

certified mail received 2-13-08



HomeWaves Inc.
2650 Northgate Avenue
Cumming, GA 30041

Keith Duncan
4177 Ancient Amber Way
Norcross, GA 30092-5125

Keith,

I have enough reason to believe and documentation to substantiate that it appears that your intent was never to partner with me at Home Waves Inc. but instead to do some or all of the following:

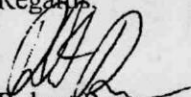
- Buy into a successful small company with minimal investment and minority ownership, but gain access to majority stockholder rights by utilizing 3rd parties to draft documents aimed at acting as if you're an equal or majority stockholder.
- Committing to a payment schedule, but delaying the partnership agreement through various means, then leading me to believe that the payment would be made, then at the last minute investing money in to cover checks you were writing knowing I was out of town and couldn't react differently. Then forcing me to sign subsequent Promissory Notes at rates that were never agreed upon in order to insure you wouldn't reverse the investment which you had already committed to. These investments you made were to be for a capital investment, not interest bearing loans, our intent letter clearly states interest free loan.
 - It was clearly indicated to you when you presented each promissory note that I was signing only because we were moving into a partnership agreement and I reiterated how critical it was for you to get that initial draft done. The intent was never for those to be a loan, but instead a capital investment. I agreed to verify for you that if the partnership agreement didn't continue we would return your 120K investment, interest free.
 - Even though you never completed the 120K investment, as our letter of intent indicated, our letter of intent did note that 'if it is determined by both parties on March 11, 2008, that we will not continue on the partnership path, the initial \$ 120,000 interest will be returned to Keith Duncan by August 31, 2008'.
 - You attempted to replace my handwritten note made on the first promissory note when you made the 2nd partial payment, which assumed

no additional interest, by giving me a later promissory note and forcing me to sign it under duress in order to make the additional partial cash investment on the 3rd payment amount; knowing I couldn't make the investment in time to clear the payroll and other checks you had already released.

- All along when you agreed to move towards a partnership, I made it very clear that we must get it done by December 10, 2007 and time was of the essence, I did not want to continue with the current level of expenses if I didn't have an owner with money in the game. At no point was it ever discussed that I would do a promissory note with interest.
- Gain access to the operations, contacts, intellectual property, and goodwill of an established automation company to accumulate information to offer services to other automation companies at a premium from the information you gained.
- Dismember or disable my company by implementing road blocks and inefficiencies in an attempt to introduce an experienced 3rd party into the company when, in combination with your majority shareholder rights, could take over the company.
- Create an employment contract guaranteeing with the company that would bind the company to commitments that were not in the best interest of the company, in an effort to personally gain monies. This employment contract request wasn't even discussed during the initial process leading up to the intent document that committed to a Dec 10, 2007 completion of the partnership agreement. In fact I had voluntarily informed you in great detail that this was small business and you would be an owner with inherent risks including the fact that the owners only get paid when the company makes money. It wasn't until mid December, after the extension was granted that you began to make demands that we guarantee money. I spoke with you in the last few days before Christmas about this matter for an extended period of time and expressed to you that if you are looking for guaranteed income, this was not the right investment for you. I did this while delaying shopping at Mall of Georgia just before Christmas 2007 right after an earlier meeting with you at Leather Creations. I spent literally HOURS trying to convince you NOT to do this deal because it was apparent that you wanted guarantees in life that simply do not come with ownership in a small business. All of these guarantees didn't come into play until the time frame that changes in your household income from other resources became a concern; then suddenly you began making additional demands for guaranteed income, that was never discussed to be part of the partnership agreement.
- Gain access to products and knowledge for personal benefit in your own home and offering products to friends and your network of individuals at a discount to what would be considered industry standard, in an order to get personal monetary gain.
- It appears your 'backup plan' might have been simply to get interest on money at a much higher than current interest rate than you were getting on your current investment in the account that you were transferring money from.

Because of my concerns outlined above, and your consistent attempts at documenting false information since your abandonment from the "good faith" efforts towards partnership; I have no intent of paying you any monies whatsoever until I understand and have evidence and protection that your intentions were not malicious and the knowledge you gained including intellectual property and confidential information will not be shared or utilized for your personal gain or the personal gain of others. I am even contemplating recovery of all the damages I have incurred as a result of your involvement with my company. These damages are extensive, and while legal costs might prove to be extensive, I do not take kindly to poor ethics being displayed by you. I also do not take kindly to the time and energy I have invested in teaching you so much about this industry, and for you to literally decide at the end of a day one day, not to show back up without notice. Do you realize that you have never even called me on your own accord to say that you were abandoning your commitments?

Regards,



Robert Rose

Jan 7, 2009

IN THE STATE COURT OF FORSYTH COUNTY
STATE OF GEORGIA

Keith B'wed Jan 26 '09
6 pgs.

KEITH DUNCAN,

Plaintiff,

v.

HOMEWAVES, INC., and
ROBERT D. ROSE,

Defendants.

CIVIL ACTION
FILE NO. 08SC-1345

AFFIDAVIT OF ROBERT ROSE

COMES NOW, Robert Rose, who after being duly sworn before an officer authorized at law to administer oaths, deposes and says as follows:

1.

I am over eighteen years of age and I am making this Affidavit for use in the above-referenced matter.

2.

I am the President of HomeWaves, Inc., a Defendant, in the above-referenced case. I have also been named as a defendant, individually.

3.

As noted by Plaintiff in his Complaint and in his Motion for Partial Summary Judgment, I executed three promissory notes, in the amounts of \$70,000, \$20,000 and \$18,000 respectively, on behalf of HomeWaves, Inc. (the "Notes"). I executed these notes in my capacity as President of HomeWaves, Inc. and not individually.

4.

I never intended to be individually obligated under the terms of the Notes and, in fact, there was no signature line on the Notes for me to execute them individually. I have never individually guaranteed the notes.

5.

The notes were executed by HomeWaves, Inc. pursuant to an arrangement whereby the Plaintiff would invest in HomeWaves, Inc. and receive stock in return. Provided that HomeWaves, Inc. and Plaintiff were able to work out suitable terms and provided that Plaintiff's efforts on behalf of HomeWaves, Inc. during a brief trial period proved beneficial, HomeWaves, Inc. would issue stock to Plaintiff.

6.

Plaintiff and HomeWaves, Inc. were not able to reach an arrangement for the investment by Plaintiff and issuance of HomeWaves, Inc. stock.

7.

The transaction whereby Plaintiff proposed to invest in HomeWaves, Inc. came about because of Plaintiff's representation to me, as President of HomeWaves, Inc. that he had extensive operations management and accounting and financial experience. Plaintiff worked his way into the company by saying he had extensive experience in operations and accounting matters and in the technical elements of high and low voltage installations. See Exhibit 1. As a result, following his investment, during the trial period, I asked Plaintiff to manage the day-to-day affairs of HomeWaves, Inc.

8.

Plaintiff's efforts were unsuccessful and, in fact, damaged HomeWaves, Inc. It became apparent to me, and Plaintiff later admitted to me, that he did not have experience in running a company nor did he have significant experience with company finance. For example, nearly 60 days into his tenure with HomeWaves, during a heated debate where Defendant was asking the Plaintiff when all of this hiring experience and accounting experience he had was going to come into play, Plaintiff stated he had never hired anyone before, did not know how to go through the process of recruiting, interviewing and hiring a bookkeeper for the company.

9.

Plaintiff damaged HomeWaves, Inc. significantly. Because of Plaintiff's actions, HomeWaves, Inc. lost at least two clients, Khan and Byrd. These clients would have generated at least \$250,000 for HomeWaves, Inc. in revenues and, approximately \$115,000 in profits.

10.

In addition, Plaintiff paid invoices that were not owed, made commitments to vendors and employees on behalf of the company to pay them monies that were not owed, made purchases that were not required or requested and reimbursed himself through HomeWaves' funds. He made other mistakes which have cost HomeWaves, Inc. hundreds of thousands of dollars. For example, Plaintiff failed to file numerous forms with the IRS, provided false information during insurance related audits, failed to take action to collect large sums of monies owed by clients but continued to service those clients. Also, HomeWaves, Inc. began having problems with, and has lost various

valuable long term relationships including those with long term employees, vendors, and with landlord and banking relationships. We are still calculating the loss, but its in the amount of, at least \$830,000.

11.

In addition, Plaintiff entered into a nondisclosure agreement with HomeWaves, Inc. Plaintiff has, since leaving HomeWaves, Inc., disclosed HomeWaves, Inc.'s confidential information to others. This information includes: business structures and ownership information, customer, prospect and vendor information, status of financial affairs and matters, names and duties of employees, intellectual property and various confidential employment matters.

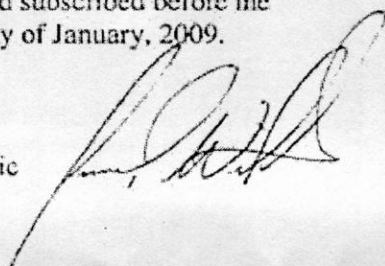
Further Affiant sayeth not.



Robert Rose, Affiant

Sworn to and subscribed before me
this 7 day of January, 2009.

Notary Public



IN THE STATE COURT OF FORSYTH COUNTY
STATE OF GEORGIA

KEITH DUNCAN

Plaintiff,

v.

HOMEWAVES, INC.
and ROBERT D. ROSE,

Defendants.

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CIVIL ACTION

NO. 08-SC-1345

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the AFFIDAVIT OF ROBERT ROSE upon opposing counsel in the above-stated matter by causing a copy of the same to be deposited in the United States Mail, in a properly addressed envelope, with adequate postage thereon, addressed as follows:

David Edward Oles, Sr., Esq.
9925 Haynes Bridge Road
Suite 200-308
Alpharetta, GA 31405

This 7th day of January, 2009.



Stephen M. Dorvee
GA Bar No. 226989

Notice Date of year 2006

From: Keith Duncan [mailto:kduncan@bellsouth.net]

Sent: Fri 4/14/2006 11:12 PM

To: Robert Rose

Subject: Keith. Operations Position. Follow-up.

Have a good trip to Bahamas. Call me when you get back Wed. I fully understand you had a packed day getting ready. Since you continue to have an interest in developing a working relationship with me, I am continuing developing business ideas and applying my background skillset to move to Homewaves if you deem me a good fit. Amy wanted to know about my financial background. I have been designing and implementing financial, banking, and trust accounting systems on and off since 1989. These systems manage millions of dollars of transactions and assets. I understand and am very comfortable managing company finances and all the associated book keeping.

We can also talk about my extensive RF, embedded processor control, high and low voltage experience. My intention is to apply what I already know and build on learning every aspect of the home automation business.

Regards,

Keith Duncan, Norcross Georgia kduncan@bellsouth.net



Keith Rival
COUNTY
Jan 26, 09
9 pages

KEITH DUNCAN

Plaintiff,

 γ

HOMEWAVES, INC.
and ROBERT D. ROSE,

Defendants.

ss. ss. ss. ss. ss. ss. ss. ss. ss. ss.

CIVIL ACTION

NO. 08-SC-1345

**DEFENDANTS' BRIEF IN RESPONSE AND OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

In response to Plaintiff's Motion for Summary Judgment (the "Motion"), Defendants HomeWaves, Inc. ("HomeWaves") and Robert D. Rose ("Rose") (together, "Defendants"), submit this Brief to show the Court that there are well-established legal principles or genuine issues as to facts material to Plaintiff's Motion such that Plaintiff Keith Duncan ("Plaintiff"), as a matter of law, is not entitled to summary judgment.

Specifically, it is clear that Rose did not sign the promissory notes at issue in his individual capacity. Hence, he cannot be liable. Moreover, Defendant HomeWaves has substantial set-offs against any amounts owed by it under these Notes. Hence, a jury will need to decide how much, if anything, one party owes to the other. Also, Plaintiff is only entitled to collect attorneys' fees in an amount of four percent of any recovery.

Defendants' Response To Plaintiff's Statement Of Undisputed Material Facts As To Which No Genuine Issue Is To Be Tried ("Defendant's Response"), as well as the

Affidavit of Robert Rose ("Rose Aff.") have been submitted contemporaneously with this Brief.

I. DISCUSSION OF FACTS MATERIAL TO PLAINTIFF'S MOTION

On July 11, 2008, Plaintiff filed his Complaint. Each Defendant submitted an Answer and Counterclaim on September 5, 2008. Plaintiff filed his Motion on November 19, 2008.

In the Motion, Plaintiff seeks summary judgment against Defendants with regard to three promissory notes, a \$70,000 note dated November 17, 2007, a \$20,000 note dated November 28, 2007 and a \$19,800 note dated December 28, 2007 (together, the "Notes"). Principal Payments along with accrued interest allegedly became due under the Notes on March 31, 2008. The maker of the Notes was HomeWaves, not Rose. See, Rose Aff., at ¶s 3 and 4. See also, Plaintiff's Theory of Recovery and Statement of Undisputed Material Facts As To Which No Genuine Issue Exists To Be Tried ("Plaintiff's Statement") at ¶s 2, 5 and 8 ("HomeWaves executed and delivered a . . . Promissory Note.") (emphasis added).

As noted in the Brief in Support of Plaintiff's Motion For Partial Summary Judgment ("Plaintiff's Brief"), the funds were advanced by Plaintiff pursuant to a "Partnership Agreement Intent Letter" (the "Letter") whereby the Plaintiff would invest in HomeWaves and receive stock in return. The Letter explained the desire "for both parties to agree upon a partner agreement on or before November 26, 2007 with December 10, 2007 being the deadline." Plaintiff's Brief at 1. Also, pursuant to the Letter, Plaintiff was to invest "his own work time on a full time basis beginning on November 12, 2007. . ." Provided that HomeWaves and Plaintiff were able to work out

suitable terms and provided that Plaintiff's efforts on behalf of HomeWaves during a brief trial period proved beneficial. HomeWaves would issue stock to Plaintiff. See, Rose Aff. ¶5. The Notes would be cancelled and Plaintiff would be a shareholder. If a deal was not consummated, then the Notes would be in effect. Hence, as a part of this anticipated investment transaction, Plaintiff advanced the funds memorialized in the Notes and worked for HomeWaves.

The Letter came about because of Plaintiff's misrepresentation to Rose and HomeWaves, that he had significant experience in operating a company and in company finance. Rose Aff. ¶7 and Exhibit 1 thereto. As a result, following his investment and pursuant to the Letter, Rose asked Plaintiff to manage the day-to-day affairs of HomeWaves, Inc. See, Rose Aff. ¶7. Plaintiff's tenure as an operations manager was a disaster. Plaintiff's efforts were not only unsuccessful, they damaged HomeWaves. Rose Aff. ¶s 7, 8, and 9. It became apparent to Rose, and Plaintiff later admitted to Rose, that Plaintiff did not have experience in running a company nor did Plaintiff have significant experience with company finance. See, Rose Aff. ¶8.

As a direct result of Plaintiff's actions, HomeWaves lost two potential clients, who would have generated \$250,000 for HomeWaves in revenues and, approximately \$115,000 in profits. See, Rose Aff. ¶9. In addition, Plaintiff paid invoices that were not owed, made unauthorized purchases, failed to make various government filings and made other mistakes which have cost HomeWaves hundreds of thousands of dollars. Defendants are still calculating the loss, but the loss is in excess of \$800,000. HomeWaves is setting off such sums against the amounts owed under the Notes and will recover the balance at trial.

In addition, Plaintiff entered into a nondisclosure agreement with HomeWaves. Plaintiff has, since leaving HomeWaves, disclosed HomeWaves' confidential information to others. This includes information on HomeWaves' business structure, ownership, customers, prospects, vendors, financial affairs, employees and intellectual property. See, Rose Aff. ¶10.

Rose has no liability on the notes, given that Rose only signed the notes as President of HomeWaves. HomeWaves has no liability on the Notes because it is owed far more in damages than is owed on the Note.

II. DISCUSSION OF APPLICABLE LAW

A. Standard of Review

To prevail by summary judgment under Georgia law, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. *O.C.G.A. § 9-11-56(c)*.

B. Legal Theories in Opposition to Plaintiff's Motion

1. Robert Rose Is Not Individually Liable On The Notes.

Plaintiffs' Motion apparently seeks to hold both HomeWaves and Rose, individually, liable on the Notes. Under *O.C.G.A. § 11-3-402*, however, if a representative signs his name to an instrument and if the form of the signature shows that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument. *O.C.G.A. § 11-3-402(b)(1)*. That is the case here. Here Rose's signature appears on the line reserved for

"HomeWaves, Inc." and all of the Notes state that "Homewaves, Inc. promises to pay." See, Plaintiff's Brief at Exhibit A. Hence, Rose is not liable.

In fact, it appears that the parties should agree on this point. As noted in Plaintiff's Complaint, Plaintiff's Statement, and in Plaintiff's Affidavit, Rose did not sign the Notes in an individual capacity but merely as President of HomeWaves. See, Complaint at ¶13, 14, 37, 48 and 60, Affidavit of Keith Duncan ("Duncan Aff.") at ¶s 2,4,5,7,8 and 10; Plaintiff's Statement at ¶s 2, 5 and 8. This fact is confirmed by Rose. See, Rose Aff. at ¶3. As a result, Rose is not obligated on the Notes. See also, e.g. Laurens County Convalescent Center, Inc. v. Ernest Jones & Assoc., 168 Ga. App. 705, 210 S.E.2d 282 (Ga. App. 1983) (corporation's president's signature was on behalf of corporation only) Plaintiff's Motion, with regard to Rose, must be denied.

2. Plaintiff Has Severely Damaged HomeWaves And HomeWaves Is Entitled To Set Off Or Recoup Such Funds.

"A plaintiff producing an instrument is entitled to payment. . . unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proven, the right to payment is subject to the defense or claim. . . *O.C.G.A. 11-3-308(b)*.

Since the Plaintiff is not a holder in due course, because he was the original maker of the Notes, he holds those three Notes subject to all defenses that would be available on a simple contract. See, Scamans v. Miller, 142 Ga. App. 147, 235 S.E.2d 542, (Ga. App. 1977); Sosbee v. Atha, 140 Ga. App. 555, 231 S.E.2d 381 (Ga. App. 1976).

Hence, to the extent that HomeWaves has any claims against Plaintiff, those claims may be set-off against, or recouped from, amounts owed to Plaintiff.* As shown above, HomeWaves was damaged by Plaintiff in an amount that exceeds the balance due on the Notes. See, Rose Aff. ¶s 9 through 11. At a minimum this creates an issue of fact, and summary judgment is unavailable.

Specifically, based upon Plaintiff's representation that he had experience in running a company and in corporate finance, HomeWaves agreed to allow Plaintiff to invest in HomeWaves and to allow Plaintiff to manage the day-to-day activities of HomeWaves while HomeWaves' President, Rose, handled other matters. Unfortunately, Plaintiff did not possess the experience that he said he had. As a result, during the time that he worked at HomeWaves, Plaintiff paid numerous vendors which were not owed, made unauthorized purchases, failed to make tax filings and failed to collect debts. Such damages amount to in excess of \$800,000, Rose Aff. at ¶10, and succeeded in drive off two significant customers of HomeWaves. Rose Aff. at ¶9. These customers would have accounted for at least \$250,000 in revenue and resulted in \$115,000 in profits to HomeWaves. Rose Aff. at ¶9. Hence, between the business loss as a result of Plaintiff's actions, and the sums paid by Plaintiff that were not owed, HomeWaves has been damaged in excess of \$900,000. This sum should be recouped by HomeWaves and/or set-off against any sums owed by HomeWaves, Inc. under the Notes.

* The distinction between set-off and recoupment is important where a promissory note provides that no right of set-off is available to the obligor. Here, the Notes contain no "no set-off" language, so the distinction is meaningless. HomeWaves is entitled to credit for losses it has suffered.

Clearly, the amounts owed by Plaintiff to Defendant will need to be proven at trial. Because issues of fact abound, until these issues are resolved, this Court cannot issue a judgment. Summary judgment must be denied to Plaintiff's.

3. Attorneys' Fees Must Be Limited To Four Percent Of The Plaintiff Recovery.

Under *O.C.G.A. § 13-1-11*, if a "note . . . provides for attorneys fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent of the principal and interest owing on said note. . ." *O.C.G.A. § 13-1-11(a)(1)*. If the note provides for the payment of reasonable attorneys fees without specifying a percent, a holder can collect fifteen percent of the first \$500.00 owed plus ten percent of the balance. See, *O.C.G.A. § 13-1-11(a)(2)*. Hence, the Notes at issue all contain a clause entitling the note holder to recover "reasonable costs of the collection including reasonable attorneys' fees (not to exceed four percent. . ." See Notes, attached to Plaintiff's Brief at Exhibit A, at third paragraph of each. Hence, under *O.C.G.A. § 13-1-11(a)(1)* the most that HomeWaves can owe attorneys' fees is four percent of whatever sum is found awarded to Plaintiff. This amount is, as shown above, a question that will need to be decided by a jury.

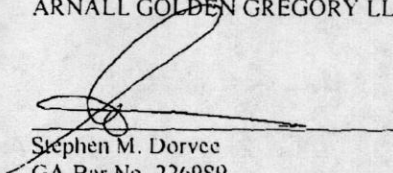
III.

CONCLUSION

For the reasons expressed in Defendants' Statement, this Brief, and in the Rose Affidavit, Plaintiff's Motion for Partial Summary Judgment should be denied.

Respectfully submitted,

ARNALL GOLDEN GREGORY LLP



Stephen M. Dorvee

GA Bar No. 226989

Edward A. Marshall

GA Bar No. 471533

Arnall Golden Gregory LLP

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Suite 2100

Atlanta, Georgia 30363

Tel: 404-873-8500

Fax: 404-873-8501

Attorneys for Defendants

IN THE STATE COURT OF FORSYTH COUNTY
STATE OF GEORGIA

KEITH DUNCAN

Plaintiff,

v.

HOMEWAVES, INC.
and ROBERT D. ROSE,

Defendants.

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CIVIL ACTION


NO. 08-SC-1345

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the DEFENDANTS' BRIEF IN RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT upon opposing counsel in the above-stated matter by causing a copy of the same to be deposited in the United States Mail, in a properly addressed envelope, with adequate postage thereon, addressed as follows:

David Edward Oles, Sr., Esq.
9925 Haynes Bridge Road
Suite 200-308
Alpharetta, GA 31405

This 7th day of January, 2009.


Stephen M. Dorvee
GA Bar No. 226989