

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SEP 17 2014

The Honorable Steven H. John, Circuit Court Judge

S.C. Supreme Court

Case No: 2012-CP-26-5610

Appellate Case No. 2013-000650

Shaul Levy and Meir Levy, Appellants.

Carolinian, LLC, Respondent.

RESPONDENT'S PETITION FOR REHEARING

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INTRODUCTION

Respondent Carolinian, LLC petitions this Court to vacate its Order filed September 3, 2014 on the grounds that the Court 1) reversed a finding of the trial court that the trial court did not make and 2) made three specific findings that are contrary to the record. This petition is not being filed for the purpose of rehashing arguments, but to inform the Court that it has been misled and has based its entire Opinion upon findings that are simply incorrect. The trial court's actual findings have not been reviewed for error by this Court. Unless this Opinion is at least modified, it will have a materially adverse effect upon not only the parties to this case, but upon all parties to operating agreements in this State that are governed by South Carolina law.

What follows are the three incorrect findings:

Carolinian contended that since the Levys failed to obtain the consent required under Section 11.1 of the Operating Agreement, their distributional interest was deemed to have been offered to Carolinian, and Carolinian was entitled to purchase that interest under Section 11.2. (Opinion, p. 26) (emphasis added).

To the contrary, Carolinian contended that, since Patel - a member and party to the operating agreement- failed to obtain the consent, he was deemed to have offered his entire membership share to Carolinian and Carolinian was entitled to purchase it. See R. P. 165-166.

We find the trial court committed an error of law in finding the provisions of Article 11 of the Operating Agreement applied and restricted the Levys right to foreclose their charging lien without the consent of Carolinian or its members. (Opinion, p. 28)(emphasis added).

The trial court never found that Article 11 restricted the Levys right to foreclose their charging lien without the required consent. See R., pp. 0010-014. To the contrary, the trial court specifically found that the transfer did not void the foreclosure sale and merely found that the Levys, as Patel's transferees, obtained exactly what Patel had at the foreclosure sale- a distributional interest in Carolinian that was limited to one final liquidating distribution (purchase price) as determined by the appraisal process in Article 11, since he had failed to obtain his fellow members' consent to the transfer. See R., pp. 012-014.

Further... Carolinian could not, through its Operating Agreement, restrict the statutory rights of the Levys by requiring consent from Carolinian or its members before the foreclosure sale, as the Levys were mere judgment creditors at that time. (Opinion, pages 28-29) (emphasis added).

Judge John never found that the operating agreement restricted any right of the Levys, much less their statutory rights as creditors. Rather, he specifically found that the operating agreement restricted Patel's rights as a member, which South Carolina law permitted. As Patel's transferee, so, too, were the rights they received at the foreclosure sale restricted.

These three findings compose the essential foundation of the Court's Opinion, and they are all based upon an incorrect analysis of the operating agreement's applicability to the Levys instead of its applicability to Bhupi Patel, a *bona fide* member. The trial court's analysis, which did consider the operating agreement's applicability to Patel, was never reviewed by this Court. Thus, as the case stands, this Court has not reviewed the trial court's actual findings for error.

ARGUMENT

- A. This Court's Opinion only considered the effect of Article 11 upon the Levys after the sale; the Court did not consider the effect of Article 11 upon Bhupi Patel prior to the sale.**

This Court's Opinion turns on a thorough review and analysis of the actions of the Levys- who were clearly not members and not subject to the Carolinian Operating Agreement- prior to the foreclosure sale. The trial court did not consider the Levys' actions prior to the foreclosure sale, nor did the trial court find the Operating Agreement's Article 11 applied to them at that time. Those facts were not germane to the trial court.

Rather, and in fact, it was the actions of Carolinian's own member, Bhupi Patel, that the trial court analyzed prior to the foreclosure sale. Of course, Bhupi Patel was a member of Carolinian, and the restrictions upon transfer did apply to him. Since this Court never reviewed this critical and essential finding of the trial court and, instead, reviewed a finding of the trial court that was never even found, this Opinion is flawed, should be vacated, and a rehearing is appropriate.

The trial court actually found, without dispute, that Bhupi Patel was a member of Carolinian, LLC who was subject to the Carolinian Operating Agreement, including Article 11. (Record, pp. 006-007). The trial court went on to find that Patel, as a member of Carolinian, never obtained Carolinian's consent to the transfer of his interest to the Levys. (R., p. 013). Therefore, since Patel failed to obtain the requisite consent, Patel's involuntary transfer of his distributional interest triggered Carolinian's or its members' right to buy Patel's entire Membership Share pursuant to Article 11, including Patel's distributional interest now in the possession of the Levys. (R., p. 013).

It is undisputed and uncontroverted that Bhupi Patel entered into a valid, binding contract with his fellow members agreeing to sell them his interest in Carolinian in the event he transferred that interest to a third party without their prior consent. However, this Court finds just the opposite since its analysis incorrectly focused upon the Levys and not Patel. The Court's conclusion provides:

We hold that Carolinian's ability to purchase Patel's interest is not controlled by any part of Article 11, but rather by Section 3.5 of the Operating Agreement, which provided Carolinian the opportunity to purchase Patel's interest *before* the foreclosure sale, not after.

This conclusion is in direct contravention of the plain language of the Operating Agreement. The Carolinian Operating Agreement specifically states, “[n]o Member may ... involuntarily ... transfer ... or otherwise convey ... any portion ... of his Membership Share ... without the prior written consent of those Members who own more than sixty-seven (67%) percent of the Voting Rights in the Company....” If no consent is obtained, “ARTICLE XI shall control....”

Bhupi Patel was a member. Article 11 did apply to him. When he allowed his interest to be transferred to the Levys through foreclosure without the prior requisite consent of his fellow members, he agreed to offer his entire membership interest to the company or his fellow members pursuant to Article 11.2. Had this Court properly analyzed the applicability of the operating agreement to Patel, to whom it applied, and not the Levys, to whom it did not apply, there would be no need for a rehearing, for it would have reviewed the trial court's actual analysis and reasoning. Since it did not, rehearing is appropriate.

B. This Court's Opinion contradicts the fundamental legal principal that a transferee can acquire no more than what his transferor had.

When the Levys acquired Patel's distributional interest/ financial rights in Carolinian at the foreclosure sale, they took it as they found it. Upon Patel transferring his interest to the Levys without consent, his distributional interest/ financial rights in Carolinian were reduced to a single right to receive one final liquidating distribution from Carolinian to purchase that distributional interest pursuant to Article 11. This Court's Opinion, to the contrary, gives the Levys more than what Patel had, for the Opinion causes their interest to be not subject to the very operating agreement's provisions that created it.

C. The Court's Opinion contradicts the South Carolina Limited Liability Company Act of 1996 and the basic principles of partnership law upon which that law is based.

Ultimately, the trial court found that South Carolina law, in particular the South Carolina Limited Liability Company Act of 1996, permits members of a limited liability company (Carolinian) to agree with one another in an operating agreement that if a member (Bhupi Patel) transfers any part of his membership interest to a third party (the Levys)- whether voluntarily or involuntarily (judicial foreclosure sale)- without first obtaining the consent of his fellow members, that such a transfer triggers a right of the company and/or the other members to buy the member's (Patel's) entire interest in the company, inclusive of any rights so transferred in violation of their agreement. (R. P. 012). The trial court characterized this right as a contractual right separate and apart from the pre-existing statutory right of redemption. (R., p. 013).

This Court's Opinion, on the other hand, holds that members of a limited liability company may not do so. This holding contradicts the expressed intent of the General Assembly when it passed the South Carolina Limited Liability Act of 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). (R. p. 165)

According to this Court's Opinion, sophisticated parties may not negotiate their own deal and judgment creditors can unilaterally decide to become partners with individuals whether they like it or not. To boot, this Opinion gives those judgment creditors a windfall of unlimited future distributions, for these distributions will not be in satisfaction of the underlying judgment. As in this case, the Levys may conceivably receive unlimited distributions of profits during the life of the company while Carolinian's other members will be shouldering 100% of the company's capital calls and loan guarantees for only 76.65% of the company's benefit. Meanwhile, Patel's judgment will never be reduced, partially satisfied, or satisfied by these future distributions. This result is neither fair nor just, nor is it what the General Assembly intended.

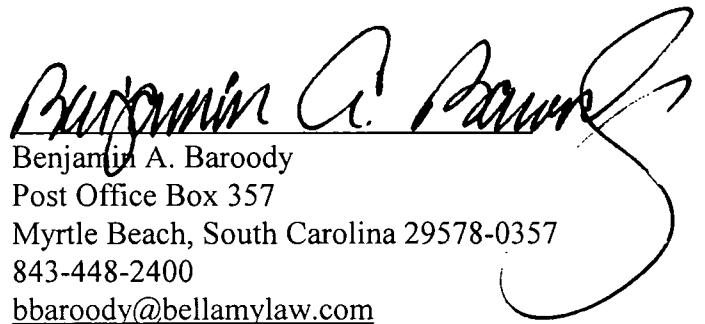
While this Court may think, conceptually, that the law provides pre-sale redemption as a remedy to the company, pre-sale redemption is sometimes impossible. As in this case, a "redemption" of Patel's distributional interest from the Levys required payment of nearly \$3,000,000.00- all to pay off a judgment lien against one of its members that it never permitted in the first place. It is important to note that in a judgment creditor scenario, such

as this, there is no underlying pledge of a membership interest as collateral for a loan. Not until a charging lien is established will the company, conceivably, discover that a member has put an interest in the company at risk of being transferred to a third party. By that time, assuming the lien exceeds the value of the interest, the damage is done. There will be no redemption.

CONCLUSION

For the foregoing reasons, Carolinian respectfully requests this honorable Court vacate its Opinion filed September 3, 2014 and substitute a new Opinion in which the Court reviews the trial court's findings relative to Carolinian's member, Bhupi Patel, who actually entered into a valid, binding contract with his fellow members agreeing to sell them his interest in Carolinian in the event he transferred that interest to a third party without their prior consent.

Respectfully submitted,


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September 16, 2014

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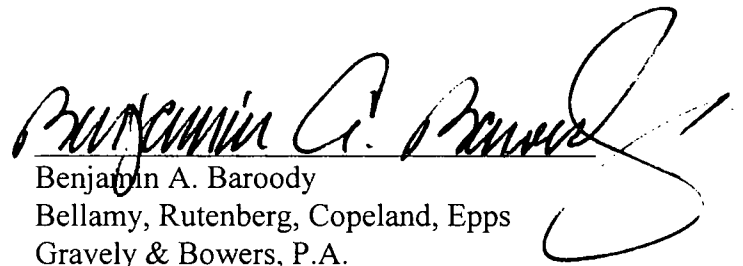
Shaul Levy and Meir Levy, Appellants.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Petition for Rehearing complies with
Rule 267 SCACR.

Respectfully submitted,



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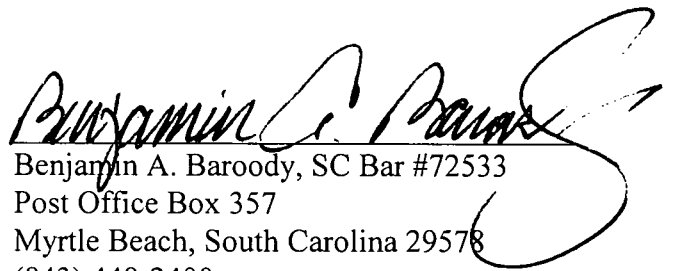
The undersigned certifies that he is employed with the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Respondent, Carolinian, LLC, that he has mailed a copy of Respondent's Petition for Rehearing to Counsel listed below this 16th day of September, 2014, with proper postage attached thereto:

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