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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-033646 08/06/2012

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C. Castro
Deputy

JAMES BEAUCHENE, et al. ANDREW S JACOB

v.

BRANDON T LEWIS, et al. CHAD A HESTER

UNDER ADVISEMENT RULING

This matter was tried to the Court on June 13, June 14 and June 18, 2012. Following trial Plaintiffs filed their Proposed Findings of Fact and Conclusions of Law on July 13, 2012 and Defendants filed their Proposed Findings of Fact and Conclusions of Law on July 18, 2012. At that time the matter was taken under advisement.

The Court now rules as follows:

Findings of Fact

1. In 2005 Plaintiffs Jim and Brenda Beauchene (collectively the "Beauchenes") were introduced to Defendant Brandon T. Lewis ("Lewis") as someone who could offer them investment opportunities.

2. In May 2006 Lewis formed Defendant Diamante Developments, LLC ("Diamante").

3. Diamante is an Arizona LLC created to invest in various development projects.

4. Lewis created Diamante and paid the initial set up costs necessary to create an Arizona LLC. Further, Lewis contributed additional time and costs necessary for Diamante to operate and meet its obligations, none of which have been reimbursed to Lewis. Diamante, as an LLC, set up a bank account, paid taxes, had members, held member meetings and had an operating agreement.

5. Lewis is one of several members of Diamante.

6. In June 2006 Lewis called Jim Beauchene to solicit the Beauchenes' participation in an investment that would provide short-term financing for the construction of a resort in Midway, Utah, called Via Saashi, being developed by Richard Hansen ("Hansen").

7. Diamante contracted to loan Hansen nearly $3 million for the project.

8. Lewis obtained proformas, appraisals, and many other documents to evaluate the project and Hansen. All of this information received by Lewis was provided to investors including the Beauchenes.

9. In telephone calls Lewis and Beauchene discussed details of the Via Saashi project.

10. As part of those discussions, Lewis provided the Beauchenes extensive written material on the Via Saashi project.

11. These materials were largely prepared by Hansen or those affiliated with him.

12. After considering the information provided by Lewis, the Beauchenes agreed to invest $300,000.00 (from the pension plan of Beauchene's medical practice ("The Plan")) in the Via Saashi project.

13. The Beauchenes are the sole beneficiaries of The Plan with an interest in the funds at issue in this litigation.

14. Loan agreements between Diamante and The Plan stated that funds loaned to Diamante would then be loaned to Hansen to be "applied as a working capital loan to be used toward completing and receiving final plat approval for the development" of the project in Utah.

15. As a member of Diamante, Lewis would not receive any money or compensation until after the Beauchenes received all of their principle and interest.

16. Lewis presented the Beauchenes with a loan agreement that had an 18 month term, provided a 30% per annum return, and stated that the funds would be secured by a "second deed of trust" on "55 acres of land with an appraised value of at least $9.4 million."

17. The Beauchenes and Lewis, on behalf of Diamante as borrower, executed this loan agreement on July 13, 2006.

18. On July 13, 2006, The Plan loaned Diamante $300,000 (three hundred thousand dollars). The loan document contained an integration clause that all prior negotiations were incorporated into the document.

19. Lewis represented to The Plan that Diamante would loan its $300,000 and funds contributed by other "investors" to Hansen, the Utah developer. Beauchene understood that Diamante would be pooling capital from other lenders and loaning to Hansen.

20. The Beauchenes, as instructed by Lewis, wired $300,000.00 to an escrow account in Utah for the benefit of Hansen.

21. Lewis sent all investors, including Beauchene, all information he received such as executive summary, appraisals, site plans, construction budgets, use of proceeds by Hansen, parcel maps, letters from engineers, architects and the City of Midway.

22. The Beauchenes were instructed by Lewis to consult with their own attorney and seek their own advice on any investment opportunity based on the information provided by Lewis.

23. The Beauchenes made a second, $200,000.00, investment in Via Saashi.

24. On that loan Lewis presented the Beauchenes with a loan agreement with a 12 month term, provided a 35% per annum return, and which stated that the funds would be secured by a "second deed of trust" on "66 acres of land with an appraised value of at least $10.4 million."

25. The Beauchenes and Lewis (on behalf of Diamante as the borrower) executed this second loan agreement on January 23, 2007.

26. The Plan loaned Diamante an additional $200,000.00. The contract contained an integration clause and terms regarding security for the loan.

27. The contract for the January 23, 2007, loan provides that Diamante would "return the original principle of $200,000.00 plus a 35% return."

28. The Beauchenes, as instructed by Lewis, then wired $200,000.00 to an escrow account in Utah for the benefit of Hansen.

29. Hansen did sign personal guarantees on his loans with Diamante.

30. Second deeds of trusts were secured to collateralize Diamante's loans with Hansen.

31. Beauchene negotiated his interest rates of 30% and 35% with Diamante based on information received such as a prospectus, appraisal, property information and other information.

32. The Beauchenes failed to present any evidence demonstrating a misrepresentation or false statement in either of the loan agreements.

33. Lewis has not received money or been paid for any of his efforts with Diamante, Hansen or the Midway project.

34. On December 17, 2007 Lewis informed the investors that there had been foreclosures of the real estate securing their funds but added that "our investment is still secured by promissory notes and personal guarantees."

35. Lewis, through Diamante, made separate loans to Hansen at interest rates significantly higher than those charged by the Beauchenes.

36. Neither the Beauchenes nor Diamante have received any funds from Hansen on any of the loans.

37. On March 23, 2011, this Court entered summary judgment for $300,000.00 (plus contract-rate pre and post judgment interest) against Diamante for breach of the July 14, 2006, loan agreement.

38. On October 5, 2011, this Court entered summary judgment for $200,000.00 (plus contract-rate pre and post judgment interest) against Diamante for breach of the January 23, 2007, loan agreement.

Conclusions of Law

1. The Beauchenes' loans to Diamante are securities for the purposes of applying Arizona's Securities Act. Ariz. Rev. Stat. §44-1801(26); MacCollum v. Perkinson, 185 Ariz. 179, 186 (App. 1996).

2. The cause of action for securities fraud is defined as follows:

   a. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities…, directly or indirectly to do any of the following:

      1. Employ any device, scheme or artifice to defraud.
      2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
      3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

      Ariz. Rev. Stat. §44-1991(A).

3. A person against whom an action for violation of A.R.S. 44-1991 is brought is not liable if the person sustains the burden of proof that the person did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.
   Ariz. Rev. Stat. §44-1998(B).

4. Lewis was not under a duty to disclose the interest rate Diamante was receiving from Hansen on its separate loans to Hansen.

5. The Beauchenes were provided all material information in Defendants' possession and were able to reasonably ascertain the risks associated with the Diamante loans and determine for themselves whether to make the loans and the interest rate they sought to make their loans.

6. Lewis did not omit any material information from the Beauchenes at the time the loans were made that would constitute a material omission.

7. Lewis and Diamante are not liable for securities fraud as they disclosed all material information in their possession to the Beauchenes advised the Beauchenes to seek independent analysis of the project, provided information which was reasonable and sufficient for the Beauchenes to conclude on their own to invest money, and were under no obligation to disclose the interest rate Diamante would received from Hansen.
8. The Beauchenes failed to establish that Lewis omitted any material information that he knew or could have known in the exercise of reasonable care at the time the Beauchenes investigated the investments and made their decision to invest with Diamante.

9. Lewis established that he did not omit any material information and that he exercised reasonable care in providing all information to the Beauchenes that was in his possession.

10. Any party in Arizona attempting to pierce the corporate veil and hold its members personally liable must overcome a presumption in favor of maintaining the corporate status.

11. Plaintiffs failed to provide any basis for this Court to pierce Diamante's corporate veil as Diamante has and continues to maintain a separate identity from its members, Diamante has and continues to operate the business for which it was established, and observing the corporation would not promote fraud or work an injustice to Plaintiffs.

12. Lewis has neither commingled his funds with Diamante nor effectuated any fraud. Lewis has always maintained separate, personal bank accounts to pay his personal expenses.

13. Diamante has observed the required corporate formalities in Arizona. Diamante held member meetings and logged the meeting minutes accordingly. Diamante filed taxes, entered into operating agreements with individuals, had members of the LLC, and effectuated status calls to its members.

14. No Diamante funds were used for Lewis' personal expenses.

15. Diamante and Lewis are distinct personalities. Having a sole shareholder in a company does not, in and of itself, lead to a situation in which the corporate form should be disregarded. Lewis maintained his separate identity from Diamante and there is no evidence to support otherwise.

16. Diamante was sufficiently capitalized at the time of its inception to meet its needs. One of Diamante's objectives was to effectuate an investment project to benefit the parties involved. Diamante was able to meet all of its financial obligations upon creation.

17. The fact that the Hansen deal has not been profitable and the loans have not been repaid is not evidence that Diamante was under-capitalized at its inception.

18. No statements made by Lewis constituted material misrepresentations that wrongfully induced Plaintiffs to enter any agreement with Diamante.

19. Plaintiffs were aware of the interest they were receiving and entered into the agreement with Diamante with full knowledge and acknowledgement of the risks of the investments.

Weighing all admitted evidence, the Court finds that Lewis and Diamante are not liable to the Beauchenes under the securities fraud claim. Likewise, the Beauchenes cannot pierce Diamante's corporate veil and hold Lewis personally responsible for the Judgments it obtained against Diamante as the Beauchenes fail to establish that Diamante is the alter ego of Lewis, that funds were co-mingled, or that any fraudulent conduct has occurred by Lewis through Diamante.

IT IS ORDERED entering verdict on all Counts in favor of Defendants.

FILED: Exhibit Worksheet

/ s / HONORABLE JOHN A. BUTTRICK

JUDICIAL OFFICER OF THE SUPERIOR COURT

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