

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-009362

11/25/2009

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
M. Brady
Deputy

PIERRE E LEROY

JAMES E PADISH

v.

J G D, L L C, et al.

J G D, L L C
NO ADDRESS ON RECORD

J GORDON DEVELOPMENT
COMPANY L L C
5450 E DEER VALLEY RD #1012
PHOENIX AZ 85054
SCOTT A MALM
KELLI S WOLPE
C/O MIKE CARROLL
702 E OSBORN #200
PHOENIX AZ 85011
JAY G WOLPE
20235 N CAVE CREEK # 104-287
PHOENIX AZ 85024

MINUTE ENTRY

The Court previously held a three-day Bench Trial in this matter. At the conclusion of the trial, the Court made some findings of fact and conclusions of law, and ordered the parties to provide supplemental briefs on certain remaining issues. The Court essentially ruled as follows at the conclusion of the trial:

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- There was a valid, binding Operating Agreement as to JGD. *See* Exhibits 36 and 95;
- The terms of the Operating Agreement were supplemented by verbal agreements between the parties (Plaintiff Leroy and Defendant Wolpe);
- The Operating Agreement prohibited Wolpe from unilaterally obtaining either of the SFG loans;
- Both loans were obtained without the knowledge or approval of Plaintiff Leroy;
- The resolution purportedly containing Mr. Leroy's signature was a forgery;
- Plaintiff Leroy did not unreasonably delay in notifying SFG of his position that the loans were improper; and
- Plaintiff Leroy was not judicially estopped via the judgment obtained against Wolpe.

If that were the end of the story, no more analysis would be necessary and Plaintiff Leroy would win. However, Defendant SFG has raised multiple arguments as to why Plaintiff is not entitled to relief. Although the parties discussed several arguments in their supplemental briefs, there were primarily two other issues that the Court directed the parties to brief. First, SFG argues that Plaintiff Leroy ratified the loans. Second, SFG argues that the doctrines of waiver and estoppel apply because Plaintiff and Wolpe knowingly acted in contravention of the Operating Agreement on other occasions. The parties have now fully briefed these issues (and others) and the Court rules as follows.

On the ratification issue, the Court agrees with Plaintiff that the critical analysis focuses on intent. *E.g., United Bank v. Mesa N.O. Nelson Co.*, 121 Ariz. 438, 440, 590 P.2d 1384, 1386 (1979). Here, the Court finds that when Plaintiff received proceeds from the loan, he was not aware of the source. Promptly after learning of the loan, he objected and demanded that the loan be removed. However, Plaintiff still retained proceeds from the loan and his attempt to return the proceeds was conditional. While retention of benefits can, in some circumstances, evidence an intent to ratify, it does not necessarily do so. Weighing the evidence here, and mindful that the amount retained by the Plaintiff is a small percentage of both the amount of the loans and the amount actually disbursed, the Court finds that Plaintiff Leroy did not ratify the loans. Plaintiff simply never manifested any acceptance of the loans – he has vigorously objected from the outset after learning of the loans. The failure to unconditionally tender the return of the funds does not outweigh this fact.

Defendant SFG also argues that Plaintiff's actions were inconsistent with the contractual provisions upon which he now relies. Specifically, SFG argues that Plaintiff told his banker to lien the property in violation of Section 3.3 of the Agreement and received interest on his capital contribution in violation of Section 6.7. SFG argues that Plaintiff has either waived or is estopped from now relying on a violation of Section 3.3 of the Agreement because his own conduct is inconsistent with the position he now takes. Plaintiff counters that his actions were consistent with the intent of the parties and were taken with the approval of Wolpe, thus making

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them consistent with the Agreement. Further, Plaintiff argues that with respect to waiver, no waiver could have occurred as to Section 3.3 because the alleged waiver occurred after the SFG loan. Additionally, with respect to SFG's quasi-estoppel argument, Plaintiff argues that SFG did not raise this argument before trial and thus cannot raise it now.

The Court finds that no waiver occurred because there was not a clear and decisive act which showed a determination by Plaintiff not to have the benefit of Section 3.3. The act of requesting Wells Fargo to contact Wolpe to obtain permission to put a lien on the property does not evidence a clear waiver. Further, the Court believes the timing of the SFG loan versus the directive to Wells Fargo is critical – the alleged act of waiver by Plaintiff relating to the directive to Wells Fargo occurred after the SFG loan had already been made and thus prior to Wolpe's unauthorized acts. Additionally, as to the allegations regarding a violation of Section 6.7, the Court does not believe they rise to the level of a systemic failure to follow requirements of the Operating Agreement or otherwise relate to the critical provision here (Section 3.3) so as to constitute a waiver.

As for the quasi-estoppel argument, SFG argues that it did not waive this argument because it raised the affirmative defense of "estoppel" in both its answer and amended answer, and quasi-estoppel is a form of estoppel. The Court has its doubts as to whether quasi-estoppel should be considered estoppel – the tests are different – but more critically the Court believes that substantively the defense does not apply here. The Court believes the question is the degree to which the Plaintiff's acts can be considered inconsistent with his position on the effect of Section 3.3. The Court does not believe that Plaintiff's acts in seeking Wolpe's agreement for a Wells Fargo lien evidence a strong inconsistency. Moreover, Plaintiff's directive to Wells Fargo to contact Wolpe to discuss placing a lien arguably does not even breach Section 3.3 because it prohibits the manager from entering into such loans, and Plaintiff was not the manager. Weighing the evidence from throughout the trial, the Court finds that Plaintiff simply did not act inconsistently with his positions in this lawsuit such that he ought to be estopped from asserting them.

The Court has also considered the additional arguments discussed by Defendant SFG in its post-trial briefs. First, the Court has already found that there was a valid Operating Agreement, and thus rejects SFG's arguments that no valid Operating Agreement was produced pursuant to Arizona Rules of Evidence 1002 and 1003. Second, the Court finds that JGD is not liable for Wolpe's fraud. Third, the Court does not believe that the elements of unjust enrichment have been met or that an equitable lien is appropriate.

Plaintiff is therefore entitled to judgment on his declaratory judgment claim. Although SFG argues that the Court may not award damages in a declaratory judgment action, the Court agrees with Plaintiff that damages may be awarded. *See, e.g., Starkovich v. Noye*, 111 Ariz.

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347, 529 P.2d 698 (1974). The question thus shifts to the appropriate relief. Plaintiff seeks two types of relief: (1) a judgment declaring the SFG Promissory Note and Deed of Trust to be invalid; and (2) money damages in the amount of \$461,823.46. As for the declaration that the SFG Promissory Note and Deed of Trust are invalid, such a judgment is a natural result of the Court's holding as set forth above. The more difficult issue is what amount of damages, if any, are appropriate.

The money damages claim contains two elements: a claim for the alleged decline in the property value, and a claim for accrued interest. Plaintiff's calculation appropriately subtracts the \$48,000 interest payment he received. As for the claim for interest, the Court awards Plaintiff \$52,423.46. The diminution in value claim is more problematic. SFG argues that this claim is speculative at best because it assumes that the property would have sold in 2006 and there is simply no way to know if it would have sold and what it would have sold for, and whether the presence of SFG's lien really would have affected the sale. The Court agrees with SFG that this element of damages is too speculative for the Court to make an award. It is unclear from the evidence whether Plaintiff and Wolpe ever would have agreed to sell the property in 2006 versus one party buying the other out. There is simply no way to know what would have happened had a sale been attempted in 2006, and awarding damages based on pure speculation is not appropriate. Therefore, the total amount of money damages awarded is \$52,423.46.

In summary, the Court finds for Plaintiff on his declaratory judgment claim, finds that the Promissory Note and Deed of Trust are invalid, and awards a total amount of \$52,423.46 in damages. Plaintiff may submit a proposed form of judgment.