

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2009-CP-10-0553

EMERALD INVESTMENTS, LLC AND,

Appellant,

v.

ASHLEY RIVER PROPERTIES II, LLC and KRITI RIPLEY, LLC,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the binding arbitration findings that ARP II committed no misconduct warranted the Circuit Court's denial of Emerald's request for dissolution.

I. PRELIMINARY STATEMENT

This case and *Ashley River Properties, II v. Ashley River Properties I*, a companion case that was tried at the same time as this case, are hopefully the last of what the South Supreme Court described as “a pattern of abusive litigation” engaged in by the Respondent, Emerald Investments, LLC and its principal, Stuart Longman. *Kriti Ripley, LLC v. Emerald Investments, LLC and Stuart Longman*. 404 S.C. 367, 369, 746 S.E.2d 26, 27 (SC 2013).

In this case, Emerald brought suit against Kriti Ripley LLC (“Kriti”) to dissolve Ashley River Properties, II claiming Kriti had been oppressive. The case was referred to arbitration in New York upon the consent of the parties (and an order of the Circuit Court) that the arbitration findings would be binding in this suit for dissolution. The arbitration panel found that Kriti engaged in no misconduct. When the case was tried here, the Circuit Court enforced those factual findings and denied Emerald’s request for dissolution. The Circuit Court was correct and its order should be affirmed.

STATEMENT OF THE FACTS

Kriti Ripley, LLC (“Kriti”) and Emerald Investments, LLC (“Emerald”) are the two members of Ashley River Properties II, LLC, referred to in this brief sometimes as ARP II or “the Company”. In December 2003, Kriti and Emerald formed ARP II to continue the development of a marina on the Ashley River. The ARP II Operating Agreement has a broad arbitration provision requiring any dispute concerning the Company to be submitted to arbitration in New York.

In 2004, Emerald and its principal, Stuart Longman, diverted funds from the Company to personal accounts and committed various other defaults under the ARP II Operating Agreement.

2005 Award. In 2005, Kriti commenced an arbitration that resulted in Emerald being stripped of its voting rights and leaving Kriti with the sole right to manage the Company and as the sole voting member of the Company. In addition monetary damages were awarded to Kriti.

Thereafter, in 2006, Kriti commenced a second arbitration to recover additional monetary damages due from Emerald because of its misconduct. Again, the arbitrators found in favor of Kriti. In February 2008, both awards were confirmed by the New York State Supreme Court and judgment was entered in favor of Kriti. The monetary portion of this judgment was \$1,184,581.72. This judgment was domesticated in South Carolina in 2009, and Kriti applied for and obtained a charging order against Emerald's interest in ARP II to secure payment of the judgment. This judgment remains unpaid to this day.

In 2009, Emerald commenced this lawsuit to dissolve the Company and to declare that Emerald owned 70% of the Company. On September 17, 2009, the Defendants filed their motion to compel arbitration of this case and to stay the lawsuit pending arbitration. On April 19, 2010, the Honorable Deadra L. Jefferson entered a Consent Order referring this case to , arbitration and staying the case pending the outcome of the arbitration. Most importantly, the Court's order provides, "The 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**" (emphasis added).

Emerald then commenced arbitration seeking, among other things, an order that the Company be dissolved or, in the alternative, a finding that Kriti's misconduct justified an order expelling Kriti from membership in the Company and an award of damages in an amount not

less than \$10 million. Emerald contended that Kriti, as the sole managing member of the Company, had wrongfully withheld information from Emerald, including books and records of the Company; that Kriti had unilaterally and without notice wrongfully diluted Emerald's ownership percentage in the Company; that Kriti had not resolved the claims of a condominium purchaser seeking a refund of amounts paid to Mr. Longman and his company.

Specifically, Emerald alleged in the arbitration that Kriti had committed corporate waste and other acts of misconduct in its management of ARP II since mid-2005 which justified a finding that Kriti had breached the Operating Agreement, and that Kriti should therefore be disassociated from ARP II, that Kriti had forfeited its membership shares in ARP II, and/or ARP II should be dissolved.

After six days of hearings, on October 28, 2010, the arbitrators issued their Award. On December 16, 2011, the Award was confirmed by the Supreme Court of the State of New York by consent of the parties.

When the parties agreed to the entry of an order staying this case and referring the matter to arbitration, it was the intent of the parties, as expressed in the Court's Order, "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." As the Circuit Court properly held, the findings of the Supreme Court of the State of New York in its confirmation of the arbitration award, resolve all factual issues in this case. Specifically, Emerald sought in this case to have the court judicially dissolve ARP II because of the alleged prior misconduct of Kriti. The allegations that Emerald makes in this lawsuit to support that claim are (1) Kriti persists in

seeking indemnification from ARP I (an entity controlled by Longman) for amounts due to Lunar Systems, Inc., (2) Kriti has purported to dilute Emerald's membership interest in the Company and (3) Kriti has refused to provide financial records to Emerald.

These are the same claims that were litigated in the New York arbitration proceeding.

The relevant findings as confirmed by the Supreme Court of the State of New York are:

“All Kriti’s actions in managing ARP II complained of by Emerald, were ‘well within reasonable efforts to manage a complex piece of waterfront property’ such that Kriti’s decisions do 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.”

Respondent’s Exhibit D, p3.

The Order and Judgment finds that:

“there is ‘no basis to dissociate Kriti or Emerald from [ARP II] or to dissolve [ARP II]’”.

Respondent’s Exhibit D, p3.

The Order and Judgment finds that:

“neither 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.”

Respondent’s Exhibit D, p3.

Emerald argues that the legal bases for dissolving the Company under the terms of the Operating Agreement are more restricted than are the bases that exist under South Carolina law for judicially dissolving the Company. Emerald is correct but the issue in this case is not whether the New York judgment confirming the arbitration award adjudicates the legal claim for judicial dissolution. The issue is whether the factual findings of the confirmed arbitration award

that Kriti has committed no misconduct are binding and thus dispositive of the claims in this case.

Emerald spent six days in New York litigating every conceivable claim of misconduct. Emerald's fifty page post hearing memorandum and twenty page reply post hearing brief describe the evidence that was submitted to the arbitration panel and the allegations that Emerald litigated in New York. By the express terms of the Circuit Court's Consent Order, Emerald is not allowed to re-litigate those claims. The findings of the New York arbitration award as confirmed by the State Supreme Court of New York are binding. Because the arbitration proceeding found that Kriti has engaged in no misconduct and that all of its conduct was "well within reasonable business efforts to manage a complex piece of waterfront property," Emerald's request to judicially dissolve ARP II was properly denied.

Properly concluding both that the Court was bound by the factual findings of the Third Arbitration Award and that Emerald's evidence did not warrant dissolution, the Circuit Court issued its Order of Judgment denying and dismissing Plaintiff's claim to judicially dissolve the Company. The Court properly held that the Third Arbitration Award's factual findings that Defendants have committed no wrongful or oppressive conduct preclude ordering judicial dissolution. Plaintiff's argument that the Third Arbitration Proceeding could not have considered the grounds (the facts supporting the claim) for judicial dissolution is simply wrong. For six days the parties tried before the Third Arbitration Panel the issues of whether anything the Defendants had done was wrongful or oppressive. The Panel found that there was no wrongful or oppressive conduct. Those findings are binding here and preclude holding that the company may be judicially dissolved on the basis of wrongful or oppressive conduct.

The Circuit Court also properly found that Plaintiff failed to establish that Defendants breached any duty with respect to the provision of information about permits or anything else.

1. **The Court was correct in observing that the ARP II Operating Agreement's dissolution and dissociation provisions mirror the LLC Act's dissolution provisions and the Court was correct in holding the Third Arbitration Award's findings preclude judicial dissolution of the Company.**

South Carolina's LLC Act's Section 33-44-801, provides for judicial dissolution where the Court finds that (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member, (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement and (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. The Operating Agreement's Section 10.5(b) provides the elements of wrongful dissociation include engaging in "wrongful conduct that adversely and materially affected the Company's business", "willfully or persistently committed a material breach" of the operating agreement and engaging "in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member." Although the provisions are not verbatim quotes of one another, some of the provisions are identical and the two sets certainly mirror one another as the Court observed. All of the Defendants' arguments that the remedies of dissolution and dissociation are different completely miss the point. The remedies are different. But, the point is that many of the elements needed to prove entitlement to the remedies are the same and the factual findings of the Third Arbitration Award conclusively dispose of any claim that Defendants committed wrongful conduct that would entitle Plaintiff to judicial dissolution of the Company.

Moreover, the Circuit Court made its own findings that Emerald's evidence did not establish wrongful conduct so as to be entitled to judicial dissolution. In paragraph 15 on page 11 of the Order of Judgment, the Circuit Court held, "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.' Emerald's argument that the Court did not consider the evidence presented at the trial is simply wrong.

2. The Order correctly held that Emerald failed to prove Respondents committed any breach with respect to the slip permits.

Emerald argues that the timing and manner of when and how it learned of the permits the Company obtained for additional boat slips (none of which have been constructed) caused Emerald to somehow be damaged, but it cites no provision of the operating agreement or the LLC Act that places a duty on Respondents to do anything other than what they did do.

3. The Circuit Court acknowledged that it had broad discretion to fashion a remedy, but properly concluded that the evidence did not warrant any such remedy.

Emerald argues that the Circuit Court erred in holding that the immediate sale of the property was the only remedy. The Circuit Court took pains to point out that it had broad discretion in fashioning a remedy but properly concluded that "while the Plaintiff seeks relief under equitable principles, the court has not been provided nor can it discern any basis to grant such relief."

CONCLUSION

In a related case, Kriti sought to foreclose its charging lien against Emerald's interest in

ARP II in an effort to collect the 2005 award entered against Emerald and Longman. In holding that Kriti was entitled to proceed with foreclosure, the South Carolina Supreme Court reviewed the Circuit Court's order in this case and held that it is Emerald and Longman, not Kriti, who has engaged in misconduct.

While Emerald and Longman have protested for years, not only in this litigation but also in collateral litigation, that Kriti has acted inequitably and this weighs against ordering foreclosure, we find the opposite to be true. Emerald and Longman have attempted to game the system in order to avoid any consequences for their wrongful acts while at the same time trying to make a profit at Kriti and Ashley River II's expense. On the other hand, throughout the events underlying this case, Kriti has repeatedly been found to have acted appropriately. Most notably, in the 2010 Arbitration, Emerald and Longman presented all of the allegations of wrongful conduct by Kriti that they present here, and the arbitrators denied their claims finding that Kriti had consistently acted within its business judgment. Again, in Emerald and Longman's most recent attempt, the 2009 Dissolution Suit, the court found that Kriti had not engaged in any misconduct. Additionally, Kriti tried to give Emerald a way out of Ashley River II without the loss of any of its capital contribution by offering to purchase Emerald's interest pursuant to the 2005 Arbitration award, but Emerald refused. Also, it bears repeating that Emerald and Longman find themselves in this position because of their wrongful acts. In conclusion, contrary to Emerald and Longman's assertions, to the extent the parties' conduct is relevant to the decision whether to grant foreclosure, we find it weighs against Emerald and Longman.

Kriti Ripley, LLC v. Emerald Investments, LLC and Stuart Longman, 404 S.C. 367, 384, 746 S.E.2d 26, 35 (SC 2013).

The Circuit Court properly applied the findings made by the New York arbitration panel and the Circuit Court's order denying Emerald's application for dissolution should be affirmed.

Respectfully submitted,

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