

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

TERRELL K. RALEY, individually, and)
on behalf of 4 POINTS HOSPITALITY, LLC,)

Plaintiffs,)

VS.)

NO. 16-196-BC

CEES BRINKMAN and BRINKMAN)
HOLDINGS, LLC,)

Defendants,)

AND)

CEES BRINKMAN, individually, and)
on behalf of 4 POINTS HOSPITALITY, LLC,)

Counterclaimant,)

VS.)

TERRELL K. RALEY, AMARANTH)
HOSPITALITY GROUP, LLC,)

Counterdefendants.)

**MEMORANDUM AND ORDER GRANTING IN PART AND DENYING
IN PART RALEY'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

After considering the arguments and authorities in support and in opposition to Raley's *Partial Motion for Summary Judgment*, the *Motion* is granted in part and denied in part as follows.

It is ORDERED that Raley's Partial Motion for Summary Judgment is denied in its entirety with this one following exception.

It is ORDERED that Raley's Partial Motion for Summary Judgment is granted dismissing that part of Paragraph 8 of Brinkman's Prayer for Relief seeking recovery of attorneys fees pursuant to section 24 of the Partnership Agreement.

Not granting summary judgment in favor of Raley but nevertheless it is ORDERED that summary judgment is entered as a matter of law, contrary to Raley's *Motion* and as asserted by Brinkman, that the February 16, 2016 unilateral lease renewal by Raley, without the consent of Brinkman, constitutes a "significant business transaction outside the ordinary course of business" as provided in section 16(e) of the Partnership Agreement, and, because there was no consent, constitutes an "unauthorized LLC act" under Tennessee Code Annotated section 48-249-105(c).

As to the section 48-249-105(c) remedy, however, the Court does not enter summary judgment. Determination of the remedy requested by Brinkman of invalidating the lease renewal shall be determined at the conclusion of the trial to take into account the equities of the case as provided in section 48-249-105(c).

The undisputed facts, law and reasoning on which these rulings are based are provided below.

1. Raley's Statute of Limitations Defense to Brinkman's Count I Claims of Breach of Fiduciary Duty

Summary Judgment is denied with respect to Raley's defense that Brinkman's Count I¹ breach of fiduciary duty claims are barred by the one-year statute of limitations, Tennessee Code Annotated section 48-249-407.

There are genuine issues of material fact on when Brinkman discovered or reasonably should have discovered the alleged breaches of fiduciary duty.

In so concluding, an inexhaustive by sufficient sampling of the Court's evaluation of the record includes the following.

- Competing inferences can be drawn from the April 1, 2014 England email about whether Brinkman should have discovered his distribution was unequal, depending upon whether the Court accredits Brinkman's explanation that his accounting knowledge was insufficient to understand the email as notice of unequal distributions, and contrasting the information Mr. England provided to Raley versus Brinkman. These credibility and inferential determinations can not be made from the summary judgment record. A trial with "live" testimony is needed to make these determinations.
- Competing inferences can be drawn on whether Brinkman's receipt of a W-2 for 2013 with a low amount provided actual notice that Brinkman was not being paid a salary of 4% of 4 Points gross income, depending upon whether the Court accredits Brinkman's explanation of his insufficient accounting knowledge and that he was attributing the payments he received every two weeks as including salary.
- On the placement of Butchertown Hall employees on the Pharmacy payroll, competing inferences can be drawn on when Brinkman knew or should have known that this was something different than a temporary occurrence of a few employees that would be reimbursed, depending upon which party the Court accredits on the discussions of this matter.

¹ The reference to Brinkman's pleadings throughout this Memorandum is to the Third Amended Counterclaim filed March 10, 2017.

- Because the bank records and ADP payroll records do not enable one to discern whether checks written on the Pharmacy account or payroll records had a legitimate business purpose, those records do not establish irrefutable notice for purposes of summary judgment.

2. Raley's Statute of Limitations Defense to Brinkman's Count II Claims of Breach of Partnership Agreement

Summary judgment is denied on Raley's claim that the one-year statute of limitations applies to Brinkman's breach of Partnership Agreement claims, and the Count II claims are, therefore, not time-barred.

The Court adopts the arguments and authorities of Brinkman that while the facts of the breach of the Partnership Agreement claims may overlap with the facts pertaining to Brinkman's claims that Raley breached his fiduciary duty, nevertheless the Partnership Agreement claims are sufficient to stand alone and, therefore, are governed by the six-year statute of limitations for contracts. Applying *Benz-Elliott*, 456 S.W.3d 140, 148-49 (Tenn. 2015), cited by Brinkman, the Court concludes that the Partnership Agreement constitutes an enforceable contract, and the remedies sought in Count II of damages, specific performance, and termination of Raley's membership emanate and derive from obligations stated in the contract to form a stand alone breach of contract claim. For these reasons, the six-year contract, statute of limitations applies, and summary judgment is denied.

3. Raley's Defense That the Statute of Frauds Bars Recovery of Brinkman's Count III, Paragraph 97, Claim of a 4% Reserve Fund

Summary judgment is denied as a matter of law.

Based upon the analysis and authorities, which the Court adopts herein, at pages 20-22 of Brinkman's April 12, 2017 *Opposition to Plaintiff's Motion for Partial Summary Judgment*, the Court concludes that there is a possibility that the oral 4% Reserve Fund, asserted by Brinkman, could be performed within a year, and a possibility is all that Tennessee law requires. That a start-up restaurant might determine to close within a year for a variety of reasons—business failure, reiteration as a new concept in a new location, etc.—is at least a possibility. Raley's reply of the 5-year lease obligation of the business is not a conclusive fact that it was impossible for the business to close within a year. Businesses close despite lease obligations. Accordingly, applying the Tennessee law cited by Brinkman to the record, the Court concludes that it is possible the business would have closed within a year. The alleged oral agreement of a 4% Reserve of Count III, Paragraph 97, was, therefore, susceptible to being performed within one year, and is not barred by the Statute of Frauds.

4. Raley's Motion for Summary Judgment on His Claim That Brinkman Breached the 4 Points Operating Agreement by Failing to Make the Required Capital Contribution of \$175,000 to 4 Points and on Brinkman's Competing Claim That He Is Owed \$195,000 for Unreimbursed Excess Capital Contribution

Summary judgment is denied because there are genuine issues of material fact on Brinkman's claims of satisfaction and release by Raley of Brinkman on the \$175,000

capital contribution, or waiver. In so ruling, the Court adopts Brinkman's identification of fact issues at pages 24-26 of his *Opposition*.

As to Brinkman's Counterclaim to be reimbursed for start-up expenses, there are genuine issues of material fact on whether the funds were spent before the effective date of the Partnership Agreement and, in turn, whether the provisions of section 4 of the Partnership Agreement is applicable to provide reimbursement.

5. February 26, 2016 Lease Renewal

Summary judgment is entered in part and denied in part.

Summary judgment is entered as a matter of law that the February 16, 2016 lease renewal, between 4 Points Hospitality, LLC and Brinkman Holding, LLC, for the Pharmacy constitutes a "significant business transaction outside the ordinary course of business" as provided in section 16(e) "Acts Requiring Majority Consent" of the Partnership Agreement. The Court rules as a matter of law that the lease renewal is not a matter which comes within section 15 of the Partnership Agreement of a day-to-day decision of the managing general partner. In so ruling the Court adopts the analysis of Defendant Brinkman:

The decision to commit a company to a long-term 10 year facility lease would not be considered an 'administrative,' ministerial,' or 'day-to-day' decision for any business, and it was not such as decision in the context of 4 Points. Instead, that was clearly a significant business transaction to which both partners were required to consent.

Defendant's Opposition To Plaintiff's Motion For Partial Summary Judgment, p. 27 (Apr.

12, 2017). A 10-year lease obligation can not reasonably be categorized as a “day-to-day decision” because of the potential long-term effect and consequences such a decision could have on the business for years to come.

Additionally, the Court enters summary judgment and determines as a matter of law that Raley’s renewal of the Pharmacy’s lease for an additional ten years by exercising an option in the lease on behalf of 4 Points on February 22, 2016 constituted “an unauthorized LLC act” under Tennessee Code Annotated section 48-249-105(c).

Both of these rulings are contrary to the positions asserted by Raley in his *Motion* for summary judgment. Nevertheless, the Court enters summary judgment on these issues contrary to Raley’s *Motion* because these are issues of law which do not require a trial. *See Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976) (Summary judgment may be granted in favor of a nonmovant. Such action should be taken only in rare cases and with meticulous care. Further, the party against whom summary judgment is to be rendered must have had notice and a reasonable opportunity to respond to all the issues to be considered.); *March Group, Inc. v. Bellar*, 908 S.W.2d 956, 959 (Tenn. Ct. App. 1995); *Griffis v. Davidson Cty. Metro. Gov’t*, 164 S.W.3d 267, 284 (Tenn. 2005).

As to the remedy, under section 48-249-105(c), however, the Court does not enter summary judgment, and shall wait until the conclusion of the trial to determine the remedy. That is, the Court does not rule at this time on Defendant Brinkman’s claim in the *Third Amended Counterclaim*, that the remedy for such an unauthorized act, pursuant to Tennessee Code Annotated section 48-249-105, is to “set aside Raley’s purported renewal

of the Pharmacy's lease on behalf of 4 Points as an *ultra vires* act and/or declare that the purported renewal was ineffective under the terms of the Lease." *Defendant's Answer To Second Amended Complaint And Third Amended Counterclaim, Prayer For Relief*, p. 24, ¶ 76 (Mar. 10, 2017).

The reason a determination of remedy will be decided from the trial is the wording of the statute. Section 48-249-105(c) provides on the matter of remedy:

(c) Derivative action. In a member's proceeding, under subdivision (b)(1), to enjoin an unauthorized LLC act, the court may enjoin or set aside the act, if equitable, and if all affected persons are parties to the proceeding, and may award damages for loss suffered by the LLC or another party because of enjoining the unauthorized act.

TENN. CODE ANN. § 48-249-105(c) (West 2017). This section authorizes the Court to provide a remedy for such unauthorized LLC acts, but does not require it. Under the terms of the Statute, the decision is discretionary and takes into account the equities of the case: the Court "may enjoin or set aside the act, if equitable, . . . and may award damages for loss." Thus, a decision on a remedy, if any, for Plaintiff Raley's unauthorized LLC act will be decided from the trial. At the conclusion of the trial, the Court will be in a better position to determine whether Defendant Brinkman's request to set aside the renewal or determine it was ineffective is "equitable" under the circumstances of this case.

6. Brinkman's Prayer for Relief, Paragraph 8, for Recovery of Attorneys Fees Pursuant to The Partnership Agreement

Summary judgment is granted dismissing that part of Brinkman's Paragraph 8 of the Prayer for Relief seeking recovery of attorneys fees under section 24 of the Partnership Agreement.

As cited by Raley, there is a "bright-line rule" in Tennessee with respect to recovery of attorneys fees based upon a contract. That rule is that the contract text must "specifically and expressly articulate" that recovery of attorneys fees was intended under the circumstances presented by the case. *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 310-11 (Tenn. 2009). "[C]ontract provisions awarding attorney fees are strictly construed and will be interpreted to override the American rule 'only when a contract specifically or expressly provides for the recovery of attorney fees.'" *National Healthcare Corporation v. Barker*, 2016 U.S. Dist. Lexis 76546 *34-35 (No. 3:14-cv-02015 (J. Campbell, 2016) *34-35, (citing *Cracker Barrel v. Epperson*, 284 S.W.3d 303, 309 (Tenn. 2009)). "[I]f a contract does not specifically or expressly provide for attorney fees, the recovery is not authorized" and "as a general principle, the American rule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case." *Id.*

Applying this law to the summary judgment record, the Court turns to section 24 of the Partnership Agreement, the provision on recovery of attorneys fees. Section 24 provides as follows:

24. DISPUTE RESOLUTION

If a dispute between the Partners arises under this Agreement, such dispute shall be settled by arbitration in accordance with the rules for commercial arbitration of the American Arbitration Association (or similar organization). . . .

The prevailing Partner shall be awarded all of its attorneys' fees and related costs. The non-prevailing party shall bear all cost of the arbitration proceeding including any amounts paid for subpoenas, depositions, transcripts and witness fees. . . .

The Court's analysis of section 24 is that the caption: "Dispute Resolution," and text: for settlement "by arbitration" with the "prevailing Party . . . awarded all of its attorneys' fees," plainly and unambiguously do not apply to the in-court litigation in which the parties in this case are engaged. Additionally, below the surface level of the plain text, the assumptions on which recovery of attorneys fees in arbitration are based do not elide to litigation. The rules for commercial arbitration of the American Arbitration Association, provided for in section 24, differ from court procedures. Thus, the assumptions and premise on which recovery of attorneys fees was agreed to by the parties in section 24 of the Partnership Agreement are not present in this litigation. The result is that in-court litigation can not serve as the basis for recovery of attorneys fees. As stated by Raley, "According to the plain language of the Partnership Agreement, the parties' agreement to shift the burden of attorneys' fees and expenses to the non-prevailing party is strictly

limited to the dispute resolution process of arbitration. . . . Because the parties chose to pursue their claims in this forum and not in an arbitration proceeding, the fee-shifting provision of the Partnership Agreement is inapplicable and not enforceable, regardless of the prevailing party. The Partnership Agreement does not allow for the recovery of attorneys' fees outside of arbitration. The attorney fee-shifting is not 'explicitly authoriz[ed]'. . . ." *Raley's Motion for Partial Summary Judgment and Supporting Memorandum* at 22-23.

With respect to Brinkman's citation to *Halto v. Meyers*, 198 P.3d 552 (Wy. 2008), the Court concludes the case is not persuasive authority to intervene in equity or take into accounts equities because the kind of abusive tactics in *Halto* are not present in the summary judgment record. The *Halto* Court explained that it awarded fees in the litigation, even though the fee recovery was contained in an arbitration provision, because of unreasonable and unjustified conduct of one of the parties:

Despite the arbitration clause, . . . [plaintiffs] decided to bring the instant civil action. This decision was unreasonable under the circumstances. The decision unjustifiably forced [defendant] into a long-distance defense simply to extricate itself from an unauthorized civil action. We find the [plaintiffs] took an untenable position, placing the equities convincingly in favor of [defendant].

Id. at 559. There is somewhat of the appearance of a sanction. No such circumstances are present on the summary judgment record in this case. Accordingly, this Court is not authorized to employ equity to act outside of Tennessee law that recovery of attorneys fees under a contract must adhere to the explicit contract terms. For these reasons, Raley's

motion for summary judgment is granted dismissing that part of paragraph 8 of Brinkman's Prayer for Relief to recover attorneys fees under section 24 of the Partnership Agreement.

7. Raley's Summary Judgment Claim That Brinkman's Count II Breach of Contract Claim Fails For Failure To Establish the Essential Elements of Damages

Plaintiff Raley argues that summary judgment should be granted on Defendant Brinkman's breach of contract claim for failure to establish the required element of damages as it relates to the following alleged breaches:

- Unilateral decisions on behalf of 4 Points
- Excessive distributions to Raley and distributions withheld from Brinkman
- Causing Raley to refrain from reimbursing Brinkman's alleged build out expenses
- Transfer of intellectual property rights
- Underpayment of Rent
- Bank Account Claims

As to these breaches, Raley argues either that he has rectified the issues with payments after the lawsuit was filed, or that no damages flow from the alleged breaches, or that the conduct is not wrongful so that there can be no damage.

Determination of these issues must await trial when the Court will be provided both the global and detailed accounting proof to sort out these issues.

An additional reason the issue of monetary damage for these alleged breaches must await trial is that non-monetary remedies have been requested as an alternative or in conjunction with these alleged breaches. Under these circumstances, the Court needs the full context of the trial before ruling.

Summary judgment dismissing these damages claims is therefore denied to be ruled upon at trial.

8. Brinkman's Count IV Conversion Claim

Summary judgment dismissing Brinkman's Count IV conversion claim is denied.

In support of summary judgment dismissing Defendant Brinkman's conversion claim, Plaintiff Raley, cites to *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525 (Tenn. Ct. App. 2012), arguing that the conversion claim fails as a matter of law to meet the required pleading standard of "specific, identifiable funds."

In opposition, Defendant Brinkman argues that the alleged conversion of "money" is identifiable because "the funds that Raley converted were specific and capable of identification, and through the discovery process, the sum of those funds has been determined" citing specifically to the expert report from Stephen S. Englert which lists specific amounts of money allegedly converted by Plaintiff Raley.

In reply, Plaintiff Raley argues that the expert report is not relevant to a determination of whether the Defendant Brinkman's claim was adequately pled as a matter of law because the expert report is not technically part of the pleading.

Plaintiff Raley's argument on summary judgment is based on Rule 9.02 of the Tennessee Rules of Civil Procedure which requires that "an allegation of conversion must be pled with particularity under Tenn. R. Civ. P. 9.02." *Shaw v. FSGBank, N.A.*, No.

E201401365COAR3CV, 2015 WL 5169155, at *7 (Tenn. Ct. App. Aug. 31, 2015), *appeal denied* (Jan. 14, 2016) (citing *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 555 (Tenn. Ct. App. 2012)). The purpose of Rule 9.02 is to provide notice to the opposing party of the specific identity of the piece of property, or in this case, the specifically identifiable money allegedly converted so that the Defendant can properly raise a defense to the allegation of conversion. Rule 9.02 allows an opposing party to challenge the sufficiency of a pleading early in a lawsuit in order to obtain this critical information in order to adequately defend the lawsuit or else the lawsuit is subject to dismissal.

There is no dispute that the expert report filed by Stephen S. Englert identifies specific sums of money that Defendant Brinkman allegedly converted. This information was provided to Plaintiff Raley on October 28, 2016, over five months ago, putting Plaintiff Raley on specific notice of the alleged converted funds. Under these circumstances, dismissal on Rule 9.02 grounds is inappropriate given that the pleadings have been adequately informed through the discovery process, and a trial on this claim is less than a month away.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

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