

Hylton v. Garfield Gunter & Progressive Electric & Telecommunications, LLC, 031411 CTSUP,  
CV096006054S

**Richard Hylton**

**v.**

**Garfield Gunter and Progressive Electric & Telecommunications, LLC**

**No. CV096006054S**

**No. 114803**

**Superior Court of Connecticut**

**March 14, 2011**

Caption Date: March 14, 2011.

Judicial District of Hartford at Hartford

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Rittenband, Richard M., J.T.R.

**MEMORANDUM OF DECISION**

RITTENBAND, JTR.

**FACTS:**

Sometime prior to September 21, 2006 the plaintiff (hereinafter also "Hylton"), Garfield Gunter, the defendant (hereafter also "Gunter"), Derrick Fraser, David Morgan and Wellesley Shaw decided to form an LLC the purpose of which was to provide electrical materials and service for construction projects. An Operating Agreement was executed as to the terms and conditions of the LLC subsequent to September 21, 2006 but back dated to that date. (Defendant's Exhibit B.) Gunter, Hylton and Derrick Fraser signed the Operating Agreement, but David Morgan and Wellesley Shaw did not. Nonetheless each party contributed a 20% interest in the company in the amount of \$1, 500 for a total of \$7, 500 start up money. Subsequently, David Morgan, Wellesley Shaw and Derrick Fraser had their interest purchased by the LLC leaving the two remaining members as the plaintiff and the defendant, Hylton and Gunter, as equal members of the LLC. Gunter was named Manager of the LLC. All of the parties worked on the jobs obtained by the LLC and took draws against the profits. On July 7, 2007 David Morgan and Wellesley Shaw were bought out by the LLC and on May 2, 2008 Derrick Fraser sold his interest to the LLC. Even though Gunter and Hylton were equal members in the LLC, the day to day control was in the hands of Gunter who was not only the managing member but was also a licensed electrician, Hylton being only an apprentice. The books and records of the LLC were technically open to Hylton, but they were in fact controlled by Gunter. Hylton apparently made only one effort to review the records by obtaining from the bookkeeper of the company a flash drive. This occurred in the Spring of 2008, and Hylton stopped working for the LLC by the end of July 2008. There is a dispute between Gunter and Hylton as to whether Gunter failed to pick up Hylton with the vehicle that belonged to the LLC and take him to the jobs. By July 2008 Hylton was no longer doing work in the field and had become suspicious based upon his review of the records that Gunter was not providing Hylton's fair share of the profits and was also using monies of the LLC for his own personal use. By return date of December 8, 2009 Hylton brought this action against Garfield and Progressive Electric and Telecommunications, LLC to recover what he believed were shares of profits that had been illegally withheld from him and to recover 50% of the monies from Gunter that

were used for Gunter's personal expenses.

The complaint was brought in Fourteen Counts. The following were brought against Gunter individually: First Count in Negligence, Second Count in Breach of Contract, Third Count in Unjust Enrichment, Fourth Count in Statutory Theft, Fifth Count in Conversion, Sixth Count for Breach of Fiduciary Duty, Seventh Count for Breach of Implied Duty of Good Faith and Fair Dealing and Eighth Count in Fraud: the Ninth Count against Progressive Electric and Telecommunications, LLC (hereinafter also "Progressive") was in Negligence, the Tenth Count for Breach of Contract against Progressive, the Eleventh Count in Unjust Enrichment against Progressive, the Twelfth Count in Theft against Progressive, the Thirteenth Count in Conversion against Progressive and the Fourteenth Count in Fraud against Progressive.

Gunter countered with the following Special Defenses: The first Special Defense was that "Hylton was paid in full for all labor he provided." Subsequently, the plaintiff withdrew his claim for the labor that he provided. The second Special Defense is that there was no written Operating Agreement between the members of the Limited Liability Company; the third Special Defense is that the plaintiff agreed to withdraw as a member of the Limited Liability Company and the fourth Special Defense is that the plaintiff was paid for work he didn't perform between March of 2009 and June 30, 2009 and that Gunter is entitled to an offset for those payments. The defendant, Gunter, also filed a Counterclaim claiming that the plaintiff orally agreed to withdraw as a member of the Limited Liability Company in exchange for a payment of his capital account as of June 30, 2009, that Gunter is a third beneficiary of the Agreement, that the plaintiff, Hylton, breach this Agreement and that defendant Gunter demands specific performance of the Agreement.

Trial was held before this Court on March 2 and 3, 2011. Plaintiff's brief was filed within one week of March 3, and defendant Gunter's was filed a week later.

#### STANDARD OF REVIEW:

"The plaintiff in a civil case (and a defendant in Special Defenses and Counterclaim) sustain their burden of proof as to any essential element in their cause of action if the evidence, considered fairly and impartially, induces in the mind of the trier, a reasonable belief that it is more probably than otherwise that the facts involved in that element are true." *Busker v. United Illuminating Co.*, 156 Conn. 456, 458 (1968). This is also known as proof by a preponderance of the evidence.

In addition, this Court evaluates the credibility of the witnesses upon their appearance and demeanor on the witness stand, the consistency or inconsistency of their testimony, their memory or lack thereof of certain events, whether they were candid and forthright or evasive and incomplete, their manner in responding to questions and their interest or lack of interest in the case as well as the exhibits in the case.

Also, the Court evaluates general credibility on the basis of other testimony in this case as well as documents in evidence as to their consistency or inconsistency with other evidence.

The burden is on the plaintiff to prove his allegations by a preponderance of evidence. The burden is on the defendants to prove their Special Defenses and Counterclaim by a preponderance of the evidence.

#### ISSUES AND FINDINGS:

## 1. Credibility:

The Court finds both Hylton and Gunter lacking in credibility. However, Gunter is less credible than Hylton. Hylton showed a lack of memory of various things which is, perhaps, understandable because of his lack of access to the books. He also showed a lack of understanding. For example he thought that Exhibit B to the Operating Agreement showed the required distribution yet there was another section, it was Article VIII that referenced the distributions and the allocation thereof. Of course, he is a layman, and it may have been unfair to expect him to pick out sections of the contract which was drawn up in legal form. Gunter, on the other hand, this Court found to be lacking in credibility when he stated that he wasn't aware that plaintiff was seeking the value of the company at the time of the suit when in fact he had already obtained with the knowledge of Gunter the flash drive to give him an opportunity to review the books and presumably try to obtain what the value of the company was. However, the real lack of credibility on Gunter's part will be described hereafter in that he did commit some of the claims made in the plaintiff's complaint and was not forthcoming to Hylton. He manipulated the books and tax returns with the CPA that the company hired, namely Carl Bagge, whose testimony was devastating to the defendant Gunter. It is more what the Court finds that Gunter did regarding the assets and expenses of the LLC than the testimony as such that results in an adverse opinion of his credibility.

## 2. Did Gunter Keep from the Plaintiff Monies that were Rightfully those of Hylton?

The short answer is Yes.

A review of the Federal Tax Returns, Form 1065, U.S. Return of Partnership Income and the testimony of Carl Bagge (hereinafter also "Bagge") who was the Certified Public Accountant hired by the LLC to among other things make out the tax returns is as follows:

1. A review of the 2008 tax return, in particular Schedule K-1 shows that Hylton had ordinary business income of \$61, 707. In paragraph 1 and in paragraph L that became \$61, 678 for the current year. He withdrew \$27, 400 leaving a balance in his capital account of \$34, 576. Clearly he is owed that money, the \$34, 576 (paragraph L of the K-1 of the tax return). Paragraph 2 in the 2009 tax return/schedule K-1 his ordinary business income is listed as \$20, 395, yet that was never put into his current year increase in paragraph L of the K-1. The reason that his \$20, 395 which he was never paid showed up as \$0 on the current year increase in paragraph L of the 2009 return K-1 for Hylton is because, according to the testimony of Bagge, which the Court believes and which Garfield stated in his testimony that he had no quarrel or disagreement with anything that Bagge said, there was a scheme put together by Bagge at the request of Garfield to show a \$0 partnership capital account. The way this was handled was by allocating in the K-1 for 2009 for Gunter in paragraph four a Guaranteed Payment of \$67, 490 which allowed the current year increase in paragraph 11 to be minus \$1 in Gunter's K-1 and \$0 in Hylton's K-1. It was agreed with Bagge at the request of Gunter to put in a Guaranteed Payment which came out of thin air of \$67, 490 which resulted in the lack of a current year increase even though Gunter took \$62, 267 in 2009.<sup>[1]</sup>

Since the \$67, 490 was fraudulent, Hylton is entitled as a 50% member to 1/2 of that or \$33, 745, and judgment is entered for him in that amount. Hylton is entitled also to the \$20, 395 and

judgment is also entered for him in that amount.

2. Then, there is the issue of the loan that Gunter took out from the LLC without the approval or even notification to Hylton in the amount of \$87, 774 which is reflected on the schedule K page 10 of the 2009 tax return. Testimony of Bagge as well as Gunter indicated that he had borrowed \$87, 774 and he used part of that money to purchase in his name and his wife's name property at 344 Blue Hills Avenue in either Hartford or Bloomfield in the amount of \$180, 000 for which he received a \$140, 000 mortgagee. The closing took place in 2010, and Gunter testified that since he only needed \$40, 000 to close the loan and purchase the property he put approximately \$50, 000 back into the company from the amount he had borrowed, leaving a balance still outstanding on the loan of \$37, 774 to which the plaintiff, Hylton, is entitled to 1/2 or \$18, 887. Judgment is entered for him in that amount.

3. The attorney for Garfield maintained throughout the trial that he and his firm represented Garfield only and did not represent Progressive Electric & Telecommunications, LLC. Therefore, the fees paid to Garfield's attorney, Houston Lowry and Brown and Welch were payments by Garfield for his personal legal fees. This money should be returned to the company, and the plaintiff is entitled to 1/2 thereof. The amounts and payments are set forth in plaintiff's Exhibit Nine as follows:

12/7/09	\$ 2, 000.00
3/5/10	\$ 3, 853.50
4/28/10	\$ 1, 137.50
5/19/10	\$ 2, 000.00
6/30/10	\$ 2, 000.00
9/1/10	\$ 2, 235.18
Total	\$13, 226.18

The total amount paid is \$13, 226.18, and the plaintiff is entitled to 1/2 thereof in the amount of \$6, 613.09. Judgment is entered for him for that amount.

4. Then, there is the matter of the work the LLC did for a church of which Gunter is a member. The work was completed, but \$100, 000 remains outstanding. The church, Bloomfield Rehoboth Church of God, f/k/a Church of God, f/k/a New Testament Church of God of both Hartford and Bloomfield (hereinafter also the "Church"), on November 30, 2009 executed a promissory note in the amount of \$100, 000 to Progressive Electric and Telecommunications, LLC for the balance due. This note is plaintiff's Exhibit 10. There is no evidence that any payment has been made on said note, but it is a debt due to the LLC, and whatever is received by the LLC on this note belongs to the LLC, and the plaintiff, as a 50% partner, shall be paid by whatever entity or person that receives the payments on this note 1/2 thereof. Judgment is entered for him for that amount including interest upon payment by the Church.

The total damages are as follows against the defendant Gunter: \$114, 216 plus 50% of monies paid by the Church as aforesaid. Plus triple damages and attorneys fees as hereafter stated.

### 3. Is the Defendant, Gunter, Liable on the Allegations of the Complaint?

The short answer is Yes as follows:

First Count-Negligence. Negligence against Gunter has been proven, and the damages are \$114, 216.

Second Count-Breach of Contract against Gunter. Gunter violated the Operating Agreement and is liable for Breach of Contract in the amount of \$114, 216.

Third Count-Unjust Enrichment. Gunter is liable for Unjust Enrichment in the total amount of \$114, 216.

Fourth Count-Theft. The Court finds by clear and convincing evidence that Gunter has violated C.G.S. §52-564, civil theft. As is well settled law, violation of said section is based upon the criminal larceny statutes. Gunter, who is intelligent and knowledgeable, intentionally took or withheld funds from the plaintiff that he knew were due to the plaintiff; in particular, his scheme with the CPA Carl Bagge to pay a guaranteed income for the purpose of having a resulting profit of \$0. Gunter's taking of an \$87, 000.00-plus loan as described above for his own benefit after return of \$50, 000.00 was also theft against the plaintiff. Failure to pay the 50% share of the profits was an intentional withholding of money due the plaintiff, and that constitutes theft. The same is true of the \$20, 395 and the \$34, 576. Under the theft statute aforementioned, the plaintiff is entitled to treble damages which is three times \$114, 216 or \$342, 648, and judgment is rendered against the defendant Gunter for that amount.

Fifth Count-Conversion. The Court finds by clear and convincing evidence that there is no question that Gunter converted these monies to his own benefit keeping them from the plaintiff, and the plaintiff is entitled to damages of \$114, 216 and judgment is entered for that amount.

Sixth Count-Breach of Fiduciary Duty. The Court finds by clear and convincing evidence that there is no question that Garfield as managing member was in a superior position to the plaintiff and violated the fiduciary trust he had to protect the plaintiff's interest. Therefore judgment is entered against Garfield in the total amount of \$114, 216.

Seventh Count-Breach of Implied Duty of Good Faith and Fair Dealing. The Court finds by clear and convincing evidence that Gunter is liable under this count for all the reasons stated above that he did not act in good faith and in fair dealing when breaching the Operating Agreement, Unjust Enrichment, Breach of Fiduciary Duty, etc., and judgment is entered against Gunter in the amount of \$114, 216.

Eighth Count-Fraud. The Court finds by clear and convincing evidence that the defendants committed fraud. In particular, the scheme he entered into with the certified public accountant, Bagge, to intentionally arrive at a \$0 amount of profit by taking a "guaranteed income" as previously described and intentionally depriving the plaintiff of money that Gunter knew was due to the plaintiff as described above constitute the elements of fraud against Gunter, and judgment is entered against Gunter for \$114, 216.

#### CONCLUSION:

For the above stated reasons, judgment is entered against Gunter based upon the Fourth Count in the amount of \$342, 648.

As for Counts Nine through Fourteen which are against Progressive, Progressive is

defaulted for failure to appear and failure to appear for trial. Accordingly, judgment is entered against Progressive on Counts Nine through Fourteen in the total amount of \$114, 216; except for Count Twelve (Theft) in the amount of \$342, 648.

Additionally, the plaintiff is entitled to punitive damages in the form of attorneys fees based upon his being found liable in the Fourth Count, the Sixth Count, the Seventh Count and the Eighth Count, and the defendant Progressive is found liable for punitive damages in the form of attorneys fees in Counts Twelve and Fourteen. Attorneys fees will be awarded against both defendants after a motion for attorneys fees is filed by the plaintiff within 30 days of this judgment. The plaintiff is to present at a hearing to be held an affidavit of attorneys fees together with any memorandum he may wish to file.

#### SPECIAL DEFENSES AND COUNTERCLAIM:

The Court rejects the Special Defenses and the Counterclaim because they have not been proven by a preponderance of the evidence. The Court finds that there was no written agreement for plaintiff to withdraw from the LLC nor was there an oral agreement. As for the alleged oral agreement the plaintiff said he wanted to speak to his attorney before making a decision, and then he did not respond to the offer set forth by Gunter. Clearly, there was no meeting of the minds.

Accordingly, the Special Defenses are denied, and judgment is entered for the plaintiff on the defendants' Counterclaim.

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Notes:

[1] There is no provision in the Operating Agreement for a Guaranteed Payment.

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