

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No.: 2012-2127525

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AUG 12 2013

SC Court of Appeals

CORPORATE AIR, LLC, and
CAM INVESTMENTS, INC.,.....Appellants,

vs.

DAVIS AIR, INC., and GARY DAVIS,.....Respondents.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in compelling Appellants to provide financial documents directly relevant to the issue of whether Appellants were in default for failing to maintain past accounting practices?
2. Are Respondents entitled to the financial and accounting records requested only upon a finding that Appellants are in default?
3. Is the current appeal rendered moot by the filing of the Amended Summons and Complaint?

STATEMENT OF THE CASE

Respondent Gary Davis is the President of Respondent DavisAir, Inc. DavisAir, Inc., is a 20% member of Appellant Corporate Air, LLC. The other members of Corporate Air, LLC are Appellant CAM Investments, Inc., a 75% member, and Tyburn Management a 5% member. In 2010, in order to settle an outstanding loan, and other disputes, the parties entered into an agreement pursuant to which Appellant Corporate Air, LLC agreed to purchase Respondents' 20% Membership Interest. In August 2010, the parties entered into a Redemption and Settlement Agreement that outlined the terms and conditions of this sale. Subsequently, in November 2010, the parties entered into a Default Agreement, which set forth the events of default and contained negotiated remedies upon the occurrence of a default.

On July 15, 2011, Respondents filed a Summons and Complaint outlining their allegations of Appellants' default, and requesting Declaratory Judgment, Injunctive Relief and Specific Performance. (R. pp. 5-9.) Appellants responded by filing an Answer denying Respondents' allegations. (R. pp. 10-16.) On October 24, 2011, Respondents served their First Requests for Production. (R. pp. 40-43.) Appellants refused to produce the records requested in Requests for Production numbers 1 through 7 on the grounds that the requests were overly broad and burdensome, irrelevant, not likely to lead to the production of relevant information and sought information to which Respondents are not entitled until there is a decision on the merits. (R. pp. 44-45.) Respondents would stipulate that Requests for Production 1 through 7 are correctly set forth in Appellants' Initial Brief.

On December 6, 2011, Respondents filed a Motion to Compel. (R. pp. 17-18.) This motion was granted by the Honorable Roger M. Young following a hearing on July 30, 2012, wherein Appellants were ordered to produce all documents requested by Respondents in their Requests for Production. (R. pp. 1-2.) Specifically, Judge Young ruled that the documents requested were relevant to the Respondents allegations of default. (R. p. 33, lines 1-2.) Further, Judge Young ruled that he was not providing Respondents with the ultimate relief requested. Rather, Judge Young correctly noted that the ultimate relief requested in the Summons and Complaint was for the Respondent DavisAir, Inc. to be reinstated to its previous position within Corporate Air, LLC as a 20% member. (R. pp. 35, lines 1-7.)

Appellants appealed this Order. The ground for this appeal is that Respondents are entitled to the documents requested only if the ultimate relief is granted. On November 26, 2012, Respondents filed their Amended Summons and Complaint wherein they removed from their prayer for relief the request that the Appellants turn over financial records. (R. pp. 23-27.)

FACTS

In 2010, the parties entered into the Redemption and Settlement Agreement that governed the purchase of Respondents' interest in Appellant Corporate Air, LLC. Pursuant to this Agreement, Appellants agreed to pay a total purchase price of \$1,600,000.00. Additional terms of this agreement stipulated that Respondents would transfer their interest in a hangar to Appellants for the price of \$1,449,708.00, and Appellant Corporate Air would execute written employment agreements with

members of Respondent Davis' family that would remain in effect for three years from the date of the Redemption Agreement.

The parties also executed a Default Agreement, which set forth events of default and remedies available to each party upon the occurrence of a default. The portions of the Default Agreement relevant to this appeal are as follows:

1(c)(ii): Corporate Air shall report that DavisAir remains a member of Corporate Air for tax purposes and DavisAir will be entitled to twenty percent (20%) of any tax distributions made by Corporate Air.

1(c)(iv): Corporate Air shall maintain all of its accounting and financial records in accordance with past practice, provide copies to DavisAir on a monthly basis and make its controller available to meet with Davis on a bi-monthly basis to review financial transactions and records.

In the event of a default by Appellants, Respondents were entitled to the following remedies:

2(a): The right to retain all funds previously paid to them under the Redemption Agreement...

2(b): The right to appoint two (2) new representatives to the Membership Committee in place of CAM's two (2) designees;

2(c): Notwithstanding any intervening events, including but not limited to any changes in the compensation of Officers or any actual or purported change, amendment, modification or addition to the Corporate Air Operating Agreement, upon the occurrence of any Event of Default, the rights possessed by DavisAir shall be the same in all respects as the rights of DavisAir as of the date immediately preceding the Closing, including but not limited to a representative of said owner having the same positions as an officer of Corporate Air and receiving the same compensation and benefits as Davis had received prior to the Redemption Agreement. Any subsequent intervening event or actual or purported change, amendment, modification or addition to the Corporate Air Operating Agreement to the contrary shall be null, void and without effect to diminish the rights of DavisAir as the owner of the DavisAir Membership Interest including but not limited to any purported changes in the Unanimous and Super Majority Voting

provisions of Sections 6.3 and 6.4 of the Operating Agreement or the identity or compensation of the officers of Corporate Air;
2(d): With respect solely to a default in subparagraph 1(g), the right to enforce the Family Agreements, including but not limited to invoking statutory rights and remedies that exist under the Pennsylvania Wage Payment and Collection Law 43 P.S. § 260.1 *et seq*;

2(e): The right to exercise its remedies under the Hangar Installment Sales Agreement and the Assignment of Lease Agreement with respect to Hangar [sic] 56 which will give DavisAir possession of Hangar 56 and all rights under CAM's Lease with the Allegheny County Airport Authority for the property on which Hangar 56 is located.

2(f): The right to end suspension of the Compensation Agreement and the right to name a replacement for Sam Spataro on the Committee.

Each year since its formation in 1999, Appellant Corporate Air, LLC has made annual distributions to its members. Depending on the year, these distributions represented cash, repayment of tax liability, or payback for the personal use of corporate equipment to equalize the benefits between members. According to the terms of the Agreements, this practice was to continue.

In the 2010 tax year, Respondents incurred tax liability as a result of their ownership interest in Appellant Corporate Air, LLC. Respondent Davis requested a distribution to repay this liability in accordance with past practice. Upon inquiry, he was advised that for the first time in the corporation's history, distributions would not be made for tax liabilities. Appellant stated that this practice was changed because it was not in the financial best interest of the corporation to make a distribution. In order to explore this explanation, Respondent Davis requested copies of all of the accounting and financial records and a meeting with the controller, both of which he was entitled to under the Default Agreement. In response, Appellants provided a one page summary of financial transactions to Respondent Davis and refused to allow

Respondent to meet with the controller unless he agreed to take no legal action regardless of his findings. Respondent Davis believes that a review of these documents and a meeting with the controller would show that Appellants have changed their accounting practices in contravention of the Default Agreement.

In their initial Complaint, Respondents allege that Appellants are in default based on their failure: 1) to maintain all of Appellant Corporate Air's accounting and financial records in accordance with past practice; 2) to provide copies of these records to DavisAir on a monthly basis; and 3) to make its controller available to meet with Davis on a bi-monthly basis to review financial transactions and records. (R. pp. 6-7.) In addition to these allegations, Respondents reserved their right to "bring such other and further claims and causes of action as may be determined from a review of the documentation and information." (R. pp. 7-8.) By this reservation, Respondents asserted their belief that a review of the records would reveal additional grounds of default, including but not limited to a change in accounting practices and self-dealing to the detriment of Respondents. The prayer for relief requested the remedies provided under the Agreements, in addition to the request that the financial and accounting records be provided as required. (R. p. 8.)

Respondents continue to assert that production of the records is not the ultimate relief requested but rather they are critical documents to the claim that Appellants are in default. Notwithstanding, on November 26, 2012, Respondents filed an Amended Summons and Complaint again alleging default based on Appellants' failure to provide Respondent Davis with complete accounting and financial information, refusal to allow Respondent Davis to meet with the controller, and

failure to maintain its accounting and financial records in accordance with past practice. (R. pp. 23-27.) Further, Respondents amended their prayer for relief to request that the Appellants be ordered to be in default and Respondents awarded all remedies described in the Default Agreement, removing the specific request for copies of all of the financial and accounting records. (R. pp. 26-27.)

ARGUMENT

I. Standard of Review

“The rulings of the trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). An abuse of discretion occurs when the trial judge’s ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E. 2d 565 (1987)

II. The Trial Court properly granted the Respondents’ Motion to Compel financial and accounting documents.

“In South Carolina, the scope of discovery is very broad and an objection on relevance grounds is likely to limit only the most excessive discovery request.” Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997) Rule 26 provides that “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to the discovery of admissible information.” S.C. R. Civ. Pro. 26. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.” S.C. R. Evid. 401.

The documents requested in Respondents’ Requests for Production are directly relevant to the claims and allegations contained in their Complaint. Respondents allege that the “failure to maintain all of its accounting and financial records in accordance with past practice, provide copies to DavisAir on a monthly basis, and make its controller available to meet with Davis on a bi-monthly basis to review financial transactions and records” are events of default that trigger the remedies set forth in the Default Agreement. (R. pp. 24-27.) Not only are the accounting and financial records relevant to Respondents’ claims that Appellants have failed to maintain accounting and financial records in accordance with past practice, they are, in fact, the best evidence of whether the Appellants have complied with the Agreement. These documents are absolutely necessary for determination of whether Appellants are in default. Further, production of these records is not a remedy for default, but rather a performance requirement under the Agreement. The fact that copies of the financial and accounting records are included as one provision in the prayer for relief in the initial Summons and Complaint, does not make these records any less relevant to the other claims alleged by Respondents.¹

The Trial Court’s determination that the ultimate relief is to restore the Respondent to its previous position is based firmly on the pleadings and arguments presented at the hearing. (R. p. 34-35, lines 19-7.) Accordingly, Appellants have

¹ Respondents’ Amended Summons and Complaint removes the request for accounting and financial records from the prayer for relief, rendering the argument that the discovery sought by the Respondents is the same as the ultimate relief moot.

failed to meet their burden that the Trial Court abused its discretion in ordering that the records be turned over.

III. A finding of default is not a prerequisite to the documents becoming relevant and discoverable.

Appellants' assertion that Respondents are not entitled to copies of the accounting and financial records until there is a decision on the merits awarding them access to these documents is erroneous. To support their argument, Appellants cite cases that are inapplicable to the facts of the present case.

In Wolther v. Samuel, 110 A.D.2d 506, 487 N.Y.S.2d 45 (1985), the relief requested by the Plaintiffs was an accounting and the imposition of a constructive trust. In discovery, Plaintiffs requested information regarding the assets of the decedent. The court properly held that if the Plaintiffs had no interest in the property, then a constructive trust would not be imposed and the property is irrelevant.

In State Farm Fire & Cas. Co. v. Martin, 673 So.2d 518 (Fla. Dist. Ct. App. 1996), the court addressed the disclosure of privileged materials in a claims file, where coverage had not been established. The Respondent sought discovery of the claims file to support his bad faith cause of action. The court held that if there was no coverage, then there could be no bad faith and the privileged claims file never becomes relevant.

Finally, in Mari v. Strater, 91 A.D.2d 579 (N.Y. App. Div. 1982), the Plaintiff sought a declaration that the parties were never married, the Defendant counterclaimed for a divorce and the equitable division of marital assets. The court held that discovery regarding the "marital assets" was inappropriate until such time as

it was established that the parties were married. If there was no marriage then there could be no marital assets, and information regarding these assets is irrelevant.

These cases are easily distinguishable from the present case. In this case, there is no finding or determination required to make the accounting and financial documents relevant. The Agreements negotiated by the Appellants and Respondents unequivocally state that the Appellants must provide copies of the records to Respondents on a monthly basis. This is not a remedy, but rather a requirement under the Agreement. Regardless of whether there is a determination that the Appellants are in default, Respondents are entitled to the records, as they are relevant and necessary to the Respondents' claims.

IV. The filing of the Amended Summons and Complaint on November 26, 2012 renders this appeal moot.

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy....A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existence of the controversy. This occurs when some event occurs making it impossible for the reviewing Court to grant effectual relief. Curtis v. State of S.C., 345 A.S. 557, 566, 549 S.E.2d 591, 596 (2002).

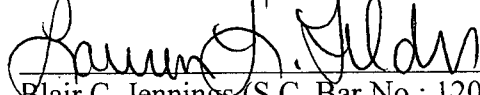
The filing of the Amended Summons and Complaint removing the request for financial and accounting records from the prayer for relief renders the argument that Respondents are seeking the ultimate relief through discovery moot.

In the alternative, the Amended Complaint renders the Order interlocutory and not properly before the Court pursuant to S.C. Code Ann. §14-3-330.

CONCLUSION

For the reasons stated above, Respondents respectfully request the Trial Court's decision be affirmed.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Blair C. Jennings", is written over a horizontal line.

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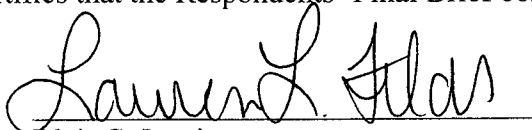
DAVISAIR, INC., and GARY
DAVIS,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR.

August 8, 2013



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PROOF OF SERVICE OF RESPONDENTS' FINAL BRIEF

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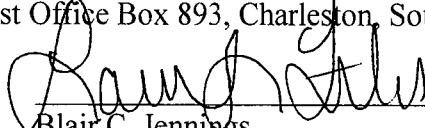
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PROOF OF SERVICE

I certify that I have served the Respondents' Final Brief on Corporate Air, LLC and CAM Investments, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 8, 2013, addressed to their attorneys of record, Alice F. Paylor, Esquire, Rosen, Rosen & Hagood, LLC, Post Office Box 893, Charleston, South Carolina and Rene S. Dukes, Esquire, Rosen, Rosen & Hagood, LLC, Post Office Box 893, Charleston, South Carolina.

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