VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-01917
21-CV-1920
21-CV-1921

In Re: Corporate Dissolution of Koffee Kup Bakery, Inc.,
Vermont Bread Company, Inc., and Superior Bread Company, Inc.

RULING ON RECEIVER'S MOTION OBJECTING TO CLAIM OF CAREN TURNER AND TGPA, INC.

This matter comes before the court on the Receiver's motion objecting to the claim filed by Caren Turner and TGPA, Inc. (collectively, "Ms. Turner"). The court notes, as a threshold matter, that the provision of the dissolution statute governing receivers, 11A V.S.A. § 14.32, does not address the procedure for the judicial resolution of disputed claims in dissolution proceedings. The applicable provision of the civil rules, V.R.C.P. 66, offers only slight guidance, providing that "the practice in actions for the appointment of a receiver and in actions brought by or against a receiver shall be governed by [the Rules of Civil Procedure]."

Neither party invoked any provision of the Rules or otherwise addressed the procedural posture of the motion. Nevertheless, the Receiver's motion presents functionally as one for summary judgment. The Receiver has filed a motion, supported by citations to the record, asserting that Ms. Turner had no valid claim against the subject entities. *Cf. Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)) (Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact.) In response, Ms. Turner did not dispute any of the Receiver's factual submissions; instead, she submitted factual materials of her own and argued different inferences from those facts. *Cf. Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The Receiver does not dispute any of Ms. Turner's factual submissions. Rather, the dispute is over the inferences supported by the undisputed facts. In this regard, the court gives Ms. Turner, as the non-moving party, the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Viewed through this lens, the following facts emerge. On June 12, 2019, Ms. Turner entered into a contract with Leonard Levie and American Industrial Acquisition Company ("AIAC"), pursuant

to which they agreed to compensate Ms. Turner in the event she found targets for them to acquire. Pursuant to that agreement, Ms. Turner was given access to AIAC's Regus facilities (shared rental office space), an AIAC email address, an AIAC business card, and access to proprietary database sources.

Nearly two years later, through an affiliate, KK Bakery Investment Company, LLC ("KKBIC"), Levie and AIAC acquired an 80% interest in the parent of the three entities now the subject of these dissolution proceedings (the "Koffee Kup entities"). They promptly began a search for a buyer for the Koffee Kup entities. On April 24, 2021, Mr. Levie sent an email to multiple recipients—most, including Ms. Turner, at AIAC addresses—initiating a search for a "white knight," who "would see this as the bargain it is and could move fast." Ms. Turner responded, "obviously I cannot work for free." Accordingly, on April 25, 2021, AIAC/Levie and Ms. Turner entered into an agreement to compensate Ms. Turner for efforts to find a buyer for the Koffee Kup entities. Ms. Turner promptly began reaching out to prospective buyers. One such prospect was Flowers Foods, Inc. ("Flowers"). While Ms. Turner was evidently unaware, Flowers was no stranger to the Koffee Kup entities, and vice versa; Flowers and Koffee Kup Bakery, Inc. had entered into a "Confidentiality, Non-Disclosure, and Non-Solicitation Agreement" less than 3 months earlier.

On April 29, 2021, Ms. Turner, writing from her AIAC email address, reached out to KeyBank, the secured creditor in possession of the Koffee Kup entities' assets. She advised that "AIAC is in serious discussions with H & S Bakery," and inquired as to the process for setting up plant tours early the next week. On April 30, KeyBank referred Ms. Turner to Ronald Teplitsky; it advised that he "will be coordinating property visits next week," and that "[w]e have been working through getting him appointed as our receiver which should be approved by the end of today." KeyBank copied Mr. Teplitsky on this response. When Ms. Turner continued to press, Mr. Teplitsky responded. Two days later, Ms. Turner emailed Mr. Teplitsky to "introduce" H & S Bakery, leaving it to them to coordinate plant visits, which apparently occurred on May 4. She subsequently emailed Mr. Teplitsky to arrange plant visits by two other prospective buyers. None of these prospects ever made an offer to purchase any assets of the Koffee Kup entities.

On May 3, 2021, by stipulation between Keybank, N.A. on the one hand and the three entities and their corporate parent on the other, the court appointed Mr. Teplitsky as receiver for the subject entities. The stipulated order gave Mr. Teplitsky the authority to sell the entities' assets, and to "engage broker(s) and related professionals to market [those assets]." Mr. Teplitsky did not engage Ms. Turner. At no time did Ms. Turner offer to act in a brokerage capacity for Mr. Teplitsky. Indeed, at no time did

she indicate to him that she was a broker, or that she was acting in any capacity other than as a representative of AIAC. Although she was then in contact with Flowers, and had communicated with Mr. Teplitsky to arrange plant visits for other prospective buyers, she never communicated with Mr. Teplitsky concerning Flowers; nor, obviously, did she set up a plant visit for Flowers. Her last communication with Mr. Teplitsky was by email on May 10, 2021.

On May 11, 2021, AIAC entered into a Confidentiality and Non-Circumvention Agreement with Flowers, to allow the parties "to discuss and evaluate a possible financing, investment, acquisition or any other financial transaction by [Flowers] or an affiliate of [Flowers] with or of [the Koffee Kup Entities] or [their] assets." The agreement provided that Flowers could not "pursue, assist in, or participate in any financing, acquisition, business combination or other transaction involving [the Koffee Kup entities] unless [AIAC] in its sole discretion, as the case may be, (i) consents to such activity, or (ii) announces or discloses that it has no desire to pursue a transaction involving [the Koffee Kup entities]." The agreement thus precluded Flowers from pursuing any transaction involving the Koffee Kup entities except through AIAC.

On May 19, 2021, Ms. Turner emailed Mr. Levie that she had spoken with someone at Flowers who was a "direct report" to the CEO. She reported that Flowers was planning to make an offer to purchase all of the Koffee Kup entities' assets. She reported further that it would take Flowers approximately three weeks to put an offer together. She never communicated this information to Mr. Teplitsky.

Sometime before May 27, 2021, Mr. Teplitsky selected another bakery to purchase the Koffee Kup entities' assets. This evidently came as news to AIAC and Ms. Turner. It was also news to Flowers, which learned through a press release and sent Ms. Turner a "what the heck?" email:

> From our conversation on purchasing Vermont, I understood the process was in the court system and we would discuss in 2-3 weeks. Today there is a press releases that Vermont was sold?
> If that is an accurate press release, I will need to let our mgmt. team know why our bid for the entire business was not considered.

Ms. Turner did not respond immediately. Instead, on June 1, 2021, she emailed her contact at Flowers:

> Events with regard to KK and Vermont Bread have not evolved quite as anticipated. At this point, we had anticipated being the senior secured lender of KK, VT bread etc.

> Nonetheless, I am told by [Mr. Levie] that there is still an opportunity to submit a bid for the entities. Ideally, [Mr. Levie], as 80 percent shareholder, would like to partner with Flowers to submit a bid to the Receiver or the Bank.
>
> At his request I am attaching a bid sheet for this purpose. We are hopeful to create this arrangement.
>
> If, however, this type of arrangement does not work for you, AIAC is open to helping you with your own bid. Per [Mr. Levie], we would, of course, charge Flowers a commission for this work and assistance.

On the morning of June 3, 2021, Ms. Turner communicated to Flowers on behalf of AIAC:

> As you are aware, the Vermont courts have appointed a receiver in the matter of KoffeeKup/Vermont Bread's secured debt to Key Bank. Though AIAC and its officers had hoped to create a strategic alliance with Flowers Foods to purchase the note from Key Bank and the receiver, it appears that this will not be possible.
>
> We know that Flowers Foods has considered the possibility of submitting a bid for the business. Unfortunately, AIAC will be unable to participate along with you.
>
> Should you wish to submit your bid, you may do so directly and promptly to the Receiver, Key Bank, and/or the court. Please be aware that the court will conduct a hearing on the actions of the Receiver on June 7, 2021.

When Flowers thanked Ms. Turner for this email, she responded: "Mark, I know you went through great lengths to accomplish what you have. I wish you good luck with it." That ended her involvement with Flowers. Indeed, as far as the evidence submitted by either party reflects, the narrative above reflects the sum total of Ms. Turner's contacts with Flowers.

Later on June 3, 2021, Flowers sent Mr. Teplitsky a letter of intent, offering to purchase the Koffee Kup entities' assets. Mr. Teplitsky accepted this offer, and June 7, 2021, he entered into an asset purchase agreement with Flowers. That agreement recited that "No agent or broker or other person acting pursuant to authority given by [either party] is or will be entitled to any commission or broker's or finder's fee, or other compensation, directly or indirectly, from [either party] in connection with the transactions contemplated by this Agreement."

At a hearing held later that day, Mr. Teplitsky advised the court that he had reached an agreement with Flowers to sell the Koffee Kup entities' assets for an undisclosed sum; he advised further that the sum would be sufficient to satisfy all secured creditor claims and meet the entities' outstanding obligations to their employees. Ms. Turner learned of this sale only through an article in

the Brattleboro Reformer. Two days later, she sent AIAC/Levy an invoice for services rendered under the April 25, 2021 agreement. She never sent an invoice to Mr. Teplitsky.

On these facts, Ms. Turner acknowledges that she has no contractual right to recover against the Koffee Kup entities. Instead, she suggests, she has a right in quasi-contract and unjust enrichment. Her arguments fail.

Most fundamentally, Ms. Turner greatly inflates her role in the transaction. The instances of her painting the lily[1] are too many to catalog; it suffices here to point out the most egregious. For example, Ms. Turner asserts,

> Here, Turner is not an officious intermeddler who opportunistically injected herself into the affairs of the Receivership uninvited. KeyBank and the Liquidating Receiver invited Turner to participate in finding a buyer for the Koffee Kup assets from the onset.[]They had the authority to hire Turner without prior court approval under § 3(g) of the Receivership Order.

Turner's Opp. to Dissolution Receiver's Mot. Objecting to Claim, 12. In fact, at least as regards Mr. Teplitsky, Ms. Turner was indeed an officious intermeddler; she had no invitation from either KeyBank or Mr. Teplitsky but rather bugged each until they responded. And while Mr. Teplitsky had the authority to hire Ms. Turner, he did not do so. Indeed as far as the record reflects, he never asked her to do anything.

Ms. Turner then asserts,

> In mid-May, 2021, it was unclear to Turner whether the purchaser's bid would be submitted directly to the Receiver, Teplitsky, or whether the purchaser might combine finances and resources with Levie to form a strategic alliance to create the highest bid. Turner did everything in her power to procure "healthy" offers and whet the competitive appetite of Flowers, Bimbo and H & S Bakeries to purchase the assets of KK Bakeries.

Id., 13. In fact, it appears that in mid-May, 2021, Ms. Turner worked with Mr. Levie and AIAC to prevent Flowers from presenting a bid directly to Mr. Teplitsky; this effort was so successful that the auction had ended before Flowers said "what the heck?" and AIAC then released it to make a bid. Apart from her bald assertion, Ms. Turner offers is no evidence that Ms. Turner procured a single offer, healthy or otherwise. Equally, she offers no evidence that she did anything to whet anyone's competitive appetite.

Ms. Turner further asserts, "Turner acted as a business broker bringing qualified bidders to an auction." *Id.*, 15. In fact, she brought not a single bidder to Mr. Teplitsky. Rather, the evidence—that Turner herself submitted—shows instead that together with AIAC, Turner kept Flowers away from the

[1] W. Shakespeare, *The Life and Death of King John*, Act IV, Scene 2.

auction, until it had closed. And even then, Ms. Turner did not bring Flowers to the auction; at most, she and AIAC stepped aside, allowing Flowers to enter the auction alone and without introduction.

The court need not further belabor the point. A careful review of Ms. Turner's evidence, even considered in the most favorable light and indulging all inferences in her favor, reveals a wide chasm between reality and her fanciful narrative. This failure is critical. The Receiver's motion papers fairly challenged Ms. Turner to come forth with more than just bald assertions to support her claim. It was her burden, therefore, to produce solid evidence of her efforts. *Cf. Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). Instead, the evidence that she produced reflects that her role—at least as any kind of intermediary between Flowers and Mr. Teplitsky—was less than negligible.

This role falls far short of establishing a right to the broker's commission on which Ms. Turner's claim rests. As Ms. Turner recognizes,

> "Under Vermont law, to be entitled to a commission, a broker must show that he [or she] procured a purchaser ready, willing, and able to purchase at the price and upon the terms prescribed by the seller." . . . To shoulder this burden, the broker "must show more than incidental relationship to the resulting sale"—he must "show that his efforts dominated the transaction."

Masiello Real Est., Inc. v. Matteo, 2021 Vt. 81, ¶ 15, — Vt. — (citations omitted). Here, at most, Ms. Turner had an incidental relationship to the sale; her bald assertion that her efforts dominated the transaction, Turner's Opp. to Dissolution Receiver's Mot. Objecting to Claim, 14, is, frankly, laughable.

This observation alone is sufficient to defeat any claim sounding in quasi-contract.[2] "Claims for quasi-contract are based on an implied promise to pay when a party receives a benefit and the retention of the benefit would be inequitable." *DJ Painting, Inc. v. Baraw Enterprises, Inc.*, 172 Vt. 239, 242 (2001). Here, while Mr. Teplitsky clearly received a benefit, there is no evidence that it was Ms. Turner who conferred the benefit. Thus, it would hardly be inequitable for Mr. Teplitsky to retain the benefit.

Moreover, as in the *DJ Painting* case, "this is not the ordinary quasi-contract case in which one party has performed work for another party without the formality of a contract, . . . the party benefitted

[2] In her Opposition, Ms. Turner claims a right to compensation "based on quasi contract and unjust enrichment." Turner's Opp. to Dissolution Receiver's Mt. Objecting to Claim, 1. The Vermont Supreme Court has recognized that the two terms are interchangeable. *See Center v. Mad River Corp.*, 151 Vt. 408, 410 n.2 (1989).

has accepted the services, and therefore ought to be required to pay for them." *Id.* at 243. Rather, Ms. Turner had a contract with AIAC, held herself out to Mr. Teplitsky as acting for AIAC, and even dealt with Flowers exclusively on behalf of AIAC. That Mr. Teplitsky, with no knowledge of or involvement in these efforts, may have derived an incidental benefit from them does not mean either that Ms. Turner performed services for Mr. Teplitsky or that he accepted them. Rather, he would fairly have assumed that if anyone would have an obligation to compensate Ms. Turner, it would be AIAC. Under these circumstances, if there is inequity, it is in Ms. Turner's assertion of a right to recover, not under her contract with AIAC, but instead from another with whom she had no relationship.

These conclusions obviate the necessity of addressing other arguments made by the Receiver in support of her objection to Ms. Turner's claim. The court need note only that some of these arguments appear to have merit; they are left unaddressed only because the conclusion above renders them moot. Equally, the court need not address whether Ms. Turner's claim is properly asserted as a trade creditor based on pre-receivership transactions or as a priority administrative expense based on post-receivership transactions; either way, Ms. Turner performed no services for which Mr. Teplitsky was obligated to compensate her. Rather, she must pursue her recovery, if any, from the party with whom she contracted and evidently was working.

ORDER

The court grants the motion. The claims asserted by Caren Turner and TGPA, Inc. are disallowed.

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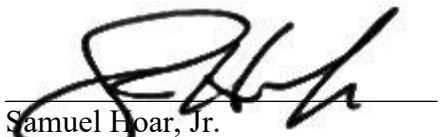

Samuel Hoar, Jr.
Superior Court Judge