

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

KELLY HYMAN and
BOUGANVILLA INVESTMENTS, INC.,

Complex Business Litigation Division

Case No. 12-44972 CA-40

Plaintiffs,

vs.

ARNOLD DAOUD, TITAN SIGNS, INC.
GARDEN APARTMENTS, INC., and THE
ALEX DAOUD IRREVOCABLE TRUST

FINAL ORDER ON PLAINTIFFS'
FOURTH AMENDED COMPLAINT

Defendant.

THIS MATTER came before the Court for non-jury trial on Count VII of the Fourth Amended Complaint sounding in a cause of action for Declaratory Judgment. The Court heard and received the evidence, testimony, argument of counsel and being otherwise fully advised in the premises, it is

ORDERED and **ADJUDGED** as follows:

Currently before the Court is a business dispute that should have been filed in family court. A sophisticated father and daughter, both of whom have law degrees, both of whom have sophisticated counsel, are fighting over what amounts to expectation inheritance rights.

Count VII of the Fourth Amended complaint for Declaratory Judgment requests the Court declare Plaintiff, Kelly Daoud Hyman (“Kelly” or “Hyman”), owner of 100% of the stock of Bouganvilla Investments, Inc. In the alternative, Ms. Hyman seeks a declaration of the ownership structure of the corporation and a declaration that the payments contributed by Titan Signs when the property was purchased were a gift to her.

Having heard the evidence the Court declares as follows:

The relationship between the parties will not be regurgitated here other than to determine that Arnold Alex Daoud (“Alex Daoud” or “Daoud”) wanted to purchase the property at 1750 Michigan Avenue, Miami Beach, but did not want the publicity related to the acquisition of it. His daughter, Plaintiff Kelly, either acquiesced or volunteered to help her father obtain the property. To accomplish that goal, Kelly was named director and resident agent of the purchaser of the property, Bouganvilla Investments, Inc., in the official corporate documents filed with the State of Florida.

FINDINGS OF FACT

At issue is the actual ownership of the corporation which holds title to the property located at 1750 Michigan Avenue, Miami Beach, Florida.

1. Mr. Daoud’s testimony -- that it was his desire to find and purchase a property on Michigan Avenue for his family to live in -- was credible.

2. Mr. Daoud’s testimony -- that he did not want his name attached to the property at the time of its acquisition -- was credible.

The Court does not find that Mr. Daoud’s purpose in keeping his name off the property was, as argued by Plaintiffs, to defraud creditors, but was to ward-off what otherwise would be the inevitable publicity surrounding him, particularly in light of the release of his book and the potential for lawsuits.

3. Mr. Engelman’s testimony -- that he was retained by Alex Daoud, that at the direction of his client he set up Bouganvilla Investments, Inc. to hold title to the property sought to be purchased, that he in fact misspelled the word Bouganvilla in the corporate filings, that at

Daoud's direction he sought and obtained permission from Ms. Hyman to name her as incorporator and director, that no stock was issued -- was credible. In fact the Court finds Mr. Engelman's testimony credible in its entirety.

3. Ms. Hyman's testimony -- that she conceived the idea, prepared the documents on line, and later hired Mr. Engelman -- was not credible.

4. Mr. Daoud's testimony -- that he executed documents prepared by his now deceased attorney to transfer Bouganvilla Investments into what he referred to as his Irrevocable Trust -- while credible, was suspect, troubling and questionable, even though he testified the same attorney had previously transferred his holdings in Titan Signs and Garden Apartments to the trust at various earlier times. Moreover, there was insufficient evidence that the transfer was ever accomplished. The only copy of the purported trust, which was created in 1992, is nearly illegible, even to the extent that the actual name of the trust is indecipherable.

In light of the fact that the res being transferred to the Trust via Bouganvilla Investments, Inc., was real property, it was incumbent upon the transferor to have the deed signed and delivered in the presence of two subscribing witnesses, otherwise the conveyance was void and of no effect.¹ Because Mr. Daoud was not the owner of the property, but Bouganvilla was, the exception under the statute does not apply, particularly in light of the fact that no such deed was ever recorded.² The Court finds there was insufficient evidence that Bouganvilla Investments, Inc., was transferred into the Trust.

Daoud's testimony that Richard Zaretsky prepared the documents changing the Trustee of the trust from Charles Modica, who had resigned as Trustee, to Alex Daoud, was somewhat credible but was also troubling. There was insufficient evidence that Mr. Daoud was ever

¹ §689.06 Fla. Stat.

² See *Brevard County v. Ramsey*, 658 So. 2d 1190 (Fla. 5th DCA 1995).

appointed as Trustee to replace Mr. Modica. At this point in time there is insufficient evidence as to who the Trustee of the *Irrevocable* Trust is, or for that matter whether the Trust remains irrevocable.

4. Ms. Hyman's testimony as to why she put herself forward as the guarantor for Bouganvilla's loan was credible. Clearly Bouganvilla was not in a position to obtain a loan without a guarantor. Aleida Aroix of Colonial Bank testified that Daoud had contacted her with regard to purchasing the property and had filled out the loan application. He explained to her that he was purchasing the property in the name of "his" corporation, Bouganvilla. She further testified that she met Hyman through Daoud and that Hyman had no accounts with Colonial and had never banked with them.

5. Aroix further testified she was present when the loan to Bouganvilla closed and that Daoud submitted a check directly to Colonial in the amount of \$146,481.21 to close the loan. Those funds came from Titan Signs, which is held by the Trust. Ms. Aroix further testified that without the payment by Titan Signs and Daoud's prior relationship with the Bank, the loan would never have been consummated. The evidence further demonstrated that Titan Signs signed off by Daoud, provided payment for all of the closing costs or costs of the loan. The Court finds Aroix's evidence and testimony credible.

6. Hyman asserts that her role as guarantor on the loan is evidence of her ownership of Bouganvilla. The Court disagrees. Clearly Ms. Hyman's guarantee and credit were needed in order to finance the purchase. Her later offer to assist her father in the refinancing of the loan further reveals her lack of ownership. If she had indeed been an owner of Bouganvilla, there would have been no necessity to offer such assistance. Indeed, in May 2011 Ms. Hyman wrote the bank (now BB&T after its takeover of Colonial) and confirmed that her "present guarantee

will not be applicable to any refinancing of the property.” The bank responded that since she was an officer she would be signing on behalf of the corporation. She responded that she was not. Obviously, the guarantor of a loan merely steps into the shoes of a borrower in the event of default on a loan. It does not create an ownership stake.³

7. The Court does not find Hyman’s testimony credible with regard to her alleged 100% ownership of the company.

Nor does the Court find Hyman’s testimony credible that the payments made by Titan Signs, or any other entity at the time of the closing to consummate the closing, were advancements on her inheritance. Additionally, there was no credible testimony that this was an advancement. The doctrine of advancement does not apply unless the ancestor dies wholly intestate. Mr. Daoud has not died. The Court finds no advancement.

8. The testimony and evidence received with regard to Hyman transferring her personal interest in her condominium unit under the umbrella of Bouganvilla Investments, Inc., and subsequently seeking permission to transfer it back out by having her brother sign the quit claim deed from Bouganvilla, is also contrary to her ownership claims in Bouganvilla.

9. Based on the testimony received, the Court does not find that payments made by Titan Signs to and on behalf of Bouganvilla before, during and after the closing, were gifts to Ms. Hyman. They were clearly funds advanced to either secure the purchase of the property for Bouganvilla or to maintain it. Period.

10. What the Court does find credible is Ms. Hyman’s understanding from her father that she would ultimately receive a one-half ownership interest in the property upon his death.

What the Court does find believable is Ms. Hyman and Mr. Daoud thought that the property was transferred into the existing irrevocable trust. While a trust need not be evidenced

³ *Cukierman v BankAtlantic*, 89 So. 3d 250 (Fla. 3d DCA 2012).

by a trust instrument, the creation of an oral trust and its terms may be established only by clear and convincing evidence. The Court finds no such evidence was presented and the transfer which the parties thought occurred was not consummated.

Thus, the Court determines that the property currently remains corporate property solely held by Bouganvilla Investments, Inc., and not held within Daoud's trust.

11. Because the Court has determined there is no trust involvement, the Court views this matter as having arisen as a result of a mutual mistake or inequitable conduct regarding the ownership of the property itself.⁴ The Court thus determines that it needs to equitably reform an oral agreement between Mr. Daoud and Ms. Hyman, based on their testimony and the intent of the parties, such that Ms. Hyman is entitled to a one-half (1/2) ownership interest in the real property which is owned by Bouganvila Investments, Inc.

The Court is permitted to resolve this matter and equitably reform the agreement because once equity acquires jurisdiction full, complete and final relief is provided.⁵ Reformation is an equitable remedy designed to correct a defective or erroneous instrument so that it reflects the true agreement of the party or parties. *Id.*⁶

12. The Court finds that Ms. Hyman has tendered insufficient evidence to support her contention that she is the 100% owner of Bouganvilla. The Court determines that based on all the evidence received, Kelly Daoud Hyman is not the 100% owner of Bouganvilla Investments, Inc., as that was not the intention of the parties when the corporation was initially organized. Accordingly, the Court finds the shares Ms. Hyman issued to herself in 2013 are invalid and the same are hereby canceled.

⁴ See *Malt v. R. J. Mueller Enterprises, Inc.*, 396 So. 2d 1174 (Fla. 4th DCA 1981); *Palmer v. R. S. Evans Jacksonville, Inc.*, 69 So. 2d (Fla. 1954).

⁵ See *Schroeder .v Gebhart*, 825 So. 2d 442 (Fla. 5th DCA 2002); *Cook v. Lee*, 290 So. 2d 65 (Fla. 3d DCA 1974).

⁶ See *Blumberg v. American Fire & Casualty Co.*, 51 So. 2d 182 (Fla. 1951).

In addition, the Court finds that Mr. Daoud has also tendered insufficient evidence to support his contention that he is the 100% owner of Bouganvilla Investments, Inc.

13. The documentary evidence in this matter has shown that the corporation was initially established in 2005 with Kelly as a director, not an officer. In addition, after discussions with counsel and her father, on January 3, 2006 an Action by Written Consent of the Shareholders of Bouganvilla Investments, Inc., (reflecting that Kelly was the sole shareholder of the Corporation) was executed authorizing the settlement of the lawsuit against Jordan Schwartz which sought specific performance of the contract of sale of real property. Kelly signed as shareholder on January 11, 2006. Moreover, a Certificate of Corporate Resolution of Bouganvilla Investments, Inc., which authorized the purchase of the property and provided that Kelly was elected President of the corporation, was executed on January 27, 2006. On even date, the Warranty Deed from Jordan S. Schwartz to Bouganvilla Investments, Inc. was executed.

The Court does not believe the testimony of either of the parties with regard to these matters. The Court believes Attorney Engelman. The Court believes that this father and daughter were going through the necessary corporate motions to advance their joint goal of obtaining the property for the family to live in.

The Court believes the father made promises to the daughter, the daughter made promises to the father, and the father and daughter failed each other repeatedly.

14. The evidence was clear that Kelly was the signatory to, as agent of the corporation, as well as guarantor, individually, of the mortgage obtained in order to purchase the property. However, the testimony has further revealed that whether she was living in state or out of state, she did not, and has not, made any additional contributions or received any distributions from the corporation as to the property in question, asserting that the property pays for itself.

The evidence was clear that when the property was not self-supporting, funds were advanced from Mr. Daoud's trust to pay for improvements, taxes, mortgage payments, etc. What this shows the Court is that while Ms. Hyman signed all the corporate documents necessary to effectuate the transfer of the property to Bouganvilla, and subjected herself to the potential of the guarantee being enforced, she has never otherwise participated in the management of the corporation, preservation, upkeep, or liabilities of the asset. She instead turned all those responsibilities over to her father and had nothing further to do with the property or the corporation once the property was purchased. In fact, testimony revealed that Ms. Hyman never disclosed her interest in the corporation or property as a personal asset. The Court further finds that the corporate formalities that were followed were done merely for form; not for purposes of following statutory requisites or establishing corporate ownership in fact, but were done by Ms. Hyman in good faith based on Mr. Daoud's promises that she would be entitled to a half interest in the property upon his death.

15. Had Bouganvilla been properly transferred into his trust, Mr. Daoud's subsequent acts of going into SunBiz and moving or removing Kelly, himself, and even his son, from various positions in Bouganvilla Investments, Inc., would not have been effective. He did not have the authority to make those corporate changes as the corporation would have then been held by the trust, not by him. Although Bouganvilla had not been properly transferred, Mr. Daoud still had no corporate authority to remove Ms. Hyman, replace her or reposition her in the corporate structure. The testimony was clear that Ms. Hyman had not given him the authority to make those changes. These actions smacked of bad faith behavior on his part.

16. The Court finds that Ms. Hyman's holding of a corporate meeting and issuance of shares in 2013, a year after this lawsuit was instituted also smacked of bad faith behavior.

CONCLUSIONS OF LAW

Based on all of the foregoing findings, and the Court's general dismay and disappointment in the actions and behaviors of these parties, the Court concludes as follows:

Plaintiffs voluntarily dismissed Defendant Alexander Daoud (son) from this case on December 10, 2013.

Plaintiffs Fourth Amended Complaint, sounding in seven (7) causes of action does not bring any of those claims against defendants Titan Signs, Garden Apartments, or the Trust, with the exception of Count VII for Declaratory Judgment.

By agreement the parties tried only Count VII before the Court. Based on the foregoing findings, the Court declares as follows:

From an equitable standpoint, the Court finds that Mr. Daoud's Trust, which did not legally hold any interest in Bouganvilla Investments, Inc., has been funding all expenses or shortfalls related to the real property beyond rental income received. Contrary to Ms. Hyman's position, the funding did not constitute advancements or gifts to her. At a minimum they were loans to Bouganvilla Investments, Inc., from the Trust. Accordingly, neither Titan Signs nor Garden Apartments has any interest in either the real property or Bouganvilla Investments, Inc., beyond repayment of the loans if the Trust should choose to so proceed.

As a result of the foregoing actions, inactions, promises, prevarications, dissembling and misrepresentations by both Hyman and Daoud, the Court determines that ownership of the corporation should be distributed as follows:

The one hundred (100) shares of stock previously issued by Kelly Daoud Hyman in 2013 to herself are hereby canceled and the books and records of the corporation shall so reflect.

Kelly Daoud Hyman shall own fifty (50) shares of Bouganvilla Investment, Inc., and those shares shall be issued in her name and held in trust in the Arnold Alex Daoud Irrevocable Trust.

Based thereon, Kelly Daoud Hyman shall own a fifty (50%) percent beneficial interest in the real property located at 1750 Michigan Avenue, Miami Beach, FL, held by Bouganvilla Investments, Inc.

The remaining fifty (50%) percent interest in Bouganvilla Investments, Inc., shall be held by and transferred to the Arnold Alex Daoud Irrevocable Trust, together with the remaining authorized fifty (50) shares of Bouganvilla Investments, Inc., which shall be issued, transferred to, and held by, the Arnold Alex Daoud Irrevocable Trust.

The Trust shall thus own the remaining fifty (50%) percent beneficial interest in the real property located at 1750 Michigan Avenue, held by Bouganvilla Investments, Inc.

As a result, the entirety of Bouganvilla Investments, Inc., and its sole asset, 1750 Michigan Avenue, Miami Beach, Florida, shall be properly and officially transferred into and held by Daoud's existing Irrevocable Trust. This transfer is for the joint benefit of Kelly Daoud Hyman, (reflecting her fifty (50) percent interest in the corporation and related fifty (50%) percent beneficial interest in the real property) and the Trust's beneficiary of the remaining fifty (50%) percent interest in the corporation (and related fifty (50%) percent beneficial interest in the property) held by the Trust.

The property located at 1750 Michigan Avenue, Miami Beach, FL may not be transferred, assigned, sold or otherwise disposed of without the express written consent of both Hyman and the duly appointed Trustee of the Trust. The Court reserves jurisdiction over any dispute regarding disposition of the property. The Court will not entertain a judicial dissolution

based on deadlock. If the relevant parties agree to sell the property during Mr. Daoud's lifetime, the proceeds of said sale will remain in the Trust pending Mr. Daoud's demise. No beneficiary under the trust will receive his or her share during Mr. Daoud's lifetime.

The evidence further supported the notion that the parties had an oral understanding and agreement that Mr. Daoud would live on the property from its acquisition until his demise.

Accordingly, Mr. Daoud is granted a life estate in the real property owned by Bouganvilla Investments, Inc., shall be entitled to reside in the property and be entitled to quiet enjoyment thereof for the duration of his life. All income and maintenance of the real property, payment of expenses, costs and repairs related to the real property including timely payment of the mortgage, insurance and taxes shall be borne by Mr. Daoud as has been the case since the purchase of the property.

Mr. Daoud shall be responsible for renting the apartments, making certain improvements, and otherwise performing consistent with owning a life estate.⁷ Waste to the property may result in a termination of the life estate. Accordingly, the Court finds that any and all expenses or costs related to or associated with the real property, incurred during Mr. Daoud's life estate, are obligations of Mr. Daoud individually, and not the owners of Bouganvilla Investments, Inc. Failure to keep the mortgage current could constitute waste.

Any refinancing of the real property, which is the sole asset of Bouganvilla Investments, Inc., will necessarily require the approval of both owners of the corporation as well as the life tenant who is obligated to pay the mortgage.

Any sale of the real property, which is the sole asset of Bouganvilla Investments, Inc., will necessarily require the approval of both owners of the corporation, as well as the life tenant

⁷ See, e.g. *Marshall v Hewett*, 24 So. 2d 1 (Fla. 1945); *Chapman v Chapman*, 526 So. 2d 131 (Fla. 3d DCA 1988); *Schneberger v. Schneberger*, 979 So. 2d 981 (Fla. 4th DCA 2008).

whose tenancy would be affected by any sale, transfer or assignment. The Court reserves jurisdiction, though it does not look forward to its exercise, to judicially resolve any dispute, if necessary.

During the term of the life estate, Mr. Daoud may not mortgage, lien or otherwise encumber the real property asset belonging to Bouganvilla Investments, Inc., and he may not transfer or attempt to transfer title in and to the property, or his life estate without the express written agreement of the owners of Bouganvilla Investments, Inc.

As a life tenant Mr. Daoud may be entitled to a homestead exemption for that portion of the property which he occupies. If such should prove to be the case, a corrective deed shall be issued reflecting his status as a life tenant, with a reversion to the Trust which holds both the Trust and Hyman's interests in said property.

Neither Daoud nor Hyman shall be permitted to incur any obligations on behalf of Bouganvilla or otherwise encumber or have a lien placed against their interests in Bouganvilla or the real property. Neither of the owners of Bouganvilla Investment, Inc., shall impair or impede the refinancing of the real property. If such should be sought, however, Kelly Daoud Hyman will not be required to personally guarantee any such corporate loan on behalf of Bouganvilla Investments, Inc. for such refinancing.

The daily affairs of Bouganvilla shall be managed solely by Daoud during his life, unless he is declared incompetent by a Court of law, after the determination of same by two (2) board certified physicians. Following such determination, the daily affairs of Bouganvilla shall be managed by the Trustee of the Trust, or if the Trustee fails to so act, by Arnold Alex Daoud's son, Alexander Daoud, the current beneficiary of the balance of the Trust. Any expenses incurred by Bouganvilla shall be borne by Bouganvilla and to the extent that its funds are

insufficient to cover those expenses, by Daoud's Irrevocable Trust. Hyman will not be required to bear any additional expenses beyond her guarantee of the existing mortgage loan.

As this Court sitting in equity has resolved the ownership issues, status of gift funds, and otherwise, the Court now proceeds to resolve the remaining causes of action because they are moot and thus no further hearing is necessary.

Ms. Hyman brought additional claims, including claims for accounting, breach of fiduciary duty, eviction and ejectment. The determination that Mr. Daoud is entitled to a life estate in the real property disposes of those counts against Mr. Daoud, and thus there is no need for further hearing, argument or trial.

The determination that Mr. Daoud is entitled to a life estate in the real property proves there was no evidence of waste as of the date of trial, and thus he may not be evicted or ejected. Because as the life estate holder he is entitled to collect the rents from, and is responsible for the expenses of the property, the counts for breach of fiduciary duty and accounting fail, absent a showing of waste.

As relates to the foregoing, Arnold Alex Daoud shall first and foremost resolve outstanding issues with regard to the Trust, the Trustee, and otherwise, and the foregoing requisite documentation and transfers shall be effectuated forthwith. Failing therein, the Court retains jurisdiction to appoint a special magistrate to execute the necessary documents on behalf of the parties.

The Court reserves jurisdiction with regard to the entitlement to fees, if appropriate at all, upon proper notice and motion.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 11/17/14.



JOHN W. THORNTON
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 3
THE COURT DISMISSES THIS CASE AGAINST
ANY PARTY NOT LISTED IN THIS FINAL ORDER
OR PREVIOUS ORDER(S). THIS CASE IS CLOSED
AS TO ALL PARTIES.
Judge's Initials JWT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

cc: Counsel / Parties of record
bburstein@bursteinpa.com; abrito@zarcolaw.com; khernandez@zarcolaw.com