[Cite as *Greenberg v. Isan*, 2013-Ohio-2243.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jonnard and Addy Greenberg, et al.	Court of Appeals No. L-12-1149
Appellants	Trial Court No. CI0200902287
v.	
Jerry Isan, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 31, 2013

* * * * *

Christopher F. Jones, for appellants.

Richard M. Kerger and Kimberly A. Conklin, for appellees.

* * * * *

SINGER, P.J.

{¶1} Appellants, Jonnard and Addy Greenberg, Denton and Bonnie Tussing, and Mark Greenberg, appeal from the April 27, 2012 judgment of the Lucas County Court of Common Pleas granting summary judgment to appellees, Jerry Isan, Burton Rose, John

Powell Jr., Don Carter's All Star Lanes Kendall Ltd., and Don Carter Lanes of Florida Ltd., on appellant's breach of contract claims. For the reasons which follow, we affirm.

{¶2} Appellees are general partners (and in some cases also limited partners) in numerous limited partnerships created in the 1970s to operate bowling centers in several states under the name of Don Carter All Star Lanes. Only two of the partnerships are involved in this appeal: Don Carter's All Star Lanes Kendall Ltd. (hereinafter "Kendall") and Don Carter Lanes of Florida Ltd. (hereinafter "Tamarac"). Jonnard and Addy Greenberg and the Tussings are limited partners in both Kendall and Tamarac, and Mark Greenberg is only a limited partner in Kendall. Don Carter, for whom the bowling centers were named, is a limited partner in Kendall and Tamarac and a general partner in other limited partnerships involving these parties.

{¶3} In the 1990s, appellants filed four lawsuits asserting derivative and personal claims against appellees. A settlement agreement was reach between the parties in 1998 regarding ten limited partnerships, including Kendall and Tamarac. The settlement agreement generally provided the general partners of these partnerships would be removed from management of the partnerships and an independent management company owned and operated by Joe Schumacker should be hired to manage the partnership. The management company was required to report directly to Donald Carter, who would serve as the directing partner.

{¶4} On May 29, 2009, appellants filed an amended complaint against appellees seeking monetary damages and other relief for the breach of the 1998 settlement agreement. Summary judgment was granted to appellees. The trial court found that although there was evidence that these directing partner and licensing fees were paid to Carter they were not prohibited by the settlement agreement and there was no evidence of any damage to appellants. Appellants appealed from the judgment asserting a single assignment of error:

> The trial court erred in granting summary judgment for defendants on plaintiffs' breach of contract claims for defendants' payments to Don Carter from the Kendall and Tamarac partnership funds for Carter's directing partner fees and license fees.

{¶5} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is

made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶6} The settlement agreement identified Don Carter as a general partner of the various limited partnerships in the first paragraph of the document. However, it is undisputed that Carter was only a limited partner in the Kendall and Tamarac partnerships.

{¶7} Section 8 of the settlement agreement states in pertinent part as follows:

> General Partner Compensation. So long as the General Partners remain as general partners of the subject Limited Partnerships, their compensation shall be as follows:
>
> a. The General Partners shall continue to receive their pro rata share of distributions of profits or cash flow when such distributions are made to all Partners.
>
> b. The General Partners shall continue to receive their ten percent (10%) share of net sales and receipts each year from Tamarac and Kendall pursuant to Sec. 4.2 of the respective limited partnership agreements.
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> * * *
>
> d. So long as Donald J. Carter shall be the Directing Partner, he shall receive the sum equal to Thirty Thousand Dollars ($30,000) from each

of Dallas West, Boca Raton, and Baton Rouge, for a total annual payment to Don Carter of Ninety Thousand Dollars ($90,000.00). In no event shall these payments be made for less than the years commencing April 1, 1998, through March 31, 2001.

e. For and inconsideration of the use of his name by the Limited Partnerships, Donald J. Carter shall receive a license fee of 3/4 of one percent (0.75%) of net sales and receipts per year generated from the bowling operations at Dallas West, Boca Raton, Baton Rouge, New Orleans Eastbank, Sunrise and PBC.

* * *

g. The General Partners may be reimbursed for ordinary, necessary, and reasonable expenses incurred in the performance of their duties as general partners for the Limited Partnerships.

h. The General Partners and the General Partner Entities shall receive no other income or money of any kind from any of the Limited Partnerships, provided, however, that this limitation shall not impair any right to contribution or indemnification that the General Partners may have under the partnership agreements for the Limited Partnerships.

{¶8} After this document was signed, appellees entered into an agreement with Carter entitled the Resolution of General Partner Inequities Issues on November 16,

1998. Carter was not a general partner of Kendall and Tamarac and the settlement agreement did not provide for him to receive a directing partner fee or a licensing fee for the use of his name with respect to these two partnerships. Appellees agreed, pursuant to their authority as general partners, to pay Carter directing partner fees of $43,200 for his work related to Kendall and $26,800 for his work related to Tamarac. Carter testified that while he was paid a portion of the directing partner fees, a portion of the fees have been accruing.

{¶9} Appellees also agreed to pay Carter a license fee, for the use of his name, equal to 1% of the total gross revenues. Carter testified that this fee was not paid regularly, but it was accrued.

{¶10} The accounting records prepared by Robert Dreker, the certified public accountant for Kendall and Tamarac, show that Carter was paid $43,200 in 1998 and $21,600 in 1999 directing partner fees from Kendall partnership funds. The remaining fees from 2000 through 2005 were accrued.

{¶11} Also in evidence was a 2004 letter from Robert Strickfoot, a Florida attorney, to Joe Schumacker, manager of the bowling centers, responding to questions Dreker had about whether Carter was entitled to these director fees. Strickfoot advised that:

{¶12} First, the Kendall and Tamarac partnership agreements provide that the general partners are to receive 10% of the net sales and receipts, divided as they

determine, and that they agreed to give 1% of their share to Carter. The Tamarac Certificate of Limited Partnership had been amended in 1974 to provide for the 1% share to Carter. The settlement agreement provided for a continuation of the 10% share of the net sales and receipts to be paid to the general partners. Nothing in the settlement agreement precluded the general partners from giving Carter 1% of their share.

{¶13} Second, the directing partner fees of $43,200 and $26,800 from Tamarac and Kendall, which were paid to Carter in 1998 and 1999 and were accruing after that time, are not authorized by the partnership agreement or the settlement agreement. However, Strickfoot was not aware of the Resolution of General Partner Inequities Issues agreement.

{¶14} In 2006, the general partners sold the Kendall property. Richard Coker, a Florida attorney handled the transaction. One issue that arose during the sale negotiations was a claim for outstanding accrued fees by Carter ($43,200 per year in accrued management fees and the 1% license fee). The general partners withheld $266,400 of the sales proceeds pending a resolution of the dispute over the fees.

{¶15} Coker testified he paid Carter $51,338.48 out of the Kendall proceeds. Isan testified that this payment was for Carter's licensing fee, which came out of the 10% share of the management fees owed the general partners.

{¶16} Coker and Isan both testified that Coker advised Isan the $266,400 directors fee should be paid out of the general partners' share unless the general partners obtained

the limited partners' agreement to pay it out of their share. Coker also advised the general partners they had a duty to fully disclose the settlement with Carter and allow the limited partners to decide if they wished to join in or not, with the general partners paying the difference. Isan testified that he followed this advice. Carter and the general partners eventually settled the dispute for $200,000. The remaining $66,400 held in escrow was disbursed to all the limited partners except Carter.

{¶17} Isan and Coker also testified that appellants received more than their pro rata share of the $66,400. Isan testified that Coker, Kerger, and the other limited partners who were asked, advised Isan to give appellants their pro rata share of the entire $266,400 so they would not participate in any payment of the director's fee to Carter. Isan testified that he did not ask appellants whether they wanted to participate in the settlement because this lawsuit was already pending. Coker testified appellants' excess shares were paid by the general partners and was not taken from the sale proceeds. Plaintiffs returned the additional payments, which are being held in a trust account.

{¶18} Therefore, we find, with respect to the Kendall partnership and Carters' licensing fee, the only evidence presented was that the fee was paid out of the share of the management fee paid to the general partners. Furthermore, the only evidence presented regarding the director's fee is that appellants did not suffer any damages as a result of the payment of the fee out of the sale proceeds even if such payment violated the settlement

agreement. Damages are a prima facie element of a breach of contract claim. *Firelands Regional Med. Ctr. v. Jeavons*, 6th Dist. No. E-07-068, 2008-Ohio-5031, ¶ 19.

{¶19} In 2008, the Tamarac partnership property was sold. Bert Oliver, the attorney who handled the sale, prepared disbursement records which show a disbursement to Carter of $3,999. Isan testified that this amount was paid to Carter for his licensing fee and was part of the general partners' accrued management fees paid at the time of the sale. Therefore, there is no evidence to support appellants' claim that partnership funds were used to pay the licensing fee.

{¶20} Because appellants did not establish that they suffered any damages, summary judgment was appropriate on this basis. Furthermore, the trial found that there was nothing in the settlement agreement which prohibited the general partners from contracting with Carter to pay him a directing partner or licensing fee since he was not a general partner of either the Kendall or the Tamarac partnerships. We agree. Therefore, appellants' sole assignment of error is not well-taken.

{¶21} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE