STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ARTHUR KOBIERZYNSKI,

Plaintiff,

-v-

File No. 97-16402-CK
HON. PHILIP E. RODGERS, JR

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, and GRS GRAND HOTEL CORPORATION, a Michigan corporation,

Defendants.
/

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Attorney for Plaintiff

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Attorneys for Defendants

DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

This suit represents Plaintiff's efforts to recover an undetermined amount of money allegedly owed him under the terms of the Settlement Agreement executed when he sold his interest in the Grand Traverse Resort ("Resort") more than 10 years ago. The alleged relationship between the parties arises from their independent financial investments in the Resort. The following facts are undisputed. Plaintiff Kobierzynski and Paul Nine were the original partners in the Grand Traverse Development Company Limited Partnership ("Limited Partnership"). The Limited Partnership was the owner and developer of the Resort. On July 13, 1987, Plaintiff sold his interest in the Resort when he entered into the Settlement Agreement with Paul Nine.[1]

[1]As shown on page 1 of the subject agreement, Paul Nine signed the document "in his representative capacity as a general partner of the Grand Traverse Development Company Limited Partnership and the Grand Traverse Development Company, Inc.

Over the years, the Resort has been owned and controlled by a succession of partners and corporate entities. Beginning in 1982 and continuing through 1992, Defendant General Retirement System ("GRS") loaned substantial sums of money to the Limited Partnership. The Limited Partnership was unable to repay the loans and, in 1993, GRS asserted its equity interest and sued the debtor Resort in Bankruptcy Court. As a result of the bankruptcy proceedings, GRS took title to and began to operate the Resort and its affiliate company, Grand Traverse Personalty, Inc. In 1997, GRS sold the Resort. Currently, neither GRS nor its affiliates have any ownership interest in or control of the Resort.

In the Complaint, Plaintiff alleged that Defendant GRS was a "de facto general partner" of the Limited Partnership and, for that reason, it owed Plaintiff various fiduciary duties.[2] Plaintiff alleged that GRS breached its fiduciary duties to Plaintiff and is thereby liable for the claimed resultant damages. Defendants' dispositive motions are brought pursuant to MCR 2.116(C)(7) and (10). The parties presented their oral arguments to the Court on May 18, 1998 and the decision was taken under advisement. This Court has reviewed the motions, the briefs, the extensive exhibits produced by both parties and the Court file. For reasons that will now be described, Defendants' motions are granted.

The Michigan Supreme Court recently discussed the standard for review of a motion brought pursuant to MCR 2.116(C)(10), in *Quinto* v *Cross and Peters Co*, 451 Mich. 358, 362-363; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material

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[2]Without addressing the impact, if any, that such "de facto general partner" status would generate, there is no support in the record for Plaintiff's assertion that the Defendants were ever general partners. To the contrary, in the Complaint at paragraph 8, Plaintiff asserted that Nine and his wholly-owned corporation, Leisure Real Estate Services Corp., was the only general partner of the Limited Partnership after Plaintiff converted his interest to that of limited partner at the time the Restated Reorganization Agreement was created in September 1988.

fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher* v *Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart* v *J Walter Thompson*, 437 Mich. 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic* v *Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The standard of review for a (C)(7) motion is set forth in *Moss* v *Pacquing*, 183 Mich App 574, 579; 455 NW2d 339 (1990):

> In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. *Wakefield* v *Hills*, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. *Levinson* v *Sklar*, 181 Mich App 693, 697; 449 NW2d 682 (1989); *Hazelton* v *Lustig*, 164 Mich App 164, 167; 416 NW2d 373 (1987).

The Complaint includes Count I -- Breach of Contract, Count II -- Constructive Fraud and Count III -- Declaratory Judgment. In the dispositive motions, Defendants argued that terms of the Settlement Agreement do not provide a basis for recovery from the pension fund/investor. The record shows that Plaintiff executed the Settlement Agreement with Paul Nine and thereby sold his ownership interest for $205,000. The Settlement Agreement included a provision that *if* Plaintiff's *specifically identifiable interest* was sold within the next five years, he would be paid 50 percent of any sale amount over $205,000. In addition, Plaintiff and his family were to have access to certain Resort facilities with a value up to $5,000 per year for five years "so long as PN/GTD [sic] own, manage or are affiliated as owners and/or managers of the said resort."

In Count I, Plaintiff seeks to recover damages related to his "continuing right to use and enjoyment of the facilities of the Grand Traverse Resort" which he alleged Defendants are obligated to pay pursuant to the July 1987 Settlement Agreement. Plaintiff contended that Paul Nine continued to be affiliated with the Resort as the owner of the Grand Traverse Water Company, later known as the Michigan Water Company. Plaintiff provided the following broad arguments which are only partially supported by the record:

> [The] second bankruptcy proceedings was resolved by an agreement between GRS and Paul Nine to approve a plan of reorganization proposed by GRS which put GRS in possession of all the assets of GTD. The inducement to Paul Nine was a tacit agreement that Paul Nine could retain ownership of the water tower at the Grand Traverse Resort.
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> The ownership of the water tower by GTD was well known and easily documented.
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> A lawsuit was filed by GRS against Paul Nine, the Grand Traverse Water Company and its successor, Michigan Water Company, to obtain possession of the water tower. This action, Grand Traverse County Circuit Court File No. 95-13502-CZ was resolved by a settlement whereby Paul Nine received an undisclosed sum of money for his interest in the water tower and GRS executed a confidentiality agreement to prevent disclosure of the settlement to the other limited partners in the GTD.

As more fully discussed below, Plaintiff's counsel submitted an affidavit in which he averred, at paragraph 65, as follows:

> Between the conclusion of the second GTD bankruptcy in 1993 and the date of settlement of Grand Traverse County Circuit Court Action # 95-13502-CZ [sic], Paul Nine was affiliated with the Grand Traverse Resort as an owner of the Grand Traverse Water Company, the entity owning and controlling the water system at the Grand Traverse Resort and its successor, Michigan Water Company.

Plaintiff's counsel's cursory conclusions are not evidence and misstate the complete record established in the extensive litigation related to the Resort. Plaintiff's arguments that Paul Nine owned the water company are inaccurate.

The record shows that, after the Bankruptcy Court proceedings, GRS and Grand Personalty, Inc. were stymied in their efforts to expand when Paul Nine asserted that he had ownership rights to the water system at the Resort and he set rates for the use of water at the Resort. Defendants were unable to purchase water from the "Water Tower Company" for a reasonable rate. The Defendants/Resort operators sought declaratory relief by filing the suit identified as Grand Traverse Circuit Court File No. 95-13502-CZ to determine whether the Limited Partnership's operating entity, the Development Company or Paul Nine and/or his wife, Susan D. Nine, owned the water system.

In the water system litigation, this Court reviewed extensive documents and briefs and heard oral presentations relating to several motions for summary or partial summary disposition which addressed the ownership issue. *Inter alia*, Paul Nine asserted variously that he or his wife, Susan Nine, owned the water company. In its Decision and Order dated May 22, 1996, this Court concluded with the following footnote:

> If the Nines' theory of ownership is predicated upon the transfer of stock in a nominee corporation as compensation and the Nines recognize that the asset continued to be treated as partnership property on tax returns for years thereafter and agree there was no contemporaneous recognition of this compensation on the Nines' tax returns and no contemporaneous actual notice to the limited partners of the transfer and no change in the corporate purpose of the Grand Traverse Water Company until after the GRS plan of reorganization was confirmed, then the Defendants' should know that their theory lacks intuitive appeal. The Court makes these remarks with the understanding that these motions were not intended to be and are not dispositive of the ultimate ownership claim. A trial will allow the evidence to be heard. Rather, this Court hopes to provide the parties with some guidance as to how this case is viewed after having spent a substantial amount of time reviewing the parties' briefs, the voluminous exhibits, the deposition testimony cited to the Court and the case law. If there is more to be heard, then a trial will resolve the issue. If not, the parties may wish to adjust risk and provide themselves certainty and finality without further Court assistance.

Defendants' conclusion, then, that neither the Nine's nor the Limited Partnership owned, managed or were affiliated with the Resort after the April 22, 1993 Order of Confirmation issued by the Bankruptcy Court are fully supported by the record. Indeed, the Nines never produced any documentation to support their claim of ownership.

After this Court issued its May 1996 ruling on the dispositive motions, the parties entered into an Amended Consent Judgment dated September 6, 1996. The Findings of Fact in the consent judgment thoroughly documented the acquisition and construction of the water system from its inception as a resource constructed and paid for by the Limited Partnership and held by the Development Company as the agent of the Limited Partnership. The Limited Partnership then formed Grand Traverse Water Company as a wholly owned subsidiary in late 1979. In December 1979, the Development Company transferred its interest, as agent, in the Water System to the G T Water Company. As recounted in detail in the Findings of Fact, the relevant transfers, the Water System Governance Agreement and the warranty deeds were properly recorded in the books of the Grand Traverse County Records. None of these records supported the Nines' ownership claim.

At the conclusion of the suit for declaratory relief, the parties' stipulated Findings of Fact traced the G T Water Company's Articles of Incorporation, the filings of the various Resort entities as debtors in the bankruptcy case and through the April 1993 Confirmation Order. The Conclusions of Law provided, in pertinent part as follows:

> D. Prior to April 22, 1993, the Limited Partnership was the true, legal and equitable owner of all property comprising the Water System. *See* MCL §449.8.
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> E. By virtue of the Plaintiffs' acquisition of all property of the Limited Partnership through the Confirmation Order, Plaintiffs are the true, legal and equitable owners of the real and persona, and tangible and intangible property comprising the Water System and any and all assets and rights related thereto.
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> NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff, Grand Personalty, Inc., whether through itself and/or its affiliates, acquired and is the owner of the entire interest in the Water System, by operation of the confirmation Order entered on April 22, 1993.
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> IT IS FURTHER ORDERED AND ADJUDGED that Defendants, Grand Traverse Water Company n/k/a Michigan Water Company (Michigan Corporate Identification Number 023-013), the former Michigan Water Company (MI Corp. ID # 048-877), Paul L. Nine and Susan D. Nine, have no right title or interest in or to the Water System.

Based on the foregoing analysis, the Nines had no ownership interest in the water system on the Resort during the relevant time period. Defendants' arguments related to the breach of contract claim in Plaintiff's Count I prevail, and Count I is dismissed with prejudice.

Plaintiff next alleges that Defendants purchased his "specifically identifiable" partnership interest in the Resort. Having reviewed the Settlement Agreement, this Court concludes that the Plaintiff sold his interest in 1987 without any provision for tracing or identifying the asset should it be sold within the next five years. In fact, there is evidence that Plaintiff's interest was not sold but simply transferred pro rata to the other remaining limited partners.[3]

Moreover, this Court finds merit in Defendants' argument that the release clauses within the Settlement Agreement preclude Plaintiff from recovering any monies from Defendants. The Settlement Agreement includes the following release provisions:

> This document shall constitute an agreement of settlement and shall constitute a mutual release of all claims however such claims may be designated arising from the beginning of time to the date hereof by or between the parties including all affiliated and related entities, their heirs, successors, assigns, partners, officers, employees and agents, against each other except for those claims based upon this Agreement or documents executed pursuant to this Agreement. This release shall apply whether or not such claims arose out of the dealings regarding PN/GTD or any other dealings between the released parties. In addition, AK approves all partnership amendments to the partnership agreements dated prior to the date of this agreement.
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> As further consideration for the payment by PN/GTD of the amounts set forth in paragraph 2 above, AK for himself, his heirs, successors and assigns, does hereby release, quit claim and discharge PN, GTD [sic] and all entities and persons connected directly or indirectly with said partnership, including all general partners, limited partners and former general partners, (both in their personal and in their representative capacities), from any and all claims, whether known or unknown and whether liquidated or contingent[,] existing as of the date of this Agreement arising out of the purchase, sale or ownership by AK of a partnership interest in GTD or arising out of any association or affiliation between AK and PN/GTD, the released individuals, or its affiliated entities.
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[3]See the 1987 through 1992 IRS tax returns filed by the Limited Partnership, Defendants' Exhibit G and H(1-5). See also, Paul Nine's January 16, 1998 affidavit, paragraph 5. Defendants' Exhibit F.

> This Agreement shall be binding upon PN/GTD and any affiliates released hereunder, their heirs, successors or assigns and likewise, shall be binding upon AK, his family, his heirs, successors or assigns, and any person listed on Exhibit A. The releases contained herein shall be broadly interpreted so as to maximize their coverage and the persons claims so released.

This Court must follow the Supreme Court's ruling in *Stefanac* v *Cranbrook Ed Comm*, 435 Mich 155; 458 NW2d 56 (1990). The *Stefanac* Court addressed the issue of whether a plaintiff must tender the consideration recited in the release prior to or at the time of filing a suit which raises a legal claim in contravention to the agreement. The following excerpted remarks provide the basis for this Court's enforcement of the release provisions in the Settlement Agreement:

> It is a well-settled principle of Michigan law that settlement agreements are binding until rescinded for cause. Further, tender of consideration received is a condition precedent to the right to repudiate a contract of settlement. See, generally, *Randall* v P*ort Huron, St C & MCR Co,* 215 Mich 413; 184 NW 435 (1921); *Kirl* v *Zinner*, 274 Mich 331; 264 NW 391 (1936); *Leahan* v *Stroh Brewery Co, supra.* The policy consideration underlying the general rule is that the law favors settlements. A party entering into a settlement agreement, offering adequate consideration, is entitled to rely on the terms of the agreement. The rationale for the rule was explained further by this Court in *Kirl* v *Zinner*:
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> > A compromise and release is not to be confused with the law of contract, in which equivalents are exchanged, for the very essence of a release is to avoid litigation, even at the expense of strict right.
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> It is a general and salutary rule that one repudiating or seeking to avoid a compromise settlement or release, and thereby revert to the original right of action, must place the other party in status quo, otherwise the very fact of payment, in consideration of the compromise or release, will likely operate as a confession of liability. [274 Mich. at 334-335; 264 NW 391(1936) (Emphasis in original.)]
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> * * *
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> [T]he plaintiff must tender the recited consideration before there is a right to repudiate the release.

Id. at pp 163-165. The *Stefanac* Court clearly stated the bright-line ruling as follows:

> We hold as a matter of law that a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement, tender the consideration recited in the agreement prior to or simultaneously with the filing of suit. To allow a grace period for tender after the commencement of a lawsuit would undermine the very rule announced by this Court in Carey.[4] Although seemingly harsh, we find that this rule is necessary in order to preserve the stability of release agreements. As we have previously stated, a defendant is entitled to rely on the binding nature of the agreement. The very essence of a release and settlement is to avoid litigation. The plaintiff is not entitled to retain the benefit of an agreement and at the same time bring suit in contravention of the agreement.

Id. at pp 176-177. In Michigan, then, it is the law that a plaintiff must tender the consideration before even attempting to repudiate the release.

These principles reflect long-standing Michigan law. Recently, the Court of Appeals issued its opinion in *Rinke* v *Automotive Moulding Co*, 226 Mich App 432; 573 NW2d 344 (1997), which is factually parallel to the instant matter and addresses the policy of finality which underlies the tender requirement. In *Rinke*, plaintiffs/shareholders sold their stock at book value with a contractual provision that if the corporation was sold for a higher price per share within two years, plaintiffs would receive the higher price. The company sold for a higher price more than two years after execution of the redemption agreement. Plaintiffs sued to recover excess profits. The trial court dismissed the case and allowed Plaintiffs Rinke to amend their complaint to include an offer of tender. Later, the trial court dismissed the case without prejudice pursuant to defendants' motion for summary disposition holding "that plaintiffs' claims were barred by the clear and unambiguous language of the release." *Id.* at p 435.

Defendant Automotive Moulding appealed. The *Rinke* Court provided the following discussion which is applicable to the instant matter:

> [D]efendant argues that the trial court erred in dismissing plaintiffs' claims without prejudice. We agree. Generally, the decision whether to dismiss a case with prejudice is within the trial court's discretion. *George Morris Cruises* v *Irwin Yacht & Marine Corp*, 191 Mich App 409, 420; 478 NW2d 693 (1991). However, when deciding whether dismissal should be with or without prejudice, we have recognized that summary disposition is different from other forms of dismissal. *ABB Paint Finishing,*

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[4]Referring to *Carey* v *Levy*, 329 Mich 458; 45 NW2d 352 (1951).

Inc v *Nat'l Union Fire In. C. of Pittsburgh, PA*, 223 Mich App 559, 564, n 3; 567 NW2d 456 (1997). The question whether a grant of summary disposition pursuant to MCR 2.116(C)(7) based on a release should be with prejudice is a question of law. We review questions of law de novo. *Michigan Employment Security Comm* v *Westphal*, 214 Mich App 261, 263; 542 NW2d 360 (1995); *Duggan* v *Clare Co Bd of Comm'rs*, 203 Mich App 573, 575; 513 NW2d 192 (1994).

"Where a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *ABB Paint Finishing, supra* at 563, 567 NW2d 456. We conclude that the trial court's determination that plaintiffs entered into a binding release that bars their claims is a decision on the merits. Thus, the summary disposition should have been granted with prejudice. Any other conclusion could expose defendants to another lawsuit despite the fact that the plaintiffs had entered into a binding release. It also might allow plaintiffs to attempt to circumvent the *Stefanac* rule by tendering consideration before filing a new action. Thus, we reverse that part of the trial court's order dismissing plaintiffs' claims without prejudice.

Id. at pp 439-440.

The record, in this case, is clear. Plaintiff testified that he has not tendered the consideration he received as a result of the settlement with Paul Nine. Further, he would not want to return the $205,000. Plaintiff deposition transcript, pp 118-119. Plaintiff failed to tender the $205,000 to Defendants prior to filing this suit. Defendants have not waived the tender of the consideration as allowed by *Stefanac*. *Id.* at p 167. In the event that Plaintiff may have a change of heart and consider tendering the consideration to Defendants prior to filing a new or amended complaint alleging fraud, this Court notes that the *Rinke* Court also analyzed MCR 2.118(D) and the relation back of amendments. The *Rinke* Court held as follows:

MCR 2.118(D) provides:

Relation Back of Amendments. Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

An offer of tender purportedly made at the time of the amendment of a complaint obviously does not arise out of the conduct, transaction, or occurrence set forth in the original pleading; the alleged tender offer occurred long after the events giving rise to the original complaint. Thus, by its express terms, MCR 2.118(D) does not apply.

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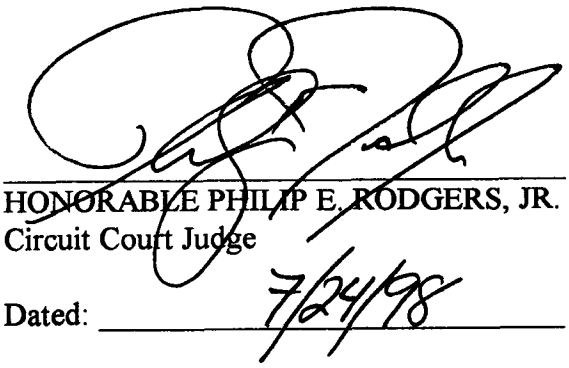
> We hold that plaintiffs may not use the relation-back doctrine to create the kind of "grace period" disallowed in *Stefanac*. Plaintiffs were precluded from challenging the validity of the release because they failed to tender in a timely manner. Thus, the trial court properly granted summary disposition for defendants based on the release.

Id. at pp 437-348.

This Court concludes that amendment of the complaint is futile and, therefore, denied. The parties' arguments relating to the effect of the Bankruptcy Court proceedings, or the retrospective/ prospective application of the release language and applicable statute of limitations are moot. Based on the foregoing analysis, Defendants' motion for summary disposition is granted. MCR 2.116(C)(7) and (10). The case is dismissed with prejudice. *Stefanac*, pp 176-177 and *Rinke*, pp 436-438. Taxable costs may be awarded. The case was not frivolous. MCR 2.114.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/24/98