SO ORDERED.

SIGNED this 26th day of August, 2015.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:	
C AND M INVESTMENTS OF HIGH POINT INC., et al.	Case No. 13-10661 (Consolidated for purposes of administration)
Debtors.	
JOHN A. NORTHEN, Chapter 7 Trustee for C&M Investments of High Point, Inc., C. Wayne McDonald Contractor, Inc., C. Wayne McDonald, and Wendy C. McDonald,	
Plaintiff,	Adv. Pro. No. 14-02005
v.	
MDC INNOVATIONS, LLC; MDC INVENTIONS, LLC; JASON MCDONALD; and MARK ALLEN HALL	
Defendants.	

ORDER GRANTING IN PART, DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Court on May 14, 2015 upon: 1) the Motion for Summary Judgment filed by MDC Innovations ("Innovations"), MDC Inventions ("Inventions"), and Jason McDonald ("Jason"); 2) the Motion for Summary Judgment filed by Mark Hall ("Mark"); 3) and

the Motion for Summary Judgment filed by John Northen, Chapter 7 Trustee for C and M Investments of High Point, Inc. et al. ("Trustee"). At the hearing, Ellis Drew, John Meadows, and Leon Porter appeared on behalf of Innovations, Inventions, and Jason (collectively, the "Defendants"); Peter Juran appeared on behalf of Mark; and JP Cournoyer appeared on behalf of the Trustee.

For the reasons set forth below, this Court concludes that there is no genuine dispute of material fact as to Mark's five percent ownership interests in both Innovations and Inventions, and that judgment is appropriate as a matter of law. All other issues raised in the motions are not ripe for summary judgment.

I. JURISDICTION

This Court has jurisdiction to decide this matter under 28 U.S.C. §§ 157 and 1334(b), and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. This Court has constitutional authority to enter a final order, because all parties have either explicitly or implicitly given their consent.[1]

II. PROCEDURAL BACKGROUND

This case arises out of involuntary bankruptcies filed against C and M Investments of High Point, Inc., C. Wayne McDonald Contractor, Inc., C. Wayne McDonald ("Wayne"), and Wendy McDonald. The Trustee initiated the present action against the Defendants and Mark to

[1] In Mark's Answer he consented to this Court's adjudication, which provides constitutional authority under *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015). *See* Mark's Answer to Complaint, ¶ 2 (Doc. No. 6). The Defendants' generally denied that this Court has constitutional authority to enter a final order, *see* Defendants' Answer to Complaint ¶ 2 (Doc. No. 10), but they have not otherwise argued against this Court's constitutional authority in their numerous briefs. More significantly, this Court interprets the Defendants' Motion for Summary Judgment as consent for this Court to enter a final judgment. *See Wellness*, 135 S.Ct. at 1948 (noting that the implied consent standard reflects the "pragmatic virtues" of "increasing judicial efficiency and checking gamesmanship"); *see also Haley v. Barlays Bank Del. (In re Carter)*, 506 B.R. 83, 88 (Bankr. D. Ariz. 2014) (finding that a summary judgment movant waived its *Stern* objection to the court's constitutional authority because the party also moved for summary judgment and commenting that "it is difficult to understand how both the objection to final judgment and the request for entry of final judgment could have been filed in compliance with Rule 9011(b).").

obtain a declaratory judgment as to the ownership rights of the parties with respect to Innovations and Inventions, obtain an accounting of Innovations and Inventions, and avoid and recover pre-petition fraudulent transfers and post-petition transfers. Mark filed a cross-claim against the Defendants for fraud, unfair and deceptive trade practices under North Carolina law, and specific performance. The Defendants moved for summary judgment as to the solvency of Wayne, the validity of his transfers, and the ownership of certain patents.[2] Mark moved for summary judgment as to the ownership rights of the parties in Innovations and Inventions, as well as with respect to the existence and enforceability of certain contractual rights. Lastly, the Trustee moved for summary judgment as to the ownership interest of the bankruptcy estate in Innovations and Inventions.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56, made applicable through Federal Rule of Bankruptcy Procedure 7056, states that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact "exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News and Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). The movant has the burden to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To survive a summary judgment motion, the non-movant "need only present evidence from which a jury might return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). "The evidence

[2] The Defendants also argued in their brief that they should be granted summary judgment on Mark's fraud claim. However, the Defendants failed to raise this issue in their motion. Thus, this argument will not be considered here.

of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

IV. DISCUSSION

The proper starting point for examining the issues before the Court is with the ownership interests of Innovations and Inventions which will clarify the parties' rights with respect to any intellectual property held by the companies and inform the necessity of invoking the Trustee's avoidance powers.

A. Ownership of Innovations and Inventions

Before October 17, 2011, Wayne and his son Jason were the sole owners of Innovations and Inventions; both owned fifty percent of each company. On October 17, 2011, Wayne and Mark[3] signed an agreement (the "2011 Agreement") that purported to employ Mark as the Executive Vice President and Chief Financial Officer of both Innovations and Inventions. Under the terms of the 2011 Agreement, Mark was immediately given a five percent ownership interest in both Innovations and Inventions, a right to an additional two and a half percent ownership interest in both companies at the end of the first year, and an option to purchase an additional two and a half percent interest in both companies for $100,000.

1. The 2011 Agreement

The controversy between the parties begins with the 2011 Agreement. The Defendants claim that the 2011 Agreement was not binding, because it was subject to the signing of later, definitive agreements. The failure of the parties to enter into these later agreements means that,

[3] The 2011 Agreement does not bare Jason's signature. No party furnished the Court with an operating agreement that was effective during the 2011 Agreement, which would expound on the ability of Wayne to bind the companies without Jason's approval. Wayne's title, as listed on the 2011 Agreement, is described as the "Chief Executive" of both companies. In the absence of any argument from counsel and in accordance with North Carolina agency law, this Court finds that Wayne was acting on behalf of Innovations and Inventions in signing the 2011 Agreement. *See Sledge Lumber Corp. v. S. Builders Equip. Co.,* 126 S.E.2d 97, 100 (N.C. 1962) (finding that an individual's "position as chief executive officer of the corporation was such that his acts and knowledge would be the acts and knowledge of the corporation which can act only through its agents.").

according to the Defendants, the 2011 Agreement granting Mark an immediate five percent ownership in Innovations and Inventions is not enforceable. In support of this contention, the Defendants cite not to the 2011 Agreement itself but to the second affidavit of Wayne made on March 2, 2015. Wayne's second affidavit says, simply, that the 2011 Agreement "was subject to the signing of full definitive agreements, which never occurred."

The parol evidence rule bars consideration of Wayne's second affidavit. When bankruptcy courts consider the parol evidence rule, they must apply the state law developed in the state in which they sit. *See Burns v. Creech*, 350 B.R. 24, 28 n. 4 (Bankr. M.D.N.C. 2006) (*citing Gilbert v. Scratch 'N Smell, Inc.*, 756 F.2d 320, 322 (4th Cir. 1985)). As applied by North Carolina, the parol evidence rule "prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract." *Thompson v. First Citizens Bank & Trust Co.*, 567 S.E.2d 184, 188 (N.C. Ct. App. 2002) (*quoting Hansen v. DHL Labs.*, 450 S.E.2d 624, 626 (S.C. Ct. App. 1994)). Specifically, the parol evidence rule prohibits contracts from being "changed by prior or contemporaneous oral agreements." *Lancaster v. Lancaster*, 530 S.E.2d 82, 86 (N.C. Ct. App. 2000). In the absence of ambiguous terms, the "contract language…can be interpreted as a matter of law." *Taha v. Thompson*, 463 S.E.2d 553, 556 (N.C. Ct. App. 1995).

There is nothing ambiguous in the 2011 Agreement concerning Mark's ownership interests. The 2011 Agreement granted Mark a five percent ownership interest in both Innovations and Inventions "immediately." The 2011 Agreement's immediate transfer of a five percent ownership interest in both companies is clear and unambiguous. The Defendants did not specify, nor did this Court find, any provision in the 2011 Agreement that either made its terms subject to a further agreement or made the ownership interests contingent upon any future events. The Defendants' reference to Wayne's second affidavit is an attempt to introduce

evidence of an oral agreement made contemporaneously with the 2011 Agreement that directly contradicts its plain language. In light of this contradiction, the parol evidence rule bars consideration of Wayne's second affidavit. Therefore, this Court finds as a matter of law that the 2011 Agreement gave Mark an immediate five percent interest in both Innovations and Inventions.

2. The 2012 Agreement

On May 18, 2012, Wayne, Jason, and Mark all signed a new agreement (the "2012 Agreement") that purportedly increased Mark's ownership interests in Innovations and Inventions. Under the 2012 Agreement, Mark agreed to pay $150,000 to receive an additional seventeen and a half percent ownership interest in both companies, and an option to purchase an additional two and a half percent ownership interest in each for $50,000. Thus, according to the 2012 Agreement, Mark owned twenty two and a half percent of Innovations and Inventions as of May 18, 2012.

The parties dispute the events leading up to the 2012 Agreement as well as its definitive nature. According to the Defendants, Wayne transferred all of his interests in Innovations and Inventions to Jason on December 30, 2011, as part of Wayne's estate planning, which would preclude Wayne's bankruptcy estate from possessing any interest in the companies. In addition to affidavits from both Jason and Wayne, the Defendants point to two assignments, one for Innovations and one for Inventions, dated December 30, 2011 (collectively, the "2011 Assignments"), in which Wayne conveyed his "entire 38.75% Membership Interest" in both companies. The Defendants also submitted an affidavit of Scott Randolph which states that he saw Wayne and Jason sign two documents on December 30 or 31, 2011, documents which gave all of Wayne's interest in Innovations and Inventions to Jason. Further, the Defendants contend

that the 2012 Agreement was subject to a later, definitive agreement that never occurred, precluding Mark's claim of a twenty two and a half percent ownership interest in each company. In support of this last contention, the Defendants quote the 2012 Agreement's qualifying language, which they conceive as a condition precedent to enforcement of the contract: "However, it is agreed by all that the legal stock certificates and / or membership documents shall be legally prepared, issued and concluded as described above, before the close of business on June 18, 2012." In contrast, Mark and the Trustee argue that the 2011 Assignments were fabricated sometime after the 2012 Agreement. In support of their argument, Mark and the Trustee point to inconsistencies between the 2011 Assignments and the 2012 Agreement, and to certain documents obtained from a law firm that Innovations and Inventions retained. Mark and the Trustee also allege that the 2012 Agreement is a binding, enforceable, and unambiguous contract.

The parties' ownership interests after the 2012 Agreement are not ripe for summary judgment. The 2012 Agreement does not, on its face, allocate ownership percentages among the signatories or discuss whether Wayne or Jason would give up their ownership interests, if any, to satisfy Mark's increased ownership interests. Further, despite Mark's and the Trustee's arguments against the assignments and in support of Mark's twenty two and a half ownership interests (which requires Wayne to have a thirty eight and three quarters interest in both companies), the validity of the 2011 Assignments is essentially a factual dispute that requires the Court to weigh the 2011 Assignments against other documents and to make credibility determinations of Wayne, Jason, and Scott Randolph. Such factual and credibility determinations are not appropriate at the summary judgment level. *See Williams v. Staples*, 372 F.3d 662, 667 (4th Cir. 2004) ("In reviewing the evidence, the court must draw all reasonable

inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence.").

The material disputes as to the definiteness of the 2012 Agreement are also not ripe for summary judgment. The key language in the 2012 Agreement, that "the legal stock certificates and / or membership documents shall be legally prepared, issued and concluded…before the close of business on June 18, 2012," is unclear. The Defendants interpret this language to imply that the 2012 Agreement would not become effective until the mentioned documents were finalized. In contrast, Mark argues that the 2012 Agreement was effective upon signing, because it recites that his ownership interests would increase, "effective immediately." While this is the same phrase found in the 2011 Agreement, the additional language requiring membership documents to be finalized on a later date muddles the contract's meaning. The Trustee attempts to establish Wayne's ownership percentage by citing an April 25, 2013 email with an attached membership purchase agreement, signed by both Wayne and Jason, which details the parties' ownership interests. While this email supports an inference that Wayne retained ownership in Innovations and Inventions after the 2011 Assignments, "[on] summary judgment the inferences to be drawn from the underlying facts…must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (*quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Therefore, because the Defendants opposed Mark's and the Trustee's motions for summary judgment, this Court will draw inferences in the Defendants' favor and deny both motions related to the 2012 Agreement.

B. Ownership of Patents

Both Mark and the Defendants claim that summary judgment should be granted in their favor as to the ownership of certain patents. The patents at issue involve those for what the parties call the "Nexcavator," an excavator with a backhoe cup that can swivel and rotate 360 degrees, and gear bearings designed for the Nexcavator. Jason—who all parties agree actually invented designs for both patents—claims that no evidence exists that he assigned his interests in both patents to Innovations and Inventions. Mark relies on Jason's verbal representations, corporate documents noting Jason's contribution to Innovations and Inventions as intellectual property, a recitation in the 2012 Agreement that Mark's twenty two and a half percent ownership of both companies would include "all related intellectual properties," and on Wayne's and Jason's depositions. Because both parties dispute material facts as to the ownership of the patents to the Nexcavator and its gear bearings, both motions for summary judgment are denied.

C. Transfers

Defendants moved for summary judgment on the solvency of Wayne before his involuntary petition was filed. The Bankruptcy Code defines the term "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation…" 11 U.S.C. § 101(32)(A). Courts apply a balance sheet test to determine if a debtor's "liabilities exceed the fair value of its assets." *Harden v. Niemchak (In re Wingen)*, 2009 WL 3381555, at *4 (Bankr. E.D.N.C. Oct. 16, 2009). In the context of § 101(32)(A), fair value "is determined by the fair market price of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts." *Heilig-Meyers Co. v. Wachovia Bank (In re Heilig-Meyers Co.)*, 328 B.R. 471, 477-78 (Bankr. E.D. Va. 2005) (*quoting Lawson v. Ford Motor Co. (In re Roblin Indus.)*, 78 F.3d 30, 36 (2d Cir. 1996)).

The Defendants submitted numerous financial documents that tend to show the value of Wayne's assets, including real estate, was higher than the sum of his liabilities in 2011 and 2012. Despite relying on other provisions to establish his § 548 claim, the Trustee did raise a dispute of material fact as to the valuation of Wayne's assets, pointing to a document obtained through discovery from Wayne's law firm which values some of Wayne's real property at substantially less than what is reflected on his balance sheet. This discrepancy is sufficient to create a genuine dispute of material fact such that summary judgment is not appropriate.

D. Mark's Contractual Rights

Mark moved for summary judgment on certain contractual rights provided under the 2011 Agreement and 2012 Agreement, including the right to have an equal salary and benefits as Wayne and Jason and the right of reimbursement for paying company expenses. Mark's contractual rights are subject to the definitiveness of the 2012 Agreement and are consequently not ripe for summary judgment. Therefore, Mark's motion as to his contractual rights is denied.

Conclusion

Therefore, in light of the foregoing, this Court partially GRANTS Mark and the Trustee's Motions for Summary Judgment as to Mark's five percent ownership interests in Innovations and Inventions, and DENIES the remainder of Mark and the Trustee's Motions for Summary Judgment. The Court also DENIES the Defendants' Motion for Summary Judgment.

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