

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Emerald Investments, LLC, )  
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 Plaintiff, )  
 )  
 v. )  
 )  
 Ashley River Properties II, LLC; )  
 And Kriti Ripley, LLC, )  
 )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT  
 Case No.: 2009-CP-10-0553

**ORDER DENYING PLAINTIFF  
 EMERALD INVESTMENTS, LLC'S  
 MOTION TO ALTER OR AMEND**

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 JULIE J. ARMSTRONG  
 CLERK OF COURT


**FILED**

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

THIS MATTER is before the Court on Emerald Investments' Motion to Alter or Amend pursuant to Rule 59(e), SCRCF. The case initially came before the Court on January 22-23, 2013, for a non-jury trial on the legal cause of action of 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"). At the conclusion of the trial, the Court took the matter under advisement. On April 26, 2013, this Court issued an Order denying the Plaintiff's cause of action for judicial dissolution. The Plaintiff's Motion to Alter or Amend was filed May 9, 2013 and received by the Court on May 14, 2013. Defendants' Memorandum in Opposition to the Motion to Alter or Amend was received by the Court on May 23, 2013.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCF, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v.

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Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

#### ANALYSIS

Plaintiff contends the Court's Order erred in three ways: a) by finding the "Third Arbitration Award, by itself, resolves Emerald's judicial dissolution action", b) "by treating Kriti's concealment of the marina expansion permits as an 'everyday managerial function' and finding that Kriti had no duties to convey this information to Emerald", and c) "by finding that a sale of the ARP-II property was the only available remedy should dissolution [have] been ordered." The Court will address each contention in the order they were raised by the Plaintiff.

First, Plaintiff argues the Order erred by finding the Third Arbitration Award resolves Emerald's action for judicial dissolution, specifically because the Award could not have addressed the grounds for dissolution in the LLC Act and was restricted to the grounds stated in the Operating Agreement. The Consent Order entered by this Court on April 16, 2010, found "[t]he parties further stipulate and agree that the findings of the above-referenced New York

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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."

The arbitration panel held six hearing days and considered all allegations of misconduct asserted by the Plaintiff before issuing its Award, concluding there was no misconduct to support dissolution or dissociation. The Court's Order of April 26, 2013, specifically disposes of the exact argument Plaintiff reasserts in its Motion to Alter or Amend Judgment. While section 9.1 of the Operating Agreement does not exactly mirror the dissolution grounds in the LLC Act, when section 9.1<sup>1</sup> is read in conjunction with section 10.5<sup>2</sup>, the grounds do mirror one another. The Third Award specifically found no "misconduct which would support a finding of fact requiring dissociation, dissolution or an award to Emerald of damages." It then follows that the panel must have relied on Sections 9.1 and 10.5 of the Operating Agreement, addressing both dissolution and dissociation, which together mirror the LLC Act. Considering such, if Plaintiff was permitted to re-litigate its cause of action for judicial dissolution on the ground that the arbitrators' analysis was restricted to disputes arising under the ARP-II Operating Agreement only, it would in essence circumvent the purpose of having an arbitration proceeding in the first place. Furthermore, their contention regarding the language at paragraph 19 is taken out of context. The Court, at paragraph 15, clearly makes an independent assessment and articulates its

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<sup>1</sup> Section 9.1 includes the following grounds for dissolution: "(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."

<sup>2</sup> Section 10.5 states that such events shall be a basis for wrongful dissociation: "(i) Engag[ing] in wrongful conduct that adversely and materially affected the Company's business; or (ii) Willfully or persistently commit[ing] a material breach of this Agreement or of a duty owed the Company or the other Members under Section 33-44-409 of the Act; or (iii) Engag[ing] in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member."

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findings that there was no basis for dissolution or dissociation pursuant to S.C. Code Ann. 33-44-801(4)(e) and S.C. Code Ann. 33-44-601(6). The Court stands by its previous ruling denying Plaintiff's cause of action for judicial dissolution.

Next, Plaintiff argues the Order erred in mischaracterizing Kriti's obtaining slip permits as a managerial function of the Company, while also finding Kriti had no duties to convey such information to Emerald. As articulated in the Court's Order, the panel stripped Emerald of its voting power for valid reasons. While the Plaintiff directs the Court's attention to an article authored by Chief Justice Toal on fiduciary duties of partners and limited liability companies, Plaintiff neglects a key premise of the article: "In South Carolina, a clear delineation exists between the high fiduciary standards of the partnership and the lower standards of the LLC." Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective From the Bench*, 56 S.C. L. REV. 275, 289 (2004).

The October 31, 2005, Arbitration Award considered numerous violations of the Operating Agreement before stripping Emerald of all voting rights in ARP II, leaving Kriti as the sole member with voting rights. Furthermore, the arbitration panel "did [not] hear sufficient evidence to find corporate waste by Kriti or commission of any act which would justify enjoining Kriti from violating any provision of the Operating Agreement." Among these acts was the construction of a bulkhead, dredging of a canal, construction of an out building, along with the application of funds by the Company. Kriti's decisions "did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business...'" The panel concluded that Kriti's conduct neither breached the Operating Agreement nor violated duties owed to the Company or other Members. The panel failed to find that Kriti's conduct violated

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any fiduciary duties owed to Emerald. Instead, the panel deferred to the business judgment rule, which "immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith." Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 541 S.E.2d 257 (2001). The Court stands by its previous ruling and finds no reason to find that Kriti violated any fiduciary duties owed to Emerald by way of its business decisions.

Finally, Plaintiff argues the Order erred by finding a sale of the ARP-II property was the only available remedy in the event of dissolution. The Court clearly acknowledges that 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). Further, the Court considered that while the Plaintiff sought equitable relief, "the court ha[d] not been provided nor c[ould] it discern any basis to grant such relief." At no point does the Court find that an immediate sale of the property is the only available remedy in the event of dissolution. As such, Plaintiff's contention is wholly incorrect.

#### CONCLUSION

Having considered the Plaintiff's Motion, the Defendants' Memorandum in Opposition thereto, as well as the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Alter or Amend is hereby DENIED.<sup>3</sup>

IT IS SO ORDERED.

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<sup>3</sup> This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

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*D L Jefferson*

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

*July 24*, 2013  
Charleston, South Carolina

ATTEST: A TRUE COPY  
JULIE J. ARMSTRONG (SEAL)  
CLERK, C.P. & G.S.

By *[Signature]*  
DEPUTY CLERK

*6/20/16*  
*[Signature]*