

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2012-CP-26-5610

Appellate Case No. 2013-000650

Shaul Levy and Meir Levy, Appellants.

Carolinian, LLC, Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in ruling that the Carolinian, LLC may exercise its “Right to Buy” pursuant to Section 11.2 of the Carolinian, LLC Operating Agreement against the Levys as transferees of Patel’s Distributional Interest?
2. Did the Circuit Court err in ruling that the April 2, 2012 Foreclosure Sale transferred Bhupendra Patel’s interest in Carolinian, LLC to the Levys?
3. Did the Circuit Court err in ruling that the Levys rights, as non-member transferees, were subject to the Carolinian, LLC Operating Agreement and equal to the rights held by Patel as transferor?
4. Did the Circuit Court err in ruling that Carolinian may exercise its “Right to Buy” Patel’s distributional interest in Carolinian, LLC from the Levys without voiding the April 2, 2012 Foreclosure Sale?

STATEMENT OF THE CASE

Shaul and Meir Levy (“the Levys”) are judgment creditors of Bhupendra Patel (“Patel”), a Member of Carolinian, LLC (“Carolinian”). The Levys acquired Patel’s distributional interest in Carolinian via foreclosure sale. The Levys now dispute Carolinian’s application of certain provisions of the Carolinian Operating Agreement to the Levys as Patel’s transferees.

PROCEDURAL HISTORY

On July 23, 2012, the Levys filed a Summons and Verified Complaint for a Declaratory Judgment and a Permanent Injunction. The Levys assert that a controversy exists between them and Carolinian regarding their rights as transferees of Patel’s distributional interest in Carolinian.

[Complaint, para. 21]. At trial, Carolinian only disputed the following declaratory relief sought by the Levys in the Complaint:

- b. Any right to purchase the subject distributional interests pursuant to the terms of Carolinian's Operating Agreement terminated upon the sale of the distributional interest to Plaintiffs at the public auction held April 2, 2012;**
- c. Other than dissolution and wind-up of Carolinian's business, neither Carolinian nor its members can force Plaintiffs to sell their distributional interests in Carolinian;**
- d. Plaintiffs, as "non-member transferees" of Carolinian, are not parties to Carolinian's Operating Agreement....**

With regard to their action for an injunction, the Levys' claims are based upon the same basic foundation as their claim for declaratory relief. At trial, Carolinian only disputed the following injunctive relief sought by the Levys in their Complaint:

- c. ...[A]ttempting to force the sale of Plaintiffs' distributional interest in Carolinian....**

Carolinian timely filed a Summons, Answer, and Counterclaim on August 17, 2012 denying the relief sought in the Levys' Complaint and asserting the defense that the Levys, as transferees, were subject to the Operating Agreement of Carolinian. Carolinian also requested a Declaratory Judgment that, in sum:

- a. Upon the April 2, 2012 sale of Patel's distributional interest, the Levys became transferees who were subject to the terms of the Carolinian Operating Agreement;**
- b. the Levys' interest cannot exceed that which Patel had prior to the foreclosure sale;**
- c. the value of the distributional interest cannot exceed the value of Patel's distributional interest at the time of the foreclosure;**

- d. Carolinian has the right to purchase Patel's entire interest in Carolinian, including his distributional interest that was transferred to the Levys, pursuant to Article XI of the Operating Agreement; that**
- e. Carolinian has complied with each and every provision of Article XI toward executing its purchase of Patel's entire interest and, in turn, that**
- f. the Levys must accept Carolinian's offer to purchase as is set forth in that certain letter dated September 6, 2012.**

[Counterclaim, paras. 31-42; Stipulation, para. 26].

The Levys timely filed a Reply to the Counterclaims, denying the material allegations therein and asserting the affirmative defenses of Estoppel and Laches and Waiver. [Reply.] This action followed. Carolinian consented to the entry of a Temporary Injunction since Carolinian was not attempting to take any action adverse to the Levys, but only trying to negotiate the purchase of their interest after they refused to participate in the process, claiming they were not bound by the Carolinian Operating Agreement.

STATEMENT OF FACTS

The judgment arose out of a loan from the Levys to Pier View Resort Development, LLC. The Levys are residents of New York and Florida who have extensive experience in real estate investment. [Stipulation, para. 5]. The underlying Promissory Note was personally guaranteed by Harry Pavilak, Arkadiusz Grabara, and Patel. [Stipulation of Facts, Exhibit 1]. The three guarantors executed a Confession of Judgment in the amount of \$2,500,000.00 in favor of the Levys as security for repayment of the Note. [Id.] Following a default under the note, the Levys filed the Confession of Judgment on February 10, 2010 and thereafter pursued the collection thereof against the three guarantors. [Stipulation, Paragraphs 8-9].

Bhupendra “Bhupi” Patel (“Patel”) at the time was a member of several entities that did business in Horry County, including Carolinian. [Stipulation, Para. 4]. Carolinian owns the Best Western Carolinian Resort, an oceanfront, high-rise resort located in Myrtle Beach. [Stipulation, paras. 1-2]. Carolinian is a closely-held company consisting of nine members. [Stipulation, para. 3]. Patel owned a 23.35% Membership Share in Carolinian. [Stipulation, para. 7].

On or about January 27, 2011, the Levys commenced supplemental proceedings against Patel. [Stipulation, Exhibit 7]. Carolinian was not a party to that case. [Id.]. The Levys then pursued Patel’s interests in four limited liability companies, among them Carolinian. By letter dated June 14, 2011, Patel provided the Levys with a copy of the current Operating Agreement for Carolinian. [Stipulation, paras 6 and 15] By Order of the Master in Equity dated August 12, 2011, the Levys obtained a Charging Lien in the amount of \$2,500,000.00 plus statutory interest against Patel’s distributional interests in the four (4) companies, including Carolinian. [Stipulation, para. 9 and Exhibit 4]. The Order established the Levys’ right to receive any distributions to which Patel would be entitled from any of the four entities until the satisfaction of the judgment. [Id.].

On September 26, 2011, the Levys filed a Petition to foreclose the \$2,500,000.00 lien against Patel’s distributional interests in each entity. [Stipulation, para. 11]. No notice of the Motion or Hearing was provided to Carolinian. [Brief of Defendant]. On February 9, 2012, a hearing was held on the Levys’ Petition. [Stipulation, para. 12]. As of February 10, 2012, the lien, with interest, had increased to a total of \$2,875,640.63. [Stipulation, Exhibit 7]. By Order filed March 14, 2012, the Master in Equity ordered the foreclosure and sale of Patel’s distributional interests in the four companies, including Carolinian. [Stipulation, para. 14 and Exhibit 7]. The Order recites, **“Plaintiffs’ Judgment is secured by the charging liens against Patel’s distributional interests**

in each of the LLCs up to the amount of the Judgment, including accrued interest at the legal rate of interest.” [Stipulation, Exhibit 7]. No notice of the sale was provided to Carolinian. [Brief of Defendant].

On April 2, 2012, Patel’s distributional interests in each of the four companies were sold separately at public auction. [Stipulation, para. 16]. On the date of the sale, the Levys’ lien upon the Patel distributional interests totaled \$2,900,290.80. [Stipulation, Exhibit 8]. The Levys submitted the winning bids upon each of the four distributional interests, which bids totaled \$291,200.00. [Stipulation, Exhibit 8]. The Levys’ winning bid for Patel’s distributional interest in Carolinian was \$215,000.00. [Stipulation, para. 16]. The Master in Equity confirmed the sale by Order filed April 11, 2012. [Stipulation, para. 19, Exhibit 8].

Carolinian received notice of the establishment of the charging liens against Patel’s distributional interest therein by letter dated August 30, 2011 from the Levys’ counsel. [Stipulation, para. 10]. Prior to the February 9, 2012 foreclosure hearing, Carolinian offered to negotiate the purchase of or “redeem” Patel’s distributional interest in Carolinian from the Levys. [Stipulation, para. 13]. Carolinian intended to pay the Levys, as lienholders, a price to release their lien and, in turn, acquire Patel’s interest.

Carolinian proffered testimony of Loyd Daniel, Carolinian’s managing member, in its Brief, but the Trial Court determined that such testimony was not necessary to make its determination [Transcript of Hearing, pp 33-35]. That proffered testimony set forth in Carolinian’s trial brief was as follows:

Loyd Daniel telephoned Meir Levy on behalf of Carolinian, LLC to discuss a purchase of Patel’s distributional interest prior to the hearing. Levy informed Daniel that the Levys were not interested in negotiating the release of their lien

upon Patel's distributional interest in Carolinian for a price because they did not need the money and, instead, wanted to be "part of the deal." Daniel also informed counsel for the Levys, Dan Butler, on several occasions both prior to the foreclosure hearing and prior to the sale that he was interested in negotiating such a release/sale of the lien, but was never informed that the Levys were interested in such a negotiation.

Due to the Levys' unwillingness to discuss the release/sale, Carolinian and one of its members, Southwestern Equities, LLC had their counsel attend the sale to bid upon Patel's distributional interest in Carolinian. [Stipulation, para. 17]. Counsel bid up to \$190,000.00. [Id.]. Neither Patel nor the Levys requested or were given permission by Carolinian or its members to transfer Patel's distributional interest at the sale. [Stipulation, para. 18].

By letter dated April 16, 2012, the Levys provided Carolinian with a copy of the Order Confirming Sale and requested that any distributions be made to the Levys. [Stipulation, para. 22]. By letter dated June 11, 2012, Carolinian notified the Levys that the involuntary transfer of Patel's distributional interest in Carolinian without the prior consent of its members was a violation of the Operating Agreement that triggered Carolinian's right to purchase Patel's former distributional interest from them pursuant to the terms of the Operating Agreement. [Stipulation, para. 23 and Exhibit 10]. Carolinian set forth a calculation of a purchase price pursuant to the terms of Article XI of the Operating Agreement and offered the sum of \$100,000.00. [Stipulation, para. 23]. By letter dated June 18, 2012, the Levys denied that Carolinian had the right to purchase Patel's former distributional interest from them, contending "**[t]he Levy's are not subject to any of the terms of the Operating Agreement.**" [Stipulation, para. 24] (emphasis added). By letter dated June 27, 2012, Carolinian responded by saying the Levys, as transferees, were subject to the Operating

Agreement, were moving forward with obtaining an appraisal of the interest, and would purchase it pursuant to the terms of the Operating Agreement. [Stipulation, para. 25]. This action followed.

STANDARD OF REVIEW

Respondent denies the standard of review in this case is *de novo*.

Appellants' Complaint contained causes of action for both an injunction and declaratory relief. Respondent's Counterclaim asserted an action for a declaratory judgment. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 261, 270, 705 S.E.2d 73, 75 (Ct. App. 2010).

Since the issue underlying the parties' actions for declaratory judgments is the interpretation of a contract, the standard of review in this case extends only to the correction of the Trial Court's errors of law. See Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000) (holding that an action a declaratory judgment action involving the interpretation of a contract to be an action at law.). "The characterization of a declaratory judgment suit depends on the nature of the underlying controversy." Barnacle Broadcasting, 675, 146. "In order to determine the standard of review to apply, we must look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure." *Id.* "In an action at law, tried without a jury, our scope of review extends merely to the correction of errors of law." *Id.* "Thus, the Trial Court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings". *Id.*

SUMMARY OF ARGUMENT

The Levys are sophisticated real estate investors who obtained a \$2,500,000.00 judgment against three separate individuals. The Levys obtained charging liens against Patel's distributional interests in four separate LLCs, thus providing the Levys with sufficient security to obtain distributions out of each LLCs to apply toward the satisfaction of their judgment. The Levys did not have to foreclose those liens.

The Levys were in possession of the Carolinian Operating Agreement prior to deciding to foreclose their charging liens against the four Patel distribution interests and prior to bidding on those interests. The Operating Agreement applies one set of rules to the transfer of a member's interest to a third party after obtaining the consent of a majority of Carolinian's membership, and applies another set of rules to the transfer of a member's interest to a third party in the event the member does not first obtain the consent of Carolinian's membership. If the former, neither the company nor any of its members have the right to buy the interest so transferred. If the latter, both the company and the members are given the opportunity to buy the interest back. This case involves the latter scenario, and the circuit court properly construed the Operating Agreement to give Carolinian the opportunity to buy the distributional interest that Patel transferred to the Levys without the requisite consent.

Neither the Operating Agreement nor the South Carolina Limited Liability Company Act mandates that Carolinian redeem a charging lien against one of its members' distributional interests prior to the foreclosure sale. Moreover, neither the Operating Agreement nor the Act provides that the sale of the member's distributional interest at a foreclosure sale voids the very Operating Agreement that created the interest. When the Levys elected to foreclose its charging lien against

Patel's distributional interest in Carolinian without the consent of sixty-seven percent (67%) of Carolinian's members, they assumed the risk that Carolinian or its other members would elect to exercise its Right to Buy the interest back for its fair value to be determined pursuant to Section 11 of the Operating Agreement.

By contrast, the Levys' position necessarily seeks a declaration that the Carolinian Operating Agreement does not apply to the transfer, to the distributional interest they acquired, or to them as Patel's transferees and successors in interest. Such a position would be contradictory to the basic, clear intent of the members of Carolinian when they agreed to adopt the Carolinian Operating Agreement to govern themselves.

ARGUMENT

- I. **The Circuit Court properly ruled that Carolinian could exercise its Right to Buy Patel's distributional interest from the Levys as Patel's transferee/ successor in interest.**
 - A. **An Operating Agreement may lawfully restrict the rights of transferees of a member's distributional interest.**

The South Carolina General Assembly enacted the South Carolina Uniform Limited Liability Act in 1996. "The act is intended to be flexible with a comprehensive set of default rules.... The act is flexible in the sense that the vast majority of its provisions **may be modified by the owners in a private agreement**. To simplify, those nonwaivable provisions are set forth in a single subsection. Thus, **sophisticated parties will negotiate their own deal.**" 1996 South Carolina Act No. 343, Section 1 (emphasis added). All provisions within an Operating Agreement subject to South Carolina law are permissible so long as they do not run afoul of the seven mandatory, non-waivable rules set forth in S.C. Code Ann. § 33-44-103(b). An Operating Agreement in South

Carolina may restrict the rights of both a member of an LLC and a transferee of a distributional interest of a member. See S.C. Code Ann. § 33-44-103(b)(7) (“The operating agreement may not restrict rights of a person, **other than a manager, member, and transferee of a member’s distributional interest...**”)(emphasis added).

B. The Carolinian Operating Agreement applies to both members and non-member transferees.

The Agreement provides that the company “shall exist under and be governed by the provisions of the South Carolina Uniform Limited Liability Company Act of 1996, Sections 33-44-101, et. seq... except as otherwise provided or modified by this Agreement.” [Stipulation, Exhibit 1, p.2]. Upon their purchase of Patel’s distributional interest at the foreclosure sale, the Levys became transferees who were subject to the Operating Agreement of Carolinian, LLC. See S.C. Code Ann. § 33-44-504(b) (“. . . A purchaser at the foreclosure sale has the rights of a **transferee.**”)(emphasis added).

The Operating Agreement, itself, is binding upon not only the members of Carolinian, LLC, but also any successor to any member’s interest so transferred. See Operating Agreement, paragraph 12.12 “Binding Effect. This Agreement shall be binding upon, ... and **shall be enforceable ... against all the parties and their respective ... successors and permitted assigns.**” [Stipulation of Facts, Exhibit 2 (emphasis added)]. A “successor” is defined as “[a] person who succeeds to the office, rights, responsibilities or place of another; one who replaces or follows another.” Black’s Law Dictionary, Seventh Edition, p. 1446 (1999). The Levys are the successor owners of Patel’s distributional interest, an interest created by and subject to the Carolinian Operating Agreement.

C. Carolinian may exercise its Right to Buy Patel's distributional interest from the Levys as Patel's successors in interest.

The Levys have succeeded to the ownership of Patel's distributional interest in Carolinian, LLC. Since that interest is subject to the Carolinian Operating Agreement, and since the Operating Agreement is enforceable against the successors to a member's distributional interest, Carolinian may buy Patel's distributional interest from the Levys.

II. The Circuit Court properly ruled that Patel's distributional interest, and not his entire membership interest, was transferred at the foreclosure sale.

The Circuit Court never ruled that Patel's entire membership interest- both his distributional interest and voting interest-was transferred at the foreclosure sale to the Levys. Carolinian agrees that Patel transferred only his distributional interest in Carolinian at the foreclosure sale, and the Circuit Court's Order reflects the same. The Circuit Court refers to Patel's "distributional interest" as having been transferred to the Levys throughout its Order. The Order makes only two references to Patel's "interest" as having been transferred at the sale, and both refer to Patel's distributional interest.

First, in paragraph 2 of the Order, the Circuit Court finds, "[t]he April 2, 2012 sale resulted in a transfer of Patel's interest in Carolinian to the Levys." Footnote 4 clarifies that, [p]ursuant to the Order of Judge Howe entered April 10, 2012, the Patel Distributional Interests 'have now been transferred and conveyed to the Plaintiffs.' Therefore, the reference to "interest" was a reference to Patel's "distributional interest" and not to Patel's entire membership interest.

Second, in paragraph 5 of the Order, the Circuit Court finds, "[t]he transfer of Patel's interest in Carolinian to the Levys was governed by and subject to the Operating Agreement of Carolinian." The preceding paragraph to which this paragraph refers clarifies, "...the Levys became owners of the

distributional interest in Carolinian subject to the Carolinian Operating Agreement.” Again, this reference to “interest” was a reference to Patel’s “distributional interest” and not to Patel’s entire membership interest.

Therefore, while the Circuit Court could have added the words “distributional” before the word “interest” in these two paragraphs, doing so would be unnecessary since the Court was referring to the “distributional interest” and not to both Patel’s distributional interest and voting interest in Carolinian.

III. The Circuit Court properly ruled that the Levys’ distributional interest was equal to their transferor’s distributional interest and subject to the Carolinian Operating Agreement.

The Circuit Court never ruled that the distributional interest purchased by the Levys at the foreclosure sale was greater than or exceeded the distributional interest that Patel had. Rather, the Circuit Court merely recited in its Order that, [a]s a transferee of Patel’s distributional interest in Carolinian **subject to and governed by the Operating Agreement of Carolinian’s members**, Plaintiffs cannot, through contract law or statute, have greater rights than the transferor ... had at the time of the transfer.” [Order, p. 8](emphasis added). This finding was a mere rebuke of the Levys’ contention that they “are not subject to any of the terms of the [Carolinian] Operating Agreement.” [Stipulation of Facts, Exhibit 11]. The Circuit Court intended to make a clear finding that the Levys, as transferees of Patel’s distributional interest, were subject to the Carolinian Operating Agreement. As is set forth in more detail herein, the Carolinian Operating Agreement “shall be binding upon ...and shall be enforceable by and against all the parties ... and their successors and permitted assigns.” [Stipulation of Facts, Exhibit 2].

IV. The Circuit Court properly ruled that allowing Carolinian to exercise its Right to Buy does not operate to void or otherwise contravene the foreclosure sale of Patel's distributional interest.

A. Article XI of the Operating Agreement provides that a non-consensual transfer of a distributional interest triggers Carolinian's or its Members' Right to Buy.

Because neither Patel nor the Levys obtained the consent of sixty-seven percent (67%) of Carolinian's members to the transfer and conveyance of Patel's interest to the Levys prior to the foreclosure sale, Article XI, and not Article III, of the Operating Agreement applies to the transfer, conferring upon Carolinian and its members the right to buy the distributional interest back. Such a non-consensual transfer triggered Carolinian's Right to Buy the interest from the Levys. Section 11.1 of the Agreement, "Restrictions on Transfer," provides:

No Member may voluntarily or involuntarily ... transfer, ... or otherwise convey ... any portion or all of his Membership Share to any Person without the prior written consent of those Members who own more than sixty-seven (67%) percent of the Voting Rights in the Company....

If such consent is obtained, no provision of this ARTICLE XI shall apply, and the provisions of ARTICLE III shall govern the rights of the transferor and transferee. With regard to all other transfers, ARTICLE XI shall control, and any attempted conveyance or encumbrance of all or a portion of a Membership Share in contravention of this ARTICLE XI shall be null, void, and without effect.

Contrary to the construction promoted by the Levys, Section 11.1 does not purport to void any non-consensual transfer of a distributional interest. Rather, it purports to void any non-consensual transfer wherein Carolinian or its members are prohibited from exercising their Right to Buy the transferred interest back pursuant to Sections 11.2 and 11.3. Nothing in the Master's Order of Foreclosure or the Master's Order Confirming Sale restricts Carolinian or any of its Members from exercising their Right to Buy or any other rights they maintain pursuant to the Carolinian

Operating Agreement. As set forth in the Circuit Court's Order, Carolinian is not attempting to void or set aside the foreclosure sale; it is merely trying to exercise its Right to Buy pursuant to Article XI of the Operating Agreement.

B. The Carolinian Operating Agreement unambiguously reveals an intent expressed by its members to prohibit a member's transfer of his distributional interest to another without either obtaining the consent of sixty-seven percent (67%) of its Members or, alternatively, allowing the Company or its members the right to buy it back.

The Carolinian Operating Agreement, read as a whole, clearly manifests an intention by its members to prohibit the transfer of any or all of a member's interest in the company to a third-party without either a) the consent of sixty-seven percent (67%) of its members or, if no such consent is either attempted or obtained- as is the case here- b) a right to buy it back. While a hypertechnical reading of the Operating Agreement by the Levys may create confusion, it is taken out of context and manifests the opposite intent of the parties. To construe the Operating Agreement of Carolinian as sought by the Levys would be to contravene Sections 11.1 "Restrictions on Transfer," 11.2(b) "Company and Members Right to Buy," and 11.3 "Purchase Price" altogether.

"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.

"Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Cullen v. McNeal, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (Ct. App. 2010). "The parties' intention must be gathered from the contents of the entire agreement and not from any

particular clause thereof.” Id. “Interpretation of a contract is governed by the objective manifestation of the parties’ assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.” Laser Supply and Services, Inc. v. Orchard Park Associates, 382 S.C. 326, 334, 676 S.E.2d 139, 143-144 (Ct. App. 2009).

As is set forth above in detail, Section 11.1, “Restrictions on Transfer,” is intended to prohibit transfers of distributional interests without either the prior consent of a majority of the members or, if no consent is obtained, giving the company or its members the right to buy the interest so transferred. Section 11.2, “Right to Buy,” is intended to set forth the basis for purchase price to be paid by the Company or Member to the Member or Member’s transferee (11.2(b) “Company and Members Right to Buy” provides, “[i]f a Member attempts to transfer all or a portion of his Membership Share without obtaining the other Members’ consent as required in SECTION 11.1, ... such Member is deemed to have offered to the Company all of his Membership Share at the price determined in accordance with SECTION 11.2(a), SECTION 11.3 and upon the terms contained in SECTION 11.4.”). Section 11.3, “Purchase Price,” provides the formula to calculate the purchase price, including conflict resolution in the event the parties cannot agree upon a price, and Section 11.4, “Payment of Purchase Price,” provides the method and timing of the payment once the price is determined.

The Operating Agreement is “binding upon ... and enforceable ... against” both Members and their “successors.” [Stipulation of Facts, Exhibit 2]. As Patel’s successors in interest, the provisions of Article XI are binding upon and enforceable against the Levys. The Circuit Court correctly construed the Operating Agreement liberally to give meaning to the unambiguous intent of the

members of Carolinian, LLC to give their company or themselves the ability to buy back the distributional interest, leaving for a later day the amount of consideration to be paid.

C. Article XI's Restriction on Transfer and Right to Buy provisions reflect the Act's own restriction on transfer and right to buy provisions.

Pursuant to the South Carolina Limited Liability Company Act, a member of an LLC is declared to be dissociated from the company "upon transfer of all of a member's distributional interest." S.C. Code Ann. § 33-44-601(3). Upon dissociation, "...the company must cause the dissociated member's distributional interest to be purchased under Article 7..." S.C. Code Ann. § 33-44-603(2)(B). Article 7 provides that the company "...shall purchase a distributional interest of a ... member ... for its fair value..." S.C. Code Ann. § 33-44-701(a)(2). Section 701(b) discusses the valuation of the interest and the manner in which payment is to be made. Therefore, had the Act governed the transfer of Patel's interest to the Levys, the result would be the same. Carolinian would have had the opportunity to buy the interest from the Levys for its fair value. The only difference between the default statutory right to buy procedure and the Operating Agreement's Right to Buy procedure is the fact that the Operating Agreement's procedure expressly includes a price discount. The Levys are likely trying to circumvent that discount through this litigation.

D. Both the Operating Agreement and the Act provide the Company with both a right to redeem prior to a transfer via foreclosure sale and a right to purchase for fair value following a transfer via foreclosure sale.

Whether the transfer is governed by the Carolinian Operating Agreement or the Act, Carolinian is entitled to two bites at the apple, albeit two equally sized bites at the same piece of the same place on the apple. Both the Operating Agreement and the Act provide the company with both the opportunity to redeem the interest subject to a charging lien prior to the transfer and with the

opportunity to purchase the interest transferred following the foreclosure of the charging lien for its fair value as is set forth above in Articles 5 and 7 of the Act. Neither the Operating Agreement nor the Act mandates redemption; rather, both merely recite that “[a]t any time before foreclosure, a distributional interest ... which is charged **may be redeemed.**” S.C. Code Ann. § 33-44-504(c)(emphasis added).

A redemption of Patel’s interest would have required payment in full satisfaction of the outstanding indebtedness. See 51 Am. Jur. 2d Limited Liability Companies Section 23 (explaining the meaning of redemption under 33-44-504(c), “a limited liability company or one or more members whose transferable interests are not subject to the charging order may **pay to the judgment creditor the full amount due under the judgment** and thereby succeed to the rights of the judgment creditor, including the charging order.”).

In this case, a second bite at the apple was essential, for any attempt by Carolinian to redeem Patel’s 23.35% distributional interest in a company with \$5,500,000.00 in assets and approximately \$5,200,000.00 in liabilities for \$2,900,290.80 would have been impossible. Carolinian was not a party to the pending foreclosure action, nor was it provided any actual notice of the foreclosure hearing or subsequent sale by counsel or the Court. Carolinian had no standing to contest the foreclosure sale. When Carolinian was out bid by the Levys, who were able to credit bid up to \$2,900,000.00, Carolinian was only left with the option to exercise its rights under Article XI of the Operating Agreement.

V. A reversal of the Circuit Court's Order will contradict the Operating Agreement and may result in a windfall for the Levys.

A. The Levys are sophisticated Real Estate Investors who were in possession of the Carolinian Operating Agreement prior to foreclosing their Charging Lien against Patel's Distributional Interest in Carolinian.

The Levys are sophisticated real estate investors who were in possession of the Carolinian Operating Agreement prior to foreclosing their charging lien against Patel's distributional interest in Carolinian. [Stipulation of Facts, paras. 6 and 15]. As such, the Levys had actual knowledge of the contents of the Operating Agreement. The Levys were also represented by competent counsel in its action to foreclose its charging liens against Patel's distributional interests. The Levys are, therefore, charged with knowledge of the contents of the Operating Agreement, including its application to them and the procedure set forth for acquiring Patel's distributional interest.

B. The Levys could have prevented Carolinian or its Members from exercising their Right to Buy had they chosen not to foreclose their charging lien.

When the Levys undertook to foreclose their charging liens against Patel's distributional interests, they either knew or should have known that doing so would change their legal status from that of judgment creditors with charging liens secured by Patel's distributional interest to that of transferees of Patel's distributional interest who owned Patel's distributional interest subject to the Operating Agreement. When the Levys decided to undergo the foreclosure process, the Levys either knew or should have known that doing so would trigger Carolinian and its Members' Right to Buy the interest back for its fair value as set forth in the Operating Agreement.

C. The Levys could have prevented Carolinian or its Members from exercising their Right to Buy had they chosen to obtain the prior consent to the transfer from at least sixty-seven percent (67%) of the Members of Carolinian.

When the Levys undertook to foreclose their charging liens against Patel's distributional interest in Carolinian, they knew they could proceed in one of two fashions- with or without the consent of sixty-seven percent (67%) of the members of Carolinian- each of which yielding a different result. The Levys could have elected to obtain the consent of sixty-seven percent (67%) of the members of Carolinian to the transfer prior to the sale and, in turn, acquired the interest subject to Article III of the Operating Agreement instead of Article XI. Had they done so, neither Carolinian nor its members would have had the right to buy the interest so transferred, leaving the parties to decide only whether the Levys should become members or remain non-member transferees subject to the Operating Agreement. The Levys did not even attempt to request the consent of Carolinian's members to the transfer. [Stipulation of Fact, para. 18]. By electing to pursue Patel's distributional interest in this fashion, the Levys elected to obtain the interest subject to the "Right to Buy" provisions of Article XI.

D. By purposefully not bidding the full amount of their judgment at the foreclosure sale, the Levys are attempting to double dip.

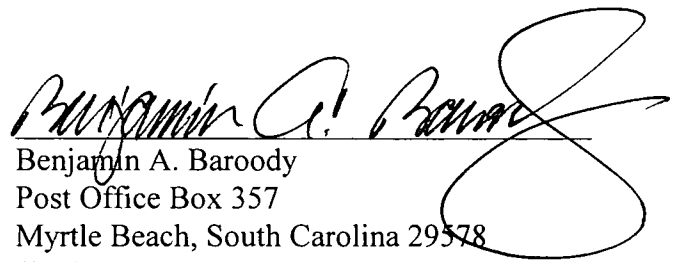
This Court must be cognizant of the fact that the Levys made four credit bids totaling \$291,200.00 to foreclose upon and acquire Patel's distributional interests in four separate entities. Doing so left unsatisfied a balance of \$2,584,440.63 on their judgment against Patel, Harry Pavilak, and Arkadiusz Garbara. [Stipulation of Facts, Exhibit 8]. This Court should take judicial notice that the possibility of collecting and satisfying the Levys' judgment in full against any of those individuals is a legal possibility when evaluating the equities of this case. In turn, the Operating Agreement's Right to Buy procedure, which reflects the General Assembly's default right to buy procedure, exists not by chance, but to prevent a potential windfall for the Levys.

Had the circuit court agreed with the Levys' contention that the Carolinian Operating Agreement does not govern them or their distributional interest, and held that the four distributional interests acquired at the foreclosure sale were each unrestricted, freely transferable pieces of personal property, then the legal possibility would exist that the Levys could recover far more than their judgment amount, plus accrued interest. As the result of the circuit court's ruling, Carolinian and the Levys are left to engage in the appraisal process to value the price Carolinian must pay to the Levys to purchase their distributional interest.

CONCLUSION

For the foregoing reasons, Carolinian respectfully requests this honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,


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July 02, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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JUL 23 2013

The Honorable Steven H. John, Circuit Court Judge

SC Court of Appeals

Case No: 2012-CP-26-5610

Appellate Case No. 2013-000650

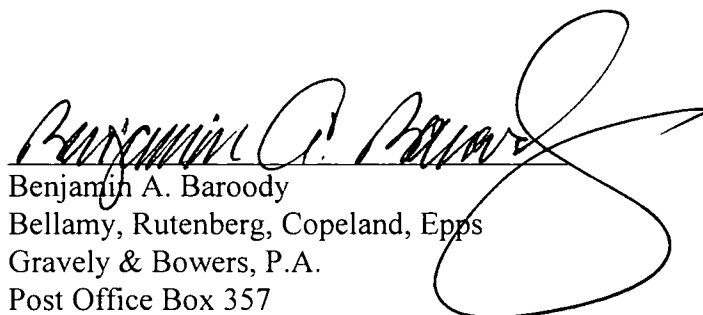
Shaul Levy and Meir Levy, Appellants.

Carolinian, LLC, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Designation of Matter to be Included in the Record on Appeal complies with Rule 209(b) SCACR.

Respectfully submitted,


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July 22, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2012-CP-26-5610

Appellate Case No. 2013-000650

Shaul Levy and Meir Levy, Appellants.

Carolinian, LLC, Respondent.

**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

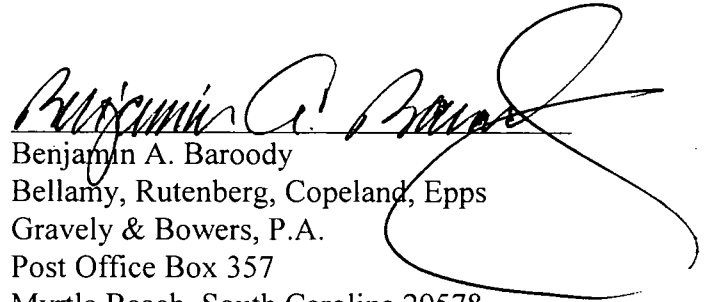
Respondent proposes the following to be included in the Record on Appeal:

1. Appellants' Summons and Complaint;
2. Appellants' Motion for Temporary Restraining Order and Rule to Show Cause;
3. Order Granting Motion for Temporary Restraining Order and Rule to Show Cause;
4. Consent Order Granting motion for Temporary Injunction;
5. Respondent's Summons, Answer, and Counterclaim;
6. Appellants' Reply;
7. Stipulation of Facts and Exhibits;
8. Appellants' Trial Brief;
9. Respondent's Trial Brief;

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SC Court of Appeals

10. Trial Transcript;
11. Order of Circuit Court;
12. Appellants' Motion to Reconsider and Motion to Stay;
13. Respondents' Memorandum in Opposition to Motion to Reconsider and Motion to Stay Order;
14. Order of Circuit Court Denying Appellants' Motion to Reconsider and Motion to Stay Order;
15. Appellants' Motion to Restore Injunction pending Appeal;
16. Consent Order Restoring Injunction pending Appeal;
17. Notice of Appeal.

I certify that this designation contains no matter that is irrelevant to this appeal.


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Shaul Levy and Meir Levy, Appellants.

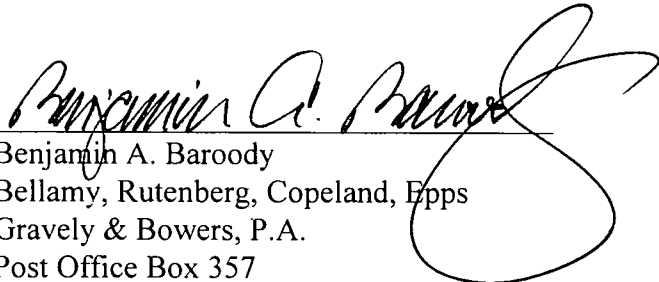
Carolinian, LLC, Respondent.

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Respondent, Carolinian, LLC, that he has mailed a copy of the Respondent's Initial Brief, Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel and Proof of Service to Counsel listed below this 22nd day of July, 2013, with proper postage attached thereto:

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