

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 EMERALD INVESTMENTS, LLC,)
)
 Plaintiff,)
)
 v.)
)
 ASHLEY RIVER PROPERTIES II, LLC;)
 and KRITI RIPLEY, LLC,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 CASE NO. 09-C-100553

RECEIVED

SEP 12 2013

Sub Court of Appeals

ORDER

BY _____
 JULIE J. ARMSTRONG
 CLERK OF COURT
 2013 APR 26 PM 2:48
FILED

Presiding Judge: Hon. Deadra L. Jefferson
 Date of Trial: January 22-23, 2013
 Court Reporter: Joyce Rueger
 Plaintiff's counsel: Clayton B. McCullough, Esq.
 Defendant's counsel: William C. Cleveland, Esq.

PROCEDURAL BACKGROUND

This matter arises out of a lawsuit filed on January 30, 2009 by Plaintiff Emerald Investments, LLC ("Emerald") against Defendants Ashley River Properties II, LLC ("ARP-II") and Kriti Ripley, LLC ("Kriti"). Plaintiff's Complaint filed January 30, 2009, contains causes of action for (1) judicial dissolution of ARP-II pursuant to Section 33-44-801(4)(b) and (e) of South Carolina's Uniform Limited Liability Company Act ("the LLC Act") and (2) a declaratory judgment that Emerald owns a 70% membership interest in ARP-II.

This matter came before the Court for a non-jury trial on the merits on the above dates. The Plaintiff was present and represented by Clay McCullough, Esq. The Defendant was present and represented by William Cleveland, Esq. At trial, Plaintiff presented three witnesses including Thomas Lussier, Stuart Longman, and Davidson Williams. The Defendant did not call

1

any witnesses. Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On January 30, 2009, Plaintiff filed a Complaint containing a cause of action for Judicial Dissolution of ARP-II, specifically seeking an Order, pursuant to S.C. Code Ann. § 33-44-801(b) and (c) of South Carolina's Uniform Limited Liability Company Act, dissolving ARP-II and directing the winding up of its affairs. Additionally, Plaintiff's Complaint alleged a cause of action for a declaratory judgment, seeking an Order, pursuant to S.C. Code Ann. § 15-53-30, declaring Emerald to be a 70% member of ARP-II.
2. On September 23, 2009, Defendants filed an Answer in the form of a general denial, as well as asserting the following defenses: 1) failure to state a claim upon which relief can be had; 2) *res judicata*; 3) collateral estoppel; 4) claims are required to be submitted to binding arbitration in the state of New York; 5) improper venue; 6) statute of limitations; 7) doctrine of estoppel; 8) doctrine of laches; 9) doctrine of unclean hands; 10) Plaintiff's allegations pertaining to steps taken by Kriti and/or ARP-II to recover monies from ARP-I are irrelevant to the Plaintiff's claim to dissolve ARP-II and should be disregarded; and 11) Plaintiff's claims for dissolution are banned by the doctrines of *res judicata* and collateral estoppel because they were litigated in the lawsuit brought by Emerald Investments against the Defendants in the Charleston County Court of Common Pleas and bearing Civil Action Number 2005-CP-10-4571. Defendants sought an Order requiring the Plaintiff submit the dispute to binding arbitration in the state of New York

or, in the alternative, that the Complaint be dismissed and the Defendants recover their costs, attorneys' fees and incurred expenses.

3. On April 16, 2010, this Court signed a Consent Order, dismissing Plaintiff's declaratory judgment claim without prejudice under Count II pursuant to the provisions of S.C. R. Civ. PRO. 41(a)(2). The parties further agreed that the claims or issues raised in Count II would be arbitrated between the parties in New York in accordance with the provisions of the ARP-II Operating Agreement. Further, the Order stayed the Plaintiff's judicial dissolution claim under Count I pending the arbitration proceedings to be conducted in New York. Finally, "[t]he parties further stipulate[d] and agree[d] that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."
4. This case involves the development of a marina and mixed-use residential condominiums in Charleston, South Carolina, known as Ripley Light Yacht Club Marina & Condominiums (the "Project"), located alongside the Ashley River.
5. Emerald Investments, LLC ("Emerald") and its principal Stuart Longman ("Longman") were the original developers of the Project through entities known as Ripley Light Development, LLC ("RLD") and Ripley Light Yacht Club, LLC ("RLYC"), and later as sole managing members of Ashley River Properties II, LLC ("ARP-II") and Ashley River Properties I, LLC ("ARP-I").
6. In the fall of 2003, Emerald sought outside investors for ARP-II, and on December 29, 2003, Emerald and Kriti Ripley, LLC ("Kriti") entered into the Operating Agreement of ARP-II pursuant to the LLC Act.

3/24/14
ARP

7. Pursuant to the Operating Agreement, Emerald became a 70% financial and voting member in ARP-II and Kriti became a 30% financial and voting member in ARP-II. Kriti paid \$1,250,000.00 for its interest in ARP-II, and Emerald's initial capital contribution to ARP-II was \$2,500,000.00.
8. In late 2004, Kriti accused Emerald of breaching the Operating Agreement in various respects.
9. Kriti and ARP-II subsequently filed for arbitration, pursuant to the Operating Agreement, against Emerald and Longman in New York, *Re: 13 115 Y 00698 05* ("First New York Arbitration") over these alleged breaches.
10. On October 30, 2005 the arbitrators issued the First New York Arbitration Award ("First Award").
11. Among other things, the First Award stripped Emerald of its voting rights in ARP-II and awarded Kriti certain moneys arising from the diversion of Company funds.
12. The First Award also denied the remedy of forfeiture and held that Kriti "may purchase the Membership Shares of the Emerald Member at a cost equal solely to the Emerald Member's unreturned capital contribution to the Company."
13. During the initial arbitration and, consistently thereafter, Emerald took the position that it continued to own a 70% interest in the Company and Kriti took the position that Emerald's interests had been diluted.
14. Thereafter, Kriti commenced a second arbitration ("Second New York Arbitration") to recover moneys due from Emerald arising from its diversion of funds and for legal fees. That arbitration, dated June 22, 2006, awarded Kriti legal fees and damages.

4
4 of 14
AKJ

15. Kriti then moved to confirm both awards in the Supreme Court of the State of New York, New York County, and on February 15, 2008 both arbitration awards were confirmed by the Honorable Ira Gammerman, Judicial Hearing Officer and reduced to judgment on March 27, 2008 in the amount of \$1,184,581.72 against Emerald and Longman.
16. On April 29, 2008, this New York Judgment was enrolled in Charleston County.
17. In an earlier action, Emerald sought a judicial determination, also in the Supreme Court of the State of New York, that Kriti's right to acquire Emerald's interest in the Company had expired, which motion was granted in 2009.
18. On January 30, 2009 Emerald brought the present action against ARP-II and Kriti. Emerald's Complaint included causes of action for (1) judicial dissolution of ARP-II pursuant to Section 33-44-801(4)(b) and (e) of South Carolina's Uniform Limited Liability Company Act ("the LLC Act") and (2) a declaratory judgment that Emerald still owns a 70% membership interest in ARP-II.
19. On April 16, 2010, this Court executed a Consent Order ("Consent Order") whereby Emerald's declaratory judgment claim was dismissed without prejudice pursuant to the provisions of Rule 41(a)(2), S.C. R. CIV. PRO., so that the remaining claims and issues could be arbitrated in New York.
20. The Consent Order also stayed Emerald's judicial dissolution action pending arbitration, and provided that "[t]he parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."

5 50114
APG

21. Emerald subsequently commenced arbitration, pursuant to the Operating Agreement, against ARP-II and Kriti in New York, *Re: 13 115 00216 10* ("Third New York Arbitration"). That arbitration, by an award, dated October 28, 2010. ("Third Award") made a number of findings and conclusions of law.
22. The Third Award found that "the Capital Call, dated February 28, 2005 was defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interests." Therefore, the Third Award concluded that Emerald continues to own a 70% interest in ARP-II, while Kriti continues to own 30% of the membership interests.
23. Citing the grounds for dissolution contained in the Operating Agreement at Section 9.1¹, the Third Award found "no basis to dissociate Kriti or Emerald from the Company or to dissolve the Company despite the fact that dissolution may be in the best interests of all parties." Furthermore, "[t]he Panel finds that none of these events [in Section 9.1] has occurred and, thus, the parties have not provided sufficient facts for the Arbitrators to render a fact finding authorizing dissolution."
24. Next, citing the grounds for dissociation contained in the Operating Agreement at Section 10.5, the Third Award found "to the extent that the Panel is empowered to opine" that "[t]he parties did not present sufficient evidence to justify a finding of the extreme remedies of dissociation or forfeiture of either member's membership interest in the Company." More specifically, the Third Award states that "the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business . . . , [n]or did Kriti's conduct constitute ' . . . a material breach of

¹ These events include the following: "(a) written consent of the members who own the Required Interest of the Voting Rights in the Company; (b) Any event occurs that makes it unlawful for all of substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection; (c) the filing by the Secretary of State of a certificate of administratively dissolving the Company; (d) The expiration of the period fixed for the duration of the Company."

6 *Case 14*
2/14

[the Operating Agreement] or a duty owed to the Company or the other Members under [Section 33-44-409 of the LLC Act].”

25. On December 16, 2011, the Supreme Court of the State of New York issued its order and judgment confirming the award issued in the New York arbitration proceeding.
26. The relevant findings of the arbitration proceedings include the following:

“All Kriti’s actions in managing ARP-II complained of by Emerald, were [‘]well within reasonable business efforts to manage a complex piece of waterfront property,[’] such that Kriti’s decisions did not constitute (i) corporate waste, (ii) wrongful conduct adverse to ARP-II’s business, (iii) a material breach of the Operating Agreement, or (iv) a material breach of a duty owed to ARP-II or Emerald[.]”

The findings also provide “[n]either Kriti nor ARP-II committed corporate waste or engaged in any misconduct to support dissociation, dissolution, or an award to Emerald of damages; and any request for dissociation, dissolution or damages against Kriti is denied[.]”

CONCLUSIONS OF LAW

I. Plaintiff's Dissolution Action Pursuant to the LLC Act

-
1. Resolving disputes by way of arbitration is favored by the public policy of this state. Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 693 S.E.2d 434 (Ct. App. 2010).
 2. A main premise upon which this policy rests is the "laudable goal of providing ‘a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.’” Batten v. Howell, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (1990) (quoting Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985)).
 3. Whenever factual allegations underlying a claim are submitted for resolution by way

7 *7021A*
APG

of arbitration, it serves the policy of this state, which favors arbitration and which favors the efficient and non-piecemeal resolution of disputes, to have all relevant facts determined by way of arbitration.

4. Section 12.18 of the Operating Agreement contains a broad arbitration clause covering "[a]ny dispute or controversy arising under or in connection with this Agreement."
5. The April 16, 2010 Consent Order entered by this Court reflects that all factual findings related to the claims asserted in the Plaintiff's complaint be resolved by way of arbitration and that the findings made in the New York arbitration proceeding "shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."
6. On October 28, 2010, the arbitration panel issued the Third Award, which found "[n]either Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, [or] dissolution." The panel continued, "Emerald did not commit sufficient acts to support a finding of dissociation, and, to the extent that the Panel is empowered to opine on the request for dissociation of Emerald, such request for relief is denied."
7. Before issuing their award, the arbitration panel held six hearing days in which they considered all of the allegations of misconduct that Plaintiffs presented at the trial of this case, with the exception that Plaintiff claims that it has not received certain information concerning ARP-II since the date of the arbitration.
8. At trial, Plaintiff took the position that the Third Award did not and could not address § 33-44-801(4)(e) of the LLC Act because those standards are much broader than the

8 Soe IA
ATG

more limited dissolution grounds found in Section 9.1 of the Operating Agreement, and the arbitrators, per Section 12.18 of the Operating Agreement, could only consider matters "arising under or in connection with this Agreement." However, the Court finds that when Sections 9.1 and 10.5 are read in conjunction with one another, they mirror the language of the LLC Act.

9. The Plaintiff contends that the manner in which ARP-II conducted a previous capital call is evidence supporting judicial dissolution of ARP-II. The 2010 arbitration proceeding specifically addressed Plaintiff's claims with regard to the subject capital call. Although the panel found the capital call defective, it was "ineffective to trigger a dilution of Emerald's membership interests." Further, the panel declined to classify the capital call as a "squeeze down".
10. Additionally, Plaintiff contends the Defendants had a duty to provide information regarding the day-to-day operations of the company. As it pertains to fiduciary duties between Emerald and ARP-II,

[M]embers of a limited liability company are like shareholders in a corporation in that they do not owe a fiduciary duty to each other or to the company, and that as long as members of a limited liability company are not acting in a managerial capacity, they do not have fiduciary duties to one another unless such fiduciary duties are set forth in the operating agreement.

51 AM. JUR. 2D LIMITED LIABILITY COMPANIES § 11 (2013).

11. There is no statutory or common law authority that creates a duty for Kriti to advise Emerald of the everyday managerial functions of the company. Emerald was stripped of its voting power for valid reasons articulated by the arbitrators.

12. Arbitration awards are conclusive and binding. Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). Plaintiff's argument that the Court should make its own findings of fact with regard to the Plaintiffs' claims that ARP-II should be judicially dissolved, while novel, would entirely circumvent the purpose of having the arbitration proceeding in the first place. As case law illustrates, "[j]udicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor." Lauro v. Visnapuu, 351 S.C. 507, 570 S.E.2d 551 (S.C. App. 2002). Absent statutory grounds, an arbitration award will be "vacated only on the non-statutory ground of manifest disregard or perverse misconstruction of the law." Jones at 78, 610 S.E.2d at 850. Pursuant S.C. Code Ann. § 15-48-130 (1976), an award may be vacated on five statutory grounds: 1) "corruption, fraud, or other undue means"; 2) "evident partiality by an arbitrator"; 3) "arbitrators [exceed] their powers"; 4) "arbitrators [refuse] to postpone the hearing upon sufficient cause being shown"; and 5) no agreement to arbitrate exists.
13. The findings of the New York arbitration award, after considering all of the evidence Plaintiff presented here, and more, are that Kriti committed no misconduct. Those factual findings are binding in this lawsuit.
14. There is no evidence that Kriti engaged in any such misconduct since the date of the arbitration award.

II. REMEDY

15. The Court acknowledges that it cannot be divested of its ability to dissolve a corporation pursuant to the LLC Act. See Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647, 649 (1977) ("It is well established in South

Carolina that general arbitration agreements which oust the South Carolina circuit court from jurisdiction are unenforceable as against public policy.") Over six hearing days, the arbitration panel considered every issue that could have been presented and was presented to them, and found "the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business" [n]or did Kriti's conduct constitute " . . . a material breach of [the Operating Agreement] or a duty owed to the Company or the other Members under [Section 33-44-409 of the LLC Act]." Pursuant to the parties Consent Order of April 19, 2010, the findings of the New York arbitration upon confirmation are binding in any action seeking an Order of judicial dissolution of ARP II. Therefore, this Court is bound by those factual findings. Further, the Court can discern no evidence from that record or the current record before it that pursuant to S.C. Code Ann. § 33-44-801(4)(e), "the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." ~~Neither party has presented any new evidence regarding the alleged basis~~ of dissolution pursuant to S.C. Code Ann. § 33-44-801(4)(e). While it is clear that these parties have a heightened degree of acrimony toward one another and a lack of trust, the Court has heard no evidence forming a sufficient basis for dissolution or warranting the Court to order such relief. In addition, in light of the decline in real estate values and depressed real estate market the Court cannot justify arbitrarily forcing the parties to place this valuable real estate on the market at what would most certainly result in a substantial loss to the parties.

16. An action for the dissolution of an LLC sounds in equity. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). Moreover, the LLC Act "grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009).
17. The Plaintiff directs the court's attention to Park Regency, LLC v. R&D Dev. of the Carolinas as the basis for the Plaintiff's argument that this Court has the authority to fashion and grant the equitable relief they are seeking in this case. In Park Regency, members of an LLC brought an action to dissociate a defaulting member from the LLC. Op. No. 5056, *1. The Court ordered the member's dissociation, and the Court of Appeals affirmed, grounding the action in equity. Id. However, the Court finds the facts of Park Regency inapposite to the present case, as this case involves the dissolution of an entire entity and not the dissociation of a single member. Further, unlike the present case, Park Regency does not involve a binding arbitration agreement. While the LLC Act "grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009), when an operating agreement exists, it supersedes statutory authority. Clary v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). Thus, the ARP-II Operating Agreement provisions regarding the basis and means for dissolution would be controlling over the LLC Act.
18. The arbitrators and the court remain bound by the ARP-II Operating Agreement. Section 9.1 of the Operating Agreement articulates the grounds for dissolution:

12/20/14
[Signature]

(a) written consent of the members who own the Required Interest of the Voting Rights in the Company; (b) Any event occurs that makes it unlawful for all of substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection; (c) the filing by the Secretary of State of a certificate of administratively dissolving the Company; (d) The expiration of the period fixed for the duration of the Company.

Section 10.5 of the Operating Agreement articulates five grounds for wrongful dissociation, including when a Member:

(i) Engage[s] in wrongful conduct that adversely and materially affect[s] the Company's business; or (ii) Willfully or persistently commit[s] a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act; or (iii) Engage[s] in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member.

The Court notes that these grounds basically mirror S.C. Code Ann. § 33-44-801.

19. "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 v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012); See also S.C. Code Ann. § 33-44-103

(1976) (discussing that members of an LLC may enter into an operating agreement "to regulate the affairs of the company and conduct of its business, and to govern relations among the members, managers, and company"). Here, because the operating agreement clearly provides grounds upon which dissolution may occur, and the arbitration panel found no factual support for dissociation or dissolution in the Third Award, statutory authority addressing dissolution need not be taken into account.


20. The Third Award found that "dissolution may be in the best interests of all parties" and "Kriti and Emerald cannot work together in any constructive manner," but the

panel concluded that "[n]either Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, [or] dissolution."

21. Moreover, this Court finds that judicial dissolution is not supported given the factual findings of the Third New York Arbitration, specifically denying relief in the form of dissolution, and while the Plaintiff seeks relief under equitable principles, the court has not been provided nor can it discern any basis to grant such relief. To grant such relief would nullify the binding nature of the factual findings as well the binding nature of arbitration, because "[o]rdinarily, where an arbitration award has been consummated in accordance with the agreement of the parties, both parties are bound by the finding of the arbitrator as to the merits of all matters within the scope of the award." Haworth v. White Stack Towing Co., 256 S.C. 542, 544, 183 S.E.2d 320, 321 (1971). "When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

BASED ON THE FOREGOING, the Court denies the Plaintiff's cause of action for judicial dissolution.

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

4/26, 2013
Charleston, South Carolina