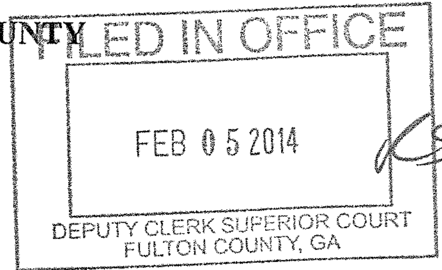
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA




**THOMAS MCDERMOTT, et. al.**

**Plaintiffs,**

**v.**

**CIVIL ACTION FILE NO. 2009CV163144**

**PROFESSIONAL TRAVEL GUIDE, LLC, et. al.**

**Defendants.**

# FINAL JUDGMENT

Plaintiffs are individuals who invested in the Defendant Professional Travel Guide, LLC, (PTG), a new venture organized for the purpose of developing and operating a website intended to provide unique travel related content to the public. The gravamen of Plaintiffs' claims is that they were fraudulently induced to invest in the venture by pre-contract misrepresentations about the website's revenue model and the company's business plan. The presentations about the website model and business plan were made to some of the Plaintiffs by Peter Muller, who is not a party to this action, and Peter Nicas. Some Plaintiffs became aware of the investment opportunity through discussions with other Plaintiffs.

The Court has previously granted summary judgment to several of the corporate and individual defendants. The remaining defendants are PTG and its management board, Marco Ferrari, George Hundley, the board chair, and Peter Nicas, president and CEO of the company.

Plaintiffs' claims are grounded upon allegedly false representations made during the solicitation process, prior to their investment in PTG. As part of the solicitation process each Plaintiff was provided with a confidential private placement memorandum explaining the investment. The memorandum contained the following statement printed in all capital letters:

NO PERSON IS AUTHORIZED TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATIONS IN CONNECTION WITH THIS OFFERING OTHER THAN THOSE CONTAINED IN THIS MEMORANDUM. INFORMATION OR REPRESENTATIONS NOT SPECIFICALLY CONTAINED HEREIN OR PROVIDED IN WRITING BY PTG MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY

PTG. THIS MEMORANDUM COMPLETELY SUPERSEDES ALL PRIOR STATEMENTS AND INFORMATION PROVIDED IN CONNECTION WITH PTG, THE OFFERING, AND THE TRANSACTIONS DISCUSSED IN THIS MEMORANDUM, WHICH HAVE BEEN MADE PRIOR TO THE DATE OF THIS MEMORANDUM.

The Plaintiffs do not allege that the private placement offering document contained material misrepresentations. The Plaintiffs' investments were subsequently finalized by each of them signing a subscription agreement. The subscription agreements contained a merger clause which states "This Subscription Agreement together with the Limited Liability Company Agreement constitutes the entire agreement between or among the parties hereto with respect to the subject matter hereof…." The subscription agreements also contained a representation by each Plaintiff that "No representations have been made or furnished to the undersigned or the undersigned's advisors in connection with the Offering which were materially inconsistent with the [Private Placement] Memorandum."

Plaintiffs have asserted claims for Rescission, Equitable Accounting, Constructive Trust and Receivership, Negligent Misrepresentation, Fraud, Conversion, Conspiracy, Georgia RICO and Attorney Fees. The Court will first address the issue of rescission. A contracting party who contends that he has been fraudulently induced to enter into the contract has an election of remedies. The defrauded party may either rescind or affirm the contract. Novare Group, Inc. v. Sarif, 290 Ga. 186 (2011). While the Plaintiffs have elected rescission in their complaint, the Court finds that they have failed to satisfy the criteria for rescission.

"Under the common law, the remedy of rescission is available only between parties who are in privity of contract. (cit.) Consequently, no claim for common law rescission can lie in an action brought solely against corporate officers who are not parties to the contract sought to be rescinded." Greenwald v. Odom, 314 Ga. App. 46 (2012). Accordingly, there can be no claim for rescission as to the remaining individual defendants in the present case.

With respect to the corporate defendant, PTG, the Plaintiffs have failed to satisfy a condition precedent to asserting their claims. "Where a party who is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of the transaction, or acts in a manner inconsistent with a repudiation of the contract, such conduct amounts to acquiescence, and though originally impeachable, the contract becomes

unimpeachable in equity." Dodds v. Dabbs, Hickman, Hill and Cannon, LLP, 750 S.E.2d 410 (Ga. Ct. App. 2013). In a letter dated October 16, 2008 the counsel for the Plaintiffs made a demand on PTG as well as the other corporate defendants. The Plaintiffs have characterized the communication as a collective rescission. While the letter includes the word rescission, the only alternatives offered are a negotiated settlement or a suit for damages calculated based on PTG's potential valuation. No offer or tender of Plaintiffs' interest in PTG was made. In sum, Plaintiffs demanded the benefit of the transaction rather than offering restoration of the parties to their relative positions pre-contract. Such a demand is inconsistent with an effort to rescind. See, Mitchell v. Backus Cadillac-Pontiac, Inc., 274 Ga. App. 330 (2005) (comparing measure of damages for rescission versus election to affirm contract). No other evidence of a purported pre-suit rescission effort has been presented.

"Critical to rescission is the tender of benefits, the prompt restoration or offer to restore whatever the complaining party received by virtue of the contract.... Rescission or attempted rescission is a condition precedent even to bringing an action seeking rescission." Id. In the absence of any evidence that Plaintiffs offered to surrender their interests in PTG, their claims for rescission fail as a matter of law. Insofar as an offer of return of shares was made as part of the complaint, it fails to satisfy the requirement that rescission efforts must occur prior to filing suit. Novare Group, Inc. v. Safir, 290 Ga. 186 (2011).

To address the lack of tender, Plaintiffs in their briefing recite the legal principle that tender is not required when to do so would be unreasonable or the defrauding party has made tender impossible. They have, however, pointed to no evidence that either circumstance exists in the present case. Insofar as Plaintiffs have made reference to Mr. McDermott's request for return of his investment, that event is insufficient to create a jury issue as to whether tender would be unreasonable or impossible. In his deposition Mr. McDermott testified that, while he requested a refund, he did not offer anything in return. Without such an offer the request for a refund did not constitute an attempted rescission. There being no evidence of a pre-suit tender of benefits by Plaintiffs, Defendants are entitled to summary judgment as to the claims for rescission. The rescission claim based upon mutual mistake of fact also fails because there is no evidence of a mutual mistake.

Without rescission Plaintiffs' fraud and negligent misrepresentation claims fail. Justifiable reliance is an essential element of claims for fraud and negligent misrepresentation.

By failing to rescind Plaintiffs have affirmed the contract and are bound by its terms. The merger clause in the subscription agreement precludes Plaintiffs from establishing justifiable reliance on representations they allege were made prior to signing the contract. "Purchasers who affirm a contract with a merger or disclaimer provision and retain the purchased articles are estopped from asserting they relied on a seller's misrepresentation." Keller v. Henderson, 248 Ga. App. 526 (2001). Thus, all of Plaintiffs' claims arising from the alleged fraud are "subject to any defenses which may be based on the contract." Id. The disclaimers, representations and merger clause in the subscription agreements are thus dispositive of Plaintiffs' claims.

"While justifiable reliance may be a jury question in a fraud case where no contract exists or where the contract has become void, it is a question of law in a case where the contract language prevails and the contract's merger clause precludes reliance on oral representations." Novare, supra. The purchaser representations and merger clause in the subscription agreement are valid and binding. For that reason PTG is entitled to summary judgment on Plaintiffs' fraud and negligent misrepresentation claims. The individual defendants are also entitled to the benefit of the contract provisions. Greenwald v. Odom, 314 Ga. App. 46 (2012).

The Court will next address Plaintiffs' Georgia RICO claim. Plaintiffs' RICO claim alleges "Defendants intentionally conducted and participated in a scheme to defraud Plaintiffs by engaging in a pattern of racketeering activity for the purpose of defrauding Plaintiffs of the value of their investments." Complaint. Para. 120. "The pattern of racketeering activity consisted of various acts of mail fraud and wire fraud." Comp. Para. 121.

"To assert a civil claim based upon either a violation of the RICO statute or a conspiracy to violate that statute, a plaintiff must show that the defendants violated or conspired to violate the RICO statute; that as a result of this conduct the plaintiff has suffered injury; and that the defendant's violation of or conspiracy to violate the RICO statute was the proximate cause of the injury. ... To satisfy the proximate cause element of RICO, a plaintiff must show that [the] injury flowed directly from at least one of the predicate acts. This burden is not met where a plaintiff shows merely that [the] injury was an eventual consequence of the predicate act or that he would not have been injured but for the predicate act." Wylie v. Denton, 323 Ga. App. 161 (2013).

The Defendants argue that the Plaintiffs' RICO claim fails because there is no evidence of mail or wire fraud; no evidence of a pattern of predicate acts and no evidence of any intent to defraud or conspiracy to defraud. In the present case the evidence establishes that multiple

communications by e-mail relating to the Plaintiffs' investment and PTG occurred. The Plaintiffs are not required to show that they personally relied upon a particular communication to establish wire or mail fraud. Nor is proof of common law justifiable reliance required to establish mail or wire fraud as predicate acts in support of a RICO claim. Pollman v. Swan, 289 Ga. 767 (2011). For those reasons, the Court finds that whether the elements of wire fraud or mail fraud can be proven based upon the communications in the record is a matter for a jury.

The Court also finds that whether a pattern of predicate acts constituting a pattern of racketeering activity can be shown is a jury question. In Georgia a RICO claim cannot be asserted with respect to a single transaction. Pollman v. Swan, 314 Ga. App. 5 (2011). Under the Georgia RICO statute multiple crimes arising from a single transaction do not constitute a pattern of racketeering activity. Smith v. Chemtura Corp., 297 Ga. App. 287 (2009). Proof of multiple victims of one isolated transaction is also not sufficient to establish a pattern of racketeering activity. Emrich v.Winsor, 198 Ga. App. 333 (1991).

The record before the Court reflects that all of the plaintiffs were solicited to invest in PTG and that their investments were made individually. The Defendants, relying upon Emrich, supra, characterize the solicitation of investments in PTG as a single transaction. In Emrich, however, the investment was described as an interest in a single investment. The investors were described as co-investors who participated jointly in a single investment. Id. Here the Plaintiffs were approached and entered into separate investment contracts. While the Plaintiffs' investments were associated with a single business, they did not make a collective investment. The Court, therefore, cannot say as a matter of law that the solicitation of PTG investors constituted a single transaction. Compare, InterAgency, Inc. v. Danco Financial Corporation, 203 Ga. App. 418 (1992).

The remaining question is whether Plaintiffs can establish intent or conspiracy to defraud or a scheme to defraud. Based upon the current record the Plaintiffs cannot make such a showing. The Defendants have all asserted they had no such intention. And the primary persons who solicited Plaintiffs testified either that the representations made were true and or that they believed the representations they made to be true when they were made. Moreover, while justifiable reliance need not be shown to prove the crimes of wire or mail fraud; it is required to establish the existence of actionable fraud which is the foundation of Plaintiffs' RICO claim.

The Plaintiffs all signed subscription agreements with a merger clause. They each affirmed that "No representations have been made or furnished to the undersigned or the undersigned's advisors in connection with the Offering which were materially inconsistent with the [Private Placement] Memorandum." The Plaintiffs' made the representation freely and consummated the transaction knowing the contents of the private placement memorandum and subscription document. Those undisputed facts preclude any showing of justifiable reliance on alleged pre-contract misrepresentations. Without justifiable reliance there can be no fraud.

Finally, an essential element of a Georgia RICO claim is proximate cause. Pollman v. Swan, 314 Ga. App. 5 (2011). Proximate cause requires a showing of direct causation. "A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money. He must show a causal connection between his injury and a predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act." Id. Accepting for purposes of the motion that acts of wire fraud and mail fraud occurred; they were not the proximate or direct cause of Plaintiffs' losses. The direct cause of the losses was the decision by each Plaintiff to enter into a contract to invest in a business when (accepting their allegations as true) the contract did not fully reflect the representations made to them about the business and contained a merger clause. Alternatively, taking the Plaintiffs' complaint as framed, the pre-contract fraud, which included oral statements and a Power Point presentation, set the forces in motion which caused them to invest; but their losses were directly caused by mismanagement of the business and a change in business strategy. For all of the reasons noted Defendants' motion for summary judgment as to Plaintiffs' RICO claim is granted.

"In order to establish a claim for conversion the complaining party must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property and (4) refusal by the other party to return the property." Dennis v. First National Bank of the South, 293 Ga. App. 890 (2008). Plaintiffs' conversion claim fails because, as they acknowledged in their brief, "[w]hether Defendants committed conversion hinges on whether they procured Plaintiffs' investments by fraud." For the reasons noted above the Court has concluded that the Defendants did not commit actionable fraud in securing those investments.

The evidence is that Plaintiffs voluntarily invested in a venture which was ultimately unsuccessful. The investments were, as a matter of law, legitimately procured. Plaintiffs cannot,

therefore, establish a right of possession with respect to the funds invested. Additionally, there is no evidence that the funds invested are in the actual possession of the individual defendants. "Where there is no evidence that the defendant possesses any of the funds or items allegedly converted, an action for conversion must fail." J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell, 284 Ga. App. 552 (2007).

In light of the preceding rulings, Plaintiffs' remaining claims cannot survive. Establishing a right to impose a constructive trust on funds requires showing that the disputed funds were obtained fraudulently. Middlebrooks v. Lonas, 246 Ga. 720 (1980). The Plaintiffs are precluded from making such a showing in the present case. Plaintiffs also cannot show a right to equitable accounting. "The mere necessity of accounting to ascertain the amount due in a contract is wholly insufficient to give equity jurisdiction to order an accounting." Insurance Center, Inc. v. Hamilton, 218 Ga. 597 (1963). With respect to the appointment of a receiver, Plaintiffs cannot establish a "clear and urgent need' which would authorize such an appointment. Id. There can be no recovery on Plaintiffs' conspiracy claim because it is a contingent claim. When, as here, "the underlying tort claim fails the conspiracy fails because it is dependent upon the viability of the primary claim." Dyer v. Honea, 252 Ga. App. 735 (2001). Recovery of attorney fees under OCGA 13-6-11 is likewise a contingent claim."[A] party cannot receive attorney fees under OCGA 13-6-11 unless he prevails on his basic cause of action." Parker v. Clary Lakes Recreation Association, Inc., 265 Ga. App. 93 (2004).

Finally, the Court has reviewed, Goody Products, Inc. v. Development Authority of City of Manchester, 320 Ga. App. 530 (2013), and finds it to be inapposite. In that case the parties entered into a contract to sell a factory facility. The facility was intended to be functional and to retain its fixtures. The seller stripped key electrical components out of the building prior to the sale. The court concluded that the merger clause in the sales contract did not preclude proceeding on a fraud claim. Two issues were asserted, first whether stripping the electrical components out of the building caused an intrinsic defect in the subject matter of the contract, i.e. the factory was not functional, and second whether the sales contract itself contained a misrepresentation.

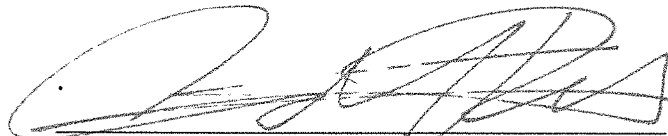
The first circumstance considered in Goody Products is distinguishable. In the present case the investment solicitation was for the purpose of creating PTG. There was no pre-existing business, website or physical plant. Consequently, there is nothing in the present case which would be analogous to rendering an operational business non-functional by either stripping its

physical plant or looting its assets. Rather, Plaintiffs received a solicitation to invest in a proposed business. Representations were made with the purpose and intent of furthering the interest of the proposed business. That business was in fact developed. Under such circumstances it cannot be shown that there was an intrinsic defect in the subject matter of the contract. Plaintiffs' claims stem from either pre-contract representations about the proposed business or how the business was run after its creation.

The second theory raised in Goody Products turned on the contention that there was a misrepresentation contained within the sales contract itself. It is true that "a valid merger clause does not prohibit a claim based upon a misrepresentation in the contract itself." Chhina Family Partnership, L. P. v. S-K Group of Motels, Inc., 275 Ga. App. 811 (2005). In this case, however, Plaintiffs have never asserted that either the private placement memorandum or the sales subscription agreement contained misrepresentations. Accordingly, they are bound by the terms of the contract documents.

For all the foregoing reasons the Court's previous summary judgment rulings are reaffirmed and the outstanding Motions for Summary Judgment are Granted as to all claims for all remaining Defendants.

So Ordered This 4th Day of February, 2014.



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