IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARGARET DOWD, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 321655-V
	:	
DOWD HOLDINGS, INC.,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Upon consideration of the plaintiffs' renewed oral motion for summary judgment on June 29, 2010, the court concluded that the plaintiffs' motion should be granted. The court's reasons, in addition to those set forth on the record in open court, are set forth below.

I.

The plaintiffs in this case are Margaret Dowd and Donald Isgrig. They are limited partners in the Clarksburg Venture Limited Partnership (the "Partnership"). The Partnership was created in the 1979 for the purpose of owning, operating and ultimately selling an 82 acre investment property (the "Clarksburg Property") located in Clarksburg, Maryland. An Amended and Restated Limited Partnership Agreement (The "Partnership Agreement") was executed in April 1991.

Corps. & Ass'ns Art., § 9A-801(3) of the Maryland Revised Uniform Partnership Act provides that "[a] partnership is dissolved, and its business must be wound up" upon the occurrence of "[a]n event agreed to in the partnership agreement resulting in the winding up of the partnership." Under Corps. & Assn's Art., § 10-108 of the Maryland Limited Partnership Act, the "provisions of Title 9A of this article with respect to partnerships shall apply to limited

partnerships except to the extent that those provisions are inconsistent with or are modified by the provisions of" Title 10. No such limitations apply in this case. The Clarksburg Property was sold in June 2009 for $8,545,000. The sale of the Clarksburg Property is an event of dissolution under § 6.02(c) of the Partnership Agreement, which provides, in relevant part, that the Partnership "shall be dissolved and its affairs wound up upon . . . . the sale of all or substantially all of its assets."

The plaintiffs brought suit on October 9, 2009 against defendant, Dowd Holdings, Inc. ("DHI"). DHI is a corporation and a general partner in the Partnership. Count I alleged that the defendant had breached the Partnership Agreement -- a breach of contract claim -- by withholding $427,250 of the proceeds of the sale of the Clarksburg Property in order to pay compensation to the officers of DHI, Charles R. Player, Jr. and Rex Sturm, for their efforts in selling the Clarksburg Property. Count II is based on the same facts, but sounds in detinue.

The plaintiffs filed a First Amended Complaint on February 26, 2010, re-alleging the same causes of action with greater specificity. On March 24, 2010, DHI filed a counterclaim. Count I of the counterclaim alleges that the plaintiffs breached the Partnership Agreement by filing the lawsuit to gain an improper advantage in negotiations with DHI over DHI's entitlement to compensation in connection with the sale of the Clarksburg Property. Specifically, Count I invokes § 8.02 of the Partnership Agreement, which requires the Partnership to indemnify the general partners for any claim arising out of the conduct of the Partnership's business, as long as they acted within the scope of their authority and in good faith. Count II specifically invokes § 8.02 of the Partnership Agreement, which provides that neither the Partnership nor any partner shall have a claim against the general partner if its "acts or omissions were performed or made in the good faith belief that he was acting within the scope of his Authority" under the Partnership

Agreement and the general partner was neither "grossly negligent" nor "engaged in willful misconduct with respect to such actions or omissions." The court granted the plaintiffs' motion as to Count II of the counterclaim on June 2, 2010.

II.

During trial, the plaintiffs renewed their motion for summary judgment. A motion for summary judgment may be considered even if raised orally during proceedings. *Rodriguez v. Clarke*, 400 Md. 39, 74 n.21 (2007). After considering the evidence of record in the light most favorable to the defendant, and after extensive argument, the court concluded that there were no genuine issues of material fact and that the plaintiffs were entitled to judgment as a matter of law. Maryland Rule 2-501(f).

DHI claimed that it was entitled to withhold from the plaintiffs $418,705 as compensation for services performed by DHI's officers and directors, Rex L. Sturm and Charles Player, in connection with the management and winding up of the Partnership. The total fee that DHI claimed to have earned was $427,250. $8,545.00 of that amount was money that DHI claimed to owe to itself. DHI claimed entitlement to this fee pursuant to Corps. & Ass'ns. Art., § 9A-401(h) which provides, "[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." DHI contends that the services performed by Messrs. Sturm and Player constitute winding up services, which are compensable, or, to the extent these services constitute management services, that there was an implied agreement that DHI would be compensated for them. DHI further contended that it was authorized to take possession of the funds pursuant to § 4.03 of the Partnership Agreement. Critically, DHI conceded that the Partnership Agreement is unambiguous and its interpretation is a question of law for the Court.

DHI also acknowledged that there was no contract between DHI and the plaintiffs to pay compensation for services performed by DHI for the Partnership. These concessions are binding. *Prince George's Properties, Inc. v. Rogers*, 275 Md. 582, 587-88 (1975). In any event, the court concludes that the Partnership Agreement is unambiguous. *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985).

Pursuant to § 6.02 of the Partnership Agreement, an event of dissolution of the Partnership did not occur until June 11, 2009, when a Judgment of Inquisition was entered in favor of the Partnership and against Montgomery County. Winding up of a partnership cannot occur prior to an event of dissolution. In this case, DHI acknowledged that the services it claims entitle it to the $418,705 were performed on or before June 10, 2009, the day before the event of dissolution. None of these services could have been performed in connection with winding up the Partnership because all such services occurred prior to the event of dissolution.

DHI had a 1% ownership interest in the Partnership and it received approximately $80,000 for its share of the proceeds of the sale of the Clarksburg Property to Montgomery County. It is undisputed, however, that the Partnership Agreement does not provide for DHI to receive a management fee and, under the statute, Corps. & Ass'ns Art., §.9A-103(a), unless the Partnership Agreement provides otherwise, the relations among the partners are governed by the Maryland Revised Uniform Partnership Act. Under Corps. & Ass'ns Art., § 9A-401(h), "[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." The partners could have, but did not, provide in the Partnership Agreement for the type of compensation that DHI seeks in this case. *See Gosman v. Gosman*, 271 Md. 514, 516-17 (1974) (all partners are equal unless there is an agreement to the contrary); *Anderson v. Anderson*, 215

Md. 483, 489 (1958)(agreement as to title to specific partnership assets) As a consequence, under the Partnership Agreement and the statute, DHI is not entitled in this case to a fee for managing the Partnership's business or disposing of its assets in the ordinary course of the Partnership's business. *See Creel v. Lilly*, 354 Md. 77, 99-100 (1999)(when the Partnership Agreement is silent on a particular point, the statute governs).

DHI nevertheless contends that there was an implied contract with the plaintiffs to pay for its services in connection with the sale of the Clarksburg Property to Montgomery County. Whether a contract is written, oral or both, "[i]t is universally accepted that a manifestation of mutual assent is an essential prerequisite" to its creation or formation. *Cochran v. Norkunas*, 398 Md. 1, 14 (2007). The failure of the parties to agree on an essential term of a contract ordinarily is fatal to contract formation. *Robinson v. Gardiner*, 196 Md. 213, 217 (1950). In this case, as a matter of law, there was no meeting of the minds between DHI and the plaintiffs regarding the payment of fees for management services and no agreed-upon "standards that will allow a neutral decision maker some basis for [a] decision" about an otherwise open-ended essential term. *First Union Nat'l Bank v. Steele Software Sys. Corp*., 154 Md. App. 97, 173 (2003), *cert. denied*, 380 Md. 619 (2004). In summary, even when the evidence is viewed in the light most favorable to DHI, any so-called implied compensation agreement simply is too vague to be enforceable as a matter of law. *Geo. Bert. Cropper, Inc. v. Wisterco Investments, Inc.*, 284 Md. 601, 618-20 (1979); *see Mogavero v. Silverstein*, 142 Md. App. 259, 272 (2002); *Lacy v. Arvin*, 140 Md. App. 412, 426 (2001).

The court holds, therefore, that neither the Partnership Agreement nor Maryland law permits DHI to recover a fee for the services of Mr. Sturm or Mr. Player in connection with the management of the business or any other activities undertaken in connection with the Partnership

prior to June 11, 2009. The court further holds that neither DHI, Mr. Sturm, nor Mr. Player is entitled to a management fee, a winding up fee, or any other compensation from the Partnership or its individual partners for services performed in connection with the Partnership before June 11, 2009, the date of an event of dissolution.

The court also holds that § 8.02 of the Partnership Agreement does not insulate DHI, a general partner, from suit by a limited partner for breaching its contractual obligations under the Partnership Agreement. Summary judgment is warranted because there is no genuine dispute of fact about whether DHI can establish one of the conditions precedent to invoking that section. To prevail, DHI would have to show either that its actions were expressly authorized by the Partnership Agreement (which they were not) or that DHI acted in the good faith belief that its actions in withholding funds otherwise due to the plaintiffs were so authorized. In this context, DHI had a personal interest in the transaction that operated to withhold money from its partners. As a consequence, just like corporate officers and directors, the test for good faith by a general partner in such a circumstance is objective, not subjective. *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 606-07 (Del. Ch. 1987); *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 115 (Del. Ch. 1986). Moreover, as the Court of Appeals recently reiterated, in a circumstance where "personal taste does not provide the basis for the exercise of discretion, an objective standard of what constitutes good faith and fair dealing applies." *Questar Builders, Inc. v. C. B. Flooring, LLC*, 410 Md. 241, 282 (2009); *cf. Clancy v. King*, 405 Md. 541, 568-69 (2008)(applying subjective standard to author's decision to withdraw his name from a series of books published by a partnership in which he was a partner). In this case, DHI's "personal taste" was not the basis for its decision; it simply wanted money for services performed for the Partnership despite the fact that there was no contract authorizing any such payment. DHI's

"honest" belief that it was entitled to be paid is legally irrelevant. A general partner's conduct in this circumstance "is measured by its objective effect, not by [the general partner's] subjective intent or good faith in [withholding money from the limited partners]." *Ivanhoe Partners*, 533 A.2d at 607.

Under an objective standard, the court concludes as a matter of law that DHI, Mr. Player, and Mr. Sturm did not act in good faith when they caused the Partnership to withhold and pay over to DHI $418,705 from monies owed by the Partnership to Ms. Dowd, Mr. Isgrig and the Dowd Trust. As noted above, DHI was not entitled to compensation for management services. Moreover, § 4.03 of the Partnership Agreement only permits the Partnership to withhold amounts deemed by the general partners "to be necessary to pay due and payable debts or obligations of the Partnership." To invoke this section, DHI would have to show: (1) that a due and payable debt or obligation existed; (2) the debt or obligation was owed by the plaintiffs to the Partnership; and (3) that the Partnership withheld the funds.

On this record, no rational juror could find that DHI or Messrs. Player and Sturm had an objectively reasonable, good faith belief that their actions were authorized by § 4.03. Mr. Sturm, on behalf of DHI, testified that he knew that the Partnership Agreement required the consent of both general partners to create a debt or obligation on behalf of the Partnership and that one of the two general partners, Clarksburg Holdings, Inc., did not agree that the Partnership would pay DHI a fee for its services. The fact that the management fee was charged to less than all of the partners further shows that DHI could not have believed in good faith that the Partnership owed DHI any funds. While DHI claims that Clarksburg Holdings, Inc. agreed to, or at least did not object to, DHI's decision to withhold money from Ms. Dowd, Mr. Isgrig, and the Dowd Trust, that fact is legally insufficient to establish that Clarksburg Holdings, Inc. agreed that the

Partnership owed money to DHI for management services. Indeed, as discussed above, the undisputed evidence is to the contrary. Moreover, DHI's counsel conceded that the individual partners from whom the money was taken never agreed to pay DHI any particular amount. Absent an agreement on this essential term, there could be no debt or obligation of the Partnership. Further, the evidence is undisputed that the Partnership did not withhold the $418,705. To the contrary, DHI caused the Partnership to pay over the $418,705 to DHI. The fact that § 7.04 of the Partnership Agreement requires all Partnership funds to be held in the name of the Partnership, and that DHI held the funds in its own name, is further indicia that DHI did not have had an objective, good faith belief that the funds were being held by the Partnership.

In summary, the court concludes that DHI breached the Partnership Agreement by withholding $418,705 from funds otherwise distributable to Ms. Dowd, Mr. Isgrig and the Dowd Trust. The court further concludes that Ms. Dowd and Mr. Isgrig did not breach the Partnership Agreement by filing this lawsuit to enforce their rights under the Partnership Agreement.

The plaintiffs request prejudgment interest, calculated at the legal rate of 6% simple interest from the date the funds were wrongfully withheld. *See Maryland National Bank v. Cummins*, 322 Md. 570, 599-600 (1991). "Prejudgment interest comes in two varieties, discretionary and of right. Both versions are 'in the nature of an element of damages.'" *United Cable Television of Baltimore Ltd. Partnership v. Burch*, 354 Md. 658, 668 (1999) (quoting in part *Maryland State Highway Admin. v. Kim*, 353 Md. 313, 327 (1999)). The type sought by the plaintiffs in this case, in their view, is as of right. *See Buxton v. Buxton*, 363 Md. 634, 656 (2001). Even if an award of prejudgment interest were discretionary in this context, *see Crystal v. West & Callahan, Inc.*, 328 Md. 318, 342-43 (1992); *David Sloane, Inc. v. Stanley G. House &*

Assoc., Inc., 311 Md. 36, 53-54 (1987), the court concludes that an award of prejudgment interest is appropriate under the circumstances of this case.

DHI shall specifically perform the Partnership Agreement by distributing monies as set forth in the following table:

Margaret Dowd	$71,179.85 plus prejudgment interest at the rate of 6% from 6/17/09 through the date of this Order, and at the rate of 10% thereafter
Donald Isgrig	$71,179.85 plus prejudgment interest at the rate of 6% from 6/17/09 through the date of this Order, and at the rate of 10% thereafter
The Trust under the Will of Thomas N. Dowd Marital Trust U/W	$276,345.30 plus prejudgment interest at the rate of 6% from 6/17/09 through the date of this Order, and at the rate of 10% thereafter

The aforesaid distributions shall be made within ten (10) business days of the date of this Order. The Clerk shall enter judgment in favor of Plaintiffs on Counts I and II of their Amended Complaint and on Count I of Defendant's Counterclaim and judgment shall be entered against Defendants; cost to the plaintiffs. IT IS SO ORDERED this 12th day of July, 2010.

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Ronald B. Rubin
Circuit Court for Montgomery County, Maryland

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