

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

SARMAD BRIKHO,

Plaintiff,

vs.

Case No. 2014-3977-CB

SHANT SHIRINIAN, SHIRINIAN INVESTMENTS,  
LLC, VAN 8 COLLISION, INC., GARY  
CUNNINGHAM, and GARY H. CUNNINGHAM,  
P.C.

Defendants,

and

CHOICE AUTOMOTIVE GROUP, LLC, d/b/a  
Chase Automotive Leasing,

Nominal Defendant.

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FILED  
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OPINION AND ORDER

This task before the Court is to determine to what extent, if any, the receiver's reports and accounting are dispositive on the issues related to the financial affairs of Choice Automotive Group, LLC ("CAG"). Plaintiff and the receiver have each filed a pleading on this issue, as have Defendants Shant Shirinian ("Defendant Shirinian"), Shirinian Investments, LLC and Van 8 Collision, Inc. (collectively, "Shirinian Defendants") jointly.

I. Factual and Procedural History

On October 14, 2014, Plaintiff and CAG filed their original complaint in this matter ("Complaint"). In the Complaint, Plaintiff and CAG allege that between 2009 and 2011 Plaintiff and Defendant Shirinian began to buy and sell

automobiles together from various auctions utilizing CAG's license, which Plaintiff had obtained on CAG's behalf as its owner in 2004. In the Complaint, Plaintiff and CAG alleged that Plaintiff and Defendant Shirinian's activities operated to form a partnership under which the profits from their activities were to be split 50/50. Specifically, Plaintiff and CAG alleged that Defendant Shirinian became a partner of CAG. (See Complaint, at ¶57.)

On November 3, 2014, the Court entered a stipulated order entitled "Temporary Mutual Injunctive Order Winding Down Assets and Liabilities Regarding the Membership Interests in [CAG]" ("Winding Down Order"). In the Winding Down Order, the parties agreed, *inter alia*: (a) to refrain from transferring, damaging, destroying, concealing, disposing of, or using so as to substantially impairs the value, any of CAG's assets; (b) to return all of CAG's business records to CAG's offices; (c) to return to CAG the value of any vehicles belonging to CAG that were sold, transferred, conveyed, damaged, concealed or impaired in value; (d) that Plaintiff and Defendant Shirinian, as the members of CAG, would continue to operate CAG for purposes of winding down their membership interests; and (e) that Plaintiff, as CAG's general manager, would pay CAG's general expenditures and provide weekly accountings to Defendant Shirinian, and that each member would continue to receive a weekly salary of \$1,500.00.

On November 14, 2014, Defendants filed a motion for an order providing that CAG be dissolved and that a receiver be appointed. On November 24, 2014, Plaintiff filed a response to the motion. On December 1, 2014, the Court

held a hearing in connection with the motion and took the matter under advisement. On December 4, 2014, the Court entered an Order dissolving CAG and appointing Anthony J. Caputo as the receiver over CAG for the purpose of continuing to wind down CAG and liquidating its assets.

On December 9, 2014, the Court entered an "Order Defining Receiver's Powers and Duties" ("Receivership Order"). The Receivership Order granted the Receiver the power to, *inter alia*, conduct an accounting of CAG and take such actions as are necessary to allow an accountant to file tax returns on CAG's behalf. Further, the Receivership Order required the Receiver to file reports each quarter of the year that include an accounting for CAG's cash disbursements and receipts. Additionally, the Receivership Order provides that parties would have 7 days to object to each report, and that the Court will approve each report if no objection is filed. If an objection is filed, the Receivership Report provides that the merits of the objection(s) would be decided by the Court at a hearing.

On December 24, 2014, Plaintiff filed a motion for reconsideration of the Court's order dissolving CAG. In the motion, Plaintiff argued for the first time that he and Defendant Shirinian did not agree to be joint members of CAG; rather, Plaintiff maintained while the parties had agreed to form a "partnership" together to buy and sell cars. On January 7, 2015, Plaintiff withdrew his motion for reconsideration; However, on the same date, having not yet received Plaintiff's withdrawal of the motion, the Court entered an Opinion and Order denying Plaintiff's motion on the grounds that Plaintiff failed to raise its arguments in its

original response to Defendant's motion for dissolution and appointment of a receiver.

On January 5, 2015, the Receiver submitted his first report, in which he documented that (1) he had opened checking and savings accounts for CAG and placed the majority of CAG's cash in those accounts, (2) began to perform an accounting and had drafted an opening balance sheet and profit loss statement, and (3) had memorialized a plan to liquidate CAG and distributed the plan to the parties. Neither side objected to the first report and it was approved by the Court on January 16, 2015.

On January 6, 2015, Plaintiff filed his motion for leave to file a first amended complaint. In his proposed amended complaint, Plaintiff, for the first time other than in his previously withdrawn motion for reconsideration, alleged that Defendant Shirinian was not a member of CAG. The Court ultimately granted Plaintiff's request to file an amended complaint including all of his proposed claims except for a part of his oppression claim, his conversion claim against Defendants Gary Cunningham and Gary H. Cunningham, P.C. (collectively, "Cunningham Defendants"), and his claim for an accounting of Van 8 Collision, Inc. and Courtesy Cars, Inc. On September 8, 2015, Plaintiff filed a first amended complaint. On September 10, 2015, the Court struck the first amended complaint and ordered Plaintiff to file a second amended complaint that complied with the Court's May 11, 2015 and August 18, 2015 opinions and orders. (See September 10, 2015 Consent Order.) On September 16, 2015, Plaintiff filed his second amended complaint ("Amended Complaint"). On

October 23, 2015, Defendants filed their answer to the Amended Complaint as well as a counter-complaint ("Counter-Complaint").

On March 4, 2015, the Receiver submitted his second report. In the second report the Receiver documented that he had liquidated CAG's inventory of cars. In addition, the Receiver conveyed he had reviewed CAG's previous tax returns and had discovered issues which necessitated the filing of amended tax returns for CAG from 2011-2013, in addition to filing a 2014 tax return. In addition, the Receiver stated that he had retained a CPA firm to prepare the amended tax returns and 2014 tax return. Further, the Receiver explained the both sides had advised him that they would retain their own experts to assist in resolving the tax return issues. On March 16, 2015, Plaintiff filed objections to the second report. One issue Plaintiff raised was that he objected to approving the Receiver's financial statements until a complete accounting had been concluded. On March 19, 2015, Plaintiff withdrew his objections to the second report. Accordingly, the Court approved the second report on March 24, 2015.

On June 3, 2015, the Receiver submitted his third report. In the third report, the Receiver (1) reported that CAG's entire inventory was liquidated, (2) confirmed that amended tax returns would need to be filed for 2011-2013, and (3) explained that he had obtained an extension for CAG to file its 2014 return. In addition, the Receiver conveyed that he had compiled 2011 opening and closing inventories for CAG, including a member account analysis, and delivered the inventories to the parties. However, the 2011 inventories were not attached to the report.

Further, the Receiver reported that he had met with both parties and their counsel to review the prior reports, where they each provided additional documentation to assist the receiver in completing his accounting. Moreover, the receiver explained that the parties had agreed that Defendants' expert would conduct a forensic audit of CAG, and that CAG would pay for the audit.

On June 12, 2015, Plaintiff filed objections to the third report. Specifically, Plaintiff objected that the Receiver had gone beyond the scope of the authority granted by the Receivership Order. In addition, Plaintiff made objections related to CAG's tax returns. Additionally, Plaintiff stated that contrary to the Receiver's representation, the parties had not agreed to be bound by the Defendant's experts forensic accounting; rather, Plaintiff asserted the parties actually agreed that Defendant's expert would prepare its accounting, which would then be reviewed by Plaintiff's expert in order to possibly reach a consensus. Further, Plaintiff expressed that Defendant's expert had not distributed its findings, resulting in Plaintiff being unsure as to whether his expert would agree with Defendant's expert's findings. Additionally, Plaintiff stated that he disagreed with the Receiver's 2011 inventory.

On July 20, 2015, the Court denied Plaintiff's objection that the Receiver had gone outside his authority and approved the Receiver's request for payment of costs and fees. On August 18, 2015, Plaintiff withdrew his remaining objections to the third report and the Court approved the third report. However, the parties reserved their right to file the necessary documents with the IRS in

the event that either one of them disagreed with the tax returns/amendments filed by the Receiver. (See August 18, 2015 Order.)

On September 11, 2015, the Receiver filed his fourth report. In the fourth report, the Receiver represented that he had accepted Defendants' experts report as to the beginning and ending inventories for 2011 for tax and accounting purposes. In addition, the Receiver stated that he had continued to take actions to account for CAG's operations from 2011 thru 2014. On September 21, 2015, the Court approved the fourth report having received no objections.

On October 7, 2015, the Receiver submitted his fifth report. In the fifth report, the Receiver asserted that he had worked with an accountant to prepare amended tax returns for 2011-2013, as well as a tax return for 2014, as well as continued to conduct an accounting of CAG. On October 14, 2015, Plaintiff filed a response to the fifth report in which he acknowledged receiving copies of the tax returns that had been prepared and consented to the approval of the fifth report. However, in his response Plaintiff also reserved his right to contest the Receiver's conclusions regarding the accounting. On October 17, 2015, the Court approved the fifth report.

On November 16, 2015, the Receiver filed his sixth report. In that report, the Receiver explained that he had identified loans from CAG to and from Plaintiff and Defendant Shirinian and provided his findings to the parties. Further, the Receiver reported that he had located an operating agreement for CAG. In addition, the Receiver expressed that neither party had contested his conclusion that Plaintiff and Defendant Shirinian were CAG's members. The

Receiver also addressed Plaintiff's reply to the fifth report. Specifically, the Receiver stated that he had given both sides opportunities to object to his business decisions and accountings, but that neither had done so. Moreover, the Receiver asserted that the result of his accounting of CAG was that Plaintiff owed CAG \$317,740.47, which he proposed to resolve by making a \$317,740.47 payment to Defendant Shirinian to cancel out the loan. In addition, the Receiver reported that CAG owed Defendant Shirinian an additional \$621,152.79, which he proposed paying off. The Receiver went on to report that if the loan to Defendant Shirinian was paid off CAG would be left with \$45,823.33.

On November 23, 2015, Plaintiff filed his objections to the sixth report in which he argued that the ultimate issue in the accounting of CAG and that as a result he did not agreed to be bound by the Receiver's accounting. The Receiver and Defendants each filed responses to the objections. On December 7, 2015, the Court entered an order denying Plaintiff's objections, approving the sixth report in its entirety, and taking the issues relating to the Receiver's findings with respect to CAG's loans to and from Plaintiff and Defendant Shirinian, as well as the Receiver's proposed distributions, under advisement. On February 2, 2016, the Court entered an Opinion and Order in which it ordered the Receiver to place the \$621,152.79 he represented CAG owed to Defendant Shirinian into a segregated, interest bearing account with the Macomb County Clerk based on the fact that the accounting of CAG was an ultimate issue in this case and that the funds should not be distributed to either party until the Court makes its determination as to the accounting.

On December 5, 2015, the Receiver submitted his seventh report. The seventh report did not include any substantive material and did not seek the Court's approval.

On January 28, 2015, Plaintiff filed a motion to strike the Court's orders approving five of the Receiver's reports. On February 6, 2016, the Receiver filed a response. On February 16, 2016, a stipulated order was entered withdrawing Plaintiff's motion.

On February 29, 2016, the Receiver filed his eighth report. On March 8, 2016, Plaintiff filed objections to the eighth report. The objections dealt, in part, with his position that many of the bases for the Receiver's conclusions were false. On March 17, 2016, the Receiver filed a response to the objections. On March 21, 2016, the Court took the matter under advisement. On May 16, 2016, the Court entered its Opinion and Order denying Plaintiff's objections, except one objection regarding a portion of the Receiver's fees.

The Court has since directed the parties to submit briefs on the issue of whether, and to what extent, the receiver's reports are dispositive as to the financial affairs of CAG and are binding on the parties. Both sides, as well as the Receiver, have filed briefs as directed.

## II. Arguments and Analysis

The issue before the Court is whether, and to what extent, the Receiver's conclusions, as set forth in his various reports, are dispositive as to the financial affairs of CAG. In their brief, Defendants contend that the Receiver's conclusions, as set forth in his accountings, are dispositive of the financial affairs

of CAG. Specifically, Defendants aver that by approving the reports the Court rendered the conclusions within the reports dispositive findings. Defendants argue that both sides' due process rights have been satisfied in this case where both sides were given multiple opportunities to provide input to Receiver and were granted full access to the records forming the basis for the accountings. Moreover, Defendants point the fact that both sides had an opportunity to object to each and every accounting and to have a hearing in connection with their objections.

In response, Plaintiff contends that several of the factual positions the Receiver based his conclusions on were false and that as a result his conclusions are incorrect. However, Plaintiff does address Defendants' position that challenges to the facts underlying the Receiver's conclusions are untimely.

While Plaintiff now challenges the factual basis for many of the Receiver's conclusions, the focus of the Court's inquiry is not on the merits of the Plaintiff's positions; rather, the issue before the Court is whether the parties may now challenge the Receiver's conclusions, or the factual positions underlying those conclusions, or whether such positions are untimely.

Defendants' and the Receiver's position in this case sounds in forfeiture, waiver and/or estoppel. Specifically, Defendants' and the Receiver contend that by failing to object to the Receiver's reports they were in fact waiving or forfeiting their right to do challenge the contents of the reports at a later date. "[W]aiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362; 666 NW2d 251 (2003).

While mere silence is not enough to establish a waiver, it may amount to a forfeiture which “is the failure to assert a right in a timely fashion.” *Id.* at 379. “[A] forfeiture necessarily requires that there be a specific point at which the right must be asserted or be considered forfeited. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002).

In this case, the parties were given an opportunity to file objections to each and every one of the Receiver’s reports. Plaintiff has exercised that right in connection with the second, third, fifth and sixth reports. In his objections to each of those reports Plaintiff stated that he did not agree to be bound by the Receiver’s conclusions regards CAG’s accounting. Moreover, while Plaintiff withdrew his objections to the third report, the parties agreed that they reserved their right to file documentation with the IRS if either one of them disagreed with the tax returns/amendments filed by the Receiver. (See August 18, 2015 Order.) Further, in his objections to the fifth and sixth reports, Plaintiff specifically reserved his right to contest the Receiver’s conclusions as set forth in his accounting. Additionally, the sixth report was the first report which included the Receiver’s findings as the transactions between CAG and the parties. In response to that report, Plaintiff specifically objected to the Receiver’s conclusions and requested that Court hold the funds at issue in escrow until the Court could rule on the accounting issue at trial. In its December 7, 2015 Opinion and Order, the Court noted that the accounting of CAG is one of the central issues in this case and that as a result the funds in question should be

held in escrow until the parties have an opportunity to present proofs on the issue at trial or in a dispositive motion.

While the Receiver was granted the power to conduct an accounting of CAG and although the parties were afforded opportunities to object to how the Receiver conducted the accounting, as well as the conclusions within the accounting, Defendant nor the Receiver has identified any basis for their position that the Receiver's conclusions were to be deemed dispositive findings on the financial affairs of CAG. The Court recognizes that the Receiver was required to complete an accounting in order to effectuate his goal of winding up and dissolving CAG, his appointment did not operate to substitute the Receiver in place of the Court as the ultimate factfinder on the accounting issue. Moreover, even if the Receiver's findings could be deemed to be dispositive findings if Plaintiff did not file objections to the findings, Plaintiff has repeatedly and consistently reserved his right to contest and challenge the Receiver's accounting and to present his case to this Court at trial. For these reasons the Court is satisfied that the Receiver's reports do not operate as dispositive findings on the matter addressed therein.

Although, for the reasons discussed above, the Court is convinced that the Receiver's reports are not dispositive on the issue of CAG's accounting, the Court finds it necessary to address an issue which has already been resolved. In his brief, Plaintiff contends that Defendant Shirinian was not, and is not, a member of CAG. However, Plaintiff, in its original complaint, alleged that Defendant Shirinian was a member of CAG, and operated in a manner consistent

with that allegation well after the Receiver was appointed. Moreover, the November 3, 2014 stipulate order represented that Plaintiff and Defendant Shirinian were 50/50 members of CAG. Indeed, it wasn't until well into this matter that Plaintiff began to argue that Defendant Shirinian was not a member of CAG. The Court is convinced that Plaintiff has waived and/or forfeited his right to take that position.

"[W]aiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362; 666 NW2d 251 (2003). While mere silence is not enough to establish a waiver, it may amount to a forfeiture which "is the failure to assert a right in a timely fashion." *Id.* at 379. "[A] forfeiture necessarily requires that there be a specific point at which the right must be asserted or be considered forfeited. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). In this case, Plaintiff not only alleged that Defendant Shirinian was a member of CAG, but also stipulated to that fact in the November 3, 2014 Order. Moreover, Plaintiff sat by while the Receiver was winding down and dissolving CAG for a prolonged period of time before raising his position. The Court is convinced that by engaging in the above-referenced activities, Plaintiff has waived and/or forfeited his ability to challenge whether Defendant Shirinian is a member of CAG. Consequently, that issue no longer remains open.

### III. Conclusion

For the reasons set forth above, the conclusions within the Receiver's reports are not dispositive of the parties' claims to the extent that the claims

pertain to the financial transactions involving CAG's funds/assets. In addition, as discussed above, the Court hereby finds that Plaintiff has waived and/or forfeited his right to contest that Defendant Shirinian is a member of CAG.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

DATED: SEP 30 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge