2012-212958

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin Dukes, III, Master in Equity

Opinion No. 2012-UP-274 (S.C. Ct. App. filed May 2, 2012)

Appellate Case Tracking No. 2012-212-958

Bill P. Passaloukas and Susie H. Passaloukas,
Individually and as Shareholders Derivatively
On Behalf of Zorba's, Inc.,.....Petitioners,

v.

Cynthia Bensch, Gary Bensch and Zorba's, Inc.....Defendants

Of whom Cynthia Bensch and Gary Bensch are the.....Respondents.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bill Passaloukas and Susie H. Passaloukas, Individually and as Shareholders Derivatively on Behalf of Zorba's, Inc., Appellants,

v.

Cynthia Bensch, Gary Bensch and Zorba's, Inc., Defendants,

Of whom, Cynthia Bensch and Gary Bensch are the Respondents.

Appeal From Beaufort County
Marvin Dukes, III, Master-in-Equity

Unpublished Opinion No. 2012-UP-274
Heard March 28, 2012 – Filed May 2, 2012

AFFIRMED

Frank F. Pape, Jr., of Atlanta, for Appellants.

Cynthia Bensch and Gary Bensch, pro se, for Respondents.

PER CURIAM: Bill Passaloukas and Susie H. Passaloukas (Appellants) appeal the master-in-equity's order denying their causes of action related to the conduct of their business partners, Cynthia Bensch and Gary Bensch. Appellants' claims included breach of fiduciary duty, unfair trade practices, and misappropriation of corporate assets, as well as individual and derivative claims for damages resulting from the alleged conversion of corporate and personal property. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Wilder Corp. v. Wilke, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App. 1996) (holding in an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence); Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct. App. 2004) (holding this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses).

AFFIRMED.

WILLIAMS, J., THOMAS, J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin Dukes, III, Master in Equity

Case No. 2000-CP-07-524

Bill P. Passaloukas and Susie H. Passaloukas,
Individually and as Shareholders Derivatively
On Behalf of Zorba's, Inc.,.....Appellants,

v.

Cynthia Bensch, Gary Bensch, Towne Center, LLC
and Zorba's, Inc. of whom Cynthia Bensch and
Gary Bensch are .....Respondents.

NOTICE OF MOTION AND MOTION

FOR REHEARING EN BANC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin Dukes, III, Master in Equity

Case No. 2000-CP-07-524

Bill P. Passaloukas and Susie H. Passaloukas,
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NOTICE OF MOTION AND MOTION

FOR REHEARING EN BANC

THE APPELLANTS HEREBY MOVE for a rehearing *en banc* pursuant to Rules 219, 221 (a) and 240 (I) of the SCACR. Alternatively, in the event that an *en banc* hearing is not allowed then a rehearing by the panel who previously heard this appeal. The reason for requesting a rehearing is that the Court misapprehended or overlooked several indisputable and documented facts as well as legal and equitable principles as set forth hereafter. A rehearing is required because the Court's decision has the effect of finally deciding the Appellants' case.

I. Rehearing En Banc is Allowed Because Issues Involve Novel Questions Which Must Be Settled and May be Necessary to Maintain Uniformity of Decision

Rehearing *in banc* is favored when consideration is necessary to secure or maintain uniformity of the Court's decisions or when the proceeding involves a question of exceptional

importance. Rule 219 (a), SCACR.

Question Involves Novel Set of Facts Implicating the Law Of Fixtures

Of importance to the case at bar is a question as to the scope and intent of the decisions concerning the application of the law of fixtures. This case involves a transfer of "leasehold improvements" ("Written Consent in Lieu of Organizational Meeting", R 289) from shareholders ("Bensches") to their corporation ("Zorba's"). A "Commercial Lease Agreement" (R 225) was executed on the same day. Thereafter Zorba's allegedly defaulted in payment of one month's rent and the Bensches evicted Zorba's using self-help.

The Master found: "I find that any fixtures were not the property of Zorba's pursuant to the lease and the law of this state and any fixtures were forfeited to the landlord upon default." Order, R 10. The Master did not identify any law nor did he cite the critical written documents in this case, especially the "Written Consent in Lieu of an Organizational Meeting". (R 289) which conveyed all of the leasehold improvements to Zorba's, the corporation which is the subject of this dispute. The conveyance states:

> The undersigned, by the execution of this Exhibit "A", do hereby transfer, grant and convey the **assets and interests referenced above** and further agree such conveyances, transfer and assignments, and agree that such transfers are being made free and clear of all liens or other encumbrances except as is otherwise provided above. The undersigned acknowledge by execution of this Exhibit "A" that they are **irrevocably making and completing such transfer**, and further agree to execute such other and additional documentation as is necessary to give further or recorded notice of such transfer. (emphasis added)
>
> R 289

When Zorba's allegedly defaulted in payment of rent, the Bensches evicted Zorba's using self help and took possession of all of the leasehold improvements. The Master and the three member panel of this Court have concluded, without citing critical facts or case law, that the leasehold improvements were forfeited when Zorba's allegedly defaulted in payment of one months' rent.

The governing principle is that the expressed intention of the parties determines

ownership of the fixture. See *Saye v. Hill*, 100 S.C. 21, 84 S.E. 307, 308 (1915) which states:

> While the manner in which a thing is attached to the soil may be of some value in determining whether it is a fixture or not, it does not afford an absolute or conclusive test. The intention with which it is so attached is usually a more controlling factor. Yet all the circumstances should be considered, especially as they throw light upon the intention. (emphasis added)

And *Pope v. McMillan*, 232 S.C. 100, 101 S.E.2d 55, 59 (1957) states:

> We know of **no legal barrier** to the voluntary sale of a common-law fixture, separate from the land upon which it is located, by the owner of both." (emphasis added).

Further, the law of fixtures, as it is usually applied, has no application to the case at bar. No analysis is required of each and every appellate decision. It is sufficient to say that those "fixture" cases deal with a complex variety of facts and circumstances which are entirely different from the facts in the case at bar. The Court of Appeals has emphasized that resolution of these disputes depends upon the relationship between the parties. *Hyman v. Wellman Enterprises, Inc.*, 337 S.C. 80, 522 S.E.2d 150, 152 (Ct.App. 1999):

> It has been noted that the principal cause of confusion in the law of fixtures is the failure to recognize the fact that there are various relationships under which the question may arise, and the same rule does not apply to all. Rather, the particular case must be considered with reference to the relation of the parties. (emphasis added).

The Appellants believe that even if Zorba's defaulted in the one rent payment, which is denied, that Zorba's still owned the leasehold improvements because they were "irrevocably" conveyed to Zorba's.

Are Forfeitures Of Corporate Assets Allowed Under The Circumstances of this Case?

Another question of importance is whether the Court will allow a forfeiture under the facts and circumstances of this case. Zorba's missed only one payment of rent. Neither the Master nor the panel of this Court, assessed or applied the principles set forth in *Kiriakides vs United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994) concerning whether the breach was "material". Forfeitures are not favored in law or equity. *Litchfield Co. of South Carolina, Inc. v. Kiriakides,* 290 S.C. 220, 225, 349 S.E.2d 344, 347 (Ct.App., 1986), citing

South Carolina Tax Commission v. Metropolitan Life Insurance Co., 266 S.C. 34, 221 S.E.2d 522 (1975). They will be allowed only when intent is clear and no other reasonable construction is possible. *Id.*, citing *Hardin v. Horger,* 252 S.C. 298, 166 S.E.2d 215 (1969). Courts will seize upon even slight evidence to prevent a forfeiture. *Id.*, citing *Clardy v. Sovereign Camp, W.O.W.*, 193 S.C. 444, 8 S.E.2d 748 (1940).

Does The Shareholder/Landlord's Obligation to "Mitigate" Trump The Shareholder/Landlord's Fiduciary Duties to Strictly Account for Corporate Assets?

The Master and the panel of this Court have concluded that the Bensches, as landlords and because of the failure to make one payment of rent, were entitled to "mitigate" their damages. Because of that right to mitigate the Bensches were held to be entitled to a "windfall" from the eventual sale of Zorba's restaurant for the sum of $75,000. The Master and the three member panel of this Court determined that the value of the restaurant was its liquidated value in spite of the fact that the restaurant was never liquidated. It was sold in one package for $75,000. That is error because the Court has stated that a business should be valued, not at liquidated value, but at its fair market value as a going business. *Mazloom v Mazloom*, 382 S.C. 307, 675 S. E. 2d 746 (2009). In *Mazloom* the Court of Appeals found that the business which was the subject of that lawsuit was actually sold to a third party in an arm's length transaction for $345,000. The Court therefore concluded that the fair market value of that business was the sale price $345,000. In this case, as in *Mazloom*, Zorba's restaurant was actually sold. It sold for $75,000.

Is the Owner of the Leasehold Improvements Entitled to the Increase in Rents Due to the Added Value of the Leasehold Improvements?

One question of importance is whether Zorba's was entitled to the increase in rents earned by the landlords, the Bensches, as a result of the "leasehold improvements" which were conveyed by the Bensches to Zorba's.

In 1919 the Supreme Court's determined in *Coggins v. McKinney*, 112 S.C. 270, 99 S.E. 844 (1919) that if the owner of the land received increased rents as a result of improvements

made by his son-in-law, he should pay the increased rents to the son-in-law because the increase was "the fruit of Coggins' expenditure, and it belonged to him". *Id.* 99 S.E. at 845. Also see *Carjow, LLC v Rev. John D. Simmons*, 349 S.C. 514, 521, 563 S.E.2d 359 (2002) where the Supreme Court allowed lost rents based upon the difference in the rental value with and without fixtures.

What Factual Findings Require Deference to the Trial Court?

The panel of this Court determined that it must defer to the Master's factual findings because he is in the best position to judge the credibility of the witnesses. See the analysis in Section II immediately below concerning the standards for deference required by the case law, the rules, a previous decision of this Court in this very case and the Master's findings, lack of citation of supporting facts, and failure to fully identify and analyze applicable legal and equitable principles required by this Court in a previous decision.

Fairness and Guidance

The Appellants believe that these circumstances must be resolved, not only for bringing justice and fairness to the parties in this case, but to provide clear guidance for future litigants and attorneys who are charged with the responsibility for drafting agreements for their clients.

II. The Court Has Erred in its Determination That it must Defer to the Master's Findings

In its *Per Curiam* the Court has determined that it must defer to the Master's findings of fact because he was in a better position to determine the credibility of the witnesses. It is error for six reasons.

Findings Must Be "Specially and Separately" Stated, Detailed

First, the Master's findings are not the kind of findings to which this Court must defer. The findings must be sufficient to allow this Court to determine whether the law has been properly applied. *In the Matter of the Treatment and Care of Luckabaugh*, 351 S.C. 122, 132, 568 S.E.2d 338, 343 (2002). In *Luckabaugh* the Supreme Court was concerned with an order of the lower court which stated:

> Upon hearing the evidence I find that the State failed to prove beyond a reasonable doubt that the Defendant meets the definition of a `sexually violent predator'. . . [e]ven if Defendant suffers from the personality disorder known as sexual sadism, the State failed to show this condition makes it likely that the Defendant will engage in future acts of sexual violence if not confined in a secure facility for longer term control, care and treatment.

The Supreme Court determined that this findings and conclusion was not sufficient. It cited Under Rule 52(a), SCRCP which requires "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." The Supreme Court held that this means that trial courts must write their findings specially and separately to allow a reviewing court to determine from the record whether the legal conclusions which underlie it represent a correct application of the law. 351 S.C. at 132. It held that detailed findings are required:

> The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.
>
> 351 S.C. at 132.

The Supreme Court reasoned that the absence of factual findings makes its task impossible because the trial court's rationale in support of its decision would be left to speculation. 351 S.C. at 132. It concluded, "To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give deference." 351 S.C. at 133. This is especially a problem in this instance because the Pro se Appellees have completely failed to cite any evidence from the record in support of the Master's conclusions. This Court now has the "chore of sorting through the record to review contradictory testimony" a task which is not properly placed on these Appellants or this Court. In no place and at no time has any trial judge or appellate court in the twelve years of this lawsuit cited any evidence to support the Master's determinations.

Court of Appeals Ordered a Detailed, Strict Accounting and Full De Novo Review of All **Legal And Equitable Issues**

Second, the Court of Appeals previously ruled that the Master must conduct a

"strict accounting" and "detail the contributions by the parties; the identity and value of equipment, furnishings, and other items belonging to Zorba's at the time of the eviction; the disposal of any property belonging to Zorba's; any revenues from the disposal of Zorba's property; and Zorba's debts, both paid and currently outstanding." (emphasis added).

R 14.

The Court of Appeals further ordered a "full de novo review of all legal and equitable issues". (emphasis added) R 14.

The Master's order does not provide the "full de novo review" required by the Court of Appeals. His Order does not make any attempt to construe the critical intentions of the parties set forth within the "Commercial Lease Agreement"(R 225), the "Shareholders' Management Agreement" (R 247), the "Written Consent in Lieu of Organization Meeting" or the "Agreement of Purchase and sale (sale of restaurant for $75,000). R 283. The intentions of the parties as set forth in these written documents are crucial. The Master's Order fails to cite any evidence in support of its ultimate conclusion that the eviction was proper, that the Bensches have the right to re-enter and take possession of Zorba's assets, that Zorba's assets were forfeited.

The Master found only that the Lease provided for default if rent was not paid and that eviction could occur if default not cured within ten days (Order, R 6) and that the Bensches evicted Zorba's, changing locks, threatening criminal prosecution if Passaloukases attempted to re-enter. Order R, 7.

The Master found that Zorba's was in default at time of eviction, that it lacked operating capital, lacked shareholder consensus and was in a slow season. Order, R 8. He found that there was no hope of paying rents and that Zorba's had no lease. That is not correct. Documented evidence contradicts it. There was more than "hope" there were valuable assets, including, among other things, the Bensches' obligation to lend $20,000, cash. See Exceptions X, XII, Brief of Appellants, p 24-25.

The Master found that the only value of a restaurant without a lease is in the "discounted breakup value of its non-fixture assets", citing erroneously Passaloukases' expert witness. Order,

R 8. There is no evidence from the Passaloukases expert that the only value in the restaurant was its "discounted breakup value of non-fixture assets. See Exception XVIII, Brief of Appellants, p 36-39.

The Master did find that there were legitimate questions as to the timing of the notice but dismissed that legitimate issue because he also found that there was no question that Zorba's was in default and that there was therefore no wrongful eviction. Order, R 8. None of these findings address the "legitimate" issues raised by the Passaloukases about the undisputed fact that the eviction took place at least one day before the Bensches were entitled to undertake an eviction, that the notices were confusing and contradictory, that the Bensches were out of town and could not be found. See Exception IX, Brief of Appellants, p 17-19.

These findings do not address the Court's duty to determine whether the default was "material" under the principles set forth in *Kiriakides vs United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). See Exception XII, Brief of Appellants, p 21-24.

While the Master did find that no party was obligated to fund the corporation to prevent default (Order, R 9), that finding was conclusory only and the Master did not address the Passaloukases' claims that the Bensches were in prior breach of their obligations, defaulting in their obligation to lend $20,000 in cash to Zorba's. See Exception X, Brief of appellants, p 19-20. The Master failed to address the matter of the Bensches' prior breach to make needed repairs to the restaurant. See Exception XI, Brief of Appellants, p 20-21. The Master failed to address South Carolina law which does not allow a landlord to distrain property of a tenant without filing a distraint action. He did not address the lease provision which allows the Benches only to remove Zorba's assets from the premises. R 229 ("Remedies Upon an Event of Default").

The Master made no findings concerning the conveyance of the leasehold improvement to Zorba's which is set forth in Exhibit "A" of the "Written Consent in Lieu of an Organizational Meeting". R 290 ("Shareholder Loans - $20,000, cash "and leasehold improvements").

Master's Findings Are Not Based Upon Issues Which Depend on Credibility

Third, the Master's rulings are not based upon any issues where credibility is an issue. The Master determined that Zorba's was not entitled to the $75,000 proceeds from the sale of the restaurant. The Master stated the reason to be the expert's testimony that "A restaurant without a lease, according to Plaintiff's expert testimony, has value only in the discounted break-up value of its non-fixture assets." Order, R 8. The Master was crediting the expert testimony, he was not discrediting it. However, he did not recite the expert's testimony correctly. It is not the expert's testimony which is questionable, it is the Master's view of what the expert said. See Exception XVIII, Brief of Appellants, p 36-39.

Strict Accounting Requires Documentary Evidence, Not Oral Testimony From Witnesses

Fourth, the strict accounting required by applicable legal principles require documented evidence and a court may not rely on the credibility of a witness. An example of the Master's error in this respect is his conclusion that Zorba's could not be awarded any part of the $75,000 from the sale of the restaurant because the sale included "consulting fees and additional square feet". Order, R 10. This conclusion violates the legal principle that the Bensches have the burden of proving that they applied the corporate assets with documented evidence. The Benches did not offer any evidence of the value which was added to the sale of the restaurant by virtue of "consulting" or added "square feet". The "Agreement of Purchase and Sale" (R 270) itself does not allocate any monetary value to "consulting" or added "square feet". The document speaks for itself. The applicable law does not permit the Bensches to suggest anything differently. See Exception VI, Brief of Appellants, p 14-15.

Master's Findings Are Conclusory Only With No Supporting Factual Findings

Fifth, although the Master has ruled against the Passaloukases with respect to several other critical issues his rulings are conclusory only and are not supported by any findings at all. For example, the Master ruled that the leasehold improvements (the Master refers to them as "fixtures") were not the property of Zorba's and that they were forfeited to the landlord upon default. He stated only that they were not property of Zorba's pursuant to lease and law of this

state and fixtures were forfeited to landlord upon default. Order, R 10. These are not findings of fact. They are only a conclusion of law and identify no applicable legal principles or the supporting facts upon which the ruling relies. The Master does not cite or attempt to construe the provisions of Exhibit "A" of the "Written Consent in Lieu of an Organizational Meeting". R 290 ("Shareholder Loans - $20,000, cash "and leasehold improvements"). He does not cite any provision of the "Commercial Lease Agreement". R 225 (Paragraph 11.a)(I) providing that upon default the landlord may "remove Tenants and its effects" and without declaring a forfeiture.) R 229.

Most importantly, related to the alleged "forfeiture, and wholly contradicting the view that Zorba's assets were "forfeited", is the written "Resolution No. 1" dated in February, 2000, following the eviction. R 332. The Resolution states that the equipment and assets shall be maintained in trust by Nicoli's Café until such time as the assets and liabilities of Zorba;s are resolved by written agreement of the shareholders of Zorba's or Order of the Court." There is no question of credibility at issue. This document is conclusive. Zorba's assets were not forfeited.

The Master concluded that the Passaloukases' claim for unpaid salary was unproven. Order, R 10. This, again, is only a conclusion. The Master did not make any findings to support this conclusion. There is a written agreement and an agreed accounting which is not dependent on any issue credibility.

Master Failed to Make Findings on Several Claims

Sixth, the Master failed to make any findings at all or even consider or rule on several issues. The Master failed to rule on the Passaloukases' claims that Zorba's assets include the following: $481 received by the Bensches from the termination of the insurance policy; $6,000 stock in trade; $404 in cash; $1,000 security deposit; $1,885 as last month's rent; $6,288.32 in reimbursements made to the Bensches; and $1,576 in expenses incurred by the Passaloukases to defend a claim for wages by a former employee.

III. Based Upon the Master's Own Findings/Conclusions The Master's Accounting Is Erroneous.

The Master's Accounting

The Master's accounting is roughly based on the method for settling accounts between partners under S.C. Code § 33-41-510 which sets for rules for determining the rights and duties of partners as to partnership assets, contributions and liabilities. Subparagraph (1) provides that partners must be repaid their contributions, whether by way of capital or advances and that they must share equally in the profits subject only to the liabilities which include those owed to the partners. It is not the correct method. However, for the sake of argument and because it is instructive the Passaloukases will examine what is wrong with the accounting.

The Master first equalized the contributions of the parties. He then credited the full amount of the difference, $3,619.93, to the Bensches. He then gave the Bensches full credit for liabilities which he found they had incurred, $1,250. The Master then gave the Passaloukases one-half credit for the non-fixture assets which they had contributed ($719) and full credit for the value of personal items which the Bensches failed to account for ($1,000). The Master finally concluded that the partnership accounts were out of equal balance and that the Bensches were therefore owed $3,150.93 by the Passaloukases. However, the Master washed that away by concluding that the Bensches had failed to make the claim against the Passaloukases and because of their mishandling of the Passaloukases' personal items.

Tables make it easier to visualize what the Master did and what he did wrong. Table A sets forth the Master's accounting.

Table A: Master's accounting.

Items	Credits to Bensch Capital Account	Debits to Bensch Capital Account	Remaining Capital Account Balance of Bensch	Credits to Passaloukas Capital Account	Debits to Passaloukas Capital Account	Remaining Capital Account Balance of Passaloukas
Capital Account	$62,995.09			$59,375.16		
Adjust Capital Account	$3,619.93				$3,619.93	
Accountant's Final Bill	$300.00				$300.00	

Pay to Eleftheriou	$950.00				$950.00	
Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Totals:	**$67,865.02**	**$4,869.93**	**$62,995.09**	**$64,245.09**	**$4,869.93**	**$59,375.16**
Balance/Imbalance						**$3,619.93**

The Court will note that an imbalance remains.

Master's First Error Is Failing to Equalize All Items of the Accounts: Table B

First, the central rule in this type of accounting is to "equalize" the accounts of each partner. The Master, as seen in Table A, with respect to the "non-fixture" items which it valued at $1,439.00, credited the Passaloukases only one-half of that value, consistent with the Master's apparent assumption that these equal partners are obligated for one-half of the debts and one-half of the assets of the business. If this method of accounting is to be utilized the Master must apply the method consistently throughout. He did not apply his equalization rule to any other item. In the first instance of error, the Master simply moved the $3,619.93 difference in contributions from the Bensches to the Passaloukases. The proper balance is to split everything in half. Splitting in half ($1,809.97) places the Bensches and Passaloukases in proper equal balance, $61,185. The Master also failed to equally balance the payments which the Bensches allegedly paid to Eleftheriou ($950) and their accountant ($300). Table B makes that correction.

Table B: First Corrected Accounting.

Items	**Credits to Bensch Capital Account**	**Debits to Bensch Capital Account**	**Remaining Capital Account Balance of Bensch**	**Credits to Passaloukas Capital Account**	**Debits to Passaloukas Capital Account**	**Remaining Capital Account Balance of Passaloukas**
Capital Account	$62,995.09			$59,375.16		

Adjust Capital Account ½ of $3,619.93	$1,809.97				$1,809.97	
Accountant's Final Bill	$300.00				$300.00	
Pay to Eleftheriou	$950.00				$950.00	
Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Totals:	**$66,055.06**	**$4,869.93**	**$61,185.13**	**$64,245.09**	**$3,059.97**	**$61,185.13**
Balance/Imbalance						**$0.00**

With this correction, the accounts are balanced.

Master's second error is Failure to Account for $6,288.32 Reimbursement to Bensches: Table C

There is a further error in the Trial Court's accounting. The reason is the Trial Court's failure to debit the Bensches' account for the reimbursement which they took in the sum of $6,288.32. Plts' Ex # 12; TR Vol I, p 153, l 9 - 13. This document does not depend upon the credibility of any witness. It is a written accounting which was admitted by the Bensches. R 295. See Exception XXVI, Brief of Appellants, p 43.

Table C: Second Corrected Accounting:

Items	Credits to Bensch Capital Account	Debits to Bensch Capital Account	Remaining Capital Account Balance of Bensch	Credits to Passaloukas Capital Account	Debits to Passaloukas Capital Account	Remaining Capital Account Balance of Passaloukas
Capital Account	$62,995.09			$59,375.16		
Adjust Capital Account	$1,809.97				$1,809.97	
Accountant's Final Bill	$300.00				$300.00	
Pay to Eleftheriou	$950.00				$950.00	

Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Reimbursement to Bensch ½ of Total Value $6,288.32		$3,144.16		$3,144.16		
Totals:	**$66,055.06**	**$8,014.09**	**$58,040.97**	**$67,389.25**	**$3,059.97**	**$64,329.29**
Balance/Imbalance						**$(6,288.32)**

With this second adjustment the Bensches owe the Passaloukases the sum of $6,288.32.

Master's Third Error is The Failure to Account for the $62,995.09 Reimbursement to Bensches: Table D

The most interesting element of this entire lawsuit is the fact that the Master, and now this Court, exercising its equitable jurisdiction, seems to be willing to allow the forfeiture all of the assets of Zorba's (except one-half of the non-fixture items) without accounting for the windfall[1] awarded to the Bensches or accounting for any portion of that windfall in balancing the accounts of these "partners". The only articulated reason is the landlord's duty to "mitigate". Order, R 6, 8. The Passaloukases have found no law which states that the theory of mitigation trumps a fiduciary's duty to strictly account for property which he holds in trust for someone else. This mitigation theory cannot be sustained. See Exception II, Brief of Appellants, p 9-11. The "forfeiture" cannot be sustained. Zorba's assets were not "forfeited". See the written "Resolution No. 1" dated in February, 2000, following the eviction. R 332. The Resolution states that the equipment and assets shall be maintained in trust by Nicoli's Café until such time as the assets and liabilities of Zorba;s are resolved by written agreement of the shareholders of Zorba's or Order of the Court." There is no question of credibility at issue. This document is conclusive.

One egregious error with the Master's accounting is awarding the Bensches a credit in the

[1] The Master expressly found that the Bensches have received a "windfall". Order, R 6, 8.

sum of $62,995.09 in the balancing of the "partners" accounts in spite of the fact that the Bensches have been fully reimbursed their contributions when all of the assets were forfeited to them. The next Table D makes this correction by again accounting for one-half of the contributions in the sum of $31,497.55.

Table D: Third Corrected Accounting

Items	Credits to Bensch Capital Account	Debits to Bensch Capital Account	Remaining Capital Account Balance of Bensch	Credits to Passaloukas Capital Account	Debits to Passaloukas Capital Account	Remaining Capital Account Balance of Passaloukas
Capital Account	$62,995.09			$59,375.16		
Adjust Capital Account ½ Total Value $3,619.93	$1,809.97				$1,809.97	
Accountant's Final Bill	$300.00				$300.00	
Pay to Eleftheriou	$950.00				$950.00	
Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Reimbursement to Bensch ½ of Total Value $6,288.32		$3,144.16		$3,144.16		
Forfeiture to Bensches ½ Total Value $62,995.09		$31,497.55		$31,497.55		
Totals:	**$66,055.06**	**$39,511.64**	**$26,543.42**	**$98,886.80**	**$3,059.97**	**$95,826.84**
Balance/Imbalance						**$(69,283.42)**

The Passaloukases are therefore owed the sum of $69,283.42 by the Bensches.

Master's Fourth Error is The Failure to Account for Certain Miscellaneous Liabilities Incurred by the Passaloukases and Assets Taken By the Bensches: Table E

Further adjustments are required which are not affected by credibility as the items are

supported by written, objective evidence. The Master also failed to make any finding at all on these issues. These items include stock in trade ($6,000), Passaloukases' expenses for defending Eleftheriou's lawsuit ($1,576.00), refund of a premium for an insurance policy ($481), cash ($404), last month's rent ($1,885) and the security deposit ($1,000). Adhering to the Trial Court's accounting method for splitting debts and assets equally, one-half of the value of each of these assets are debited to the Bensches. Table E accounts for these items. For citation of evidentiary support in the record see Exceptions XXI, XXII, XXIII, XXIV and XXV set forth in *Brief of Appellants,* pages 41-43.

Table E: Fourth Corrected Accounting

Items	Credits to Bensch Capital Account	Debits to Bensch Capital Account	Remaining Capital Account Balance of Bensch	Credits to Passaloukas Capital Account	Debits to Passaloukas Capital Account	Remaining Capital Account Balance of Passaloukas
Capital Account	$62,995.09			$59,375.16		
Adjust Capital Account ½ Total Value $3,619.93	$1,809.97				$1,809.97	
Accountant's Final Bill	$300.00				$300.00	
Pay to Eleftheriou	$950.00				$950.00	
Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Reimbursement to Bensch ½ of Total Value $6,288.32		$3,144.16		$3,144.16		
Forfeiture to Bensches ½ Total Value $62,995.09		$31,497.55		$31,497.55		
Defense of Lawsuit by Passaloukas ½ Total Value $1,576.00		$788.00		$788.00		

Insurance Policy Premium ½ Total Value $481.00		$240.50		$240.50		
Stock in Trade ½ Value of $6,000.00		$3,000.00		$3,000.00		
Cash ½ Total Value $404.00		$202.00		$202.00		
Totals:	**$66,055.06**	**$43,742.14**	**$22,312.92**	**$103,117.30**	**$3,059.97**	**$100,057.34**
Balance/Imbalance						**$(77,744.42)**

If the Court agrees with this theory is supported by the accounting evidence Table E shows that the Passaloukases are entitled to an award in the sum of $77,744.42.

The Final Error is the Failure to Account for the $75,000 Sale of the Restaurant: Table F

The Court may not defer to the Master on the Passaloukases' claim to a share of the $75,000 sale to MiTierra's. The Master's conclusion is not supported by any credible factual findings. The Master made only two factual findings with respect to this claim. He found that the sale of the restaurant included "consulting fees and additional square feet". Order, p 5. He found that "A restaurant without a lease, according to Plaintiff's expert testimony, has value only in the discounted break-up value of its non-fixture assets." Order, p 3. These two findings are not supported by the evidence.

First, the Bensches have the burden of proof because of their duty are fiduciaries. See Exceptions II, VI, Brief of Appellants, p 9-11, 14-15. The burden is not met unless they offer up documentary evidence. It is not sufficient to show that a part of the sale required the Bensches to consult. They must place a value on the consulting. They did not. There is also no evidence to show that the restaurant's value was affected by any additional square feet. The Purchase Agreement itself allocate $37,500 to equipment and $37,500 to good will. No allocation is made for consulting or added square feet. The expert witness testified that the value of the restaurant was $75,000. See Exception XVIII, Brief of Appellants, p 36-39. Accordingly, Table F, formatted using the Master's method of equalizing the "partner"'s accounts follows.

Table F: Fifth Corrected Accounting

Items	Credits to Bensch Capital Account	Debits to Bensch Capital Account	Remaining Capital Account Balance of Bensch	Credits to Passaloukas Capital Account	Debits to Passaloukas Capital Account	Remaining Capital Account Balance of Passaloukas
Capital Account	$62,995.09			$59,375.16		
Adjust Capital Account ½ Total Value $3,619.93	$1,809.97				$1,809.97	
Accountant's Final Bill	$300.00				$300.00	
Pay to Eleftheriou	$950.00				$950.00	
Non-Fixture Items ½ of Total Value ($1,439.00)		$719.00		$719.00		
Conversion of Passaloukas Personal Property:		$1,000.00		$1,000.00		
Adjustment for Passaloukas		$3,150.93		$3,150.93		
Reimbursement to Bensch ½ of Total Value $6,288.32		$3,144.16		$3,144.16		
Forfeiture to Bensches ½ Total Value $62,995.09		$31,497.55		$31,497.55		
Defense of Lawsuit by Passaloukas ½ Total Value $1,576.00		$788.00		$788.00		
Insurance Policy Premium ½ Total Value $481.00		$240.50		$240.50		
Stock in Trade ½ Value of $6,000.00		$3,000.00		$3,000.00		
Cash ½ Total Value $404.00		$202.00		$202.00		
Sale of Restaurant ½ Total Value $75,000.00		$37,500.00		$37,500.00		
Totals:	**$66,055.06**	**$81,242.14**	**$(15,187.09)**	**$140,617.30**	**$3,059.97**	**$137,557.34**
Balance/Imbalance						**$(152,744.42)**

The net sum which must be awarded to the Passaloukases is $152,744.42.

Salary to Passaloukas

The Master concluded, "I find any claim for unpaid salary to be unproven and therefore denied." Order, R 10. The findings are not sufficient enough for an appellate court to ensure the law has been faithfully executed. The failure to award damages to Bill Passaloukas for unpaid wages is erroneous. See Brief of Appellants Exception XXVIII, p 45, for recitation of supporting facts from the record. A determination is not based only upon oral testimony. It is based upon written agreement (R 254) and a written full accounting, including all monthly statements and deposits and checks. R 829-915. The Bensches' accountant presented a "Balance Sheet" for the year ending December 1999 and a general ledger and summary showing all payments of payroll. R 918-929.

Interest

If the Court determines that any assets must be brought into the corporate fund, the Appellants ask the Court to consider awarding interest on all items of the accounting as set forth in Exception XXX, Brief of Appellants, p 46-48.

Rents

If the Court determines that the leasehold improvements belonged to Zorba's and were not forfeited, the Appellants again ask the Court to consider awarding the increased value of the rents as set forth in Exception XX, Brief of Appellants, p 39-41.

Attorneys Fees

If the Court determines that the Appellants are entitled to any actual damages then the Appellants again ask the Court to award attorneys fees as set forth in Exception XXVII, Brief of Appellants, p 43-45.

Punitive Damages

If the Court determines that the Appellants are entitled to any actual damages the Appellants again ask the Court to reverse and remand the case to the Master for a consideration

of punitive damages as set forth in Exception XXXIII, Brief of Appellants, p 50-52.

IV. Conclusion

In summary, there are several documents which do not depend upon the credibility of any witness which the Court may have misapprehended or overlooked in its consideration of the merits of this appeal. The documents include the Resolution No 1, cited above, which conclusively determines that the assets of Zorba's were not forfeited. The Bensches' corporation was holding the assets in trust until the dispute was resolved by this Court. The Master wholly misapprehended the testimony of the expert witness, Robert Steinberg. The Master erred in concluding that the value of the restaurant was its liquidated value. The restaurant was not liquidated. It was operated for two months and then sold for $75,000. The law prohibits the Court from using the liquidated value. The Master incorrectly concluded that the Bensches were entitled to evict Zorba's in the event of the one "default" in payment of December rent. South Carolina law, especially including *Kiriakides vs United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994) does not favor forfeitures. The "leasehold improvements" were irrevocably transferred to Zorba's. They were not "forfeited" even if there was a right to evict. No agreement or rule of law allows for it. Zorba's is entitled to the increased rents. A strict accounting is required.

Respectfully submitted this 15th day of May, 2012.

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The South Carolina Court of Appeals

Bill Passouloukas and Susie H. Passouloukas, Individually and as Shareholders Derivatively on Behalf of Zorba's, Inc., Appellants,

v.

Cynthia Bensch, Gary Bensch and Zorba's, Inc., Defendants, Of whom, Cynthia Bensch and Gary Bensch are the, Respondents.

Appellate Case No. 2010-161606

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

FILED
22 June 2012

cc:
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Cynthia Bensch, Gary Bensch, and Zorba's

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