

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-28-322

Jamie Curley, Respondent,

v.

SCENT Land Holdings, LLC, Amy Puchalski,
and Robert Puchalski,Appellants.

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JUN 13 2013

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

- I. Did the circuit court err in granting summary judgment to Plaintiff by concluding Defendants were required to deliver Plaintiff a purchase agreement?

STATEMENT OF THE CASE

On October 17, 2011, Plaintiff Jamie Curley (“Curley”) filed an amended summons and complaint in the Court of Common Pleas for Kershaw County against SCENT Land Holdings, LLC (“SCENT Land” or “Company”), Amy Puchalski (“Puchalski”), and Robert Puchalski, M.D. (“Dr. Puchalski”) (collectively, “Defendants”) seeking a judicial dissolution of SCENT Land and judicial supervision of the winding up of SCENT Land. Am. Sum. & Comp. P. 3, 4. On November 8, 2011, Defendants timely filed an answer to the amended summons and complaint and asserted several counterclaims alleging breach of fiduciary duty, conspiracy, interference with a contractual relationship, and violation of the South Carolina Unfair Trade Practices Act. Am. Answer & Counter, P. 2, 3, 5. RR. P.

Curley filed a motion for summary judgment on her cause of action seeking judicial dissolution of SCENT Land and a motion for summary judgment as to the counterclaims asserted by the Defendants on February 23, 2012. Pl. Motions for S.J. On April 11, 2012, Defendants filed a combined memorandum opposing Plaintiff’s motions. Def. Memo. in Opposition.

Following oral argument by counsel on April 16, 2012 on the motions for summary judgment, the Honorable DeAndrea G. Benjamin, Circuit Judge, entered a Form-4 Order on July 31, 2012 granting “Plaintiff’s Motion for Summary Judgment against SCENT Land seeking dissolution of the company . . . solely on the grounds that the company failed to deliver her the purchase agreement as required by S.C. Code Ann. § 33-44-702(c).” Order, P. 1. Defendants timely filed a Rule 59(e), SCRPC, Motion to Alter or Amend the circuit court’s judgment on August 13, 2012. Def. Mot. Amend. The

circuit court issued a Form-4 Order on January 28, 2013 denying Defendant's motion for reconsideration. Order Deny. Mot. Defendants timely served and filed a Notice of Appeal. Notice of Appeal.

STATEMENT OF THE FACTS

This case arises out of an effort by Plaintiff Curley to block the construction of a physician office building owned by SCENT Land as part of a conspiracy to damage SCENT Land and an affiliated company, South Carolina ENT, Allergy and Sleep Medicine, P.A. ("SCENT"). SCENT Land is a limited liability company organized under the Limited Liability Company Act of the State of South Carolina pursuant to section 33-44-101, *et. seq.* of the South Carolina Code (2006). Oper. Agr., P. 2. SCENT Land owns buildings and real property where SCENT performs its services. Aff. Dr. Puchalski, P. 1.

On September 30, 2009, Curley, Puchalski, and Dr. Puchalski entered into an operating agreement for SCENT Land with the primary purpose of owning real estate in South Carolina. Oper. Agr. P. 1-3; Transcript, P. 26, L.22. Dr. Puchalski is a founding shareholder of SCENT and a managing member of SCENT Land. Oper. Agr., P. 39. Plaintiff's husband, Dr. Orville Dyce ("Dyce"), was a shareholder in SCENT from March 1, 2007 until May 9, 2010. Aff. Dr. Puchalski, P. 1, Transcript, P. 28, L. 11. Curley, Puchalski, and Dr. Puchalski agreed to build a new physician office building to be owned by SCENT Land and used by SCENT. Aff. Dr. Puchalski, P. 2. Shortly after signing the operating agreement and construction began, Curley refused to participate in financing the new practice building. Aff. Dr. Puchalski, P. 2. Due to Curley's refusal to finance the building, the general contractor threatened a mechanics lien and the subcontractors went unpaid. Def. Memo. in Opposition, P. 3, Ex. 5 to Def. Memo. in Opposition, & Aff. Dr.

Puchalski, P. 2. The partially constructed building was vandalized and SCENT began having to loan money to SCENT Land to meet obligations. Def. Memo. in Opposition, P. 3, Aff. Dr. Puchalski, P. 2.

In an effort raise the necessary funds to fulfill its obligations, Dr. Puchalski, as manager of SCENT Land, issued a written notice of a special meeting of the members of SCENT Land on March 11, 2010 and attached an agenda of topics to discuss which included, among other things, “a capital call and other steps to finance and complete the building.” Ex. 3 to Def. Memo. in Opposition. Curley acknowledged in writing that she would attend the teleconference to be held the following day, March 12, 2010. Ex. 3 to Def. Memo. in Opposition. During the meeting, SCENT Land voted to approve a two-stage capital call of the members of the Company and the members were subsequently notified in writing on March 17, 2010 of their obligations to SCENT Land to cover costs needed for the new medical building. Aff. Dr. Puchalski, P. 3, Ex. 3 to Def. Memo. in Opposition. Despite the approval of the majority of the membership to issue a two-stage capital call and the SCENT Land Operating Agreement allowing for a capital call, Curley refused to contribute. Aff. Dr. Puchalski, P. 3, Oper. Agr., P. 16. Dr. Puchalski, as manager of SCENT Land, issued a written notice of a special meeting of the members of SCENT Land on April 16, 2010 and attached an agenda of topics to discuss at the special meeting on April 19, 2010 which included, among other things, “failure of Jamie Curley to pay the first installment of the capital call approved on March 12, 2010 and the expulsion of her interest.” Ex. 3 to Def. Memo. in Opposition. Following the meeting, Curley was subsequently expelled from the Company pursuant to section 6.9 of the

SCENT Land Operating Agreement, entitled "Expulsion of Member." Section 6.9 provides, in pertinent part:

A Member may only be expelled by the Company and forced to accept a buy-out of his or her interest as valued in Section 5 herein if the Member . . . fails to make a mandatory capital contribution to the Company, within six (6) weeks of written notice given thereof, for a project that is approved by the Membership for such contribution to be made.

Oper. Agr., P. 16. Curley refused to meet her obligations as provided in the SCENT Land operating agreement and therefore was expelled from the Company for her failure to do so.

At all relevant times pertinent hereto, Curley's husband, Dr. Dyce, was a shareholder of SCENT. Def. Memo in Opposition, P. 2-3. Dr. Dyce was terminated from SCENT effective May 9, 2010 for conspiring with another physician employed by the practice, Dr. Gunnlauggson, for blocking actions necessary to conduct normal operations while simultaneously and secretively establishing a medical practice in the Richland County market to compete against SCENT. Def. Memo in Opposition, P. 2-3, Aff. Puchalski, P. 3-4. Section 1.1 of the SCENT Land Operating Agreement provides, in pertinent part, that "Members" of the Company "are individuals who are either physicians employed by or in partnership with South Carolina ENT, Allergy and Sleep Medicine, P.A. or their spouse." Oper. Agr., P. 3. Additionally, section 6.2 of the SCENT Land Operating Agreement provides, in pertinent part, that a "Member shall be dissociated only upon the occurrence of one of the following events . . . the Member, or Member's spouse is no longer employed by or a shareholder of" SCENT. Oper. Agr., P. 15. Despite Plaintiff's contention and the circuit court's finding otherwise, Curley was not dissociated from SCENT Land on May 9, 2010 when her husband's employment with

SCENT ended. Aff. Curley, P. 3; Transcript, P. 28, L. 11, P. 29, L. 8-9. On the contrary, Plaintiff was properly expelled from the Company several weeks earlier pursuant to section 6.9 of the SCENT Land operating agreement for her failure to contribute to the two-stage capital call. Oper. Agr., P. 16. Following the circuit court's conclusion that Plaintiff is entitled to have her distributional interest purchased pursuant to the South Carolina Limited Liability Company Act, Defendants filed this appeal.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc., 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

When reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56, SCRCP. Pittman v. Grand Strand Entm't Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) (citing S.C. Elec. Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) and Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the nonmoving party. Pittman, 363 S.C. at 536, 611 S.E.2d at 925.

ARGUMENT

- I. BECAUSE THE PLAINTIFF WAS PROPERLY EXPELLED FROM THE COMPANY PURSUANT TO THE OPERATING AGREEMENT, THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUND THE COMPANY FAILED TO DELIVER THE PLAINTIFF A PURCHASE AGREEMENT.

The circuit court granted Plaintiff's Motion for Summary Judgment against SCENT Land seeking dissolution of the company solely on the grounds that the company failed to deliver her the purchase agreement as required by section 33-44-702(c) of the South Carolina Code. The lower court's decision is an error of law. Appellants contend the operating agreement that served as the contract governing the Company provided that a member may be expelled for failing to make a mandatory capital contribution to the Company and Plaintiff was properly expelled for breaching this provision of the contract.

In granting summary judgment to Plaintiff, the circuit court erred as a matter of law in holding the Company "failed to deliver [Plaintiff] the purchase agreement as required by S.C. Code Ann. § 33-44-702(c)." Order, P. 1. Although unclear from the Order, implicit in the circuit court's holding is the finding that Plaintiff was dissociated from the Company despite not providing a date or a basis of Plaintiff's dissociation. Order, P. 1. Plaintiff was not disassociated from the Company on May 9, 2010 when Curley's husband was no longer employed by SCENT. Pl. Mot. S.J. 3; Transcript, P. 28, L. 11. On the contrary, Curley was expelled from the Company following a special meeting on April 19, 2010 for breach of contract after Curley failed to make the required contribution pursuant to section 6.9 of the operating agreement. Def. Memo in Opposition, P. 2-3. Accordingly, the circuit court failed to properly analyze the SCENT Land operating agreement and apply the applicable law. See Heins v. Heins, 344 S.C.

146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (“Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.”)

Section 33-44-103(a) of the South Carolina Code (2006) states:

except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. *To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.*

(emphasis added). Furthermore, the official Comments to this code section provides, “[t]he operating agreement is the essential contract that governs the affairs of a limited liability company. §33-44-103(a), cmt. 1. “The operating agreement of [an LLC] is a binding contract that governs the relations among the members, managers, and the company.” Clary v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). “Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply.” Clary, 398 S.C. at 297, 727 S.E.2d at 778. Moreover, a court reviewing a written contract must discern:

[T]he intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Serrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). In short, the operating agreement agreed to by the parties, not statutory law governs the affairs of the Company; only if the operating agreement fails to address a matter or if the operating agreement conflicts with a provision detailed in subsection (b) of section 33-44-103 does the South Carolina Limited Liability Company Act control.

In the instant case, the SCENT Land operating agreement signed by all members of the Company, including Plaintiff, serves as the contract governing the actions and obligations of the Company. See 51 Am.Jur.2d Limited Liability Companies § 4 (2011) (“The operating agreement governs: (1) relations among the members as members and between the members and the limited liability company; (2) the rights and duties of a person in the capacity of manager; (3) the activities of the company and the conduct of those activities; and (4) the means and conditions for amending the operating agreement.) Oper. Agr., P. 39. The SCENT Land operating agreement is not silent, but instead explicitly details the various member dissociations, including expulsion and dissociation. Oper. Agr., P. 14-16. Specifically, section 6.9 of the operating agreement, EXPULSION OF A MEMBER, provides, in pertinent part, that:

A Member may only be expelled by the Company and forced to accept a buy-out of his or her interest as valued in Section 5 herein if the Member . . . fails to make a mandatory capital contribution to the Company within six (6) weeks of written notice given thereof, for a project that is approved by the Membership for such contribution to be made.

Oper. Agr., P. 16. Following a written notice calling for a special meeting of the members of the Company, the members approved a two-stage capital call on March 12, 2010 of all the members of the company to raise the necessary funds to fulfill its existing financial obligations for the construction of a new practice building. Ex. 3 to Def. Memo.

in Opposition. Although Plaintiff was provided written notice of the Company's decision to require a mandatory two-stage capital call on March 17, 2010, she failed to make the contribution within the required six weeks under the SCENT Land operating agreement and she was subsequently expelled from the Company. Oper. Agr., P. 16, Aff. Dr. Puchalski, P. 3, Ex. 3 to Def. Memo. in Opposition. By entering into this operating agreement on September 30, 2009, Plaintiff became bound by the terms of the agreement to regulate the affairs of the company—including being subject to expulsion from SCENT Land for failure to make a mandatory capital call. Moreover, nothing in subsection (b) of 33-44-103 of the South Carolina Code prevents the parties from contracting how to expel a member from a limited liability company for the member's failure to fulfill the obligations of a company as detailed in their respective operating agreement.

Because Plaintiff was properly expelled—and not disassociated—from the Company due to her breach of the operating agreement, Appellants are not required to deliver an offer to her to purchase her distributional interest in the Company. Oper. Agr., P. 16. Instead, the operating agreement provides that Plaintiff may be “forced to accept a buy-out of her interest as valued in Section 5” of the operating agreement. Oper. Agr., P. 11-12, 16. Therefore, section 33-44-701, *et. seq.* of the South Carolina Code (2006) is not applicable because that statute only applies to dissociated members when a business is not wound up. Accordingly, the circuit court's order granting Plaintiff's motion for summary judgment is an error of law and must be reversed.

CONCLUSION

For the reasons stated herein, we respectfully request this Honorable Court to reverse the circuit court's grant of summary judgment and remand the matter for a determination to be made on the merits by a trier of fact.

Respectfully Submitted,



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June 10, 2012

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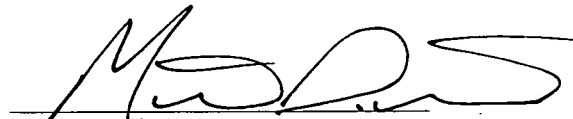
I certify that I have served the Initial Brief of Appellants dated on June 10, 2013,
by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2013,
addressed to the attorneys of record as follows:

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APPELLANTS' DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL

NOW COMES the Appellants, pursuant to Rule 209 of the South Carolina
Appellate Court Rules and hereby designates the following to be included in the Record
on Appeal:


1. Plaintiff's Amended Summons and Complaint;
2. Defendants' Answer to Amended Complaint and Counterclaims;
3. Plaintiff's Motion and Memorandum in Support of Motion for Summary
Judgment Seeking Judicial Dissolution;
4. Defendants' Combined Memorandum in Opposition to Summary Judgment on
Judicial Dissolution and Defendants' Counterclaims;

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5. Form 4 Order of Honorable DeAndrea G. Benjamin dated July 31, 2012 Granting Plaintiff's Summary Judgment;
6. Defendants' Notice of and Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP;
7. Plaintiff's Memorandum in Opposition to Motion for Reconsideration;
8. Form 4 Order of the Honorable DeAndrea G. Benjamin dated January 28, 2013 Denying Defendants' Motion for Reconsideration; and
9. Transcript of Record of proceedings dated April 16, 2012.



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PROOF OF SERVICE

I certify that I have served Appellants' Designation of Matter to be Included in Record on Appeal dated on June 10, 2013, by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2013, addressed to the attorneys of record as follows:

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CERTIFICATION OF COUNSEL

The Appellants' Designation of Matter to be Included in Record on Appeal
contains no matter which is irrelevant to the appeal.



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PROOF OF SERVICE


I certify that I have served the Certification of Counsel dated on June 10, 2013, by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2013, addressed to the attorneys of record as follows:

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