STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO:

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

2013 JUL -3 A 9:21

Kyle Pertuis *vs.* Beachfront Foods Inc

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

____
PRESIDING JUDGE -

This judgment was entered on the 3rd day of July, 2013, and a copy mailed first class this 3rd day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Rodney F. Pillsbury 1204-A E. Washington St. Greenville, SC 29601
Curtis Warren Stodghill PO Box 2431 Greenville, SC 296022431

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert C. Wilson Jr. 201 Whitsett St. Greenville, SC 29601
David A Lloyd 230 Spindale St Ste 2 Spindale, NC 28160

ATTORNEY(S) FOR THE DEFENDANT(S)

____
Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

RECEIVED JUL 09 2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

2013 JUL -3 A 9:27

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	2010-CP-23-1646
Kyle Pertuis, Plaintiff, vs. Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond, Larkin Hammond, Defendants.	**ORDER**

This case came before this Court for a bench trial on May 28, 29, 2013. Plaintiff's claim, essentially, was that Defendants Mark and Larkin Hammond, ("MLH"), had oppressed Plaintiff as a minority shareholder in the corporate Defendants. As relief, Plaintiff sought that this Court order a buyout of Plaintiff's shareholding in the three corporate Defendants. Plaintiff has also sought payment for shareholder distributions which were declared by the three corporate Defendants, but which Plaintiff never received. Plaintiff additionally sought compensation for the termination of his employment by MLH.

Plaintiff testified that he had been employed by MLH to work for the three corporate Defendants as Managing General Partner for the restaurants owned by the corporate Defendants. Plaintiff's worked for Defendants for 9.5 years; Plaintiff was responsible for the operations of 3 restaurants and approximately 100 employees. Plaintiff had acquired a 10% ownership in Beachfront Foods, Inc., ("BFI"), and in Lake Point Restaurants, Inc., ("LPR"), by operation of graduated employee stock vesting plans.

Eq

Defendant Mark Hammond testified that Plaintiff had become, at the least, a 1% shareholder in Front Roe Restaurants, Inc., ("FRR"). Defendant Mark Hammond disputed, however, that Plaintiff was a 10% shareholder. Hammond testified that there had been a document which set forth a vesting schedule so that, when FRR reached gross profit of $500,000 for a fiscal year, Plaintiff would become a full 10% shareholder. Hammond testified that FRR had gross profit of $361,498 in 2008, which did not qualify Plaintiff for a 10% ownership position in FRR. Hammond testified that the FRR vesting schedule could not be found. Defendant Larkin Hammond did not attend the trial of this case to corroborate Defendant Mark Hammond's testimony.

Plaintiff presented an exchange of emails which occurred during the early summer of 2009. The emails presented an offer from Plaintiff, apparently accepted by MLH, that Plaintiff was to become a 10% shareholder in FRR. Plaintiff testified that he endeavored to secure formal documentation of his 10 % share ownership, to no avail.

For Plaintiff, Dr. Charles Alford, Ph.D., testified as an expert witness as to the valuation of the corporate Defendants. Defendants presented Louis Manios, a local Public Accountant, to testify as to the valuation of the corporate Defendants. The Court finds, by virtue of his excellent credentials, Dr. Alford's testimony to be more persuasive.

Based on the testimony presented and the documents introduced into the record of this case, the Court makes the following findings of fact and conclusions of law:

1. Plaintiff and Defendants owned and operated a *de facto* partnership from Greenville.

This Court finds that Plaintiff was the Managing General Partner, in charge of the operations at the three corporate Defendants. From the clear, uncontroverted testimony of

Ew

Defendant Mark Hammond, Dr. Charles Alford, and Louis Manios, this Court finds that there had been considerable movement of corporate funds between the three corporate Defendants, for which Defendants did not produce any documentation in the record of this case. Defendant Mark Hammond testified that there had been no shareholder meetings, nor had there been any meetings of the board of directors, of any of the three corporate Defendants.

The record of this case presents other examples of disregard for corporate formalities. Defendant Mark Hammond testified that, without any corporate formality, MLH conveyed a boat to Plaintiff to avoid liability and high insurance premiums. It is worth noting that the three corporate Defendants and the majority shareholders were all represented by same counsel. Throughout, there has been a dearth of respect for proper corporate governance amongst the three corporate Defendants, blurring the distinction between the corporate Defendants. Accordingly, this Court finds and concludes, applying the standards articulated in *Magnolia North Prop. Owners' Ass'n* v. *Heritage Communities, Inc.*, 725 SE2d.112, 397 SC 348 (Ct. App. 2012), that MLH and Plaintiff operated the three corporate Defendants as a *de facto* partnership of the corporate entities. From Plaintiff's title, "Managing General Partner," from the joint and unified internet web site for the three corporate Defendants, and from the parties' email, the Court further finds that the *locus* of the partnership is Greenville, S.C..

2. Plaintiff is a 10% shareholder in Defendants Beachfront Foods, Inc., and in Lake Point Restaurants, Inc.

MLH and the corporate Defendants conceded that Plaintiff was a 10% shareholder in Beachfront Foods, Inc., ("BFI"), and Lake Point Restaurants, ("LPR"). Accordingly, it is the law of this case that Plaintiff was, and is, a 10% shareholder in BFI and LPR.

Ewj

3. Plaintiff's shareholder ownership in Front Roe Restaurants, Inc.

Plaintiff and Defendants contested the level of shareholding of Plaintiff in Front Roe Restaurants, Inc., ("FRR").

In support of his case for 10% ownership of FRR, Plaintiff introduced an exchange of emails. In the exchange of emails, Defendant Mark Hammond offered to Plaintiff, on June 27, 2009, $50,000 in salary, conveyance of a boat, and 10% of net shareholder distributions. In reply to Mark Hammond's offer, Plaintiff counterproposed that Plaintiff receive a salary of $67,000, the conveyance of the boat, and 10% of net shareholder distributions, certainly in 2010, if Plaintiff had not already achieved 10% ownership in all three corporate Defendants. In response to Plaintiff's counterproposal, Mark Hammond advised on June 30, 2009, that the corporations would incorporate Plaintiff's changes into a forthcoming "employment agreement," which was to be delivered soon.

Defendant Mark Hammond then adjusted Plaintiff's salary to $67,000; Mark Hammond conveyed the boat to Plaintiff. Plaintiff argues that there had been a "meeting of the minds" and that the parties engaged, at least, in part performance of their understanding, as documented by the foregoing emails. Plaintiff asserted that, thereafter, Plaintiff was a 10% shareholder in all three corporate Defendants.

Defendant Mark Hammond, however, testified that Plaintiff would not become a 10% shareholder in FRR until FRR reached $500,000 in gross profit, under the terms of the missing FRR vesting schedule. Defendant Mark Hammond testified that the 2008 gross profit for FRR was $361,498. Calculation shows that $361,498 is 72% of $500,000. This Court finds and concludes that, despite the strength of Plaintiff's argument for 10% ownership from the exchange

Emy

of emails, FRR had reached 72% of Defendants' alleged qualifying threshold for Plaintiff to become a 10% owner of FRR under the missing FRR vesting schedule. In light of the "missing" FRR vestment schedule which was under the control of MLH, this Court has determined to equitably treat this disputed ownership issue as if there was a *graduated* vesting schedule in place[1], so that Plaintiff had achieved 72% of the goal of 10% shareholding in FRR, or 7.2% ownership of FRR. Based on the foregoing, this Court has determined to declare that Plaintiff's ownership in FRR is 7.2%. ("Equity regards and treats as done that which in good conscience ought to be done." *Wilkie* v. *Phila. Life Ins. Co.*, 197 SE 375, 187 SC 382 (1938); *Atwell* v. *Orr*, 589 F. Supp. 511 (D.Ct. SC, 1984).

4. Oppression of Plaintiff by MLH.

Plaintiff has alleged that MLH has oppressed him as a majority shareholder, in violation of their common-law corporate fiduciary duties to Plaintiff. The landmark SC case for the oppression of minority shareholders is *Kiriakides* v. *Atlas Food Systems and Services, Inc.*, 541 SE2nd 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court found, the following criteria sufficient to order a buyout of the minority shareholders:

1. Unilateral action to deprive the shareholder of correct shareholding percentage;
2. Refusal to offer opportunity to minority shareholder to participate in related enterprises;
3. Minority shareholder cannot participate in future salary, distributions, and profits;
4. Majority continues to reap the benefits from the corporations;

---

[1]The Court notes that the parties had employed a *graduated* employee stock vesting schedule for Plaintiff's stock acquisition in BFI and LPR, *supra*.

Em

5. Adequate financial strength in the corporations to afford a buyout;

6. Total estrangement between majority and the minority;

7. Low-ball buyout offer to minority;

8. No public trading in stock of corporation.

Kiriakides, pp. 267-268, pp. 342-343, supra.

This case presents all of the facts which the *Kiriakides* court used as a basis for a court-ordered buyout. This Court has also considered legal authority from North Carolina, submitted by Defendants, which provides additional support for the foregoing analysis: *Meiselman* v. *Meiselman*, 307 SE2d 551, 309 NC 279 (S.Ct. 1983).

Plaintiff presented evidence that he was excluded from a real estate opportunity in connection with LPR. Likewise, cross-examination established that Defendants MLH had opened a new restaurant, "Grill Marks," using funds from FRR, without offering to allow Plaintiff to participate in the new venture, while using funds from a corporation of which Plaintiff was a shareholder. These are classic examples of misappropriation of corporate opportunities by the majority shareholders and are oppressive to the minority shareholder.

This Court finds that Defendants continued to frustrate Plaintiff by changing the threshold for Plaintiff to become a 10% shareholder in FRR and by failing to formally document the agreement memorialized in the email exchange of 2009. Post-termination examples of oppressive conduct by MLH included resisting Plaintiff's request for financial records, demanding return of the boat conveyed to Plaintiff as compensation, and using corporate funds to contest Plaintiff's shareholder rights. Based on the foregoing, this Court finds that MLH committed substantial and material breaches of their corporate fiduciary duties to Plaintiff.

Ecy

5. Plaintiff established a fair market value for a court-ordered buyout.

Plaintiff presented Dr. Charles Alford, Ph.D., to testify, as an expert, as to the "fair market value" of the three corporate Defendants. Dr. Alford described his methodology and the data to which he applied his methodology. Essentially, Dr. Alford established that LPR had a fair market value of $507,000; Dr. Alford established that BFI had no value; Dr. Alford established that FRR had a fair market value of $1,376,000. Dr. Alford established that "Larkins" was a brand which would have value in this area, regardless of the particular location in which it was located. This Court finds that Dr. Alford presented an entirely believable and competent analysis for the Court's use, based on his credentials and based on his demonstrated application of methodology.

In response to Dr. Alford, Defendants presented Louis Manios, a local public accountant. On cross-examination, Mr. Manios conceded that no minority shareholder discount should apply to any buyout of Plaintiff's stock by the majority. Mr. Manios' testimony as to the dismal future presented for FRR was not credible and did not take into account the growth and vibrancy of the downtown area of Greenville and the value of the name "Larkins" as a brand. Interestingly, Mr. Manios conceded that his schedules did not conform to GAAP, which govern the format of Mr. Manios' schedules.

6. Distributions and bonuses.

Plaintiff testified that he never received shareholder distributions from FRR or from LPR, despite tax returns, and K-1 schedules which purported to show such distributions. Defendant Mark Hammond, himself, testified as to the murkiness of the "distributions" which were "given" to Plaintiff. Defendant Mark Hammond testified that Plaintiff's bonuses were disguised as

Ew

distributions, but that they weren't distributions. To further confuse the issue about bonuses and distributions, there were emails between the parties which showed that the distributions and bonuses were to be separate and cumulative. In response to questions from the Court, Dr. Alford expressed concern that the bookkeeping for Defendants was unclear on this issue. The Court shares Dr. Alford's reservations about the reliability of Defendants' accounting. The record of this case is replete with references to shareholder/corporate loans for which no documentation was presented. For this reason, the Court has determined to rely on the corporate Defendants' tax returns as a more credible source for the amounts of distributions which were not distributed to Plaintiff by the corporate Defendants.

This Court finds and concludes that the shaky accounting applied by Defendants MLH to the distribution/bonus compensation was an additional form of oppression and wrongdoing by Defendants MLH.

7. **Plaintiff shall not receive compensation for the termination of his employment.**

8. **Based on the testimony and exhibits which are the basis for the foregoing findings of fact and conclusions of law, this Court orders the following:**

Given the estrangement between the minority and the majority shareholders, there must be a parting of the ways among the shareholders. This Court adheres to sound judicial policy, as articulated under *Kiriakides* and *Meiselman, supra*, to provide for a fair buyout for an oppressed minority shareholder whose investment in a corporation is otherwise without a market. This Court concludes, then, that the most equitable way to achieve a just workout of the differences between the parties is the following:

a. Plaintiff shall receive $198,189 for a 7.2% shareholder interest in FRR;

b. Plaintiff shall receive $98,047 for his interest in BFI and in LPR;

c. Plaintiff shall receive the sum of $99,117 for distributions which he did not receive;

d. Plaintiff shall surrender all documents, records, stock certificates, and other corporate property to Defendants and shall execute all documents reasonably necessary to bring the corporate records to full compliance with good corporate governance.

It is ordered that the parties shall comply with the terms of this Order within 45 days of the date of this Order.

Judge Edward W. Miller

~~June~~ 7/2 2013