in the light most favorable to the plaintiff “with all doubts resolved in his favor.” Snooty Fox, Inc., v. First American Investment Corporation et al., 144 Ga. App. 263, 265 (1977).

Accordingly, the Court finds that IH has sufficiently pled a special injury which permits IH Riverdale to bring a direct action against Foundry. Additionally, because Defendants IH Riverdale and MCP are the only members of RCI, a recovery directly by IH Riverdale will not prejudice any other member. See Thomas v. Dickson 250 Ga. 772, 774 (1983) (“Because Mrs. Dickson was the sole injured shareholder and because the reasons underlying the general rule calling for corporate recovery do not exist in this case, we find that Mrs. Dickson was properly allowed to bring this direct action.”). The Court hereby **DENIES** Defendants’ Motion to Dismiss.

Standing of Nolan

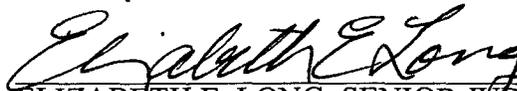
Defendants challenge the standing of Geoff Nolan to bring his claims against Defendants because he is not, and never was, a member of RCI and because Nolan suffered no injury. Nolan, however, contends that he has standing because he personally guaranteed the Regions Bank construction loan, which Plaintiffs allege was used, in part, to fund construction of the Foundry Project. Pursuant to the terms of the guarantee, however, Defendants paid IH Riverdale a 1% guaranty fee. Additionally, Nolan’s personal guarantee has been released and Nolan has not been called to perform on the guaranty. While Plaintiffs direct the Court to the sixth Amended Complaint, no additional injuries are claimed to be suffered by Nolan. Therefore, the Court finds that Nolan lacks standing to bring these claims against Defendants and hereby **GRANTS** Defendants’ Motion to Dismiss.

Monies Owed by Defendants to Plaintiffs

Defendants argue that IH Riverdale did not expect a benefit from the Foundry Project, thus its claim for unjust enrichment fails. Morris v. Britt, 275 Ga. App. 293, 294-295 (2005) (finding that the plaintiffs acted without the intent to personally benefit from the repairs and additions to the house, thus their claim for unjust enrichment failed). IH Riverdale, however, counters that the expectation for compensation (a benefit) arose when the Defendants obtained funds belonging to RCI. In Snooty Fox, Inc., v. First American Investment Corporation, 144 Ga. App. 264, the Georgia Court of Appeals held that a plaintiff had standing to sue a third-party bank for unjust enrichment when the bank purchased property developed, in part, by funds embezzled from the plaintiff. Id. at 265-266 (“[T]he law is settled that an action lies in all cases where one has received money which another...is entitled to recovery and which the recipient is not entitled in good conscience to retain.”). Accordingly, the Court finds that IH Riverdale has pled sufficient facts to claim unjust enrichment against Defendants and **DENIES** Defendants’ Motion to Dismiss.

As stated above, Defendants’ Motion to Dismiss is hereby **GRANTED IN PART** and **DENIED IN PART**.

SO ORDERED this 17th day of November, 2008.


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

cc:

David Pardue, Esq.
Kristin A. Yadlosky, Esq.
HARTMAN, SIMONS, SPIELMAN & WOODS LLP
6400 Powers Ferry Road, NW, Suite 400
Atlanta, GA 30339

Georgia Schley Ritchie, Esq.
MCP Realty Advisors, LLC
295 East Dougherty Street
Athens, Georgia 30601
(404) 869-8800
Fax: (404) 601-0235