

IN THE STATE COURT OF FORSYTH COUNTY  
STATE OF GEORGIA

FORSYTH COUNTY GEORGIA  
FILED IN THIS OFFICE

OCT 22 2010

*all*  
CLERK SUPERIOR COURT

KEITH DUNCAN,

Plaintiff,

v.

HOMEWAVES, INC. and  
ROBERT ROSE,

Defendants.

Civil Action

File No: 08SC-1345

AMENDED JUDGMENT

The above-styled matter having come on before this Court on October 8<sup>th</sup>, 2009 for a nonjury trial, and the Court having considered all the evidence and arguments of counsel, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

This case arose from a failed investment arrangement between the Plaintiff and Defendant HomeWaves, Inc. ("Defendant HomeWaves"). Defendant Robert Rose ("Defendant Rose") is Defendant HomeWaves' President. Defendant HomeWaves is primarily in the business of installing high-end audio, video and automation equipment in residences. The Plaintiff and Defendant HomeWaves agreed, pursuant to a "Partnership Agreement Intent Letter" that the Plaintiff would invest various sums in Defendant HomeWaves. The Plaintiff agreed to advance \$70,000 initially to Defendant HomeWaves and agreed to invest \$50,000 more if the deal went forward. This money would be transformed into an investment for which the Plaintiff would receive HomeWaves stock if the parties

were able to work out mutually agreeable terms for the Plaintiff's investment and continued employment with Defendant HomeWaves. In the interim, the Plaintiff agreed to work for free for several months at Defendant HomeWaves.

Following the execution of the "Partnership Agreement Intent Letter" the Plaintiff made three loans to Defendant HomeWaves. Each of these loans were evidenced by a promissory note. The first note in the amount of \$70,000 is dated November 12, 2007 and provided fixed interest in the amount of \$467.00 on the principal balance with the note to be repaid on or before March 1, 2008. Pl. Exhibit 1. The second note, in the amount of \$20,000, was dated November 27, 2007 and provided fixed interest at the rate of eight percent on the unpaid balance. Pl. Exhibit 2. The third note, in the amount of \$19,800, was dated November 27, 2007 and bore interest at the fixed rate of eight percent on the principal balance. Pl. Exhibit 3. The maturity dates of these notes were March 1, 2008, March 31, 2008 and March 31, 2008, respectively.

The Plaintiff and Defendant HomeWaves did not reach an agreement for the Plaintiff to assume partnership, and the Plaintiff left his employment with Defendant HomeWaves on January 14, 2008. Defendant HomeWaves has not paid any sums due under the notes. On March 14, 2008, the Plaintiff's attorneys, Caldwell & Watson, LLP sent a notice pursuant to O.C.G.A. 13-1-11 seeking attorneys fees on the notes. The notice predates the maturity dates contained in the second and third notes, but not the first.

The Plaintiff filed this suit on July 11, 2008. The Plaintiff's initial Complaint contained four counts. Counts I, II and III sought payment of the notes, including interest and attorney's fees and Count IV alleged that Defendant Rose had disregarded the corporate entity of Defendant HomeWaves in that he had commingled his assets with those of Defendant HomeWaves such that the corporate veil should be pierced and Defendant Rose should be held individually liable for the debts of Defendant HomeWaves.

The Plaintiff amended his Complaint on November 4, 2008, asserting claims for promissory estoppel in Count V, based on an alleged agreement by Defendant HomeWaves to pay all or one-half of the attorney's fees incurred by the Plaintiff with regard to the drafting of the investor/stockholder documents. The Plaintiff also added a claim for quantum meruit in Count VI, claiming compensation for the time that he worked at Defendant HomeWaves. In addition to actual damages, the Plaintiff has requested attorneys' fees under various theories.

Both of the Defendants counterclaimed. Defendant HomeWaves' counterclaims were for fraud, breach of contract, trade secret misappropriation, defamation and tortious interference with contract. Defendant Rose counterclaimed for defamation. The Plaintiff pursued all his claims at trial. The Defendants pursued Defendant HomeWaves' claim for breach of contract, alleging that Plaintiff Duncan failed to perform his duties competently and therefore breached an implied agreement he had with Defendant HomeWaves to do so.

## **Count I**

The Plaintiff is entitled to recover the sum of \$70,000 principal plus \$467.00 interest on the promissory note between Defendant HomeWaves and the Plaintiff dated November 12, 2007. The note provided for a fixed amount of interest prior to March 1, 2008, but does not provide for a rate of interest thereafter. O.C.G.A. § 7-4-2 provides for an interest rate of 7 percent per annum simple interest where the rate percent is not established by written contract. Accordingly, the Court finds that the Plaintiff is entitled to pre-judgment and post-judgment interest at 7 percent per annum from March 1, 2008, in the amount of \$13,113.03 as of September 29, 2010. The Court finds that pursuant to O.C.G.A. § 13-1-11, after maturity of the obligation, Defendant HomeWaves was notified in writing that the provision relating to the payment of attorney's fees not to exceed 4 percent would be enforced and that Defendant HomeWaves was given ten days from receipt of the notice to pay the obligation in full to avoid enforcement of the fee provision. Accordingly, the Plaintiff is entitled to attorney's fees on the first note in the amount of \$3,324.52.

## **Count II**

The Plaintiff is entitled to recover the sum of \$20,000 principal plus 8% pre-judgment and post-judgment interest on the promissory note dated November 27, 2007 between Defendant HomeWaves and the Plaintiff. As of September 29, 2010, the amount of interest accrued is \$4,545.75. The Court finds that the written demand for attorney's fees sent on March 14, 2008 was sent prior to the March 31, 2008 maturity date of the note. Further, although the demand letter of March 14,

2008 was attached as an exhibit to the Complaint, it did not constitute a new demand in writing giving a post-maturity ten-day period to pay the obligation and avoid the attorney's fees provision. See Third Century v. Morgan, 187 Ga. App. 718 (1988). Accordingly, the Plaintiff did not comply with O.C.G.A. § 13-1-11, and the attorney's fees provision of the note is unenforceable.

### Count III

The Plaintiff is entitled to recover the sum of \$19,800 principal plus 8% pre-judgment and post-judgment interest on the promissory note dated December 27, 2007 between Defendant HomeWaves and the Plaintiff. As of September 29, 2010, the amount of interest accrued is \$4,370.10. As in Count II, the Court finds that the written demand for attorney's fees sent on March 14, 2008 was sent prior to the March 31, 2008 maturity date of the note. Although the demand letter of March 14, 2008 was attached as an exhibit to the Complaint, it did not constitute a new demand in writing giving a post-maturity ten-day period to pay the obligation and avoid the attorney's fees provision. See Third Century v. Morgan, 187 Ga. App. 718 (1988). Accordingly, the Plaintiff did not comply with O.C.G.A. § 13-1-11, and the attorney's fees provision of the note is unenforceable.

### Count IV

The Plaintiff alleged in the complaint that the Court should pierce Defendant HomeWaves' corporate veil because Defendant Rose has commingled his assets with those of Defendant HomeWaves. To this end, the Plaintiff presented evidence in the form of cross-examination testimony that Defendant Rose installed equipment

owned by Defendant HomeWaves into his personal residence, which he also uses as a showroom. The Plaintiff also testified that the Defendant HomeWaves had more than \$5,000,000 in accounts receivable from contracts for work in the Bahamas. The Plaintiff produced a spreadsheet [Pl. Exhibit 9] which summarized the collections of various contracts, which he testified showed that the Defendant HomeWaves received \$514,651.32 from a single contract in the Bahamas entered into on September of 2007. The Plaintiff, who was responsible for Defendant HomeWaves' books, also testified that from November 10, 2007 through January 15, 2008, no revenue was deposited into the bank of accounts of HomeWaves from the Bahamas project. The Defendant Rose explained that the spreadsheet entry reflected an amendment to an existing contract on the Bahamas project, and that the figure represented cash collected on the original contract going as far back to 2005. The evidence as presented by the Plaintiff is inconclusive in establishing by a preponderance of the evidence that the Defendant Rose commingled the corporations assets with his own to the extent that Rose disregarded the corporate entity and should be held personally liable for HomeWaves' debts. Accordingly, on Count IV of the complaint, the Court finds in favor of the Defendant Rose.

#### **Count V**

In Count V the Plaintiff asserts a claim of promissory estoppel for reimbursement of attorney's fees he incurred in preparing documents for the partnership agreement. In an email exchange [Pl. Exhibit 7], the Plaintiff told Defendant Rose that an attorney agreed to do a "first pass" of a list of primary

documents for \$3,000 and then a final partnership agreement that would cost an additional \$4,000 to \$7,000. The Plaintiff asked Defendant Rose to agree to split the cost of the \$3,000 for first pass of a list of primary documents, and the Plaintiff would contact the attorney the next morning if Defendant Rose would “give the go ahead for [the Plaintiff] to initiate.” Defendant Rose responded that he was “ok with the first 1500 to split it for the 1<sup>st</sup> pass,” and that going forward they should either pay their own attorney’s fees or add the fees together and “split the difference” and Defendant HomeWaves would reimburse the Plaintiff and Defendant Rose for “each of [their] 50% contribution to these fees.” At trial the parties disputed what was meant by “first pass”. No partnership documents were ever presented for the Defendants’ review. What was presented was a list of talking points which needed to be discussed before the agreement could be finalized. The Plaintiff submitted a listing [Pl. Exhibit 8] of legal fees incurred from November 2007 to January 2008 in the amount of \$7,791.50. It appears that most of the legal services performed for the Plaintiff were in the nature of due diligence on behalf of the Plaintiff, investigating HomeWaves and other businesses of the Defendant Rose. It was the Defendant Rose’s position that he would only pay the promised \$1,500 for a first draft of the partnership agreement documents. “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” O.C.G.A. § 13-3-44. Here, the Plaintiff undertook the services of his attorney after the

Defendant Rose agreed to pay \$1,500 for the first pass. Accordingly, Defendant Rose is liable to the Plaintiff for \$1,500.

### **Count VI**

The Plaintiff failed to present sufficient evidence to support an award on Count VI, quantum meruit. Accordingly, the Court finds in favor of the Defendants on Count VI.

### **Plaintiff's Additional Claim for Expenses**

At trial the Plaintiff raised an additional claim for reimbursement of expenses he paid on behalf of HomeWaves in the amount of \$231.96. This claim was not raised in the complaint, but was unopposed by the Defendants.

Accordingly, the Court finds in favor of the Plaintiff and against Defendant HomeWaves on this claim.

### **Count I of Defendant Rose's Counterclaim**

Defendant Rose did not introduce any evidence that the Plaintiff defamed Defendant Rose. Accordingly, the Court finds in favor of the Plaintiff on this count.

### **Count I of Defendant HomeWaves' Counterclaim**

Defendant HomeWaves first count in counterclaim alleges that the Plaintiff willfully and fraudulently misrepresented his qualifications to Defendant HomeWaves, who relied upon such misrepresentations to its detriment. Defendant HomeWaves failed to present evidence of such fraud. Accordingly, the Court finds in favor of the Plaintiff on Count I.

### **Count II of Defendant HomeWaves' Counterclaim**



Defendant HomeWaves claims that the Plaintiff agreed, as part of the transaction described in the Partnership Agreement Intent Letter, to perform services for Defendant HomeWaves in a competent manner. Defendant HomeWaves further claims that the Plaintiff was not as competent as he held himself out to be, and caused various losses to Defendant HomeWaves as a result of his incompetence. The Court finds that HomeWaves did not prove by a preponderance of the evidence that the Plaintiff acted so incompetently as to be liable to HomeWaves. Accordingly, the Court finds for the Plaintiff on Count II.

#### **Counts III, IV and V of Defendant HomeWaves Counterclaim**

The Defendant HomeWaves did not introduce any evidence of trade secret misappropriation, defamation, or tortious interference with contract. Accordingly, the Court finds in favor the Plaintiff on Counts III, IV and V.

#### **Plaintiff's Claim for Attorney's Fees**

The Plaintiff seeks an award for attorney's fees incurred in litigating the promissory notes under O.C.G.A. § 13-6-11. "The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." O.C.G.A. § 13-6-11. As the Plaintiff was already awarded fees pursuant to O.C.G.A. § 13-1-11 on Count I, and did not prevail on Counts IV and VI, such fees would be limited to those incurred on Counts II and III, and V. On Counts II and III, the Defendant presented a bone fide controversy

as to the recovery of attorney's fees on the notes, and indeed, prevailed on the issue. Additionally, the Plaintiff's counsel did not apportion his proof of fees beyond estimating that 35% of the fees were incurred developing the claims raised in the complaint, and 65% of the fees were generated in defending the Defendant's counterclaims, without indicating what fees were incurred for the claims upon which the Plaintiff prevailed. As such, the Plaintiff is not entitled to recover fees under O.C.G.A. § 13-6-11.

Based on the above-stated findings of fact,

IT IS ORDERED AND ADJUDGED on Count I that Plaintiff shall recover of the Defendant HomeWaves, Inc. \$70,000.00 in principal, pre-judgment interest in the amount of \$13,113.03, post-judgment interest at the rate of 7 percent per annum, and attorneys fees in the amount of \$3,324.52.

IT IS FURTHER ORDERED AND ADJUDGED on Count II that Plaintiff shall recover of the Defendant HomeWaves, Inc. \$20,000.00 in principal, pre-judgment interest in the amount of \$4,545.75, and post-judgment interest at the rate of 8 percent per annum.

IT IS FURTHER ORDERED AND ADJUDGED on Count III that Plaintiff shall recover of the Defendant HomeWaves, Inc. \$19,800.00 in principal, pre-judgment interest in the amount of \$4,370.10, and post-judgment interest at the rate of 8 percent per annum.

IT IS FURTHER ORDERED AND ADJUDGED on Count V that Plaintiff shall recover of the Defendant Rose \$1,500.00 in principal, plus post-judgment interest at the legal rate.

IT IS FURTHER ORDERED AND ADJUDGED on the Plaintiff's additional claim that Plaintiff shall recover of the Defendant HomeWaves, Inc. \$231.96 in principal, plus post-judgment interest at the legal rate.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of the Defendants on Counts IV and VI, and in favor of the Plaintiff on all counts of the Defendants' counterclaim. Defendant shall pay costs of court.

This 21<sup>st</sup> day of October, 2010, *nunc pro tunc* October 4, 2010.



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The Honorable Russell McClelland  
State Court of Forsyth County

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