IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ESTATE OF FRANCES FORAKER, by DOROTHY HENRION, Personal Representative and DOROTHY HENRION, Individually, FRANCIS J. WEBB, Individually, and WILLIAM S. ANDERSON, Individually,	:	C.A. No. 04C-03-041
Plaintiffs,	:	
v.	:	
JOSEPH K. LARRIMORE,	:	
Defendant.	:	

Submitted: February 8, 2005
Decided: May 25, 2005

ORDER

Upon Plaintiffs' Motion for Summary Judgment.
Granted.

David N. Rutt, Esquire and Kashif I. Chowdhry, Esquire of Moore & Rutt, P.A., Georgetown, Delaware; attorneys for Plaintiff Dorothy Henrion.

R. Brandon Jones, Esquire and Dominic J. Balascio, Esquire of Hudson Jones Jaywork & Fisher, Dover, Delaware; attorneys for Plaintiffs Francis J. Webb and William S. Anderson.

H. Cubbage Brown, Jr., Esquire of Brown Shiels Beauregard & Chasanov, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

Upon consideration of Plaintiffs' motion for summary judgment, the briefs submitted by both parties and the record before this Court, it appears to the Court:

In October 1987, Mr. Heartie J. Foraker and Mrs. Frances V. Foraker granted a right of first refusal for property located at 2210 Bay Road in Milford to L.A. Enterprises.[1] In February 1995, Mr. Foraker died and his interest in the property transferred to Mrs. Foraker as surviving joint tenant. Mrs. Foraker died in December 1998 and her interest in the property was devised to Dorothy Henrion ("Plaintiff").[2] In October 2003, Mrs. Henrion and Mr. Francis J. Webb entered into a sales agreement for the property which was contingent upon the removal of the right of first refusal once held by L.A. Enterprises.

L.A. Enterprises, comprised of Joseph K. Larrimore ("Defendant") and William S. Anderson, was a Delaware partnership whose purpose was to conduct real estate development. In 1990, Larrimore and Anderson voluntarily dissolved L.A. Enterprises by signing an agreement that divided substantially all of the assets and debts of the partnership. The agreement however neglected to distribute the right of first refusal. Although a dispute currently exists between the parties as to whether the agreement effectively terminated L.A. Enterprises, the partnership has not engaged in any business or activity since the agreement was signed. In October 2003, Larrimore and Anderson, as former partners of L.A. Enterprises, received notice of

---

[1] Property is identified by Kent county tax map parcel number 5-00-152000-01-4600-0001.

[2] Francis J. Webb and Williams S. Anderson are also named as Plaintiffs in this action.

Webb's offer to buy the subject property from Henrion contingent upon the removal of the right of first refusal once held by L.A. Enterprises. Although Larrimore wants to exercise the right of first refusal on behalf of L.A. Enterprises, Anderson has signed an affidavit affirming his refusal to exercise the right of first refusal or sign any document that would indicate L.A. Enterprises still exists. Plaintiffs are now seeking summary judgment based upon two independent grounds. First, because L.A. Enterprises never transferred the right of first refusal, Plaintiffs argue that the right of first refusal terminated in 1990 when L.A. Enterprises terminated. In the alternative, if this Court determines that the right of first refusal still exists, Plaintiffs contend that Larrimore cannot unilaterally exercise said right on behalf of L.A. Enterprises.

Defendant Larrimore contends that L.A. Enterprises exists because the partnership still possesses undistributed assets, namely, the right of first refusal. Because L.A. Enterprises never distributed the right of first refusal, Larrimore argues that L.A. Enterprises merely dissolved in 1990 and continues to exist until the affairs of the partnership are completely wound up. Accordingly, Defendant contends that L.A. Enterprises along with the right of first refusal still exists and the partnership agreement authorizes him to unilaterally exercise the right of first refusal on behalf of the partnership.

Superior Court Civil Rule 56(c) provides that judgment " shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law."[3] On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.[5]

The pivotal issue in the case *sub judice* is whether L.A. Enterprises currently exists. Plaintiffs contend that L.A. Enterprises terminated in 1990 when Larrimore and Anderson, intending to terminate the partnership, signed a written agreement and divided the partnership's assets and debts. Larrimore contends this agreement merely dissolved L.A. Enterprises. Even though thirteen years have elapsed since L.A. Enterprises engaged in any business, Larrimore contends that the partnership continues to exist because it still possesses the right of first refusal and the winding up phase therefore has yet to be completed.

The agreement entered into between Larrimore and Anderson on June 28, 1990 divided substantially all of L.A. Enterprises' assets and debts between the partners.

---

[3] Super. Ct. Civ. R. 56.

[4] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

In fact, the agreement appears to have distributed all of the assets owned by L.A. Enterprises except for the right of first refusal. The agreement also contained an addendum, initialed by both Anderson and Larrimore, which provided:

> The parties by signing the above agreement and this Addendum hereby agree that the partnership known as L.A. Enterprises is hereby terminated.[6]

The agreement dividing substantially all of L.A. Enterprises' assets and debt along with the addendum confirming that the agreement served to terminate L.A. Enterprises unequivocally demonstrate the parties' intentions to terminate the partnership in 1990. The thirteen years of inactivity by L.A. Enterprises following the execution of the agreement evidences both parties' beliefs that L.A. Enterprises was effectively terminated by the agreement. Considering the agreement, addendum and inactivity since the agreement, this Court finds that L.A. Enterprises was effectively terminated in 1990. Because Larrimore and Anderson neglected to distribute the right of first refusal prior to terminating L.A. Enterprises, the right of first refusal also terminated in 1990 and is therefore unenforceable by Larrimore.

Even if this Court concluded otherwise and held that L.A. Enterprises merely dissolved as a result of the agreement in 1990, a partnership exists after dissolution only for the purpose of winding up its affairs.[7] Furthermore, once dissolution occurs, partners have an obligation to diligently wind up the affairs of the partnership. This

---

[6] Pls. Ex. F. (Agreement between Larrimore and Anderson dated June 28, 1990).

[7] 6 *Del. C.* § 15-802(a); *see also Caines Landing Wildlife Preserve Association v. Kirkpatrick*, 663 A.2d 369 (Del. 1993).

duty to diligently wind up the affairs of a partnership was also included in L.A. Enterprises' partnership agreement which provided:

> In the event of a voluntary termination, the partners shall proceed with reasonable promptness to liquidate the business of the partnership.[8]

Assuming *arguendo* that L.A. Enterprises did not terminate upon the signing of the agreement, Larrimore did not act promptly to wind up the affairs of the partnership and cannot claim following 13 years of inactivity that L.A. Enterprises still exists based upon its failure to distribute an inchoate equitable interest. More important, as stated earlier, the partnership exists upon dissolution for the sole purpose of winding up its affairs and exercising the right of first refusal on behalf of L.A. Enterprises at this juncture would not be for the purpose of winding up its affairs. In short, any opportunity Larrimore had to wind up the affairs of L.A. Enterprises following its dissolution has long since expired and the fact that L.A. Enterprises neglected to distribute an inchoate equitable interest did not prevent the partnership from terminating. This Court is unpersuaded by Larrimore's contention that L.A. Enterprises' failure to distribute the right of first refusal, an inchoate equitable interest at the time of the agreement, prevented the partnership from terminating.

Because the right of first refusal cannot be exercised on behalf of the now defunct partnership, the issue of whether Larrimore could have unilaterally exercised said right is *moot*. This Court will however note the difficulty Larrimore would have encountered substantiating his claim of possessing the authority to unilaterally

[8] Def. Ex. C (Partnership Agreement between Larrimore and Anderson).

exercise the right of first refusal. Larrimore would first have to show that L.A. Enterprises dissolved in 1990 but currently exists for the sole purpose of winding up its affairs. Therefore, Larrimore would have to demonstrate that exercising the right of first refusal is for the purpose of winding up the partnership's affairs. However, to unilaterally exercise the right of first refusal, Larrimore would then have to show that exercising the right of first refusal was an act within the ordinary course of business. Considering the facts of this case, it is unlikely that Larrimore, under any conceivable set of circumstances, would be able to simultaneously prove both assertions.

In conclusion, upon consideration of the agreement to terminate and the addendum to the agreement, this Court must conclude that L.A. Enterprises terminated in 1990. The thirteen years of inactivity following the execution of the agreement further supports this conclusion and demonstratively evidences that the partnership terminated when the agreement was signed. The parties' failure to distribute an inchoate equitable interest did not prevent the partnership from terminating and does not currently serve as a mode to revive the now defunct partnership. Because L.A. Enterprises was voluntarily terminated prior to exercising or distributing the right of first refusal, the right of first refusal terminated with the partnership and cannot be exercised by Larrimore on behalf of the defunct partnership.

Accordingly, based on the aforementioned reasons, Plaintiffs' motion for summary judgment shall be *granted*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File