

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 GREG MARCUS SIMMONS and)
 JERMAINE ROBINSON, both)
 individually and derivatively on behalf)
 of Simmons Family Holdings, LLC,)
 a South Carolina Limited Liability)
 Company,)
)
 Plaintiffs,)
)
 v.)
)
)
 PALMER E. SIMMONS, individually)
 and as Trustee of the Charles E.)
 Simmons, Jr. and Rosa G. Simmons)
 Revocable Trust dated May 5, 2016,)
 and CHARLESETTA S. AIKEN,)
)
 Defendants.)
)
 and)
)
 SIMMONS FAMILY HOLDINGS, LLC,)
)
 as a nominal Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2019-CP-07-01246

ORDER DENYING DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT AND GRANTING
 IN PART, PLAINTIFFS' MOTION FOR
 SUMMARY JUDGMENT

THIS MATTER came before the Court on cross motions for summary judgment pursuant to Rule 56, S.C.R.C.P. The record reflects that all discovery, with the exception of Plaintiffs' Motion to Compel¹, has been completed. The Verified Second Amended Complaint, the Answer thereto, the various affidavits and memoranda filed with this Court, and the deposition excerpts filed of record therewith, constitute the factual record of this case and that the Court may dispose of this case as a matter of law. Both motions were heard via WebEx by the Court on March 1, 2021.

¹ Plaintiffs' Motion to Compel was heard after the motions for summary judgment and is addressed by a separate Order.

Ehrick K. Haight, Jr., Esq. and Stacey S. Collins, Esq. appeared on behalf of Jermaine Robinson and Greg Marcus Simmons (“Plaintiffs”) and Mark S. Berglind, Esq., Steven Meyer, Esq. and Antonia T. Lucia, Esq., appeared on behalf of Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016 (the “Trust”), and Charlesetta Aiken (“Defendants”). Michael Hawanczek, the receiver appointed in this case did not appear, nor did Thomas A. Pendarvis, Esq. counsel for Simmons Family Holdings, LLC (“SFH”), the nominal Defendant in this action. Plaintiffs are seeking summary judgment as to all ten (10) enumerated causes of action set forth in their Second Amended Complaint. Defendants are seeking summary judgment on the claim that Plaintiffs are not members in SFH.

Upon reviewing the verified pleadings, the record, the affidavits and memoranda submitted, including the deposition excerpts, the evidence and the applicable law, and hearing statements and representations of counsel, the Court finds that Plaintiffs are entitled to partial summary judgment on their first cause of action in so far as it seeks a declaratory judgment establishing that they are members of SFH. Their percentage of interest is a fact to be determined at trial.

The Court further finds that Defendant Palmer E. Simmons made an unauthorized distribution to himself or to his company and that the Plaintiffs are entitled to partial summary judgment on their ninth cause of action for money had and received. The amount of unauthorized contributions is a fact to be determined at trial.

Plaintiffs’ Motion for Summary Judgment as to their claims for breach of contract, breach of fiduciary duty, conversion, breach of contract accompanied by fraud, interference with a contractual relationship and disassociation, are denied. Defendants’ motion for summary judgment is denied in its entirety.

FACTS

Simmons Family Holdings, LLC (“SFH”) is a real estate holding company. It was owned wholly by the late Charles E. Simmons, Jr. up until November 3, 2015, when he executed Amended Articles of Organization for SFH, adding Plaintiffs, as Members and Defendants, Palmer E. Simmons and Charlesetta S. Aiken, as co-managers.

The record reflects that Defendants consistently acknowledged that their nephews², the Plaintiffs, were members of SFH throughout the four years preceding this litigation. Plaintiffs membership in SFH, is further supported by the following documents and testimony in the record:

- a. the Amended Articles of Incorporation, prepared by Palmer E. Simmons, signed by Charles E. Simmons, Jr. (as the sole member and manager of SFH) and subsequently filed with the Secretary of State, adding Plaintiffs as members and appointing Defendants as Co-Managers, which document was duly authenticated by Palmer E. Simmons;
- b. additional documents signed by Jermaine Robinson as owner of SFH during Charles E. Simmons, Jr.’s lifetime;
- c. the Inventory and Appraisal, filed by Ms. Lucia in the Estate of Charles E. Simmons, Jr., indicated decedent died possessed of a one-third interest;
- d. the Assignment prepared by Ms. Lucia, indicating Plaintiffs were the only remaining members of SFH;
- e. the Resolution prepared by Ms. Lucia indicating Charles E. Simmons, Jr. owned a one-third interest in SFH and Plaintiffs were the “remaining members”;
- f. deposition testimony of Palmer E. Simmons indicating that he did not own any interest in SFH prior to his father’s death;

² Plaintiff G. Marcus Simmons is also the brother, by adoption, of Defendants.

- g. tax returns filed by SFH showing Plaintiffs as Members of SFH, signed by Palmer E. Simmons under penalties of perjury;
- h. Palmer E. Simmons sworn testimony, given before the filing of this action, in which he stated that they were members; and
- i. Plaintiffs' receipt of regular distributions from SFH.

The Defendants argued in the hearing and in their memoranda that the addition of new members requires strict adherence with the provisions of SFH's Operating Agreement. Specifically, the Defendants argued the individual Plaintiffs have no membership interest in SFH because the Amended Articles of Organization relied on by the Plaintiffs as their basis for membership do not comply with Section 3.1 of SFH's Operating Agreement. That section states in relevant part the following: "Additional Persons may be admitted to the Company as a Member and Memberships may be created and issued to those Persons and to the Member at the direction of the Member, on such terms and conditions as the Member may determine and the time of admission. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to such Person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Member shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and is effective only after the new Member has executed and delivered to the Company, as appropriate, a document including the new Member's notice address, its agreement to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members, and its representation and warranty that the representation and warranties required of the new Members are true and correct with respect to the Member."

The Defendants argued the 2015 Amended Articles of Organization state only that Greg M. Simmons and Jermaine Robinson are added as Members of SFH. There is no other direction given in the Amended Articles of Organization or percentage of interest in SFH. There is no statement of net profit and net loss allocable to Greg Simmons and Jermaine Robinson. In addition, there is no capital contribution set forth pertaining to their addition as members, nor is there any evidence that either Plaintiff contributed financially. There is no documentation indicating that Plaintiffs Simmons or Robinson ever provided written indication of a notice address or an agreement to be bound by the terms of the operating agreement.

Further, the Defendants argued absent strict compliance with the Operating Agreement, any subsequent conduct allegedly consistent with a membership interest has no relevance.

Finally, the Defendants argued there is at least a scintilla of evidence to support a denial of Plaintiffs' motion for summary judgment. The Defendants presented at the hearing and in their memoranda the 2016 deposition testimony of Charles E. Simmons, Jr. in an unrelated case. In the course of the deposition, Charles E. Simmons, Jr. testified that the members of SFH are himself, his wife, Rosa Simmons, his daughter, Charlesetta Simmons, and Palmer Simmons.

The Plaintiffs objected to the admissibility of this deposition testimony based on South Carolina Code of Laws Section 19-11-20, which is commonly known as the "Dead man's Statute."

The Court finds that strict compliance with the Operating Agreement is not a prerequisite of membership. Considering all the facts in the light most favorable to the Defendants, the Court further finds that there is no issue of material fact as to Plaintiffs' status as member of SFH, but that there is an issue of material fact as to their percentage of ownership

Having found that Plaintiffs are, and have been since the date of the Articles of Amendment of SFH, members of SFH, Defendant Palmer E. Simmons made unauthorized payments and/or distributions to himself, his business, his family members, and others, for his

personal benefit. The full extent of the amount of those distributions and payments is yet to be determined by a full accounting.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56 (c), SCRCP. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). “It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine.” *Priest v. Brown*, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). “A complete failure of proof concerning an essential element of the [nonmoving] party’s case necessarily renders all other facts immaterial.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (internal citation and quotation marks omitted).

LAW/ANALYSIS

By applying the summary judgment standard to the instance case, I find that there is no genuine issue of material fact that must be submitted to the fact finder, and that the undisputed evidence establishes as a matter of law, that Plaintiffs are member of SFH, but the extent of their membership is to be determined at the trial of this case. Plaintiffs sought a declaratory judgment as against the Defendants, asking that this Court declare their rights, status and legal relationship vis-à-vis membership in and to SFH.³ The Plaintiffs have presented a real and substantial controversy in regard to their rights as members and have standing to bring their action. Pursuant to the Uniform Declaratory Judgments Act (“Declaratory Judgment Act”), this Court has the power

³ 2nd Am.Compl., P.10.

to declare Plaintiffs are members of SFH, “whether or not further relief is or could be claimed.” S.C. Code Ann. §15-53-20 (2005). Such declaration has the same force and effect as a final judgment or decree. *Id.*

Partial Declaratory Judgment as to Membership

The granting of a declaratory judgment rests in the sound discretion of the Court, to be reasonably exercised in furtherance of the purposes of the Declaratory Judgment Act. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 567, 155 S.E.2d 618, 621 (1967). The Declaratory Judgments Act should be liberally construed to accomplish its purposes, one of which is to remove uncertainty and insecurity from legal relationships. *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 6, 56 S.E.2d 576, 578 (1949). As the Declaratory Judgment Act authorizes this Court to make determinations of questions regarding writings that constitute a contract, this Court may evaluate the terms of the Operating Agreement, the Articles of Amendment, and the related assignments and resolutions, and the other documentation presented in this case to determine the intent of the parties. S.C. Code Ann. §15-53-30, See: *Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). (*In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties*).

In the instant case, the documentation provided, the testimony of the parties, and undisputed facts, conclusively establish that Plaintiffs are entitled to the declaratory relief they request as to the issue of their membership in SFH. However, giving due regard for all of the circumstances of this case, the Court declines to go further and determine the percentage of Plaintiffs’ ownership interest and leaves that determination for the trier of fact. This Court denies Defendants’ Motion for Summary Judgment for the same reasons that support the grant of partial declaratory judgment to the Plaintiffs.

Monies Had and Received

As early as 1839, South Carolina recognized a case of monies had and received: See *Marvin v. M'Rae*, 1 Rice 171 (S.C. 1839) (“if a party has money in his or her hand that belongs to another, that other party may sue the first in an action for monies had and received”). More recently, equitable relief based on this premise was granted in *Okatie River v. Southeastern Site Prep*, 577 S.E. (S.C. App. 2003). In *Okatie*, as in this case, the Court sought to determine whether the money held by one person was really a loan, advance, deposit, or sum to be repaid upon specific terms to another person. Having determined that Defendant, Palmer E. Simmons wrongfully expended monies belonging to SFH for the benefit of the Trust, in the form of mortgage payments, insurance payments, and real property taxes on property owned by it, and further determined that it would be inequitable for the Trust to retain such funds, SFH is entitled to summary judgment as to the issue of his liability for such payments under this cause of action. The full extent of the monies to be repaid is to be determined by the trier of fact.

CONCLUSION

The purpose of the Declaratory Judgment Act is to afford a speedy and inexpensive method of deciding legal disputes. *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016). By declaring Plaintiffs members, this Court preserves Plaintiffs’ rights with respect to SFH, and clarifies their status and legal relationship to Defendants, Palmer E. Simmons and Charlesetta S. Aiken, as co-managers. The result of this declaratory relief is that those monies wrongfully appropriated by Defendant, Palmer E. Simmons, must be repaid to SFH for further redistribution upon a final determination as to Plaintiffs’ percentage interests, as described herein. The issue of damages accruing as the result of Defendant, Palmer Simmons’ actions is reserved for further determination, as are Plaintiffs’ remaining causes of action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that (a) Defendants’ Motion for Summary Judgment is denied; (b) Plaintiffs are granted declaratory judgment as to their membership in Simmons Family Holdings, LLC; (c) Plaintiffs percentage of ownership is to

be determined by the trier of fact; (d) judgment is entered for Simmons Family Holdings, LLC for monies had and paid, brought derivatively on its behalf, with the amount of damages flowing therefrom to be determined by the trier of fact. Plaintiffs' remaining causes of action are unaffected by this Order.

AND IT IS SO ORDERED

R. Lawton McIntosh
Circuit Court Judge

Anderson, South Carolina



Beaufort Common Pleas

Case Caption: Greg Marcus Simmons , plaintiff, et al VS Palmer E Simmons ,
defendant, et al
Case Number: 2019CP0701246
Type: Order/Form 4

S/R. LAWTON McINTOSH

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