

DOCKET NO.: FBT-CV-20-5043010-S

: SUPERIOR COURT

ELIZABETH MACKINNON HAAK,
AND CURRY MACKINNON, CO-EXECUTORS
OF THE ESTATE OF OLIVER P. MACKINNON, JR.

: JUDICIAL DISTRICT

: OF BRIDGEPORT

FILED

V.

GEORGE O'CONNELL

MAY 10 2024

: MAY 10, 2024

**SUPERIOR COURT
BRIDGEPORT
MEMORANDUM OF DECISION**

I. INTRODUCTION

The present action arises out of an agreement between the managing members of MMO Associates, LLC (MMO), and Oliver P. MacKinnon, Jr. ("Mac"), who is now deceased.¹ The executors of Mac's estate, Elizabeth MacKinnon Haak and Curry MacKinnon, were substituted as the plaintiffs in this action on March 24, 2021. The agreement concerns a promissory note in the amount of \$325,000, which was signed to provide the lender with recourse for money he lent to MMO, and expected to lend in the future, in order to bring about a sale of business. Thereafter, a new agreement was renegotiated and executed between Mac and two of the three managing members of MMO. While Mac and the defendant discussed a revision to the original promissory note, they did not reach a subsequent agreement.

The plaintiffs are seeking to recover from the defendant the sum of \$65,764.84, plus interest and attorney's fees. The operative pleadings are as follows. A three-count revised complaint alleging breach of contract, unjust enrichment, and fraud was filed on June 22, 2021. Docket Entry #123. The defendant filed a second amended answer, special defenses, and

¹ The original plaintiff, Oliver P. MacKinnon, Jr. ("Mac"), died on January 8, 2021. See Docket Entry #115, Suggestion of Death and Motion to Stay.

Notice sent to all
Counsel i RJD.
Richard R. Davis, Esq. Clerk

counterclaims on June 21, 2022. Docket Entry #146. A reply with denials to the defendant's second amended answer and special defenses was filed by plaintiff on August 8, 2022. Docket Entry #147. A certificate of closed pleadings and claim for trial list was filed on August 8, 2022. Docket Entry #149.

The special defenses raised by the defendant are the doctrine of equitable estoppel, setoff, unclean hands, and no meeting of the minds. The counterclaim is in five counts: setoff per General Statutes § 52-139, setoff per General Statutes § 52-141, quantum meruit, unjust enrichment and accounting.

The court trial commenced on July 21, 2023, and continued for four days, concluding on August 29, 2023. The parties filed simultaneous briefs on December 11, 2023, and December 12, 2023. Docket Entries ##178 and 179. Reply briefs were filed on January 16, 2024, by plaintiff and on January 17, 2024, by defendant. Docket Entries ##181 and 182, respectively. The court reserved its decision following the trial.

II. EVIDENCE AND FINDINGS OF FACT

In May of 2015, MMO Associates, LLC, was formed. Peter Mennona, George O'Connell, and Mac's son, Oliver MacKinnon, III (Oliver), were the managing members. Soon after forming the LLC, Oliver was replaced by his mother, Anne MacKinnon (Anne), because of the potential conflict that could arise for Oliver due to an impending purchase of a restaurant. Oliver was employed at Highland Imports, a liquor distributor, and was prohibited by Connecticut liquor laws from being an owner of a restaurant that sold liquor.

On June 30, 2015, MMO purchased Viale Restaurant located at 3171 Fairfield Avenue, Bridgeport and named it TruNorth. The business was purchased with cash and a loan to the seller in the amount of \$60,000. MMO assumed the existing lease. One year later, the business

opened after capital was raised to renovate the space. TruNorth had a successful first year and then sales began to continuously decline in 2017. The defendant, who was the general manager, ran the day-to-day operations. Due to the drop in sales, MMO struggled to meet their obligations. They took a loan with a national bank in the amount of \$100,000 to help pay the rent, state sales taxes, city property taxes, payroll, and daily supplies.² The loan was executed by Anne, a managing member of MMO.

In 2017, Oliver asked Mac, his father, to cover the shortfalls. On June 4, 2018, a notice of capital call was made by Michael Totilo, Mac's accountant, requesting \$75,000 from the members and investors. No minutes regarding the capital call meeting were submitted as evidence during the trial, and there was no majority vote by the members and investor/non-managing members to make such a call.³ The operating agreement of MMO Associates, LLC provides in Article III, paragraph 3.2, for additional capital contributions.⁴ None of the members, with the exception of one of the investors, Edward Adams, executed and returned the notice. Following the call, it was determined that Anne would hold 99 percent equity interest and Mennona would hold 1 percent equity interest. It was also determined that all other

² See Court Transcript, August 4, 2023, p. 139, lines 16-27 and p. 140, lines 1-18.

³ See Court Transcript, July 21, 2023, p. 107, lines 10-12.

⁴ See Plaintiffs' Exhibit 14, Paragraph 3.2 which states: "[U]pon the approval of a majority in interest of the investor/Non-Managing Members, the Managing Member(s) shall make a call for additional capital and the Members may contribute in proportionate amounts any additional capital so called for the operation of the Company, provided, however, that in the event that any Member refuses or fails to contribute his share of any or all of the additional capital, then the other Members or any one of them may contribute the additional capital, such failure will not be deemed a default by such Member(s) and not paid in by such refusing Member and shall receive therefor an increase in the proportionate share of the ownership or interest in the entire Company in indirect proportion to the said additional capital contributed."

members were found to have voluntarily relinquished their respective ownership in MMO pursuant to the Operating Agreement.⁵

On August 26, 2018, TruNorth was closed.⁶ On November 6, 2018, a promissory note was executed from MMO to Mac in the amount of \$325,000.⁷ Mac insisted that the managing members sign the note so he could protect the monies he loaned to MMO. Oliver, Peter, and George individually guaranteed the note. The purpose of the loan was to bring MMO current in its liabilities so that TruNorth could be sold, as well as to pay expenses of the business to keep it operating.⁸ The note made no mention of a \$125,000 forgiveness extended from Mac to the defendant, and the defendant did not raise an objection.⁹ The first time the defendant raised the issue of the \$125,000 forgiveness was in an email dated November 20, 2019,¹⁰ to Elizabeth MacKinnon Haak, who manages the family business, one year after the note was executed.

On February 4, 2019, TruNorth was sold for \$230,000. The court finds that the actual amount that Mac loaned was \$299,345.86.¹¹ After the sale, \$185,294.52 was paid to Mac.¹² According to Totilo's accounting records, as of February 28, 2019, three weeks after closing, the total amount of money loaned by Mac to bring MMO current was \$299,345.86. A balance of \$114,051.34 was due to Mac from the three managing members, plus costs and expenses including reasonable attorney's fees. A statement dated June 30, 2019, provides for an amount of

⁵ See Plaintiffs' exhibit 2. See also Court Transcript, August 22, 2023, p. 6, line 27 and p. 7, lines 1-15.

⁶ See Court Transcript, August 4, 2023, p. 113, lines 1-5.

⁷ See Defendant's exhibit C.

⁸ See Plaintiffs' exhibits 5, 17 and 29.

⁹ See Court Transcript, August 4, 2023, p. 133, lines 2-6.

¹⁰ See Court Transcript, August 4, 2023, p. 38, lines 23-27; p. 39, lines 1-10; p. 134, lines 14-17. See also Plaintiffs' exhibit 9.

¹¹ See Plaintiffs' exhibit 29, p. 6.

¹² See Plaintiff's exhibit 29, p. 2.

\$197,294.52 that is still owed to Mac.¹³ It appears from that statement that Mac paid expenses after TruNorth was sold and without the consent of the guarantors of the note. Therefore, the court finds that the amount loaned to MMO was \$299,345.86, and any additional payments made by Mac were not authorized or collectable. The defendant, therefore, is not obligated to pay the additional amounts.

III. DISCUSSION

The claims brought by the plaintiffs are breach of contract, unjust enrichment and fraud. Under Connecticut law, the elements of each cause of action are as follows.

A. Breach of Contract

Under Connecticut law, to state a claim for breach of contract, the plaintiff must demonstrate “the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages.” (Internal quotation marks omitted.) *AGW Sono Partners, LLC v. Downtown Soho, LLC*, 343 Conn. 309, 322, 273 A.3d 186 (2022). This court finds that the parties entered into an express contract as set forth in the November 6, 2018 promissory note. The court finds that there was a meeting of the minds between Mac and the managing members of MMO. Pursuant to that agreement, the defendant owes one third of \$114,051.34 plus 6 percent interest as of February 4, 2019, the date of sale of MMO. The interest is \$2281.25 per annum and \$6.25 per diem. The total period of non-payment is five years and twenty-four days.

B. Unjust Enrichment

The essential elements for an unjust enrichment claim to be proven by the plaintiffs are that: “(1) the defendant was benefited, (2) the defendant unjustly failed to pay the plaintiff for the benefits, and (3) the failure of payment was to the plaintiff's detriment.” *Gagne v. Vaccaro*,

¹³ See Plaintiffs' exhibit 29, p. 2.

255 Conn. 390, 409, 766 A.2d 416 (2001). Since the court find that the parties entered into an express contract on November 6, 2018, the court further finds that the plaintiff cannot prevail on the unjust enrichment count and enters judgment in favor of the defendant on count two.

C. Fraud

The essential elements of a claim for fraudulent misrepresentation are: “(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury.” *Miller v. Appleby*, 183 Conn. 51, 54-55, 438 A.2d 811 (1981). Prior to the signing of the promissory note, MMO received a constant stream of income from Mac to keep the business afloat and this was done with the consent of the managing members. The court finds that the plaintiffs have failed to substantiate their burden of proof as to the elements of fraud.

D. Attorney’s Fees

The plaintiff seeks attorney’s fees in the amount of \$46,532.97 from December 19, 2019, through July 19, 2023. Docket Entry #170. The court acknowledges that the case has been pending since January 23, 2020, and that plaintiffs’ counsel has put in a significant number of hours to prosecute this case, including efforts to resolve it with the defendant.¹⁴ The court has reviewed the itemization of time submitted by counsel, but an award of the attorney’s fees is not limited to the amount of time involved alone. *Shapero v. Mercedes*, 262 Conn. 1, 8, 808 A.2d 666 (2002). The court has considered multiple factors, including the total amount of damages sought in this action, and the fact that the case presents no novel or complex issue. The court finds that

¹⁴ According to Attorney Trembicki’s affidavit dated July 19, 2023, the total hours expended are 81.75 up until July 13, 2023. The attorney fees sought does not include the fees incurred at trial.

the total amount of attorney's fees requested is disproportionate to the damages sought. If the court were to award the amount of attorney's fees requested, that would consist of approximately the same amount due to the plaintiffs which includes the interest. The court in good conscience cannot award attorney's fees in that amount. On the other hand, the court cannot ignore the fact that the plaintiffs' counsel has spent a significant amount of time in the case. Taking all these facts into consideration, the court will award attorney's fees in the amount of \$15,000.

E. Counter Claims

The defendant has raised the following counterclaims: setoff per General Statutes § 52-139, setoff per General Statutes § 52-141, quantum meruit, unjust enrichment and accounting. The evidence introduced at trial revealed that Mac loaned more money to the LLC than he received upon the sale of the LLC. No evidence was submitted demonstrating malfeasance in bringing about the sale of the LLC. Accordingly, the court finds that the defendant has not sustained his burden of proof that the plaintiff was unjustly enriched. For similar reasons, the court cannot find that the defendant sustained his burden of proof as to the special defenses and remaining counterclaims. The plaintiff engaged in a course of action for the preservation of funds lent. The court further finds that the plaintiff expended more funds to bring about the sale and clear the debts of the business and intended to recover it in the end. Given those facts, the defendant has failed to sustain his burden of proof.

IV. CONCLUSION

Accordingly, the court enters judgment in favor of the plaintiff on count one, in the amount of \$38,017.11 (principal) and \$11,556.25 (interest for five years and twenty-four days), plus attorney fees in the amount of \$15,000.

The total judgment in favor of the plaintiffs is \$64,573.36.

The court enters judgment in favor of the defendant on counts two and three.

The court enters judgment in favor of the plaintiff on all of the defendant's counterclaims.



DeCastro-Tunnard, JSC