IN THE IOWA DISTRICT COURT FOR POLK COUNTY
IOWA BUSINESS SPECIALTY COURT

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| ROBERT COLOSIMO,<br><br>Plaintiff,<br>vs.<br><br>ANTHONY COLOSIMO AND A&R ENVIRONMENTAL, LLC.<br><br>Defendants.<br>_____<br><br>ANTHONY COLOSIMO,<br><br>Counterclaim Plaintiff,<br><br>vs.<br><br>ROBERT COLOSIMO,<br><br>Counterclaim Defendant. | Case No. LACL146374<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ENTRY |

On the 9th and 10th day of February, 2021, this case came on for a trial to the Court. Counterclaim Plaintiffs Anthony Colosimo and A&R Environmental, LLC., were represented by Attorneys Zach Hermsen and Anna Mallen. Counterclaim Defendant Robert Colosimo was represented by Attorney Timothy Lillwitz. The Court, having considered the testimony of the parties and their witnesses, having reviewed the exhibits and considered the applicable law, enters the following Findings of Fact, Conclusions of Law and Judgment Entry.

This case proceeded to trial on Counterclaim Plaintiff's claims in Count 1 for Breach of Oral and Written Contract and Count 2, Promissory Estoppel. [1] At the risk of

[1] Robert initiated this case by filing his Petition which Under Count 1, sought judicial dissolution of A&R Environmental, Inc., and Count 2, which alleged Breach of Fiduciary Duty by Anthony. Robert dismissed these claims without prejudice on December 17, 2020.

oversimplification, this case essentially seeks a business divorce between two brothers that did business together for many years. The key issues are whether the brothers came to an enforceable agreement on how to unwind their interests or whether, alternatively, Robert made a promise to Anthony regarding separating their business interests that he should be estopped from denying. As is frequently the case between family members in business together, there was little documentation of their discussions and agreements. Each brother had a different recollection of the events. However, at the end of the day, the Court is comfortable concluding by clear and convincing evidence that the brothers did in fact reach an agreement to separate their business interests as borne out in at least three years of action consistent with that separation agreement. After the agreement was reached regarding separating their business interests, Anthony devoted all of his time and considerable treasure to building Sparta Environmental by investing hundreds of thousands of dollars in his own sweat equity, infused over $70,000 in cash, personally guaranteed large loans and obtained an outside investor reliant on being in business with Anthony, not Robert. During this time, Robert invested no time or personal labor, no cash and personally guaranteed no loans. He devoted his energy to Mercury Concrete Services, LLC., the business he had taken under their separation agreement and also devoted his time to his other occupation as a professional football referee. For the reasons that will be explained below, the Court concludes that the facts, law and equities in this case demand that judgment be entered in favor of Counterclaim Plaintiffs.

## Facts

Anthony and his brother Robert have done business together for decades. Their father was also an entrepreneur. In the past, they built a company in the waste hauling business, Artistic Holdings, LLC., into the largest waste hauling business in Iowa. The business was sold

in 2012 and the brothers had a five year covenant not to compete as a result of that sale. In early 2017, the brothers were exploring new business opportunities. They formed two businesses: (1) Mercury Concrete Services, LLC., ("Mercury"), and (2) Sparta Environmental, LLC., ("Sparta"). Mercury filed its Certificate for Organization on March 7, 2017. Exhibit 100. Mercury was formed with the intention of running a concrete hauling business. Robert owned 55%, Anthony owned 15% and three other members owned 10% each. See Exhibit 101.

Sparta filed its Certificate of Organization on March 16, 2017. Exhibit 102. Sparta was formed with the intention of running a waste management business. Sparta was owned 49% by A&R Environmental, LLC. A&R Environmental, LLC., was owned 50% by Anthony and 50% by Robert. Exhibit 104. An investor named Green Leaf Environmental Solutions, LLC., owned the other 51% of Sparta. As consideration for its 51% interest in Sparta, Green Leaf gave its 'commitment to contribute up to $500,000." However, Green Leaf's agreement included a provision stating that it was "entitled to the 51% membership interest even if less than $500,000 is contributed." Eventually, as will be discussed below, this investment fell apart. They never contributed the $500,000 and invested little money in the company.

The Colosimos had two other business, Phoenix C&D Recycling, Inc. ("Phoenix") and R&A Properties, Inc., ("R&A"). These businesses were involved in the recycling business. Phoenix owned one building at the recycling plant and various equipment involved in the recycling process, and R&A owned the other two buildings at the recycling plant and the property the buildings were located on. A devastating fire occurred on July 6, 2017, which burned down the three buildings that were part of the recycling facility. The Phoenix business involved separating out wood, metal and biomass for fuel. There was so much fuel on the site, the fire department had to essentially let it burn. The insurance company initially denied

coverage, claiming the policy had lapsed. The Phoenix business was destroyed. They could not conduct business. R&A had no renter to pay rent and unpaid taxes. R&A was therefore taken through bankruptcy. The R&A bankruptcy liquidation was handled by the law firm Steve Wandro and Associates.

Returning to the Green Leaf Environmental investment in Sparta, Robert testified that he and Anthony had struck up a conversation with the owners of Green Leaf in January of 2017, and they wanted to invest. After they started the new relationship with Green Leaf, Robert and Anthony felt they should be putting more funds in upfront and they did not think so. They preferred to just rent trucks to Sparta. That was at a higher cost. They also felt that Robert and Anthony should have more sweat equity into it first. Anthony was insistent that they get paid. While Anthony and Robert disagreed about the reasons the Green Leaf investment failed, that is not particularly relevant to the Court's decision. The Green Leaf investment failed and an agreement was negotiated for A&R to buyout Green Leaf's shares in Sparta. On September 30, 2017, Green Leaf Environmental and A&R Environmental entered a membership interest purchase agreement whereby A&R Environmental, LLC., agreed to purchase the membership interest of Green Leaf in Sparta for $58,363.93 payable by a promissory note. Robert signed that document as president of A&R. Guarantors on the note are listed as Anthony Colosimo and Robert Colosimo but their signatures do not appear as guarantors. Anthony credibly testified that Sparta is still making payments to Green Leaf. The evidence indicates that Robert has not made any payments to Green Leaf.

The state of the Colosimo's joint business interest in the fall of 2017 was as follows. Mercury, intended to be a concrete hauling operation, had been in existence for only six months. A&R/Sparta, intended to be a waste management hauling operation, had been in existence for

only six months and had no investors. A&R's only asset was now a 100% ownership of Sparta, which at this time was essentially a company in name only: it had no assets, no cash flow, no investors, no value and was now indebted to Green Leaf. Its primary value was Anthony himself. He had built a successful waste management business before and was confident he could do it again if he found the right investor. Added to mix, the Colosimos were navigating a bankruptcy for R&A and the catastrophic fire damage at the Phoenix and R&A facilities. In and around this time, the brothers had a "falling-out." In the fall of 2017, the brothers had a physical altercation.

Anthony credibly testified that after the Green Leaf investment had fallen apart, and a new investor was needed in Sparta. He took it upon himself to find a new investor. He had known Dr. Timothy Carmody for many years as they lived in the same neighborhood. Anthony was the only one that played a role in recruiting Dr. Carmody. Anthony testified they had built their prior business Artistic Waste Services into the largest waste company in Iowa and had sold it in 2012. He was confident he could do it again. Anthony testified he and his brother had a conversation in their Urbandale office. He told Robert that Dr. Carmody wanted to invest in Sparta with Anthony only. He told Robert that would mean "I would have Sparta and you would have Mercury and we would move on." Anthony testified his brother agreed, stating, "Good luck, you ruined the company." Anthony testified that the reference to ruining the company was to Robert's belief that Anthony had spoiled the Green Leaf deal. Anthony testified Green Leaf had not put in the agreed investment. Anthony had prepared a pro forma showing that they needed to invest $500,000. Anthony believed they were micromanaging the business. Robert believed it was still going to work with Green Leaf although they had said they were done. Anthony told Robert he would take Sparta and Robert said good luck, you ruined the company.

This conversation was after the physical altercation between the brothers. Robert's recollection of the conversation is somewhat different. Robert denied telling Anthony he had ruined the company. He did testify that Anthony came into the office and said he didn't want to fight, and Robert said that he didn't want to fight either. He acknowledged Anthony said that I'm just going to run Sparta. He therefore acknowledged that they agreed that Anthony was going to run Sparta. However, Robert testified that Anthony said, "You are still going to own it and will make no less." The Court did not find that testimony by Robert to be believable. It defies common sense to think that Anthony would simply allow Robert's ownership in and profits from the business to continue without any investment of Robert's time or capital. Robert did acknowledge that things had to change with Sparta since they had lost their financing and acknowledge telling Anthony, "You handle Sparta and I'll handle Mercury and we'll go from there." He testified it made some sense to have Anthony handle Sparta and he would handle Mercury because it was top-heavy to start out with as Sparta could not afford to pay both he and Anthony. He also acknowledged that he had always been running Mercury, and Anthony had little or nothing to do with it. Robert did not get paid by Sparta after September of 2017. He stopped doing any of the books and records and let Anthony handle it. From the fall of 2017 on, Robert invested no time, no labor, no cash and guaranteed no loans. Similarly, from this point on Anthony invested no time or capital into Mercury Concrete.

The Court notes that a document from the bankruptcy filing entitled Valuation of Companies for Personal Financial Statements 8/30/17 for Robert Colosimo lists his interests in R&A Properties, his interests in Phoenix, his interests in a note payable from Recycling, Inc., and lists him as a 55% owner of Mercury Concrete Services. Robert's financial statement does

not indicate an ownership interest in A&R/Sparta. One would think he would have done so if he still believed he had ownership.

Anthony credibly testified and all the facts and evidence bear out that after this conversation, Robert never did any work for Sparta, he offered no ideas, no opinions, invested no money and none of his time. The facts also bear out that Anthony similarly separated himself from Mercury. At some point in time shortly after their agreement, Robert moved his desk and belongings out of the Urbandale office.

Dr. Timothy Carmody is a radiologist who lives in Des Moines and is a neighbor of Anthony. He has known Anthony for approximately 20 years and only knows Robert tangentially. Dr. Carmody credibly testified that when he made the decision to invest in Sparta, he believed he was investing with Anthony. He had no reason to believe Robert would be involved. To his knowledge, Robert has contributed no money to Sparta, has done no work for Sparta and has had no involvement in the day-to-day operations of Sparta.

Exhibit 108 is the amended and restated Operating Agreement dated January 1, 2018. It lists the members of Sparta as Timothy Carmody and A&R Environmental, LLC. Page 39 of this document indicates it was signed by Anthony Colosimo and Timothy Carmody. Robert did not participate.

Dr. Carmody's investment in Sparta was operating line of credit worth about $580,000. He got that line of credit from MidWestOne and moved some property over to MidWestOne so they could cross-collateralize the line of credit with the property. The amount of time he has put into Sparta since he got involved in early 2018 is "more than he cares to." He puts in a reasonable amount of time and has recruited additional professionals to help establish a business

team. He arranged for an accounting firm and a tax preparer. Anthony functions as the manager of the LLC and as CEO, runs all daily operations. As to Anthony's financial involvement, he has a capital account with a valuation. The valuation is based mostly on sweat equity. Additionally, he testified that Anthony has contributed capital.

Exhibit 110 is a collection of personal checks dated November 16, 2017; December 1, 2017; December 14, 2017; January 8, 2018; January 12; 2018; February 6, 2019; and November 18, 2019. These are personal checks from Anthony written to either Sparta or American Trust Bank for Sparta loans. These checks total $77,500. Anthony credibly testified these are all checks showing payments to Sparta after reaching the agreement with his brother to separate their business interests.

The Court heard testimony from Jeff Vroman, a CPA. Mr. Vroman began working with Anthony, Dr. Carmody and Sparta in December of 2019. He helped them update their books with accounting practices, cash flow performance and other issues. He testified that Anthony is the one in charge of running Sparta day-to-day. He has never dealt with Robert. Robert has made no payment on behalf of the company. He has never spoken to Robert. He is aware of no debts that Robert has personally guaranteed for Sparta. On the other hand, Anthony is working full-time on Sparta. Mr. Vroman usually trades emails with Anthony three or four times a week. Sparta is Anthony's full-time job. Mr. Vroman testified a lot of that is without salary or payment. For the most part, it is Anthony's in-kind services to the company right now. For capital accounting purposes, he calculated the services and money Anthony has rendered for Sparta. The dollar figure agreed upon four or five weeks prior to trial was $225,000 of services. In other words, if the company had had to go out and hire somebody else on the market, that would have been the value Anthony had provided to the company over the last three or so years

for which he has not been paid. Dr. Carmody agreed with that based on the calculations performed by Jeff Vroman.

The Court received in evidence Exhibit 115. Pages RC0029-31 are a Disbursement Request and Authorization for a Loan dated February 14, 2018 from American Trust & Savings Bank to Sparta Environmental, LLC. The principal amount of the loan is $565,000. This document was executed approximately a month after Anthony and A&R Environmental and Dr. Carmody had signed the Amended Operating Agreement. The agreement is signed by both Robert and Anthony as members and managers of A&R Environmental, LLC. Anthony individually guaranteed the loan. Robert did not. In his testimony Robert confirmed he signed those documents on behalf of A&R Environmental. He testified he did not hesitate to sign the documents because it secured a line of credit that Anthony needed for Sparta. For his part, Anthony testified Robert's signature was needed after the amended and restated Operating Agreement because this document was to extend the original line of credit. He credibly testified that because their formal conveyance, Anthony taking Sparta/A&R and Robert taking Mercury was not yet done, both brothers needed to sign. The Court concludes that Robert signing this document is not inconsistent with Anthony's testimony that had there had been a prior oral agreement for Anthony to take Sparta and Robert to take Mercury because it was simply extending a loan, Robert only signed as manager and member of A&R but did not personally guarantee the debt.

Robert testified that in the spring of 2018, he was managing Mercury and Skol Trucking and taking on drivers. There was no testimony at trial to indicate Anthony had any involvement with Mercury or Skol Trucking. The only potential exception to this is the fact that Anthony acknowledged he guaranteed a loan for a Mack Truck for Mercury in 2018. Anthony testified

credibly that the signed off on that in the spirit of cooperation so that his brother could also be successful with Mercury. Without documents formally transferring the shares in effect, the parties could not have simply gone to the bank and explain an oral agreement.

Anthony credibly testified regarding Sparta's work at the Iowa State Fair. They handled all of the trash receptacles for the fair and 500 tons for every fair. They had a hospitality tent where they entertain friends and customers. Robert attended the event as they were trying to get along at that time. At this time Anthony was running Sparta, and Robert was running Mercury. Robert had brought the Jones brothers to the state fair that were investors in Mercury and family friends. After the fair event, Robert made comments to Anthony that Anthony found very concerning. He stated he was owed money from Sparta which Robert believed he was owed for working at the state fair. Anthony testified Robert claimed he should get $10,000 for the fair. Robert's assertion that was owed some kind of money for Sparta was concerning to Anthony because at that point he had put over a half a million dollars invested in Sparta and had brought on Dr. Carmody. Anthony believed it had previously been crystal clear based on their earlier agreement that he was going to take Sparta and Robert was going to take Mercury with no money being paid to either. This raised red flags for Anthony.

Relatively shortly after the Iowa State Fair, the brothers both appeared at Steve Wandro's office to finalize the R&A bankruptcy. At this point the brothers could not be in the same room together. Pursuant to the proposed R&A Bankruptcy Liquidation Plan, Robert was going to get $157,516, and Anthony would receive nothing. The plan noted that while Anthony was owed significant money from Phoenix, the money was uncollectible. Rightly or wrongly, this was upsetting to Anthony. A few weeks before, Robert had made comments about being owed money for the state fair. Further, from Anthony's perspective, he thought he had spent more

time working on Phoenix and R&A, and he believed that it was not fair that Robert would receive over $150,000 from the bankruptcy while he got nothing.

The testimony of Attorney Terry Gibson demonstrates that the concerns of Anthony regarding the fairness of the bankruptcy plan that seemingly favored Robert were not necessarily justified. Terry Gibson was the attorney with Steve Wandro's office that prepared the R&A Bankruptcy Plan of Liquidation. See Exhibit 3. During the course of the bankruptcy, two primary properties owned by R&A had been transferred and there were proceeds left from one of those transferred properties to be administered under the plan. The plan Mr. Gibson prepared involved reviewing those claims against the company and putting together a plan to pay those claims pro rata under the priorities of the bankruptcy code. Mr. Gibson worked closely with the R&A in-house accountant, Doug Strawn. R&A held a small receivable that Anthony owed R&A. Anthony also held a receivable claim against Phoenix. Phoenix owed a large amount of past due rent to R&A. The conclusion was that R&A was not making Anthony pay back his receivable. Contrasting that, Robert was a creditor of the company. Robert was getting a prorated amount of what he was owed.

Exhibit 10 is a July 11, 2018, email from Gibson to Robert and Anthony. It attached the proposed plan. Robert and Anthony's approval was needed prior to filing the plan on behalf of R&A. The bankruptcy plan was submitted and a confirmation hearing set for September 6, 2018. However, the bankruptcy plan originally submitted had to be withdrawn by R&A due to a dispute between brothers. Mr. Gibson testified that Anthony was concerned that Robert was receiving a distribution and he was not. Mr. Gibson attempted to explain to Anthony that the plan was based on the books and records of the company showing a debt owed to Robert and no similar debt owed to Anthony. There were simply no monies allowed to be paid to equity

holders. The bankruptcy affairs of R&A had to be managed for the benefit of the creditors. Robert had a claim as a creditor and Anthony did not. However, it was very clear that Anthony did not agree with and was upset by the plan and wanted to see some distribution.

Against this background, the brothers had a meeting with Attorney Steve Wandro at his office. The bankruptcy deadline was looming and both brothers needed to sign off on the bankruptcy plan. Mr. Wandro's testimony confirms that Anthony was upset that Robert was being paid under the bankruptcy plan. Mr. Wandro recalled Anthony being upset and the two brothers yelling at each other in his presence. Mr. Wandro drafted a Memorandum of Understanding to be signed by each of the two brothers and assist them in resolving their differences and separate their businesses which in turn would encourage them both, especially Anthony, to sign off on the bankruptcy plan he disagreed with. The Memorandum of Understanding, signed October 11, 2018, is as follows:

> "This Memorandum of Understanding is entered into on this 11th day of October, 2018, between Anthony Colosimo and Robert Colosimo.
>
> Robert and Anthony are brothers and have ownership interest in Mercury Concrete Services, LLC, Sparta Waste Services, LLC and a number of companies referred to as the Phoenix Companies
>
> Robert and Anthony seek to separate their interests in the foregoing businesses.
>
> In furtherance of this goal they agree in principle to exert their best efforts to undertake the following actions:
>
> - Anthony to convey his interest in Mercury to Robert
> - Robert to convey his interest in Sparta to Anthony
> - Robert and Anthony to orderly liquidate the Phoenix Companies.
> - Robert and Anthony to use their best efforts to get releases from creditors of the companies that are the subject of the conveyances.
>
> The parties acknowledge that this is not a legally binding document but contemplate that a formal legal document will be prepared to effectuate the actions set forth above."

Mr. Wandro testified that it was fair to say that Anthony signed off on the bankruptcy proceeding in reliance on is belief that Robert was going to undertake his best efforts to put the above

actions effect. There was nothing in the words or actions of Robert or Anthony to indicate that they would not exercise their best efforts to resolve their problems and do so in good faith. As noted above, the Memorandum of Understanding was signed on October 11, 2018. The bankruptcy plan was submitted and approved the next day, October 12, 2018. See Exhibit 4.

Anthony testified that he signed off on the bankruptcy plan which he believed was inequitable in reliance on Robert's agreement set forth in the Memorandum of Understanding for Robert to convey his interest to Sparta and Anthony to convey his interest in Mercury to Robert. He also testified that he had gotten Robert off any debt to any creditors of Sparta. The only thing that was left was to actually put pen to paper to transfer Robert's interest in Sparta to Anthony and Anthony's interest in Mercury to Robert. The Phoenix companies were liquidated through the bankruptcy. It was Anthony and his counsel's theme throughout the trial that the Memorandum of Understanding stated that the parties were to exert their best efforts to undertake actions described in good faith and the Memorandum of Understanding does not state that the parties will engage in no efforts whatsoever. Anthony asserts that he relied on Robert's promise and signed off on the bankruptcy plan despite his belief that the plan unduly benefited Robert. The Court, having heard the evidence and considered the testimony of both parties, Mr. Wandro and Mr. Gibson, finds that, in fact, Anthony signed off on the bankruptcy plan with which he disagreed in reliance on Robert's promise that Robert would convey his interest in Sparta to Anthony. He has not done so to date, in spite of Anthony's reliance on that promise. In fact, Robert sued his brother in this case in an effort to dissolve A&R Environmental. The basis of Robert refusing to carry out his side of the bargain appears to be his belief that he is entitled to payment from Anthony for various items including work at the State Fair and payment for office equipment that had been jointly used by the brothers over the years. He demands a

"true up" before he will transfer his interest and appears willing to dissolve A&R if Anthony does not agree to his demands. This in spite of the fact that he has committed no time and no money to Sparta over the last three years and sat by while Anthony and Dr. Carmody invested their time, money and personal credit in building the business.

One of the numerous factual disputes in this case revolves around whether Robert did or did not execute a document dated April 17, 2019, entitled Action by Consent in Lieu of Meeting of the Members and Managers of A&R Environmental, LLC, whereby Robert purportedly transferred Robert's interest in A&R Environmental to Anthony. Robert denies that he signed that document (Exhibit 116), asserting that his signature is a forgery. Anthony acknowledges he did not witness Robert sign the document but testified it looks to be his brother's signature. Anthony acknowledges that he had asked the corporate attorney for A&R Environmental, Ryan Nixon, to prepare that document and Mr. Nixon did so. Anthony testified that he left the documents for Robert to sign at an office of an unrelated business that they both frequented and picked them up later, signed by Robert, and delivered them to Attorney Ryan Nixon.

Neither party presented any expert testimony on whether Robert's signature is genuine. To the Court, the signature certainly looks the same as other signatures Robert admit are his, but the Court is certainly no expert and one would not ordinarily think Anthony would forge a signature of his brother on such an important document that he had to know would soon be discovered by Robert. On the other hand, Robert's testimony that he did not sign the document was forceful and his actions in informing Mr. Nixon that he did not sign the document promptly after discovering the alleged forgery are consistent with Robert's denial. The Court cannot conclude that either party has produced a preponderance of the evidence on the alleged forgery issue as the Court considers the evidence to be in equipoise. However, the Court agrees with

Anthony's counsel that the issue of whether Robert signed the agreement is an interesting but ultimately moot point. As will be discussed below, the Court will conclude that Robert agreed to transfer his interest in the fall of 2017 and again agreed to that transfer in the written Memorandum of Understanding signed October 11, 2018.

Breach of Contract

To prevail on his breach of contract claim, Anthony must prove: (1) The existence of a contract; (2) the terms and conditions of the contract; (3) that he has performed all of the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) the plaintiff suffered damages as a result of the breach. *Iowa-Illinois Gas & Electric Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993). To prove an oral contract existed, only reasonable certainty of the contract existence is required. *Netteland v. Farm Bureau Life Ins. Co*., 510 N.W.2d 162, 165 (Iowa 1993). "The terms must be sufficiently definite to determine with certainty the duties and obligations of each party." *Id.* The minor details need not be proven. *Id.* When interpreting contracts, Iowa Courts "may look to extrinsic evidence, including the situation and relations of the parties, the subject of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. *Peak v. Adams,* 799 N.W.2d 535, 544 (Iowa 2011). "The cardinal rule of contract interpretation is to determine the intent of the parties at the time they entered into the contract." *Id.* In determining the intent of the parties, Courts "look to what the parties did and said, rather than to some secret undisclosed intention they may have had in mind or which occurred to them later." *Waechter v. Aluminum Co. of America*, 454 N.W.2d 565, 568 (Iowa 1990). "Words and other conduct are interpreted in light of all of the circumstances, and if the

principle purpose of the parties is ascertainable, it is to be given great weight." *Pillsbury Co. Inc, v. Wells Dairy, Inc,* 752 N.W.2d 430, 436 (Iowa 2008.)

In this case Anthony and his brother had a conversation in their Urbandale office in the fall of 2017 in which Anthony told Robert that Dr. Carmody wanted to invest in Sparta with Anthony only and that would mean "I would have Sparta and you would have Mercury and we would move on." The Court concludes, having heard the testimony of both parties and having considered the surrounding circumstances and the credibility of the witnesses, that Robert agreed to that deal. Robert agreed in his testimony that he told Anthony that "You handle Sparta and I'll handle Mercury and we will go from there." The Court does not find that Anthony said "You are going to own it and make no less." As noted above, that makes no sense whatsoever.

The Court's conclusion that the Colosimos in fact reached an oral agreement to separate their business interests with Anthony taking Sparta/A&R and Robert taking Mercury, is also influenced by the following factors. At the point of that agreement the two businesses were similar in size and value. Neither business had much, if any assets, customers or cash flow. Mercury was likely the more valuable of the two, given that it had other investors involved. Sparta/A&R had no investors when the parties reached their oral agreement, and its balance sheet consisted almost entirely of debt, including debt to buyout the Green Leaf investors. The business for business swap was a fair deal for both parties given the minimal value of both businesses. It also made sense given the undisputed fact that the brothers had had a falling-out including their physical altercation. Neither brother wanted to work with the other and this would been the cleanest way for the brothers to separate their business interests. Their remaining joint business interests were already extinct for all practical purposes. Phoenix was no longer a functioning entity and R&A was proceeding through bankruptcy.

The principle purpose of the brothers' agreement, to separate their business interests, was confirmed by what the parties did and said in the years following the agreement. From the fall of 2017 on, Robert invested no time, no labor, no cash and guaranteed no loans. Similarly, from this point on, Anthony invested no time or capital into Mercury Concrete. On Robert's personal financial statement filed in connected with the bankruptcy on August 30, 2017, Robert did not list an interest in A&R/Sparta. On the other hand, as discussed above, Anthony devoted all of his time and considerable treasure to building Sparta Environmental by investing hundreds of thousands of dollars in his own sweat equity, infused over $70,000 in cash, personally guaranteed large loans and obtained an outside investor reliant on being in the business with Anthony, not Robert. These same facts set forth above demonstrate that Anthony has done all he was required to do under the contract. Robert has not as he has not signed over his interest in Sparta/A&R to Anthony. The Court concludes Robert breached the parties' oral agreement to transfer his interest in A&R/Sparta to Anthony.

Promissory Estoppel

"The theory of promissory estoppel allows individuals to be held liable for their promises despite an absence of the consideration typically found in a contract." *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 48 (Iowa 1999). The theory has been used "in effect to form a contract, when the promisee has suffered detriment in reliance on a promise." *Id*. To succeed on a promissory estoppel claim, a plaintiff must prove the following:

1. A clear and definite promise;

2. The promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act;

3. The promisee acted to his substantial detriment in reasonable reliance on the promise; *and*

4. Injustice can be avoided only by enforcement of the promise.

*Chamberlain, LLC v. City of Ames*, No. 06-1487, 2007 WL 4322186 at *6 (Iowa Ct. App. 2007) (citing *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 49 (Iowa 1999)).

The first element of promissory estoppel requires a Plaintiff to prove "a clear and definite promise." *Id.* The Iowa Supreme Court has defined a promise as a "declaration to do or forbear a certain specific act." *Schoff,* 604 N.W.2d at 50.

As the Court found above, in the fall of 2017, Anthony and Robert had a verbal conversation whereby the brothers agreed to exchange their respective interests in Mercury and Sparta/A&R. Following these conversations, on October 11, 2018, the brothers executed the Memorandum of Understanding further affirming Robert's promise to transfer his interests. The Memorandum of Understanding states in relevant part "Robert and Anthony seek to separate their interests in the foregoing businesses. In furtherance of this goal, they agree in principle to exert their best efforts to undertake the following actions: "… Robert to convey his interest in Sparta to Anthony." The Memorandum of Understanding evidences, at a minimum, a clear and definite promise by Robert to perform a specific act, in other words to use his best efforts to transfer his ownership interest in Sparta to Anthony.

Robert's promise was sufficiently clear and definite. When analyzing whether a promise is clear and definite, the Iowa Supreme Court has stated that "A promise is clear when it is easily understood and it is not ambiguous. A promise is definite when the assertion is explicit and without any doubt or tentativeness." *Schoff,* 604 N.W.2d at 50.

In *Schoff v. Combined Ins. Co. of America*, the Court analyzed this requirement at length. *Id*. at 51. In that case, the plaintiff ("Schoff") failed to disclose certain information regarding his criminal history on an employment application. *Id*. Without knowledge of the extent of Schoff's criminal record, the employer assured Schoff that his criminal history "would be no problem." *Id*. Schoff's employment was subsequently terminated because he was unable to secure a fidelity bond based on his failure to disclose pertinent criminal history on his application. *Id*. In *Schoff*, the Court held that the employer's promise was automatically subject to ambiguity because the parties "did not have the same knowledge with respect to the nature and extent of Schoff's criminal record." *Id*. The court noted this ambiguity was crucial "because Schoff was not fired because of his criminal record in general; he was fired because he could not be bonded." *Id*. The Court offered a similar analysis in *Denner v. Deere and Co*., where the Court noted a promise is ambiguous when the parties do "not have the same knowledge regarding the nature of the facts." 2005 WL 1532607 at *8.

This case is distinguishable from both *Schoff* and *Denner*. First, the promise Robert made to Anthony was an assurance to take some definite action, as opposed to a vague assurance that a particular fact would or would not affect a term of the parties' transaction. *See Schoff*, 604 N.W.2d at 50-51; *Denner*, 2005 WL 1532607 at *9. Second, Robert's promise to transfer his shares in Sparta to Anthony is easily understood. Unlike the promises in *Schoff* and *Denner*, Robert's promise was not only made in an oral conversation between the two parties, but it is also memorialized in a later writing signed by both parties. Finally, as to the issue of ambiguity, "the entire context has to be considered in assessing the transaction." *See Jerrys Homes, Inc. v. Tamko Roofing Products, Inc.*, No. 498CV30461, 2001 WL 737537 at *2 (S.D. Iowa 2001). The evidence in this case demonstrated that Robert and Anthony had a verbal conversation in the fall

of 2017 whereby Robert agreed that Anthony would take Sparta in an effort to separate the brothers' business interests given their recent falling out. Shortly after this agreement, Robert moved his personal belongings from the Sparta office. Robert contributed nothing to Sparta following the parties' agreement, while on the other hand, Anthony continued to run the business and day-to-day operations of Sparta and made over $77,000 in payments to Sparta or for its benefit. Anthony secured Dr. Carmody as an investor with the understanding Anthony was the sole owner of the company. Considering the context of the entire transaction, it is clear based on the parties' verbal agreement, subsequent actions, and the Memorandum of Understanding, that Robert's promise was definite and unambiguous.

The Court also concludes that Robert made the promise to transfer his interest in A&R/Sparta to Anthony with the understanding that Anthony was seeking an assurance upon which he could rely and act upon. In *Kunde v. Estate of Bowman*, the Iowa Supreme Court noted promissory estoppel "should be applied to prevent injustice where there has not been a mutual agreement by the parties on all essential terms of a contract but where a promise was made which the promisor should reasonably have expected would induce action or forbearance, and the promise in fact induced such action or forbearance." 920 N.W.2d 803, 812 (Iowa 2018).

Here the Court finds that Robert made two promises that induced Anthony's reasonable reliance. First, as the Court found above, Robert made the promise to separate their business interests in the fall of 2017 after their falling-out and Anthony having found Dr. Carmody as an investor in Sparta who wanted invest with Anthony and Anthony alone. Robert agreed and thereafter discontinued all work with Sparta or investment with Sparta. Robert did this understanding Anthony would be securing Dr. Carmody as an investor and investing his own time, money and energy into building Sparta from the ground up. Robert has stood by during the

ensuing years watching Anthony do this. Robert's second promise was when he signed the Memorandum of Understanding on October 11, 2018 wherein he promised to make his best efforts to transfer his shares in Sparta to Anthony. Robert did this in order to induce Anthony to sign off on a bankruptcy liquidation plan that Anthony believed benefited Robert at Anthony's expense. This was detrimental reliance. Further, Anthony's detrimental reliance was his securing Dr. Carmody as an investor, investing over $77,000 in cash and sweat equity which Mr. Vroman testified was valued at $225,000.

Steve Wandro testified that the bankruptcy plan had been drafted and proposed to the parties, but neither party had signed off on the plan. Under the bankruptcy plan, Robert received a payment of approximately $157,000 and Anthony received nothing. Mr. Wandro testified that Anthony was upset with the discrepancy and payment to the parties and was reluctant to sign off on the plan. The Memorandum of Understanding was the solution the parties ultimately came up with, with Mr. Wandro's assistance. The Memorandum of Understanding represented a promise between the parties to put forth their best efforts to undertake the actions outlined in the Memorandum of Understanding. Robert agreed to convey his interest in Sparta to Anthony as he had orally agreed to do approximately a year prior to that. Robert also knew that, without memorializing this promise in writing, Anthony would not agree to sign off on a bankruptcy plan under which Robert stood to receive a significant financial gain and which Anthony believed was at Anthony's expense. Mr. Wandro testified as follows:

> Q. Okay. Is it fair to say that your impression is that Tony signed off on the bankruptcy proceeding in reliance on his belief that Bobby was, at the very least, going to undertake best efforts to put these actions into effect?
> A. Yeah. My understanding was that both of the parties had entered into this MOU with the intention of getting their problems resolved,

> not only using their best efforts, but to do it in good faith because they were brothers, and, you know they'd run these companies together and their kids had been involved and all of that. So that was the thing that – that was my expectation. There was nothing in the words or action so neither Tony or Bobby that led me to believe that wasn't what they were going to do.

Deposition of Steve Wandra at 24:4 – 25:21.

Having heard the evidence overall, the Court concludes that Robert made his promise to transfer his interest with the understanding Anthony would rely on it to his detriment, by signing off on the disputed bankruptcy plan.

The third element of detrimental reliance is that the promisee acted to his detriment in reasonable reliance on the promise. As discussed in considerable detail above, following the parties' verbal agreement in the fall of 2017 and continuing thereafter, Anthony made significant personal payments to A&R/Sparta for its benefit, located Dr. Carmody as an investor and invested his full-time running the day-to-day operations A&R/Sparta. Anthony clearly materially changed his position to his detriment and reliance on Robert's promises. Anthony would not have taken the detrimental actions he did in the absence of Robert's promise. If Anthony believed Robert would remain a 50% owner in A&R, Anthony would not have invested his own personal funds and full-time efforts in the business with no request for equal, or any, contributions from Robert. Anthony would not have sought an investor or made a representation to that investor that the investor would be investing solely with Anthony. Finally, Anthony would not have signed off on the bankruptcy plan for R&A under which he believed Robert was unduly benefited. Therefore, the third element of promissory estoppel, detrimental reliance, has been demonstrated by the evidence.

The final element of promissory estoppel is that injustice can be avoided only be enforcement of the promise. The Court concludes that it would indeed be unjust to allow Robert to sit back for three years and watch Anthony devote all of his time and considerable treasure to building Sparta Environmental by investing hundreds of thousands of dollars in his own sweat equity, infusing over $70,000 in cash, personally guarantee large loans and obtain an outside investor reliant on being in business with Anthony and yet refuse to enforce Robert's promise after Robert had invested no time or personal labor, no cash and personally guaranteed no loans. He has been running his other business, Mercury Concrete Services. It would be unjust not to enforce Robert's promise.

For the reasons set forth above, the Court concludes Counterclaim Plaintiffs have successfully proved by clear and convincing evidence the elements of promissory estoppel and injustice can only be avoided by enforcement of the promise.

Remedy: Money Damages v. Specific Performance

While Anthony's counterclaims sought both money damages and specific performance, at trial he argued for specific performance of the parties' agreement. The Court agrees that Iowa case law instructs that specific performance is the appropriate remedy under the facts of this case because damages are inadequate to protect Anthony's interest. In determining the adequacy of a remedy at law, the Court looks to the following factors: (1) the difficulty of proving damages with reasonable certainty; (2) the difficulty of suitable substitute performance by means of money awarded as damages; and (3) the likelihood than an award of damages would not be collected. *Homeland Energy Solutions, LLC v. Retterath* 938 N.W.2d 664, 694 (Iowa 2020). The Iowa Supreme Court's recent opinion in *Retterath* strongly supports Anthony's specific performance request.

In *Retterath*, the parties entered into a contract whereby the plaintiff agreed to buy back the defendant's membership interests in a mutually-owned limited liability company. *Id*. at 678-80. The defendant did not perform under the agreement and the plaintiff sued for specific performance. *Id*. In determining that specific performance was an appropriate remedy, the Court concluded that money damages would not provide an adequate remedy because "the loss caused by the inability to redeem [the defendant's] units, to extinguish [the defendant's] appointment powers, and to remove [the defendant] as a member of [the LLC]" could not be estimated with reasonable certainty. *Id*. at 696. The *Retterath* Court also noted that because the property at issue was membership units in an LLC, the plaintiff's loss was uncertain because the membership units were not available on an open market. *Id.* In addition, membership units confer certain rights, such as voting rights in the company and influence on board personnel; therefore, their monetary value is difficult to determine with certainty. *Id*. The Court held that the membership units at issue were unique and, therefore, damages were not adequate to protect the Plaintiff's interests. *Id.*

As was the case in *Retterath,* Anthony and Robert's dispute arises from an agreement to transfer unique shares in a limited liability company several years ago. It would be virtually impossible for Anthony to calculate his money damages. The property at issue is membership units in a LLC which is difficult to value and not available on the open market. The membership units confer various important rights such as voting rights in the company and influence on company personnel. Further, Robert has contributed nothing to the business in excess of three years, and if money damages were awarded rather than specific performance, the parties would be left in the strange position of Robert paying Anthony money for breach of an agreement to transfer his ownership interest in A&R, but Robert simultaneously moving forward as a 50

percent owner in A&R with no court order requiring him to transfer his shares. Further, failure to provide for specific performance would leave Dr. Carmody, an innocent outside investor who believed he was investing with Anthony and not Robert in an untenable position, not knowing exactly what he owns in exchange for his considerable capital investment. The brothers are at loggerheads and not on speaking terms. Specific performance is the only appropriate remedy.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Counterclaim Plaintiffs Anthony Colosimo and A&R Environmental, LLC and against Counterclaim Defendant Robert Colosimo under Counts 1 and 2 of Counterclaim Plaintiff's counterclaim and that specific performance is awarded such that Robert Colosimo's 500 units in A&R Environmental, LLC are hereby transferred to Anthony J. Colosimo, and Robert J. Colosimo is hereby removed as member and manager of A&R Environmental, LLC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Anthony J. Colosimo and A&R Environmental, LLC shall defend, indemnify and hold Robert J. Colosimo harmless from and against any and all liabilities related to the business of A&R Environmental, LLC or Sparta Environmental, LLC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Anthony Colosimo should execute such documents as are necessary to transfer his ownership interest in Mercury Concrete Services, LLC to Robert Colosimo, and Robert Colosimo should defend, indemnify and hold harmless Anthony Colosimo from any and all liability of any kind or nature arising out of Mercury Concrete Services, LLC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action are assessed to Counterclaim Defendant Robert J. Colosimo.

State of Iowa Courts

| **Case Number** | **Case Title** |
|---|---|
| LACL146374 | ROBERT COLOSIMO VS ANTHONY COLOSIMO ET AL |
| **Type:** | ORDER FOR JUDGMENT |

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa

Electronically signed on 2021-08-17 08:29:48