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District Court of Appeal of Florida, Third District.
MacKENDREE & CO., P.A. and Ronald O. **MacKendree**, Appellants,
v.
PEDRO GALLINAR & ASSOCIATES, P.A. and **MacKendree** & Gallinar, LLP, Appellees.

No. 3D07-1478.
Feb. 6, 2008.

Background: After principal of accounting professional corporation sold his practice to another firm, other firm brought action asserting breach of contract and other claims against principal and his professional corporation, and principal and his professional corporation counterclaimed. The Circuit Court, Miami-Dade County, Mary Barzee Flores, J., awarded summary judgment to firm that purchased the practice on its breach of contract claim and dismissed the counterclaims as moot. Principal and his professional corporation appealed.

Holdings: The District Court of Appeal, Rothenberg, J., held that:
(1) principal could not be held personally liable;
(2) principal retired from the practice as required by partnership and asset sale agreements;
(3) triable issues existed as to whether principal breached non-compete covenants; and
(4) counterclaim for unpaid per diem fees was not moot.

Reversed and remanded with instructions.

West Headnotes

[1] Corporations and Business Organizations 101 ⚿1960

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1959 Contracts and Guaranties
101k1960 k. In general. Most Cited Cases
(Formerly 101k306)

Principal of accounting professional corporation could not be held personally liable for breach of a partnership agreement and an asset purchase agreement between his professional corporation and another accounting professional corporation, even though principal signed two letters of clarification regarding the agreements without specifying that he was signing in his representative capacity; original agreements were signed by agents acting in their representative capacities, only the accounting firms, and not any individuals, were parties to such agreements, and the letters of clarification did not evidence any intent to expand the scope of liability to any of the principals.

[2] Corporations and Business Organizations 101 ⚿2708

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(C) Sale, Lease, or Exchange of Substantially All Corporate Assets
101k2705 Agreements to Sell, Lease, or Exchange
101k2708 k. Performance or breach. Most Cited Cases

(Formerly 101k445)

Partnership 289 ⚿105

289 Partnership
289III Mutual Rights, Duties, and Liabilities of Partners
289III(C) Actions Between Partners
289k102 Grounds of Action and Form of Remedy
289k105 k. Breach of partnership agreement. Most Cited Cases

Principal of accounting professional corporation, who sold his practice to another professional corporation, retired from the practice as required by partnership and asset sale agreements, even if principal subsequently serviced some of the clients sold to other firm; principal mailed a notice to his clients explaining his retirement and sale of his practice, principal packed up his personal belongings and vacated his office, and some of principal's subsequent work for his former clients was at successor firm's request on a per diem basis.

[3] Judgment 228 ⚿181(15.1)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(15.1) k. In general. Most Cited Cases

Judgment 228 ⚿181(29)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(29) k. Sales cases in general. Most Cited Cases

Genuine issues of material fact as to whether principal of accounting firm who sold his practice to another firm breached non-compete covenants in partnership and asset purchase agreements by servicing some of the clients sold to other firm, or whether other firm was already in material breach of its obligations so as to excuse principal's conduct, precluded summary judgment in other firm's breach of contract action against principal and his firm.

[4] Action 13 ⚿6

13 Action
13I Grounds and Conditions Precedent
13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

Counterclaim by principal of accounting firm who sold his practice to another firm, which sought unpaid per diem fees for work performed after the sale, was not mooted by trial court's award of summary judgment to other firm on its breach of contract claim against principal and his firm; counterclaim was based on facts independent of the partnership agreement on which trial court entered summary judgment.

[5] Action 13 ⚿6

13 Action
13I Grounds and Conditions Precedent
13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

An issue is "moot" when the controversy has been so fully resolved that a judicial determination can have no actual effect.

[6] Action 13 ⚿6

13 Action
13I Grounds and Conditions Precedent

13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

A case is "moot" when it presents no actual controversy or when the issues have ceased to exist.

***974** Ross and Girten and Lauri Waldman Ross and Theresa L. Girten, Miami; Sandler & Sandler and Martin Sandler, Miami, for appellants.

James W. Cusack, Miami; Woodbury & Santiago, P.A. and Michael P. Woodbury and Robert P. Santiago, Miami, for appellees.

Before WELLS, ROTHENBERG, and SALTER, JJ.

ROTHENBERG, J.

The defendants, **MacKendree** & Co., P.A. (" **MacKendree** ") and Ronald O. **MacKendree** ("Ronald **MacKendree** ") (collectively, "the **MacKendree** defendants"), appeal from a final order granting summary judgment in favor of the plaintiffs, Pedro Gallinar & Associates, P.A. ("Gallinar") and **MacKendree** & Gallinar, LLP (collectively, "the Gallinar plaintiffs"). We reverse.

In 2003, Ronald **MacKendree** decided to reduce his workload and sell his accounting practice to Gallinar. The Gallinar accounting firm was located in a neighboring office and headed by one of Ronald **MacKendree's** acquaintances. **MacKendree** and Gallinar executed a partnership agreement and a contemporaneous asset purchase agreement to effectuate the transfer. Both agreements were signed by **MacKendree** and Gallinar through agents acting in their representative capacities. However, two letters of clarification regarding both agreements were subsequently executed and signed by Ronald **MacKendree** and Gallinar's president without specifically stating that they were signing these clarifications in their representative capacities.

The partnership agreement took effect on October 1, 2003. It created **MacKendree** & Gallinar, LLP to ease the transfer of **MacKendree's** practice into Gallinar's control. The **MacKendree** and Gallinar partnership ended on December 1, 2005. The express intention of the parties was that Ronald **MacKendree** would retire [FN1] by December 1, 2005, thus completing the turnover to Gallinar. In the two years leading up to the final transfer, **MacKendree** and Gallinar shared office space, operating under the name **MacKendree** & ***975** Gallinar, LLP, but they maintained separate incomes and practices in all other respects.

FN1. Throughout this opinion, the meaning of the term 'retire' is limited pursuant to the instant agreements. Ronald **MacKendree** was not required to retire from the accounting **profession,** but only to refrain from competing with Gallinar by servicing the clients described in the asset purchase agreement.

The asset purchase agreement governed the sale of most of **MacKendree's** clients (a limited number of clients were excluded from the deal and reserved for continued service by Ronald **MacKendree**). The price was set at ninety percent of **MacKendree's** 2004 billings, [FN2] with a $50,000 deposit (paid in two annual installments of $25,000), and the remainder payable in monthly installments beginning on the closing date, December 1, 2005.

FN2. Although the 2004 billings

> formed the basis of the purchase price, the parties agreed to adjust that price upward or downward based upon the value of the clientele remaining with Gallinar as of December 1, 2006.

In November 2005, Ronald **MacKendree** sent a letter to his clients explaining that he was turning his practice over to Gallinar. Thereafter, Ronald **MacKendree** packed up his personal belongings and moved out of the office. Gallinar made the two $25,000 down payments as scheduled. Ronald **MacKendree** ceased working full-time, but returned periodically at Gallinar's request to perform per diem work. The per diem services rendered by Ronald **MacKendree** for Gallinar were not mentioned within either of the two agreements. Subsequently, Gallinar fell behind on the payment schedule outlined in the asset purchase agreement. In March 2006, Gallinar paid $28,500, which **MacKendree** accepted, although at the time, an additional $12,500 in contract payments (under the asset purchase agreement) was allegedly unpaid and outstanding.

The conflict between the parties came to a head when Gallinar terminated the employment of one of **MacKendree's** longtime employees, Diane Annesser. After Annesser was terminated, Ronald **MacKendree** became concerned with Gallinar's handling of his former business and confronted Gallinar's president. As a result, Gallinar terminated Ronald **MacKendree's** per diem services, and according to Ronald **MacKendree**, Gallinar failed to compensate him for some of his per diem fees and owed **MacKendree** for other amounts receivable and contract payments. Shortly thereafter, Ronald **MacKendree** resumed business with some of the clients previously sold to Gallinar.

On April 25, 2006, **MacKendree** sent a formal demand for overdue contract payments to Gallinar. Three days later, the Gallinar plaintiffs filed the instant lawsuit against the **MacKendree** defendants. The Gallinar plaintiffs sued the **MacKendree** defendants for breach of the asset purchase agreement, breach of the implied covenant of good faith, rescission of the asset purchase agreement, civil conspiracy, and breach of the partnership agreement. The **MacKendree** defendants counterclaimed for unpaid per diem fees, contract payments, and other amounts payable to **MacKendree**.

The **MacKendree** defendants moved for summary judgment on their counterclaims and all of the Gallinar plaintiffs' allegations, arguing in part that Ronald **MacKendree** could not be held personally liable for breach of either of the two agreements. The trial court, however, denied the motion brought by the **MacKendree** defendants. The Gallinar plaintiffs then moved for partial summary judgment on Count IX of the complaint, which alleged breach of the partnership agreement. The trial court granted the Gallinar plaintiffs' motion, finding as a matter of law that **MacKendree** breached the partnership agreement and that Ronald **MacKendree** did not retire. The trial court later granted the Gallinar plaintiffs' motion for dismissal of ***976** all remaining claims and counterclaims, finding them moot, and issued a final judgment ordering the **MacKendree** defendants to return the $50,000 deposit paid by Gallinar plus $27,868.84 in interest.

Our review of the trial court's order granting summary judgment is de novo. *See Volusia County v. Aberdeen at Ormond*

Beach, L.P., 760 So.2d 126, 130 (Fla.2000) ; *Sheikh v. Coregis Ins. Co.*, 943 So.2d 242, 243 (Fla. 3d DCA 2006). Summary judgment may only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County*, 760 So.2d at 130. The **MacKendree** defendants argue that the order on appeal must be reversed because: (1) Ronald **MacKendree** cannot be held personally liable; (2) unresolved issues of fact preclude summary judgment against **MacKendree** for breach of the partnership agreement; and (3) the trial court erred in dismissing the **MacKendree** defendants' independent counterclaims as moot. We agree.

Ronald MacKendree Cannot Be Held Personally Liable

[1] We review the two agreements **as a whole** to determine whether the parties intended to bind their principal businesses alone, or also the signing agents in their individual capacities. *Falsten Realty Co. v. Kirksey*, 103 Fla. 225, 137 So. 267, 269 (1931); *Porlick, Poliquin, Samara, Inc. v. Compton*, 683 So.2d 545, 547 (Fla. 3d DCA 1996). A review of the instant agreements reveals that the parties intended to bind the businesses alone, not the individual agents. Both agreements define the parties as **MacKendree** & Co., P.A. and Pedro Gallinar & Associates, P.A., **not Ronald MacKendree,** or any other agent of these firms. The individuals who negotiated and signed the agreements did so on behalf of their separate firms, acting in their representative capacities.

The Gallinar plaintiffs argue that the letters of clarification executed after the original agreements support the trial court's summary judgment against Ronald **MacKendree** individually. We disagree because this interpretation does violence to Florida's requirement that the agreements must be considered together, as a whole. The Gallinar plaintiffs rely on *Central National Bank of Miami v. Muskat Corp. of America, Inc.*, 430 So.2d 957 (Fla. 3d DCA 1983), as authority supporting Ronald **MacKendree's** personal liability. The Gallinar plaintiffs' reliance on *Central National Bank* is misplaced, however, because the instant case is factually distinct.

In *Central National Bank*, this Court held that a corporate president was personally liable on a guaranty agreement where the obvious purpose of that document (reviewing it as a whole) was to add the signor's personal guarantee to a corporate promissory note. *Id.* at 958. This Court reached its conclusion despite the fact that the signor affixed the word, "President" to the end of his signature. *Id.* This Court determined that the purpose of the document was to provide for the signor's personal liability; that the document, by its terms, provided for individual liability; and that interpreting the personal guaranty agreement as a corporate guarantee would render it a nullity. *Id.* Therefore, this Court held that the addition of a single word indicating the signor's representative capacity to the signature was insufficient to override the document's clear, express terms. *Id.*

The instant case is easily distinguishable. The letters of clarification added to the two agreements, although signed without reference to either agent's representative capacity, do not evidence any intent to expand the scope of **MacKendree's** or Gallinar's***977** liability. Ronald **MacKendree** did not add his personal guarantee to any portion of the deal between the businesses, and none of the terms mention personal liability. Instead,

the clarification letters must be read in conjunction with the agreements they expressly seek to clarify, and therefore, the parties to the agreements remain unchanged: the two separate accounting firms. Accordingly, we reverse the trial court's summary judgment to the extent that it holds Ronald **MacKendree** personally liable on agreements to which he was not a party, executed between two separate businesses.

Issues of Fact Preclude Summary Judgment for Breach of the Partnership Agreement

When the trial court granted the Gallinar plaintiffs' partial motion for summary judgment on Count IX (breach of the partnership agreement) it found that **MacKendree** did not retire and, **as a matter of law,** that **MacKendree** was in material breach. The **MacKendree** defendants argue that those findings amount to reversible error because the evidence establishes that Ronald **MacKendree did** retire, and there were a number of issues of material fact regarding the breach of contract claim that precluded summary judgment. We agree.

The gravamen of the Gallinar plaintiffs' breach of contract claim is that Ronald **MacKendree**, upset with Gallinar's handling of his former clients, resumed business with some of the clients who were a part of the sale, thereby effecting **MacKendree's** breach of the express and implied noncompete covenant evidenced by the written agreements. Were that version of the facts undisputed, we would be bound to uphold the trial court's ruling. However, the evidence is clouded with issues of fact that preclude summary judgment.

[2] The trial court's ruling, granting summary judgment on the breach of contract claim, was based, in part on its finding as a matter of law that Ronald **MacKendree** did not retire. The undisputed facts, however, demonstrate that **Ronald MacKendree did indeed retire** from the **MacKendree** and Gallinar partnership by December 1, 2005, as required by the two agreements. Ronald **MacKendree** mailed a notice to his clients in November 2005, explaining that he was retiring and turning his accounting practice over to Gallinar. Ronald **MacKendree** packed up his personal belongings and vacated his office. The work performed by Ronald **MacKendree** between December 1, 2005, and the time he resumed business with his former clients was done at Gallinar's request, and on a per diem basis. Additionally, Gallinar made numerous payments under the asset purchase agreement, which suggests that **MacKendree** complied with its end of the deal.

[3] The agreements specifically reflect that although Ronald **MacKendree** was to "retire," he was not required to cease working in the accounting profession. Instead, the parties understood that Ronald **MacKendree's** "retirement" was simply a retirement from the partnership. The express terms of the agreements reveal that a number of clients were excluded from the sale to Gallinar and were to remain Ronald **MacKendree's** clients with the understanding that Ronald **MacKendree** would continue to service their accounts. In addition, Ronald **MacKendree was hired by Gallinar** to work **as an accountant** at what was now Gallinar's firm, in the months following the sale. The only "retirement" obligation imposed by the agreements was that Ronald **MacKendree** refrain from competing with Gallinar in the future by servicing the clients listed in the asset purchase agreement, and by all ac-

counts,***978** he complied with that requirement for some time. Thus, we find that the trial court erred in finding that Ronald **MacKendree** did not retire, and on that basis finding as a matter of law that **MacKendree** breached the agreements. Whether **MacKendree** breached the agreements when Ronald **MacKendree** serviced some of the clients sold to Gallinar is, however, a material issue of fact which precludes summary judgment because Ronald **MacKendree** claims that at the time he began servicing the clients, Gallinar had already breached the agreements. As there is evidence to support such a finding, the issue is one which must be decided by the trier of fact.

Ronald **MacKendree** stated in a sworn deposition that as early as December 2005, Gallinar had fallen behind on the payments called-for by the asset purchase agreement. In a later affidavit, Ronald **MacKendree** averred that in the year following the wrapping-up of the **MacKendree** and Gallinar partnership, over $90,000 was due, but unpaid under the contract. The **MacKendree** defendants allege that these facts indicate that Gallinar was in material breach of the agreements before Ronald **MacKendree** resumed business with some of his former clients, thus excusing his conduct. While we do not pass on the merits of the parties' opposing viewpoints, we conclude that material facts are in direct conflict, thereby precluding summary judgment. *Volusia County*, 760 So.2d at 130.

To the extent that the trial court denied the motion for summary judgment brought by the **MacKendree** defendants on **their** claim for breach of the agreements because there exist material issues of fact, we affirm. We, however, reverse the trial court's order granting summary judgment as to Gallinar's breach of contract claim and the trial court's award of the $50,000 deposit plus accrued interest to Gallinar.

The Trial Court Erred in Dismissing the Counterclaims as Moot

Among the counterclaims brought by the **MacKendree** defendants were claims for unpaid per diem fees (incurred after the sale of the practice) and accounts receivable payable to **MacKendree**, but retained by Gallinar. These claims were dismissed as moot by the trial court in its final judgment. The **MacKendree** defendants argue that the trial court erred in dismissing these independent claims as moot. We agree, and reinstate the **MacKendree** defendants' counterclaims as well as the Gallinar plaintiffs' claims that were erroneously dismissed as moot.

[4][5][6] "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State*, 593 So.2d 211, 212 (Fla.1992). Additionally, "[a] case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Id.* (citing *Black's Law Dictionary* 1008 (6th ed. 1990)). The dismissal of Ronald **MacKendree's** counterclaim alleging non-payment of the per diem fees he claims are owed to him by Gallinar as moot was error as this counterclaim was based on facts independent of the partnership agreement upon which the trial court entered summary judgment. The other counterclaims brought by the **MacKendree** defendants regarding the non-payment of the accounts receivable are not moot because we reverse the trial court's grant of summary judgment in Gallinar's favor. We, therefore, reverse the trial court's dismissal of the **MacKendree** defendants' counterclaims as moot, and instruct the trial court

to reinstate them for consideration consistent with this opinion. We also instruct the trial court to reinstate the Gallinar plaintiffs' claims because the same ***979** issues of fact precluding summary judgment on count IX demonstrate that those other claims continue to present viable, live controversies.

Conclusion

The record evidence clearly limits liability for breach of the agreements to the corporate entities, **MacKendree** & Co., P.A. and Pedro Gallinar & Associates, P.A., **not any of their agents.** Undisputed facts demonstrate as a matter of law that Ronald **MacKendree** retired in accordance with the two agreements by December 1, 2005. On the other hand, issues of fact preclude summary judgment on the question of breach of the non-compete covenant within the agreements. The counterclaims brought by the **MacKendree** defendants as well as the Gallinar plaintiffs' claims outside of count IX, were erroneously dismissed as moot.

Accordingly, the final judgment awarding $50,000 plus accrued interest to the Gallinar plaintiffs is reversed, and we remand with instructions to the trial court to: (1) determine whether **MacKendree's** breach of the non-compete covenant was excusable; (2) reinstate the counterclaims pursued by the **MacKendree** defendants; and (3) reinstate the Gallinar plaintiffs' claims that were erroneously dismissed as moot.

Reversed and remanded with instructions.

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