

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

CLIFFORD K. BRAMBLE, JR., and)	
KIRK PARKS,)	
)	
Plaintiffs,)	
)	CIVIL ACTION
v.)	
)	FILE NO. 2018-CV-301230
KEVIN L. RATHBUN,)	
)	
Defendant.)	

ANSWER AND COUNTERCLAIM

Defendant Kevin L. Rathbun (“Rathbun”) answers the Complaint for Declaratory Judgment of Clifford K. Bramble, Jr. and Kirk Parks and files his Counterclaim against Plaintiffs.

This is a dispute between Rathbun, the majority shareholder in several entities, and his partners, Bramble and Parks, who own minority interests in those entities. Bramble and Parks, who have profited handsomely based on Rathbun’s talent and business acumen, file this lawsuit in an attempt to obtain a price for their membership interests to which they are otherwise not entitled. The relevant operating agreements set forth the purchase price, and this Court should enter declaratory judgment in favor of Rathbun. Until this lawsuit is concluded, Rathbun’s ability to manage and operate his companies remains impaired.

FIRST DEFENSE

Plaintiffs' claims for declaratory relief should be dismissed as Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiffs' claim for attorneys' fees fails because there is no viable underlying claim to support such an award.

THIRD DEFENSE

Plaintiffs' claim for attorneys' fees fails to the extent they have successfully stated a claim for declaratory relief, as the requirement of uncertainty underlying a declaratory judgment claim precludes an award of attorneys' fees under O.C.G.A. § 13-6-11. Gen. Hosps. of Humana, Inc. v. Jenkins, 188 Ga. App. 825, 828 (1988).

FOURTH DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver, estoppel, and unclean hands.

FIFTH DEFENSE

Rathbun responds to Plaintiffs' individual allegations as follows:

- 1.

Rathbun denies the allegations contained in paragraph 1 of the Complaint.

2.

Rathbun admits that the documents referenced in paragraph 2 of the Complaint speak for themselves and denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 2 of the Complaint.

3.

Rathbun denies the allegations contained in paragraph 3 of the Complaint.

4.

Rathbun lacks information and knowledge sufficient to form a belief regarding the truth of the allegations in paragraph 4 of the Complaint, and therefore denies the same.

5.

Rathbun lacks information and knowledge sufficient to form a belief regarding the truth of the allegations in paragraph 5 of the Complaint, and therefore denies the same.

6.

Rathbun admits the allegations contained in paragraph 6 of the Complaint.

7.

The allegations in paragraph 7 call for a legal conclusion and therefore do not require a response. To the extent a response is required, Rathbun denies the allegations contained in paragraph 7 of the Complaint.

8.

The allegations in paragraph 8 call for a legal conclusion and therefore do not require a response. To the extent a response is required, Rathbun denies the allegations contained in paragraph 8 of the Complaint.

9.

Rathbun admits the allegations contained in paragraph 9 of the Complaint.

10.

Rathbun denies the allegations contained in paragraph 10 of the Complaint.

11.

Rathbun admits the allegations contained in paragraph 11 of the Complaint.

12.

Rathbun denies the allegations contained in paragraph 12 of the Complaint.

13.

Rathbun denies the allegations contained in paragraph 13 of the Complaint,

14.

Rathbun denies the allegations contained in paragraph 14 of the Complaint.

15.

Rathbun admits the allegations contained in paragraph 15 of the Complaint.

16.

Rathbun admits the allegations contained in paragraph 16 of the Complaint.

17.

Rathbun denies the allegations contained in paragraph 17 of the Complaint.

18.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 18 of the Complaint.

19.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 19 of the Complaint.

20.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 20 of the Complaint.

21.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 21 of the Complaint.

22.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 22 of the Complaint.

23.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 23 of the Complaint.

24.

The Operating Agreements speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 24 of the Complaint.

25.

Rathbun admits the allegations contained in paragraph 25 of the Complaint.

26.

Rathbun admits that Bramble and Parks were employees of KRS and received salaries but denies the characterization of Bramble and Parks as employees of only KRS.

27.

Rathbun admits the allegations contained in paragraph 27 of the Complaint.

28.

Rathbun admits that the Companies have been profitable. Rathbun denies any remaining allegations contained in paragraph 28 of the Complaint.

29.

Rathbun admits the allegations contained in paragraph 29 of the Complaint.

30.

Rathbun admits that 154 Krog has acquired real property. Rathbun denies any remaining allegations contained in paragraph 30 of the Complaint.

31.

Rathbun denies the allegations contained in paragraph 31 of the Complaint.

32.

The letter referenced in paragraph 32 of the Complaint speaks for itself, and Rathbun denies any characterization or interpretation of that document. Rathbun denies any remaining allegations in paragraph 32 of the Complaint.

33.

The letter referenced in paragraph 33 of the Complaint speaks for itself, and Rathbun denies any characterization or interpretation of that document. Rathbun denies any remaining allegations in paragraph 33 of the Complaint.

34.

The letter referenced in paragraph 34 of the Complaint speaks for itself, and Rathbun denies any characterization or interpretation of that document. Rathbun denies any remaining allegations in paragraph 34 of the Complaint.

35.

The letters and attachments referenced in paragraph 35 of the Complaint speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 35 of the Complaint.

36.

Rathbun denies the allegations contained in paragraph 36 of the Complaint.

37.

Rathbun admits that a determination of the fair market value of 154 Krog has not yet been determined. Answering further, there is no deadline under the 154 Krog operating agreement for Rathbun to provide Plaintiffs with an appraisal. Rathbun has, through counsel, advised Plaintiffs of his intent to retain Meridian Advisors to perform the appraisal and, while not required under the 154 Krog operating agreement, in a show of good faith has asked Plaintiffs for their consent to retain Meridian Advisors. To date, Rathbun has received no response from Plaintiffs.

38.

The letters and attachments referenced in paragraph 38 of the Complaint speak for themselves, and Rathbun denies any characterization or interpretation of those documents. Rathbun denies any remaining allegations in paragraph 38 of the Complaint.

39.

Rathbun denies the allegations contained in paragraph 39 of the Complaint.

40.

Rathbun denies the allegations contained in paragraph 40 of the Complaint.

41.

Rathbun denies the allegations contained in paragraph 41 of the Complaint.

42.

Rathbun denies the allegations contained in paragraph 42 of the Complaint.

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Rathbun denies the allegations contained in paragraph 43 of the Complaint.

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Rathbun denies the allegations contained in paragraph 44 of the Complaint.

45.

Rathbun denies the allegations contained in paragraph 45 of the Complaint.

46.

Rathbun denies the allegations contained in paragraph 46 of the Complaint.

47.

Rathbun denies the allegations contained in paragraph 47 of the Complaint.

48.

Rathbun denies the allegations contained in paragraph 48 of the Complaint.

49.

Rathbun denies the allegations contained in paragraph 49 of the Complaint.

50.

Rathbun denies the allegations contained in paragraph 50 of the Complaint.

51.

Rathbun denies the allegations contained in paragraph 51 of the Complaint.

52.

Rathbun denies the allegations contained in paragraph 52 of the Complaint.

53.

Rathbun incorporates his foregoing responses to the paragraphs referenced in paragraph 53 as if fully set forth herein.

54.

Rathbun denies the allegations contained in paragraph 54 of the Complaint.

55.

Rathbun denies the allegations contained in paragraph 55 of the Complaint.

56.

Rathbun denies the allegations contained in paragraph 56 of the Complaint.

57.

Rathbun denies the allegations contained in paragraph 57 of the Complaint.

58.

Rathbun denies the allegations contained in paragraph 58 of the Complaint.

59.

Rathbun denies the allegations contained in paragraph 59 of the Complaint.

60.

Rathbun incorporates his foregoing responses to the paragraphs referenced in paragraph 60 as if fully set forth herein.

61.

Rathbun denies the allegations contained in paragraph 61 of the Complaint.

62.

Rathbun denies the allegations contained in paragraph 62 of the Complaint.

63.

Rathbun denies the allegations contained in paragraph 63 of the Complaint.

64.

Rathbun denies the allegations contained in paragraph 64 of the Complaint.

65.

Rathbun denies the allegations contained in paragraph 65 of the Complaint.

66.

Rathbun denies the allegations contained in paragraph 66 of the Complaint.

67.

Rathbun incorporates his foregoing responses to the paragraphs referenced in paragraph 67 as if fully set forth herein.

68.

Rathbun denies the allegations contained in paragraph 68 of the Complaint.

69.

Rathbun denies the allegations contained in paragraph 69 of the Complaint.

GENERAL DENIAL

Rathbun denies every allegation not specifically and expressly admitted.

RESPONSE TO PRAYER FOR RELIEF

Rathbun denies that Plaintiffs are entitled to the relief they seek or any relief whatsoever.

COUNTERCLAIM

Rathbun files the following counterclaim against Bramble and Parks, and alleges as follows:

I. Rathbun Includes Bramble and Parks In His Renowned Restaurant Enterprise.

70.

Kevin Rathbun is a renowned chef and restaurateur.

71.

Since the mid-1990s, Rathbun has earned celebrity chef status, his Atlanta restaurants have received nationwide laudatory attention, and he has supported Atlanta charities generously.

72.

For example, Kevin Rathbun won Food Network's *Iron Chef America* and *Chopped*, for which he donated his \$10,000 winnings to the Atlanta Community Food Bank. His restaurants, KR SteakBar, Krog Bar, Kevin Rathbun Steak, and Rathbun's, have been named among the nation's best American restaurants by

Travel and Leisure, the New York Times, Esquire, USA Today, Atlanta magazine, Creative Loafing, and Bon Appetit.

73.

Following the success of Rathbun's, Rathbun formed the Krog Bar, LLC ("Krog Bar") restaurant in 2005, in which Rathbun, Bramble, and Parks invested. Rathbun was 51% owner, Bramble 29%, and Parks 20%, and all three were Managers of the LLC. A true and correct copy of the March 30, 2005 Operating Agreement for Krog Bar is attached hereto as Exhibit A.

74.

Rathbun, Bramble, and Parks next formed Kevin Rathbun Steak, LLC ("KRS") in 2006 to operate a contemporary steakhouse. Rathbun was 51% owner, Bramble 31%, and Parks 14% (a fourth member not involved in this dispute owned the remainder). Rathbun, Bramble, and Parks were Managers of the LLC. A true and correct copy of the July 12, 2006 Operating Agreement for KRS is attached hereto as Exhibit B.

75.

Rathbun, Bramble, and Parks also formed 154 Krog Street, LLC ("154 Krog"), which purchased the property on which KRS operates its restaurant. Rathbun was 51% owner, Bramble 33%, and Parks 16%. All three were Managers

of the LLC. A true and correct copy of the July 12, 2006 154 Krog Operating Agreement is attached hereto as Exhibit C.

76.

Most recently among the restaurants pertinent to this dispute, in 2012 Rathbun, Bramble, and Parks formed SteakBar, LLC (“SteakBar”) which operated the restaurant KR SteakBar. Rathbun was 51% owner, Bramble 23%, and Parks 22% (a fourth member not involved in this dispute owned the remainder). Rathbun, Bramble, and Parks were Managers of the LLC. A true and correct copy of the SteakBar Operating Agreement is attached hereto as Exhibit D.

77.

Krog Bar, KRS, 154 Krog Bar, and SteakBar are referred to collectively as the “Companies.” Rathbun, Bramble, and Parks were all Managers in each of the Companies.

78.

Rathbun, Bramble, and Parks performed services as employees for all of the companies.

79.

For administrative ease, Bramble and Parks were paid their salary by KRS. However, they were employees of all the Companies. When they performed

services as employees for the Companies, Bramble's and Parks' role included restaurant operation, management, and administrative functions.

80.

The talent, name recognition, reputation, and goodwill of Kevin Rathbun form the recognized "brand" that is Rathbun.

81.

The Companies' success depends in large part on Rathbun.

82.

Over the years, the Companies have made distributions to its members, and Bramble and Parks have profited handsomely.

II. Each Company Has a Clear Operating Agreement.

83.

The Companies' Operating Agreements provide Rathbun majority control over all aspects of the businesses.

84.

The Companies' Operating Agreements state clearly Rathbun's majority control and the terms governing membership, termination of employment, and the purchase of departing members' shares.

85.

The KRS and SteakBar Operating Agreements contain identical provisions providing in pertinent part as follows:

In the event of the termination of employment by the Company of a Class A Member other than Kevin Rathbun, then Kevin Rathbun first, and if Kevin Rathbun does not exercise such option then the Company second, shall have the option, exercisable by written notice (the “Option Notice”) delivered to the terminated Member within thirty (30) days after the termination of employment of such Member, to purchase all of the terminated Member's Class A Membership Interest. If Kevin Rathbun or the Company exercises said option to purchase, the terminated Member shall sell, and the purchaser shall purchase, all of the Class A Membership Interest of the terminated Member (collectively the “Affected Class A Membership Interest”). **The purchase price (the “Buyout Price”) for the Affected Class A Membership Interest shall be equal to the value of the terminated Member’s Capital Account** as of the date of termination of such Member's employment.

(KRS Operating Agreement ¶ 11.3.2; SteakBar Operating Agreement ¶ 11.4.2 (emphasis added).)

86.

The Krog Bar Operating Agreement provides in pertinent part as follows:

Upon the termination of employment of a Unit Holder, voluntary or involuntary and for any reason, such terminated Unit Holder must promptly send a notice to the Company and to each Member and offer (or be deemed to have offered) to sell to the Company and to each Member, as indicated in this Section, all of the terminated Unit

Holder's Units, at the Agreement Price and on the Agreement Terms.

* * *

The Agreement Price for the Offered Units shall be an amount equal to (i) the Offering Member's Capital Account balance on the date of the notice contemplated in Section 11.1.1, multiplied by (ii) a fraction, the numerator of which is the number of Offered Units and the denominator of which is the total number of Units owned by the Offering Member.

(Krog Bar Operating Agreement ¶¶ 11.1.4; 11.3 (emphasis added).)

87.

Alone among the Companies, the 154 Krog Operating Agreement provides that Rathbun or the Company may purchase Bramble's and Parks' membership interests for fair market value:

In the event of the termination of the employment of any Member other than Kevin Rathbun from Kevin Rathbun Steak, LLC, then the other Members shall have the option to acquire the Membership Interest of the terminated Member for a purchase price equal to the **fair market value** of such Membership Interest.

(154 Krog Operating Agreement ¶ 11.3.2 (emphasis added).)

III. **Parks and Bramble Terminate Their Employment by the Companies.**

88.

By letter dated September 1, 2016 on Rathbun's letterhead, Parks announced that he was terminating his employment with the Companies:

I am going to retire on December 30, 2016. I want to thank you for a wonderful twelve plus years for being my partners in the restaurants that started with one small restaurant and had developed into an empire. I have over the years had many great friends and business relationships through the restaurants we have built together. I have benefited professionally and financially from our partnership.

89.

From the time of his retirement until this dispute, Parks did not have any communications with Rathbun, nor did he perform any work for the Companies.

90.

Bramble terminated his employment by the Companies effective December 30, 2017.

91.

Following the termination of his employment, Bramble removed himself from the payroll system so he was no longer compensated for his employment.

92.

Bramble purported to terminate his employment only by KRS. Since KRS paid Bramble's entire salary related to his work for all Companies, Bramble effectively terminated his employment with all Companies.

93.

Bramble has not worked for any of the restaurants/Companies since December 31, 2017.

IV. Rathbun Exercises His Option to Purchase Bramble's and Parks' Membership Interests in the Companies.

94.

Pursuant to the KRS, SteakBar, and Krog Bar Operating Agreements, Rathbun or the relevant Company had the option to purchase Bramble's and Parks' membership interest for the value of their capital accounts.

95.

By letters dated January 29, 2018, Rathbun, through counsel, timely provided Plaintiffs with written notice of his intent to exercise his option to purchase their interests in each of the Companies in accordance with the terms and conditions of the respective Operating Agreements. True and correct copies of the January 29, 2018 letters to Bramble and Parks are attached hereto as Exhibits E and F.

96.

By letters dated February 1, 2018, Rathbun, through counsel, tendered payment to Plaintiffs of the purchase price for KRS, SteakBar, and Krog Bar in amounts equal to their respective capital accounts in each company. True and correct copies of the February 1, 2018 letters are attached hereto as Exhibits G and H.

97.

The February 1, 2018 letters advised Plaintiffs of Rathbun's assignment of their membership interests to Rathbun under the authority provided in the KRS, SteakBar, and Krog Bar Operating Agreements.

98.

The February 1, 2018 letters further advised Plaintiffs that Rathbun was in the process of obtaining a third-party appraisal to determine the fair market value of their respective interests in 154 Krog for purposes of exercising the buy-out rights under the 154 Krog Operating Agreement.

99.

By letter dated February 7, 2018, Rathbun, through counsel, advised Plaintiffs that, pursuant to the Companies Operating Agreements and O.C.G.A. § 14-11-309 (permitting member action without a meeting where action evidenced by one or more written consents), consent actions had been entered removing them as Manager of each of the Companies. A true and correct copy of the February 7, 2018 letter is attached hereto as Exhibit I.

100.

As a result of the above-referenced assignments, Plaintiffs are no longer members of KRS, SteakBar, and Krog Bar.

101.

As a result of the above-referenced consent actions, Plaintiffs are no longer Managers of the Companies.

V. Plaintiffs Seek to Avoid the Operating Agreements.

102.

Plaintiffs dispute that Rathbun had the right to acquire their membership interests in the Companies following the termination of their employment.

103.

Plaintiffs dispute that the consent actions described herein are effective to terminate their position as Managers of the Companies.

104.

Parks and Bramble allege that they did not terminate their respective employment by the Companies, and thus that Rathbun did not have any option to purchase their membership interests.

105.

The Operating Agreements do not distinguish between voluntary and involuntary terminations of employment in describing the buy-out rights of the Company and remaining members.

106.

By contrast, the Employee Handbook, attached hereto as Exhibit J, which governs Plaintiffs' employment with the Companies refers to the involuntary cessation of employment as a "dismissal," and not as a "termination." The Employee Handbook identifies both voluntary "resignations" and involuntary "dismissals" as forms of "Severed Employment."

107.

Plaintiffs allege they were employees of only KRS. In fact, Plaintiffs were employees of all of the Rathbun endeavors, including SteakBar, Krog Bar, and KRS. KRS was the entity which paid them as a matter of administrative convenience.

108.

Plaintiffs do not deny that the Operating Agreements for KRS, SteakBar, and Krog Bar unequivocally set the purchase price for membership interests at an amount equal to the terminated member's capital account balance.

109.

Plaintiffs nonetheless have demanded that Rathbun pay them the "fair market value" of their membership interests in KRS, SteakBar, and Krog Bar.

110.

Per the terms of the KRS, SteakBar, and Krog Bar Operating Agreements, Bramble's and Parks' ability to sell their membership interest to third parties is highly restricted. Thus, there is no "market" for their interests.

111.

The 154 Krog Operating Agreement alone provides for a purchase price of fair market value, and Rathbun has offered to pay Parks and Bramble fair market value for their interests in that Company.

112.

Given these disputes, under Georgia law, the question of the parties' rights and interests in the Companies are questions of law for determination by this Court.

113.

Under O.C.G.A. § 9-4-5, Rathbun is entitled to a prompt hearing to determine the parties' rights and interests in the Companies.

COUNT I
Declaratory Judgment
(Rathbun v. Plaintiffs)

114.

Rathbun reasserts the allegations in the foregoing paragraphs as though fully set forth herein.

115.

Due to the foregoing and because of the parties' dispute over the proper interpretation of the Companies' Operating Agreements, Rathbun is uncertain and insecure as to the parties' rights, interests, status, and legal relations in the Companies.

116.

There exists an actual, justiciable controversy between the parties entitling Rathbun to a declaratory judgment.

117.

Until the allegations and claims reflected in this suit are concluded, Rathbun's ability to operate and manage his Companies is impaired.

118.

Rathbun accordingly requests that this Court declare as follows:

- (a) Plaintiffs terminated their employment by the Companies;
- (b) Rathbun had the option under the Companies' Operating Agreements to acquire Plaintiffs' membership interests in the Companies following the termination of their employment;
- (c) Rathbun properly exercised his option to acquire Plaintiffs' membership interests in KRS, SteakBar, and Krog Bar at a

price equal to Plaintiffs' capital accounts in same following the termination of their employment;

- (d) Rathbun has the option to acquire Plaintiffs' membership interests in 154 Krog at a price equal to the fair market value of Plaintiffs' interests in same;
- (e) The assignment of Plaintiffs' membership interests in KRS, SteakBar, and Krog Bar to Rathbun was valid under the authority provided in the KRS, SteakBar, and Krog Bar Operating Agreements; and
- (f) As a result of the consent actions, Plaintiffs are no longer Managers of any of the Companies.

119.

The above is the only means to afford Rathbun relief from the uncertainty and insecurity which results from the dispute and this lawsuit.

120.

The ends of justice require that the Court should enter a declaratory judgment in Rathbun's favor.

WHEREFORE, for the reasons set forth in this Counterclaim, Rathbun respectfully prays that the Court

- (a) Enter declaratory judgment in favor of Rathbun;

(b) Grant such other and further relief to Rathbun as the Court considers
just and appropriate under the circumstances.

Respectfully submitted this 16th day of March 2018.

/s/ Alexa R. Ross

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