

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

LOUANN A. MASCIOLI

Plaintiff,

v.

Civil Action No. 15-C-722
(Hon. Susan B. Tucker)

CARL A. MASCIOLI,
ALBERT J. MASCIOLI,
MBD COMPANY, LLC, and
MASCIOLI BROTHERS DEVELOPMENT,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, LouAnn Mascioli, by counsel, brought on her *Motion for Summary Judgment* for hearing by the Court on March 27, 2018. Plaintiff renewed her Motion on July 9, 2018. Upon further thoughtful consideration of the Motion, the Plaintiff's Memorandum in support thereof, the Memorandum in opposition thereto filed by Defendants, Plaintiff's Reply Memorandum, the positions of counsel advanced at the March 27, 2018 hearing and again at the July 9, 2018 hearing, the applicable law, and the entire record in this action to date, the Court has determined that *Plaintiff's Motion for Summary Judgment* should be, and it is hereby, **GRANTED**. In granting the *Motion for Summary Judgment*, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. Mascioli Brothers Development, A West Virginia Partnership

1. From 1989 through 1998, Mascioli Brothers Development acquired five properties in Monongalia County, West Virginia. [Ex. 1 to MSJ, Depo Tr., C. Mascioli, p. 45 (September 14, 2017).]

2. A "Certificate Showing Ownership of Business Under Assumed Name" for Mascioli Brothers Development, a West Virginia Partnership, was executed by Carl A. Mascioli, Albert J. Mascioli, and Paul E. Mascioli and filed in the Monongalia County Clerk's Office on May 2, 1990. [Ex. 4 to MSJ.]

3. The "Certificate Showing Ownership of Business Under Assumed Name" provides that Carl Mascioli, Albert Mascioli, and Paul Mascioli are "the true name or names of persons actually owning, conducting and transacting the said business" [*Id.*]

4. Carl Mascioli, Albert Mascioli, and Paul Mascioli signed and executed the "Certificate Showing Ownership of Business Under Assumed Name" in their official capacity as partners before a notary. [*Id.*]

5. Carl Mascioli was identified as the "Sec Treas", Albert Mascioli was identified as the "President", and Paul Mascioli was identified as the "Vice President" of Mascioli Brothers Development in the "Certificate Showing Ownership of Business Under Assumed Name." [*Id.*]

6. The "Certificate Showing Ownership of Business Under Assumed Name" was prepared by attorney Daniel Oliver as legal counsel for Mascioli Brothers Development. [Ex. 3 to MSJ; Ex. 2 to MSJ, Dep. Tr. D. Oliver, p. 20-21 (February 21, 2018).]

7. No Partnership Agreement was ever executed for Mascioli Brothers Development. [Defs' Counterclaim ¶ 5; Defs' Amended Counterclaim ¶ 5.]

8. There were no oral agreements between Carl, Albert, and Paul regarding the ownership of properties owned by Mascioli Brothers Development. [Ex. 1 to MSJ, p. 61-62, 87; Ex. 17 to MSJ, Dep. Tr. A. Mascioli, p. 31 (September 14, 2007).]

9. In 1992 Carl Mascioli hand wrote a receipt: "Received from Carl Mascioli Sec-Treas Mascioli Bros Dev. \$5,000.00 for excavation work at development site." [Ex. 5 to MSJ.]

10. In 1992, Mascioli Brothers Development donated property to the Monongalia County Board of Education. [Ex. 7 to MSJ.]

11. Albert Mascioli and Paul Mascioli both claimed this donation of property on their respective 1992 tax returns, representing that each had a "1/3 undivided interest" in the property. [Ex. 11-12 to MSJ.]

12. From 1994 through 2008, at least five deeds, right of ways, leases, and easements were executed by Mascioli Brothers Development. [Ex. 6-10 to MSJ.] Of these five documents, four were executed in the Mascioli Brothers Development's name and signed by Carl Mascioli, Albert Mascioli, and Paul Mascioli, in their capacity as a "partner" of Mascioli Brothers Development. [*Id.*]

13. Attorney Daniel Oliver represented Mascioli Brothers Development in four of five of the transactions described in paragraph 12. [*Id.*; Ex. 2 to MSJ, p. 25-31.]

14. Mr. Oliver testified that he believed that Mascioli Brothers was a West Virginia partnership during the entirety of his representation of the entity. [*Id.* at p. 19-20, 25-31.]

15. Of the five properties owned by Mascioli Brothers Development, three were residential properties that were leased by Mascioli Brothers Development.

16. Although certain information identifying the parties to the leases has been removed, the lessor in at least some residential leases for the properties owned by Mascioli

Brothers Development was Mascioli Brothers Development. [Ex. 13-14 to MSJ; Ex. 1 to MSJ, p. 133-136.]

17. The remaining two properties owned by Mascioli Brothers Development, referred to as "DuPont" and "Camp Ridge", are undeveloped land. [Ex. 1 to MSJ, p. 157.]

18. In attempts to develop the DuPont property as a RV park, Carl and Paul, on behalf of Mascioli Brothers Development, prepared a "Request for Estimate" for the Morgantown Utility Board in 2012. [Ex. 1 to MSJ, p. 158-61, Ex. 16 to MSJ.]

19. Signage was placed on the DuPont property advertising leasing opportunities. The sign, which remains on the property today, displays the contact information for Carl, Albert, and Paul Mascioli. [Ex. 1 to MSJ, p. 106-107; Ex. 18 to MSJ.]

20. On December 20, 2012, Paul Mascioli died intestate a resident of Monongalia County, West Virginia. [Am. Complaint ¶ 13.]

21. In 2014, Mascioli Brothers Development was contacted by Northeast Natural Energy LLC ("Northeast") regarding the mineral rights to the Camp Ridge property. [Ex. 1 to MSJ, p. 176-77.]

22. A representative of Northeast met with Carl and Albert Mascioli, the living partners of Mascioli Brothers Development, at Albert's home. [*Id.*]

23. On April 17, 2014, Mascioli Brothers Development entered into an oil and gas lease with Northeast for the Camp Ridge property. [Ex. 19 to MSJ.]

24. The oil and gas lease was signed by Carl, as President of Mascioli Brothers Development, and Albert, as Vice President of Mascioli Brothers Development. [*Id.*]

25. Albert admitted at his deposition that as of April 17, 2014, he was the Vice President of Mascioli Brothers. [Ex. 17 to MSJ, p. 101.]

26. On or about May 30, 2014, Albert Mascioli organized Mascioli Brothers, LLC. [Ex. 21 to MSJ.]

27. LouAnn Mascioli was presented with a deed, signed by Albert, on behalf of "MASCIOLI BROTHERS DEVELOPMENT, A West Virginia Partnership" which would have transferred all of LouAnn Mascioli and Mascioli Brothers partnership's right, title and interest in the oil, gas and coal bed methane, and the right to remove the same to Mascioli Brothers, LLC. [Ex. 22 to MSJ.]

28. On August 1, 2014, LouAnn entered into a separate oil and gas lease with Northeast for her interest, as the widow of Paul Mascioli. [Ex. 24 to MSJ.]

29. On September 12, 2014, Albert Mascioli and Carl Mascioli, on behalf of "Mascioli Brothers Development, a West Virginia Partnership" signed an Amendment and Ratification of Oil and Gas Lease. [Ex. 20 to MSJ.] The Amendment directed "All monies coming due and payable under the terms of this lease to be made payable to Mascioli Brothers, LLC" at the home of Albert Mascioli. [*Id.*]

30. On September 30, 2014, Albert, on behalf of "MASCIOLI BROTHERS DEVELOPMENT, a West Virginia Partnership" granted "all of its right, title and interest in the oil, gas and coal bed methane, and the right to remove the same" to "MASCIOLI BROTHERS, LLC." [Ex. 25 to MSJ.]

31. Mascioli Brothers, LLC received an upfront payment from Northeast and royalty payments. [Ex. 1 to MSJ, p. 182-83.]

32. Albert and Carl split the upfront payment and royalty payments 50/50. [Ex. 1 to MSJ, p. 182-83; Ex. 17 to MSJ, p. 119-120, 123-124.]

33. Following Paul Mascioli's death, Carl Mascioli and Paul's widow, LouAnn Mascioli, discussed "Tax Receipts" for three of the five of the properties owned by Mascioli Brothers Development for purposes of the administration of Paul's Estate.

34. Carl Mascioli hand wrote on the top of certain of these Tax Receipts: "Paul on this deed." [Ex. 26 to MSJ; Ex. 23 to MSJ, p. 51-52.]

35. There has been no conveyance of any of the properties deeded to Mascioli Brothers Development to Carl Mascioli individually. [Ex. 1 to MSJ, p. 115.]

36. The five properties purchased by Mascioli Brothers Development remain in the name of Mascioli Brothers Development. [Ex. 1 to MSJ, p. 115.]

B. MBD Company, LLC

37. Articles of Organization for MBD were prepared by attorney Daniel Oliver and filed with the West Virginia Secretary of State. [Ex. 27 to MSJ; Ex. 2, p. 32-33.]

38. In the filed Articles of Organization, MBD identified three individuals as its organizers and members: (1) Carl Mascioli; (2) Albert Mascioli; and (3) Paul Mascioli. [Ex. 27.]

39. On October 26, 1998, MBD was officially recognized as a limited liability company with the West Virginia Secretary of State's Office. [Ex. 27 to MSJ.]

40. There was no operating agreement for MBD. [Defs' Counterclaim ¶ 5; Defs' Amended Counterclaim ¶ 5.]

41. There were no oral agreements between Carl, Albert and Paul Mascioli regarding the ownership of properties owned by MBD. [Ex. 1 to MSJ, p. 61-62, 87; Ex. 17 to MSJ, p. 31.]

42. During its existence, MBD purchased two residential properties. [Ex. 28-29 to MSJ.]

43. Attorney Daniel Oliver prepared a deed dated September 24, 2001 for one property purchased by MBD. [Ex. 2 to MSJ, p. 35.]

44. Mr. Oliver testified at his deposition that it was his belief that MBD was operating as an LLC as of this date. [*Id.*]

45. MBD was administratively dissolved by the West Virginia Secretary of State on August 1, 2002. [Ex. 30 to MSJ.]

46. MBD did not cease operations and wind up the business or make any distributions to its members.

47. On or about January 20, 2003, MBD purchased a third residential property. [Ex. 31 to MSJ.]

48. In 2006, MBD engaged Petroplus & Associates, Inc. to propose a marketing strategy for two properties owned by MBD and two properties owned by Mascioli Brothers Development. [Ex. 1 to MSJ, p. 204; Ex. 32 to MSJ.]

49. Petroplus & Associates, Inc. presented its strategy to MBD, "c/o All Members" at the address where Carl, Albert and Paul conducted business. [Ex. 32 to MSJ.]

50. A website, <http://mbdcompany.com>, was also created by Petroplus & Associates, Inc., and provided the names and contact information for Carl, Albert, and Paul with a list of properties owned by both MBD and Mascioli Brothers Development that were for sale or lease. [Ex. 1 to MSJ, p. 100-103; Ex. 33 to MSJ.]

51. Paul Mascioli was involved in seeking other commercial opportunities for properties owned by MBD. [Ex. 1 to MSJ, at 190-191.]

52. A 2012 lease for one residential property owned by MBD, 404 Crowl Street, Morgantown, West Virginia, provides that rent is payable to "Mascioli Brothers." [Ex. 34 to MSJ.]

53. A 2016 lease for one residential property owned by MBD, 823 Fairmont Road, Morgantown, West Virginia, has admittedly been altered and replaced with handwriting where the lessor was identified. [Ex. 35 to MSJ; Ex. 1 to MSJ, p. 128-131.]

54. Following Paul's death, Carl Mascioli and LouAnn Mascioli discussed "Tax Receipts" for two of the three of the properties owned by MBD for purposes of the administration of Paul's Estate. [Ex. 26 to MSJ; Ex. 23 to MSJ, p. 51-52.]

55. Carl Mascioli wrote on the top of both of these Tax Receipts: "Paul on this deed." [*Id.*]

56. The three properties purchased by MBD remain in the name of MBD. [Ex.1 to MSJ, p. 115.]

C. Buyout of a Dissociated Partner's Interests in a Partnership/Damages

57. On or about December 19, 2014, LouAnn Mascioli, Paul's widow and the personal representative of his Estate, requested complete and accurate accountings of profits and losses for Mascioli Brothers Development and MBD, copies of the business and member's individual tax returns, as well as information on distributions made to Carl and Albert Mascioli. [Ex. 40 to MSJ; Defendants' Amended Answer at ¶ 14.]

58. Defendants did not respond.

59. On or about March 23, 2015, LouAnn Mascioli formally demanded that Defendants buyout Paul's interests in Mascioli Brothers and MBD. [Ex. 40 to MSJ.]

60. Defendants refused to tender payment or an offer to pay.

61. Plaintiff filed a Complaint in the Circuit Court of Monongalia County, West Virginia on or about November 4, 2015, and an Amended Complaint on or about June 28, 2016.

62. Appraisals have been conducted on each of the eight properties owned by Mascioli Brothers Development and MBD at the request and expense of Plaintiff. [Ex. 36 to MSJ.]

63. The uncontroverted appraised value of the properties as of December 20, 2012, the date of Paul Mascioli's death, collectively totals \$3,030,400.00. [*Id.*]

64. Defendants did not submit any independent appraisals for the eight properties owned by Mascioli Brothers Development and MBD.

65. No distributions were ever made to the members/partners of Mascioli Brothers Development and MBD. [Am. Counterclaim ¶ 5.]

66. Defendants did not produce an accounting to support the claim that they made individual contributions of funds or assets to Mascioli Brother Development or MBD.

67. Defendants admit that rental income received from the properties owned by Mascioli Brothers Development and MBD was used to purchase the properties, payoff any loans on the properties, and to pay for all maintenance, insurance, and tax expenses. [Ex. 1 to MSJ, p. 95-96, 212-213.]

68. Plaintiff produced a valuation report prepared by a qualified expert, Richard A. Riley, Jr., which concluded that the fair market value of a one-third ownership interest on a controlling, non-marketable basis as of December 20, 2012 for Mascioli Brothers Development and MBD Company, LLC is \$1,010,000.00. [Ex. A to Pl.'s Reply.]

69. The valuation report is uncontested.

D. Defendants' Conduct

70. Defendants failed or refused to mediate this matter in good faith on two separate occasions, and otherwise failed to make any reasonable and realistic overture to resolve the Plaintiff's claims by compromise, despite active encouragement and assistance by the Court.

71. Despite repeated requests beginning in December 2014 for an accounting of all of Mascioli Brothers Development and MBD's business activities, Defendants did not produce any "accounting" for Mascioli Brothers Development and MBD until July 17, 2017, pursuant to this Court's Order. [See Order entered July 14, 2017.]

72. Defendants admit to shredding documents that were kept at the place of business for both Mascioli Brothers Development and MBD.

73. Defendants produced documents in response to Plaintiff's discovery requests that had obviously and admittedly been altered.

74. In response to Plaintiff's request to inspect the original documents, which necessitated Plaintiff to file a Motion to Compel, Defendants claimed that the originals no longer existed.

75. Defendants refused to permit inspections of the properties at issue in a timely manner and to provide information to the Plaintiff's appraisers, delaying and hindering the appraisal process. [Ex. 15 to MSJ.]

76. Defendants' counsel later confronted Plaintiff's expert appraiser with a document related to one of the properties, which had been requested but not produced in earlier discovery responses, at his deposition approximately ten days before the scheduled trial.

77. Certain factual assertions and representations by Defendants in pleadings and arguments to the Court are wholly inconsistent with the evidence in this matter.

II. CONCLUSIONS OF LAW

A. Standard of Review

78. Pursuant to Rule 56(c), a court should grant summary judgment 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.” W. Va. R. Civ. P. 56(c).

79. The West Virginia Supreme Court of Appeals has held:

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is ‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if in essence there is no real dispute as to salient facts or if only a question of law is involved . . . Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation...To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

Syl. Pt. 5, *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (citations omitted).

80. As the Supreme Court has more recently explained:

[t]o meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted.

....

[T]he party opposing the summary judgment motion “must do more than simply show that there is some metaphysical doubt as to the material facts.”

Harbaugh v. Coffinbarger, 209 W. Va. 57, 62 (2000) (citations and quotations omitted).

81. The Court here concludes as a matter of law that Defendants have failed to establish any material facts, *i.e.*, any facts “that ha[ve] the capacity to sway the outcome of the litigation[.]” *Jividen v. Law*, 194 W. Va. 705, 708 (1995), that create a genuine issue of material fact.

82. The Court has made the foregoing findings of relevant, determinative and undisputed facts, based upon which it has concluded summary judgment is appropriate.

“Although our standard of review for summary judgment remains *de novo*, a circuit court’s order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.” Syl. Pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997). Syl. Pt. 2, *In re Hearing Losses I*, 208 W. Va. 169, 171, 539 S.E.2d 112, 114 (2000)

B. The Court concludes as a matter of law that Carl Mascioli, Albert Mascioli, and Paul Mascioli formed and conducted Mascioli Brothers Development as a partnership under West Virginia law

83. In 1995 the West Virginia Legislature adopted the Revised Uniform Partnership Act (“RUPA”), and stated that RUPA “governs all partnerships” in existence before, on, or after July 1, 1995. W. Va. Code § 47B-11-4.

84. RUPA is a “gap filler” in that it only governs such partnerships when there is no partnership agreement or to the extent an agreement does not otherwise provide. *Valentine v. Sugar Rock, Inc.*, 234 W.Va. 526, 540, 766 S.E.2d 785, 799 (2014); W. Va. Code §47B-1-3(a).

85. RUPA is controlling as there is no partnership agreement for Mascioli Brothers Development.

86. RUPA defines a partnership as “an association of two or more persons to carry on as coowners a business for profit” W. Va. Code § 47B-1-1(7).

87. RUPA further provides that “the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.” W. Va. Code § 47B-2-2(a).

88. A partnership may be created despite an expressed subjective intention not to do so. *Valentine*, 234 W. Va. at 540, 766 S.E.2d at 799.

89. Defendants mistakenly argue that Carl Mascioli's present statement of his retrospective and never documented intention is controlling - specifically that it was not his intention to actually form and do business in a partnership with his brothers. This argument fails as a matter of law.

90. Defendants also mistakenly argue that a partnership did not exist because there was no agreement among Carl, Albert, and Paul to share profits and losses. This argument also fails as a matter of law.

91. The West Virginia Supreme Court of Appeals has observed that any discussion regarding the “common law of general partnerships is purely historical and academic” due to the legislature’s adoption of RUPA. *Valentine*, 234 W. Va. at 534, 766 S.E.2d at 793.

92. The *Valentine* Court noted that “At common law, we defined a general partnership as: a contract relation between two or more competent persons who have combined their money, effects, labor and skill, or some or all of them, in a lawful joint enterprise, or business, for the purpose of joint profit.” *Id.* (quoting Syllabus Point 4, *Hi Williamson & Co. v. Nigh*, 58 W.Va. 629, 53 S.E. 124 (1906)).

93. Defendants mistakenly rely on *Pruit v. Fetty*, 148 W.Va. 275, 134 S.E. 2d 713, 716 (1964); *Hinkson v. Ervin*, 40 W.Va. 111, 20 S.E. 2d 849 (1894); *Lipscomb v. Ballard*, 106 W.Va. 694, 146 S.E. 2d 826 (1929), and *O'Neil v. Moore*, 78 W.Va. 296, 88 S.E. 2d 1044 (1916), all of which predate RUPA, as support for their argument that Mascioli Brothers Development was not a partnership.

94. The *Valentine* Court also noted that the underlying philosophy of the RUPA differs radically from the common law:

This new philosophy is bluntly expressed in West Virginia Code § 47B-2-1: "A partnership is an entity distinct from its partners."

This philosophical distinction is important to understanding property owned by partnerships. Under the entity theory, "Partners are no longer conceived of as co-owners of partnership property. Rather, the partnership entity owns partnership property." Donn, Revised Uniform Partnership Act, § 203. "Even property that is contributed by partners becomes property of the entity rather than property of a cotenancy of the contributing partners." *Id.*

Id. at 234 W.Va. at 541, 766 S.E.2d at 800.

95. This concept is clear under RUPA: "Property acquired by a partnership is property of the partnership and not of the partners individually." W.Va. Code § 47B-2-3. The statute specifically details when property is partnership property: "Property is partnership property if acquired in the name of...[t]he partnership." W.Va. Code § 47B-2-4(a).

96. As such, Defendants repeated arguments that the properties purchased by and deeded to Mascioli Brothers Development are solely the properties of Carl Mascioli fails as a matter of law.

97. The Court finds that the record in this matter is replete with uncontroverted evidence of Carl Mascioli, Albert Mascioli and Paul Mascioli associating to carry on as coowners a business for profit.

98. The Court concludes that the undisputed evidence shows that Carl Mascioli, Albert Mascioli, and Paul Mascioli formed and operated Mascioli Brothers Development as a partnership under West Virginia law. As such, the properties deeded to Mascioli Brothers Development are partnership assets.

99. Therefore, Plaintiff's Motion for Summary Judgment on this element of her claims is **GRANTED**.

C. **The Court concludes as a matter of law that Carl Mascioli, Albert Mascioli, and Paul Mascioli formed MBD Company, LLC as a limited liability company from 1998-2002, and continued to conduct business as MBD as a partnership following its administrative dissolution**

100. West Virginia has adopted the Uniform Limited Liability Company Act ("ULLCA"), which controls the formation, operation, and termination of a limited liability company. W. Va. Code § 31B-1-101, *et. seq.*

101. The ULLCA "governs relations among the members, managers, and company" when no operating agreement is present. W. Va. Code § 31B-1-103(a).

102. A limited liability company holds the "same powers as an individual to do all things necessary or convenient to carry on its business or affairs," which includes, for example, the power to acquire real and personal property, make contracts, and be sued or sue. W. Va. Code § 31B-1-112.

103. To organize a limited liability company under the ULLCA, a member of the prospective limited liability company must deliver articles of organization to the office of the secretary of state for filing, together with a statutory fee. W. Va. Code § 31B-2-202(a).

104. Once the articles of organization are filed with the secretary of state, the "existence of a limited liability company begins." W. Va. Code § 31B-2-202(b).

105. Filing the articles of organization is “conclusive proof that the organizers satisfied all conditions precedent to the creation of a limited liability company.” W. Va. Code § 31B-2-202(c).

106. The ULLCA requires a limited liability company that has been administratively dissolved to cease ongoing operations and begin to wind up the business. W. Va. Code § 31B-8-810(c).

107. If a limited liability company is dissolved, but two or more persons of the limited liability company continue to carry on as coowners of the business for profit, the nature and structure of the business changes from a limited liability company to a partnership - “an association of two or more persons to carry on as coowners a business for profit” W. Va. Code § 47B-1-1(7).

108. The undisputed evidence clearly shows that Carl Mascioli, Albert Mascioli and Paul Mascioli operated MBD as members of an LLC from 1998 through 2002, and thereafter continued to be associated to carry on as coowners a business for profit. Therefore, the Court finds that MBD was an existing partnership under West Virginia law following its administrative dissolution in 2002.

109. Again, Defendants mistakenly contend that Carl Mascioli's present statement of his retrospective and never documented intention is controlling - specifically that it was not his intention to actually form and do business in an LLC or partnership with his brothers. This argument fails as a matter of law.

110. Defendants also mistakenly argue that an LLC and partnership did not exist because there was no agreement among Carl, Albert, and Paul to share profits and losses. This argument also fails as a matter of law.

111. Defendants also contend, without any basis in fact or law, that Carl Mascioli is the sole owner of the properties deeded to MBD Company.

112. Finally, Defendants mistakenly argue that if Plaintiff is due anything, it is the value that was due to Paul Mascioli when MBD was dissolved in 2002.

113. The Court finds that the overwhelming and uncontroverted evidence conclusively shows that Carl Mascioli, Albert Mascioli, and Paul Mascioli formed and operated MBD as a limited liability company from 1998-2002, and continued to conduct business as MBD as a partnership following its administrative dissolution. Therefore, the three properties deeded to MBD are partnership assets.

114. Therefore, Plaintiff's Motion for Summary Judgment on this element of her claims is **GRANTED**.

D. The Court concludes as a matter of law that Defendants were and are required to buyout the Estate of Paul Mascioli's one-third partnership interests for \$1,010,000.00, plus interest from the date of dissociation to the date of payment

115. "Each partner: (i) Shall share equally in partnership profits; and (ii) shall share in partnership losses as provided in section seven, article eight of this chapter in proportion to the partner's share of the profits." W.Va. Code § 47B-4-1(b).

116. A partner is dissociated from a partnership if he or she dies. W.Va. Code § 47B-6-7(i).

117. Upon dissociation,

If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under section one, article eight of this chapter, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b) of this section."

W.Va. Code § 47B-7-1(a).

118. Further,

"If no agreement for the purchase of a dissociated partner's interest is reached...after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest.

W.Va. Code § 47B-7-1(e).

119. If the partnership fails to tender payment, a dissociated partner may maintain an action to determine the buyout price of the partner's interest. W.Va. Code § 47B-7-1(i). The Plaintiff has appropriately and necessarily done so here.

120. Once suit is filed, "the court shall determine the buyout price of the dissociated partner's interest...and accrued interest, and enter judgment for any additional payment or refund." *Id.*

121. RUPA defines how to calculate the buyout price:

The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection (b), section seven, article eight of this chapter if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of (1) the liquidation value or (2) the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership being wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

W.Va. Code § 47B-7-1(b).

122. Pursuant to the statute, each partner is entitled to a settlement of all partnership accounts during the buyout process. *Id.*, W.Va. Code § 47B-8-7(b).

123. A partnership account is credited with the partner's contributions and share of the partnership profits and charged with distributions to the partner and the partner's share of partnership losses. *Id.*

124. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. *Id.*

125. With respect to credits to a partner's account, the West Virginia Supreme Court of Appeals has held:

When a managing partner, whose duty it is to keep correct accounts, is sued for settlement by his co-partner, he will be held to strict proof of the items in his partnership account, with which he seeks to charge the partnership; and if he has not credited himself on the books of the firm with such items, and cannot or does not furnish the amounts of such items, with dates, and vouchers, or by other satisfactory evidence show to whom disbursements have been made, going to make up the sum total claimed by him, he is to be denied credit therefor in settlement of the partnership.

Gay v. Householder, 71 W. Va. 277, 76 S.E. 450 (1912).

126. Defendants incorrectly contend that Plaintiff's demand that Mascioli Brothers Development and MBD purchase the Paul Mascioli Estate's interests is barred by the doctrine of laches because Paul Mascioli and/or Plaintiff did not assert their right from 1989 through 2012.

127. "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." *Dunn v. Rockwell*, 225 W.Va. 43, 55, 689 S.E.2d 255, 267 n. 11 (2009) (citations omitted).

128. Furthermore, "as long as the partnership continues, failure to demand a partnership accounting does not amount to laches." 59A Am. Jur. 2d Partnership § 684. "Thus the failure of a partner to demand a formal partnership accounting prior to his or her death and before the dissolution of the partnership by his or her death did not constitute laches on the part of the deceased partner." *Id.*

129. The Court therefore concludes that the doctrine of laches is inapplicable to any claim, defense or other issue in this matter.

130. The lawful right of the Paul Mascioli Estate, to have its interest in Mascioli Brothers Development and MBD purchased by the prescribed statutory process, did not accrue until his dissociation (by his death) on December 20, 2012.

131. Defendants also contend, without any evidence in support, that Carl Mascioli paid for the purchase of the properties, maintenance, insurance, and tax expenses.

132. The uncontroverted evidence shows that rental income received from the properties owned by Mascioli Brothers Development and MBD – partnership revenue – was used to purchase properties, pay off any loans on the properties, and pay for all maintenance, insurance, and tax expenses.

133. Defendants have no accountings or other competent evidence to support their contention otherwise. Therefore, there is no genuine issue of fact to be considered by the Court in resolving this issue.

134. Appraisals have been conducted on each of the eight properties purchased by Mascioli Brothers and MBD at the expense of Plaintiff. The appraised value of the properties as of December 20, 2012, the date of Paul Mascioli's dissociation, totals \$3,030,400.00.

135. Defendants did not submit any independent appraisals for the eight properties owned by Mascioli Brothers Development and MBD. Therefore, there is no genuine issue of fact as to the value of the eight properties purchased by Mascioli Brothers and MBD.

136. Plaintiff produced a qualified expert's uncontested valuation report prepared by Richard A. Riley, Jr., which provides that the fair market value of a one-third

ownership interest on a controlling, non-marketable basis as of December 20, 2012 for Mascioli Brothers Development and MBD Company, LLC is \$1,010,000.00.

137. The Court finds that the uncontroverted evidence conclusively shows that Mascioli Brothers Development and MBD Company, LLC are statutorily required to purchase the Estate of Paul Mascioli's one-third partnership interests for \$1,010,000.00, plus interest from the date of dissociation to the date of payment.

138. Pursuant to RUPA, the Court's Order is not for the sale or conveyance of property, but for the prescribed amount of monetary buyout of the Paul Mascioli Estate's interest in Mascioli Brothers Development and MBD.

139. As such, the Court finds that while Defendants may choose to sell the partnership assets, the appraised values of which are undisputed, they are not required to do so, but they are required to satisfy the monetary judgment ordered herein.

140. Accordingly, Defendants cannot assert that they are unable to sell the partnership assets at their estimated market value as a reason to evade or offset this Court's determination of the buyout price of the Paul Mascioli Estate's equitable interests in Mascioli Brothers Development and MBD, and interest will continue to accrue on any unpaid portion of the buyout obligation amount hereby determined, until it is paid in full.

141. Therefore, Plaintiff's Motion for Summary Judgment on this element of her claims is **GRANTED**.

E. The Court finds and concludes as a matter of law that its ruling granting Plaintiff's Motion for Summary Judgment is an adjudication on the merits of Defendants' undeveloped counterclaim

142. Defendants' asserted a counterclaim against Plaintiff in their Amended Answer.

143. The Court notes that the counterclaim was not developed or supported by any evidence developed or referred to by Defendants in discovery or otherwise.

144. The Court further notes in the record that Plaintiff previously moved for judgment as a matter of law on Defendants' counterclaim in *Plaintiff's Motion to Dismiss Defendants' Amended Counterclaim*, *Plaintiff's Motion for Partial Summary Judgment*, *Plaintiff's Motion for Summary Judgment*, and *Plaintiff's Bench Brief on Precluding the Introduction of Evidence and Argument Regarding Defendants' Counterclaims*.

145. Therefore, the Court holds that its ruling granting "*Plaintiff's Motion for Summary Judgment*" constitutes an adjudication on the merits of Defendants' counterclaim and effectively resolves all issues thereby asserted.

F. The Court concludes that the Plaintiff is entitled to recover attorney fees and costs she has incurred, and may yet incur, in prosecuting this matter to conclusion, in amounts to be determined by the Court on appropriate motion and satisfactory proofs by Plaintiff

146. "The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay[.] W.Va. Code 47B-7-1(i).

147. It is undisputed that Defendants failed and refused to tender payment or offer to pay the Estate of Paul Mascioli.

148. It is further undisputed that Plaintiff retained an expert real property appraiser and a business valuation expert to prosecute this claim.

149. The Court finds and concludes that Defendants have acted arbitrarily, vexatiously, and not in good faith, both in their pre-suit failure or refusal to extend the Paul Mascioli Estate its lawful rights, and in their litigation conduct.

150. The Plaintiff's claim for attorney fees and costs under the Revised Uniform Partnership Act is therefore and hereby **GRANTED** and shall be hereafter addressed by the Court on appropriate motion and proofs.

151. The Court reserves the right to entertain additional motions and supplemental submissions on behalf of the Plaintiff for attorney fees and costs as the result of any appeal in this matter and/or Defendants' delay in tendering payment of the buyout price as determined by the Court.

G. The Court concludes that it is necessary and appropriate to substitute "LouAnn Mascioli as the Personal Representative of the Estate of Paul Mascioli" in place of "LouAnn A. Mascioli" as the proper plaintiff in this action

152. During the March 27, 2018, hearing on *Plaintiff's Motion for Summary Judgment*, the Court inquired and counsel for the Plaintiff responded that she intended to substitute "LouAnn Mascioli as the Personal Representative of the Estate of Paul Mascioli" in place of "LouAnn A. Mascioli".

153. The Plaintiff further informed the Court that counsel for the parties had previously discussed this substitution and agreed that the Estate of Paul Mascioli was the real party in interest. Counsel for Plaintiff also informed the Court that they had agreed to allow Defendants' counsel the opportunity to explore if the substitution changed the character of any defenses or required additional discovery.

154. Defendants informed the Court that the substitution was indeed not a contested issue.

155. Defendants did not conduct additional discovery or move the Court to assert additional defenses, nor were there any further developments in the case which could have reasonably changed the character of any defenses or required additional discovery.

156. Rule 17 of the West Virginia Rules of Civil Procedure mandates that "[e]very action shall be prosecuted in the name of the real party in interest." W. Va. R. Civ. P. 17(a).

157. Rule 15 (a) of the West Virginia Rules of Civil Procedure states that leave to amend a pleading "shall be freely given when justice so requires." W. Va. R. Civ. P. 15 (a).

158. "A motion for leave to amend a complaint is addressed at the sound discretion of the trial court." *McCoy v. CAMC, Inc.*, 557 S.E.2d 378, 383 (W. Va. 2001).

159. The Court finds and concludes that the Estate of Paul Mascioli is the real party in interest and the appropriate plaintiff.

160. In accordance with Rule 15 of the West Virginia Rules of Civil Procedure, the Court **GRANTS** Plaintiff's motion to substitute "LouAnn Mascioli as the Personal Representative of the Estate of Paul Mascioli" in place of "LouAnn A. Mascioli" as the proper plaintiff in this action.

161. The Court directs that the case caption shall be amended accordingly on all pleadings and documents subsequently filed in this action.

H. Conclusion

Based upon and incorporating all of the foregoing findings and conclusions, it is **ORDERED** and **ADJUDGED** that **Summary Judgment is hereby GRANTED in favor of Plaintiff** with respect to all of the claims asserted in Plaintiff's Amended Complaint and the Counterclaim asserted by Defendants, and the Plaintiff shall recover against the Defendants both

jointly and severally in the amount of **One Million Ten Thousand and no/100 Dollars (\$1,010,000.00)**, plus pre-judgment and post-judgment interest at the applicable rates, and attorney fees and costs in amounts yet to be determined by the Court, all as more particularly detailed and set out above. The Defendants shall recover nothing of the Plaintiff in her individual capacity, nor in her representative capacity as the Plaintiff to be substituted, and the Defendants shall be responsible for those costs to be assessed by the Clerk of the Court.

Any and all motions by the parties shall be filed within the period(s) prescribed by the West Virginia Rules of Civil Procedure after entry of this Order. The objections by the Defendants to this Order are noted for the record.

The Clerk of the Court is asked and authorized to provide a copy of this Order upon entry to counsel for the parties as identified below.

ENTER: August 10, 2018
Susan B. Tucker
Susan B. Tucker, Circuit Judge

[Counsel for the parties identified on following page]

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk

Prepared and Proposed by:

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