January 27, 2006

Mr. Gour-Tsyh Yeh
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Oviedo, FL 32765
Pro-Se Plaintiff

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Re: Gour-Tsyh Yeh *v. Norman N. Aerenson and Alice Yang*
C.A. No.: 2004-11-576

Date Submitted: January 17, 2006
Date Decided: January 27, 2006

FINAL ORDER AND OPINION ON CO-DEFENDANTS' MOTION FOR DIRECTED VERDICT PURSUANT TO C.C.P. CIV. R. 50(a)(1)

Dear Counsel and Mr. Yeh:

Trial in the above captioned matter took place on Tuesday, January 17, 2006. The instant matter is an *appeal de novo* brought pursuant to 10 *Del. C.* §9570 *et seq.* from the Magistrates Court. At the close of Plaintiff's case, both defendants' counsel moved for a Directed Verdict pursuant to *Court of Common Pleas Civ. R. 50(a)(1)*. The Court reserved decision on those motions. This is the Court's Final Decision and Order.

THE FACTS

At trial, the Court received as part of the plaintiff's case-in-chief testimony from Gour-Tsyh Yeh ("Yeh"). By stipulation, Yeh read his testimony into the record. He is a Provost Professor at the University of Central Florida for the past five years and resides at 4507 Old Carriage Trail, Oviedo, Florida. He is the plaintiff in the instant action. Yeh claims in paragraph 1 of his prepared statement that on August 4, 2003 co-defendant Norman N. Aerenson ("Aerenson") withheld from him a share of proceeds of selling the Sleep-Inn Hotel and owned by Five-T Associates, which is a limited corporation in Delaware. Yeh claims the deposit was intended to be an escrow for the purchase by him of .13 acre of land owned by Five-T Associates, LLC which he also alleges in his Complaint co-defendant Alice Yang ("Yang") was the manager.

In his testimony, as well as paragraph 3 of his prepared statement, Yeh claims that on July 19, 2004, one day prior to the scheduled settlement date of July 20, 2004 wherein NABSTAR, LLC was purchasing the Sleep-Inn Hotel from Five-T Associates, LLC, he offered to buy a track of .13 acres of land. He claims he was misled by Yang about the potential uses of the .13 acres. He subsequently unilaterally decided to not purchase the land because of the reasons set forth below.

On or about July 19, 2004, Mr. Yeh claims he demanded the deposit of $15,000.00 returned from co-defendants Aerenson, counsel for Five-T Associates, LLC. Yeh claims he was told by Aerenson and Yang that the proceeds had been already distributed to the partners of Five-T Associates, LLC long before the scheduled settlement date. Therefore, these monies were no longer in existence.

Finally, in paragraph 5 of his prepared statement Yeh claims this "land deal" for the purchase of .13 acres fell through for the reasons set forth in his testimony. He therefore demands under the theory of tort-negligence to enter judgment against Aerenson and Yang who allegedly "collaborated or connived" to distribute plaintiff's deposit of $15,000.00 without notifying him and seeking his approval. He therefore now claims $11,325.00 in damages because he realized he had been paid 24% of the proceeds of the $15,000.00 distributed at settlement that he previously gave to LLC to purchase the land.

As will be described herein, the purported reason plaintiff now seeks only $11,325.00 in his prayer for relief is that he was paid is pro-rata share of 24% when the LLC was dissolved and liquidated. At settlement of the instant Sleep-Inn Hotel described above, all partners of the LLC were distributed their pro-rata percentage ownership of the $15,000 proceeds they owned of the LLC. Yeh received his pro rata of 24% of the $15,000.00.

The Court also notes that co-defendants' have filed respective Answers to the Complaint and raised the affirmative defenses of failure to state a claim; waiver; acquiescence; and a factual defense that plaintiff himself actually directed all actions of Aerenson, which he now complains with "full knowledge of the consequences". Co-defendant's attorney Lyons who represents Aerenson also notes that defendant failed to alleged conspiracy and fraud with particularity and therefore Yeh is barred from raising these allegations in the subject lawsuit and/or trial.[1]

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[1] The Court conducted a pre-trial conference and prayer conference at which time the parties stipulated without objection and moved in their respective exhibits into evidence. Plaintiff's Exhibit 1 was a copy of the City of Newark Deed Transfer affidavit acknowledged by Plaintiff which is a Rule and Regulation that he has been informed of the property zoning, as well as the zoning of adjacent lands and approximate location of flood plains. Plaintiff's Exhibit 4 were letters between Mr. Aerenson and Mr. Shaw which are incorporated by reference into the trial testimony. They will be discussed later. Defendants' Exhibit 1 was a copy of Mr. Aerenson's notes of the proceeds of the Settlement Statement between NABSTAR, LLC and Five-T Associates, LLC and the proceeds and distribution of the net profits from the sale of the Sleep-Inn Hotel. As noted on Defendants' Exhibit No. 1, Mr. Yeh owned 24.5 percent and received minus the $15,000.00 for the subject .13

On cross-examination at trial by Mr. Lyons, plaintiff testified he had absolutely "no evidence to show a conspiracy or an agreement" between co-defendants Yang and Aerenson wherein he claimed in the instant Complaint "both collaborated or connived to distributed plaintiff's deposit without notifying and seeking his approval."

Yeh also testified he had no evidence with respect to Mr. Aerenson as to whether the Yang and Aerenson spoke about the distribution of the $15,000.00 which is the subject to the instant lawsuit. Yeh has ideas but "no proof of corroboration." Yeh testified that he lectures his class in English at his University and has Ph.D. He is also a partner in a five-member partnership LLC which sold the Sleep-Inn Hotel and he understands the partners decided to sell the subject property in 2002.

At the settlement and partner meetings held with Five-T Associates, LLC and Mr. Aerenson, he testified he "completely forgot about the .13 acres" which is the subject of the instant lawsuit.

Yeh concedes that was informed in August 2003 that the .13 acre parcel was not part of the settlement and NABSTAR who would not be purchasing that property. That land is an unimproved tree lot and he anticipated putting a sign up on the tree lot as intended use.

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acres of land, $341,856.00. Defendants' Exhibit 2 was a client ledger and distribution sheet by Aerenson & Aerenson, LLC which described with handwritten notes each distribution of the subject settlement to each limited partner of Five-T Associates, LLC and specifically the proceeds which were sent to Mr. Yeh. Defendants' Exhibit No. 3 was a letter from Mr. Aerenson directed to all six partners of the Five-T Associates, LLC explaining the limited partners that it is "time to make final distribution and terminate the partnership of Five-T Enterprises". The letter notes that Alice Y.T. Yang has delivered a check in the amount of $74,778.79 and the account leaves $40,648.28 making a total for distribution of $115,427.07. Mr. Aerenson enclosed a check payable to each of the limited partners of Five-T Enterprises with their percentage interest. Attached thereto is Jeffrey Lee and Associates, CPA's letter to Five-T Partners wherein he delivered the bank account statements of $74,778.79 which is a true and exact balance as of April 19, 2004. Defendants' Exhibit 4 was the final Settlement Statement between NABSTAR, LLC and Five-T Associates, LLC describing in detail the settlement charges, fees and distribution following the sale of the subject Sleep-Inn Hotel. Defendants' Exhibit No. 5 was a report to each shareholder following a meeting in 2002 which lists the land which is the subject of the instant lawsuit which is $15,000.00. Finally, Defendants' Exhibit No. 6 was the Deed between the State of Delaware and Five-T Associates LLC dated May 28, 2002 for the sum of $15,000 selling the instant .13 acres, which is the subject of the instant lawsuit.

Yeh decided he wanted to sell the property and at a full meeting of the partnership owners he agreed that he would pay Five-T Associates, LLC $15,000.00 for the property. Before the company dissolved and was terminated in accordance with Mr. Aerenson's letter and subject distribution he agreed to give the partnership $15,000.00 in exchange for the land. Yeh never signed a contract for the .13 acres for the sale of the property, but simply paid the $15,000.00 to his co-partners at which time he was distributed 24% of that $15,000.00. Yeh believes he made that payment of $15,000.00 on August 3, 2003.

Aerenson informed the plaintiff must go to the City of Newark on or about July 19, 2004 and comply with the City of Newark's regulations which require he sign an affidavit to show he understood the permitted use of the .13 acres. That document has been moved into evidence by stipulation. It is marked as Plaintiff's Exhibit No. 1 and it is a City of Newark document dated July 19, 2003. At trial, Plaintiff acknowledges he read and signed it.

As set forth in the Complaint, plaintiff unilaterally decided that he could not use the sign on the property and to cancel the deal.

Aerenson told him "I distributed the money according to the terms of the partnership" at settlement for the Sleep-Inn Hotel.

The reason for the lawsuit is Yeh claims he never told Aerenson to distribute the $15,000.00, although the documents in his testimony clearly describe that plaintiff actually received 24% of the $15,000.00 which was distributed to the partners at liquidation of the LLC.

The sequence of events is that in December 2003 $12,250.00 was paid to the partnership. In December 2003 an additional $7,300.00 was distributed. Additionally, in December 2003 $12,250.00 was distributed as a result of the final proceeds of the sale.

Yeh was shown Defendants' Exhibit No.: 3 which was a letter dated to the partners dated April 20, 2004 which is detailed above.

Yeh was also informed that Five-T had to be in existence to give the deed and the subject proceeds back to him and the LLC partnership had been dissolved and terminated.

Plaintiff concedes he "didn't pay attention to Mr. Aerenson's letter" and did not make his own accounting of his proceeds to actually show that he received 24 % of the $15,000.00. He realizes now that he has allegedly been paid his pro-rata portion of the share of the $15,000.00 for the .13 acres of land to LLC at the final distribution. He testified, "I got my money back for the 24% of the $15,000.00."

Plaintiff also conceded several times during his testimony that, "I am a very sloppy person" and acknowledged the he did not review his own accounting statements and/or computer records to determine he received his pro rata distribution of the $15,000.00 even though he is a Ph.D. Engineer.

Plaintiff also claims he did not intend to "flip" the property.

Yeh also concedes there is "no evidence" during the meetings with Mr. Aerenson and all the partners of the LLC that they somehow agreed with Ms. Yang to defraud him out of the proceeds of the $15,000.00.

Norman Aerenson ("Aerenson") was sworn and testified for the plaintiff. Aerenson was Five-T Associate, LLC's attorney which is a LLC group which sold the Sleep-Inn Hotel to NAPSTAR. He denies in any way that he defrauded plaintiff or that he did not keep him informed. Aerenson was the attorney for the entire corporation and LLC, not plaintiff individually. At final settlement he distributed $15,000.00 to the partners of NAPSTAR in the proportion of ownership of the LLC that they individually owned. At the time Yeh

requested the $15,000.00 returned, the corporation was no longer in existence. On August 4, 2003 the Sleep-Inn Hotel "settled" and all partners in the room understood the proceedings. The date of the sale of the Sleep-Inn Hotel was August 4, 2003 and approximately $1,400,000.00 net profits were distributed. Plaintiff received $356,865.40 and $15,000.00 was deducted from his net profit as specifically requested by the plaintiff.

On July 19, 2004 Yeh told Aerenson that he was no longer interested in purchasing the .13 acres because of the limited uses set forth in the affidavit required by the City of Newark.

Ms. Alice Yang ("Yang") was sworn and testified. She denied she ever misled plaintiff as to the use of the subject property which is fully accessible by public record of the City of Newark. Yang also presented testimony that the public permitted use of the .13 acres was always open as a public record and available for all citizens of Delaware.

DISCUSSION

At the close of plaintiff's case-in-chief, pursuant to Court of Common Pleas Civ. R. 50, both Mr. Ferry and Mr. Lyons have moved for a directed verdict. Mr. Lyons noted there was no *prima facia* case presented at trial by Yeh and according to the Civil Rules, plaintiff has not plead the fraud and conspiracy allegations with particularity. Therefore Lyons argues no substantial evidence to support a verdict for the plaintiff exists. Mr. Ferry also moved on behalf of his client Yang pursuant to C.C.P. Civ. R.19 and C.C.P. Civ. R. 50 that the indispensable parties were not before the Court and there is absolutely no evidence of liability by both defendants.

Factually, co-defendants' counsel argue that defendant requested the LLC and Mr. Aerenson to distribute and accept the $15,000.00 with his full knowledge for the .13 acres of

land which is the subject of the instant lawsuit. They also noted that Mr. Yeh conceded that he is a "very sloppy person" and did not read his own accounting statements or computer records confirming his pro rata 24% proceeds of the $15,000.00. Yeh conceded in his direct testimony that "absolutely no evidence exists" that Yang and/or Aerenson conspired to defraud him or take the $15,000.00. Mr. Ferry also noted in his argument that Yang had full knowledge and access to all Cit of Newark public records which lists the permitted uses for the .13 acres according to the City of Newark Rules and Regulations. Therefore, Yang could not have misled him if Yeh simply reviewed public records clearly accessible to him. Mr. Ferry also noted that Ms. Yang, who testified, denied any conspiracy or knowledge or information that misled him as to the use of the subject property.

THE LAW

The Civil Rules Governing the Court of Common Pleas state:

> **Rule 50: Motion for a directed verdict and for judgment notwithstanding the verdict.**
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> (a) *Motion for directed verdict; when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for directed verdict shall state the specific grounds therefor.

The law is clear that a motion for directed verdict must state the specific grounds for the basis of granting said motion. *Mather v. Voss*, Del. Supr., 98 A.2d 499 (1953). A directed verdict in favor of the defendant presents a situation for the trial judge requiring the evidence to be viewed in the most favorable light to the plaintiff. *Rumble v. Lingo*, Del. Super., 147 A.2d 511 (1958). When considering a directed verdict for the defendant, the Court should be convinced that there is no substantial evidence to support a verdict for the

plaintiff. *McCarthy v. Mayor of Wilmington*, Del. Super., 100 A.2d 739 (1953). *See also, Wilson v. Klabe*, 2000 Del. C.P. LEXIS 29, Welch, J. (July 22, 2003); *Rick Pheasant and State Farm Automobile Insurance Company, as subrogee of Rick Pheasant v. Jason E. Destafney*, 1998 Del. C.P. LEXIS 23, Welch, J. (September 29, 1998).

OPINION AND ORDER

After carefully scrutinizing the subject testimony and credibility of the evidence of trial, it is clear as a matter of law that the Directed Verdict Motion by both defendants must be granted by the Court. Even viewing the evidence in the most favorable light to the plaintiff, there is simply no substantial evidence to support a verdict in Yeh's favor. Plaintiff concedes he is a "very sloppy" person and that he did not read the subject documents post settlement. Only when he made the visit to the City of Newark and found the permitted uses by the City of Newark for the /13 acres was contrary to his intended use for the property for a sign that he cancelled unilaterally the transaction. Yeh also conceded at trial there is simply no evidence against co-defendants to support a conspiracy. Nor did he introduce any records or documents or testimony to support that claim. In addition, he has failed to plead fraud allegations and conspiracy with particularity. *See e.g., Reginald Brewington v. Kent General Hospital, Inc.*, 1986 Del. Super., LEXIS 1208, Ohara, J. (April 22, 1986); *Lee v. Agnew*, 1996 Del. Super., LEXIS 417, Babiarz, J. (June 28, 1996). These counts must be dismissed.

The Court also notes that Yeh failed to join the indispensable parties; the remaining four (4) members of the Five-T Associates, LLC. These four (4) partners are clearly indispensable parties required for just adjudication. C.C.P. Civil R. 19(a). These four partners, along with Yeh, all voted to accept Yeh's $15,000.00 for the .13 parcel; distribute these funds according to their % interest in the LLC; and are limited partners in the LLC.

These four LLC partners, in essence, hold the funds Yeh seeks in his Complaint against Yang and Aerenson. These facts clearly support the conclusion that Yeh's case fall under the purview of a C.C.P. Civ. R. 50 (a)(1) Directed Verdict, or alternatively, dismissal of the action.

Finally, even reviewing Yeh's own testimony, it is clear that Yang in no way misled him as to subject use of the property. Yeh never reviewed the public records indicating the permitted uses by the City of Newark for the subject .13 acres of land at the City of Newark, all accessible to him as public record.

Even viewing all the evidence in the light most favorable to Yeh, it is clear that Yeh did not prove, nor is there substantial evidence to support such a verdict as Yeh claims in his subject Complaint.

Accordingly, co-defendants' Motion, both for a Directed Verdict are hereby **GRANTED**. Each party shall bear their own costs.

IT IS SO ORDERED this 27th day of January, 2006.

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John K. Welch
Judge

/jb

cc: Rebecca Dutton, Case Processor
CCP, Civil Division