

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS E. PEREZ,)
Secretary of Labor,)
United States Department of Labor,)

Plaintiff,)

v.)

DSI CONTRACTING, INC.,)
DSI CONTRACTING, INC. PROFIT)
SHARING PLAN, a benefit plan, and)
BURGESS BAIRD, JR., an individual,)

Defendants.)

FILE NO.

COMPLAINT
(Injunctive Relief Sought)

Plaintiff THOMAS E. PEREZ, Secretary of Labor, UNITED STATES

DEPARTMENT OF LABOR ("Secretary") alleges as follows:

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, et seq., and is brought by the Secretary under §§502(a)(2) and (5) of ERISA, 29 U.S.C. §§1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA § 404(a)(1)(A), §§ 404(a)(1)(B) and (D), and § 406(b)(1), 29 U.S.C. § 1104(a)(1)(A), (B) and (D), § 1106(b)(1) and §§ 406(a)(1)(B), and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of that Title.

2. This court has subject matter jurisdiction over this action pursuant to ERISA §502(e)(1), 29 U.S.C. §1132(e)(1).

3. Venue lies in the Northern District of Georgia, Atlanta Division, pursuant to §502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2).

4. The DSI Contracting, Inc. Profit Sharing Plan (hereinafter "the Plan") is an employee benefit plan within the meaning of §3(3) of ERISA, 29 U.S.C. §1002(3), subject to coverage under ERISA pursuant to §4(a), 29 U.S.C. §1003(a), and is joined as a party defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to ensure that complete relief may be granted.

5. DSI Contracting, Inc. ("DSI"), a Georgia corporation and the Plan Sponsor, was at all relevant times a "fiduciary" to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a "party in interest" to the Plan within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14)(A) and (C). On information and belief, DSI is no longer a going concern.

6. Defendant Burgess Baird, Jr. (hereinafter "Baird"), an individual and owner of DSI Constructing, Inc. (hereinafter "DSI") was at all relevant times a Trustee of the Plan, a "fiduciary" to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a "party in interest" to the Plan within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14)(A) and (C).

7. The Plan was implemented by DSI on March 1, 1980.

8. The Plan is a non-contributory, defined-contribution plan that allows for discretionary employer contributions.

9. The Plan allows for investments and limited participant loans, and Plan participants do not direct the investments of the Plan.

10. Baird served as sole owner, Chief Executive Officer, and Chief Financial Officer of DSI during all relevant times.

11. During all relevant times, Baird possessed the authority and discretion to manage and control the Plan assets, based on his position in the company and as named Plan Trustee.

12. On August 12, 2004, Eight Stones, L.L.C. ("Eight Stones") was registered with the Georgia Secretary of State. Eight Stones had seven members, five of which were participants in the Plan. Baird owned a 60% share in Eight Stones.

13. Baird caused the Plan to extend loans to several of the participants associated with Eight Stones, including:

(a) In August 2004, Baird caused the Plan to issue a \$50,000 loan to Truitt Sims, Jr.; a \$25,000 loan to Truitt Sims, III; a \$50,000 loan to Marcia Carter; a \$15,000 loan to Baird's wife, Ann Baird; and a \$14,000 loan to Baird's son, Jason Baird.

(b) On May 21, 2007, Baird caused the Plan to extend a second loan of \$25,000 to Truitt Sims, Jr.

(c) On January 28, 2008, Baird caused the Plan to issue a participant loan to himself in the amount of \$17,000.

(d) Two days later, on January 30, 2008, Baird took a second participant loan for \$68,000 from the Plan.

(e) Less than a week later, on February 5, 2008, Baird took another participant loan for \$80,000 from the Plan.

14. The promissory notes underpinning the loans described in Paragraph 13 required four annual repayments of principal and a static 6% interest rate.

15. On information and belief, the loaned funds described in Paragraph 13(a) were used by Eight Stones to invest in a property development in Austell, Georgia, called “Stonebrook.”

16. Between December 22, 2004 and January 26, 2006, Baird caused the Plan to purchase three parcels of real estate contiguous to the Stonebrook development.

17. Baird failed to procure qualified and independent appraisals of the land purchased with Plan assets as described in Paragraph 16. Defendants reported the value of the purchased land by its original purchase price.

18. On September 24, 2007, Baird caused the Plan to loan \$490,000 to Burge Realty, LLC, a Georgia company unrelated to DSI. That same day, Burge Realty bought ten lots in the Stonebrook development from Eight Stones for the purchase price of \$490,000. The Promissory Note between the Plan and Burge Realty required a one time lump sum payment of all outstanding principal and interest to be paid on the loan on August 24, 2010. Burge Realty pledged the ten lots it purchased as collateral on the loan.

19. Defendants allowed all the loans described in Paragraphs 13 and 18 to consistently be in default and did not attempt collection on the outstanding balances. On information and belief, no principle or interest from any of the loans described in Paragraphs 13 and 18 has been repaid. Defendants have taken no action to seek repayment.

20. By their actions described in paragraphs 12 through 19, Defendants, as fiduciaries of the Plan,

(a) failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits

to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

(b) failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

(c) failed to discharge their duties in accordance with the documents and instruments governing the Plan, in violation of §404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

(d) caused the Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of Plan assets to, or use of Plan assets by or for the benefit of a party in interest, in violation of ERISA §406(a)(1)(B), 29 U.S.C. §1106(a)(1)(B); and

(e) dealt with assets of the Plan in their own interests or accounts, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1).

21. Defendants are each liable for the breaches of the other, pursuant to §405(a) of ERISA, 29 U.S.C. §1105(a), in that they either (1) participated knowingly in an act of the other fiduciary, knowing such act was a breach, in violation of §405(a)(1) or ERISA, 29 U.S.C. §1105(a)(1); (2) failed to monitor or supervise the other fiduciary and thereby enabled the breach, in violation of §405(a)(2) of ERISA, 29 U.S.C. §1105(a)(2); or (3) had knowledge of a breach by the other fiduciary and failed to make reasonable efforts under the circumstances to remedy the breach, in violation of §405(a)(3) of ERISA, 29 U.S.C. §1105(a)(3).

WHEREFORE, pursuant to §502(a)(2) and (5) of ERISA, 29 U.S.C. §1132(a)(2) and (5), Plaintiff prays that the Court:

- A. Order Defendants to restore to the Plan all losses, including interest and lost opportunity costs, which occurred as a result of these breaches of fiduciary obligations;
- B. Order that the Plan set off the individual Plan accounts of any Defendant against the amount of losses, including lost opportunity costs, resulting from his fiduciary breaches, as authorized by §1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. §1056(d)(4)), if the losses are not otherwise restored to the Plan by the Defendants and reallocated to the non-breaching participants;
- C. Appoint a successor fiduciary or administrator, at Defendant Burgess Baird, Jr.'s expense;
- D. Permanently enjoin Defendant Burgess Baird, Jr. from serving as fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to ERISA;
- E. Enjoin Defendant Burgess Baird, Jr. from engaging in any further action in violation of Title I of ERISA;
- F. Reverse each prohibited transaction described herein;
- G. Award Plaintiff the costs of this action; and
- H. Provide such other relief as may be just and equitable.

Respectfully submitted,

ADDRESS:

Office of the Solicitor
U. S. Department of Labor
61 Forsyth Street, S.W.
Room 7T10
Atlanta, GA 30303

Telephone:

(404) 302-5435

(404) 302-5438 (FAX)

E-mail:

chastain.lydia.j@dol.gov

ATL.FEDCOURT@dol.gov

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

By: s/ Lydia J. Chastain
LYDIA J. CHASTAIN
Attorney

Office of the Solicitor
U. S. Department of Labor
Attorneys for Plaintiff.

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