

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-000741

06/05/2018

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

MANISH THAKRAR

GREGORY G MCGILL

v.

SURENDRA PALA

GORDON S BUELER

GORDON S BUELER / BUELER JONES
L L P
1300 N MCCLINTOCK DR STE B4
CHANDLER AZ 85226

MINUTE ENTRY

East Court Building - Courtroom 712

8:30 a.m. This is the time set for a Trial Management Conference and for Oral Argument on Plaintiff's Motion for Summary Judgment, filed on April 14, 2018. Plaintiff/Counter Defendant, Manish Thakrar, is present and is represented by counsel, Gregory McGill. Defendant, Surendra Pala, is present and is represented by counsel, Gordon Bueler.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court has read all briefing on Plaintiff's Motion for Summary Judgment, the Court of Appeals Opinion, the Complaint, Counterclaim and Answer.

The parties present argument on Plaintiff's Motion for Summary Judgment.

IT IS ORDERED taking this matter under advisement.

9:29 a.m. Matter concludes.

LATER:

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The Court has considered the Motion for Summary Judgment filed April 14, 2018 (with exhibits), the Statement of Facts (Rule 56) filed April 14, 2018, the Response to Motion for Summary Judgment filed May 15, 2018, the Statement of Facts in Support of Response to Motion for Summary Judgment (with exhibits) filed May 15, 2018, the Reply on Motion for Summary Judgment (with exhibits) filed May 27, 2018, the opinion of the Arizona Court of Appeals in this case filed November 29, 2016 No. 1 CA-CV 15-0448, and the oral argument conducted on June 5, 2018.

Plaintiff Thakrar and Bipin Kanabar formed BIL Investments, LLC in April 2012. Also in 2012 Plaintiff Thankrar and Kanabar entered into a partnership to operate an Indian restaurant with Defendant Pala. Two partnership agreements were signed and dated September 19, 2012. The parties agree the written partnership agreements must be read together but disagree about their meaning.

The partnership agreements provide Pala had 50% of the partnership and Plaintiff and Kanabar each had 25%. One of the agreements stated: "Surenda Pala has the option of becoming a 50% share of the LLC name added to the lease and added to the bank account within one years of the startup date." Defendant Pala was in bankruptcy in 2012 and agreed to stay out of BIL Investments, LLC subject to the option. Plaintiff and Kanabar were to contribute \$20,000 each as an initial contribution and Defendant Pala was responsible for the day to day management and operation of the restaurant, including food inventory, staff, hygiene, cleanliness and customer relations. Defendant Pala did not contribute any money to the restaurant. Pala was to receive a monthly salary of \$3,000 after the restaurant opened. The agreements provide the partners will share costs as follows: Defendant Pala 50%, Plaintiff Thakrar 25% and Kanabar 25%.

The restaurant in October 2012 and Pala was no longer involved with Plaintiff or this restaurant after October 2012. The restaurant opened in November 2012. Plaintiff entered into a management agreement with others to operate the restaurant in December 2012. The restaurant operated until it was sold in 2015 for \$65,000.

In January 2013, Plaintiff Thakrar filed a complaint alleging claims for breach of contract, breach of fiduciary duty, and an injunctive claim to oust Pala. In March 2013, Defendant Pala filed a counterclaim and third party complaint alleging claims for breach of fiduciary duty, breach of contract, fraud, dissolution of BIL, unjust enrichment, and a request for an accounting.

Plaintiff filed a motion for summary judgment which was granted in 2015. The Arizona Court of Appeals reversed the order granting summary judgment and remanded to the trial court. The Court of Appeals found there were genuine issues of material fact that precluded summary judgment, including Pala's alleged management failures, whether the parties intended to create

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partnership separate from BIL, whether Pala became a partner in the partnership or a member in BIL upon signing either of the partnership agreements, and whether Pala lost the opportunity to become a member of BIL by not exercising his first agreement option.

In the current motion for summary judgment, Plaintiff Thakrar seeks summary judgment on liability on the claims in the complaint and counterclaim, arguing Pala failed to exercise the option to become a member of BIL, LLC. Plaintiff contends he has conducted additional discover and the record now supports summary judgment. Plaintiff also contends Pala made no capital contribution to BIL and he can prove no damages. Specifically, Pala cannot show lost profit with reasonable certainty and Pala was not entitled to any salary because he never worked for the restaurant after it opened. In addition, he was not a party to the management agreement Plaintiff negotiated with others to operate the restaurant in December 2012 and is therefore not entitled to any distributions or profits from that agreement.

Defendant Pala responds that there are material issues of fact precluding summary judgment. Pala contends he was always a 50% partner and there was no need to exercise an option. Pala claims Thakrar breached the partnership agreement and improperly froze him out of the partnership. Thakrar thereby improperly obtained all financial consideration from the restaurant during its period of operation. Pala contends he is entitled to his share of any distribution that was made by the partnership. Pala also contends he is entitled to half of the proceeds from the sale of the restaurant.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App. 2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011) and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 (App. 2010).

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The opponent of a motion for summary judgment does not raise a genuine issue of fact by merely stating in the record that such an issue exists. The party must show that competent evidence is available which will justify a trial on the issue. *Flowers v. K-Mart Corp.* 126 Ariz. 495, 499 (App. 1980). An unsupported contention that a dispute exists is insufficient to defeat a motion for summary judgment. *Sewell v. Brookbank*, 119 Ariz. 422, 426 (App. 1978). A nonmoving party may not rest on allegation in its pleadings. See Rule 56, Ariz.R.Civ.P. and *MacConnell v. Mitten*, 131 Ariz. 22, 25 (1982). Vague or generalized unsupported statements are not sufficient to withstand a motion for summary judgment. *Burrington v. Gila County*, 159 Ariz. 320, 767 P.2d 43 (App. 1988).

A plaintiff/counterclaimant has the burden of establishing a contract, its breach, and damages that resulted from the breach. *Savoca Masonry Co. v. Homes & Son Const. Co.*, 112 Ariz. 392, 542 P.2d 817 (1975) and *Graham v. Asbury*, 112 Ariz. 184 (1975). When interpreting contracts, the parties' intent controls. When a contract is ambiguous (when there is more than one reasonable interpretation), what the parties intended is a fact question decided on the contract language and any parole evidence. *Taylor v. State Farm*, 175 Ariz. 148, 854 P.2d 1134 (1993). The court will look to the plain meaning of the words as viewed in the context of the contract as a whole to discover and enforce the parties' intent at the time the contract was made. *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 475 (App. 2015).

Given the quantum of evidence required to establish the claims in the complaint and counterclaim and, viewing the evidence in a light most favorable to the proponent, the Court finds there are genuine issues of material fact and summary judgment is not appropriate. The issues of material fact include: Pala's alleged management failures; whether the parties intended to create a partnership separate from BIL, LLC; whether Pala became a partner in the partnership or a member in BIL, LLC upon signing either of the partnership agreements; if there was a partnership, when did it terminate; and did Pala lose the opportunity to become a member of BIL, LLC by not exercising his option and, if so, what significance that had on the terms of the written agreements. Since the written agreements do not provide any specific requirements relating to exercising the option, the intent of the parties is important. In addition, since there is a dispute about the intent of the parties, credibility is key and should be reserved for the trier of fact at trial. Some or all of these issues may impact the damages to which each party may be entitled and thus summary judgment is inappropriate on the damages issues as well as the liability issues.

Accordingly,

IT IS ORDERED denying Plaintiffs' Motion for Summary Judgment filed April 14, 2018.