THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

CASE NO. 2016-000474

C. GORDON LOVINGOOD, JR., C3 INVESTMENTS, INC., and PPC12, LLC

Appellants,

v.

VICTOR APAT, ANTHONY MCALLISTER, J. ERIC WADE d/b/a CT TOURING, and PEARL CO. SC, LLC, Defendants, of whom,

ANTHONY MCALLISTER; J. ERIC WADE d/b/a CT TOURING; and PEARL CO. SC, LLC are

Respondents.

APPELLANTS' FINAL BRIEF

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III. Did the Circuit Court err in holding that Respondents were entitled to Summary Judgment on Appellant's Contractual Indemnity claims under the PPC12, LLC Operating Agreement?

STATEMENT OF THE CASE

C. Gordon Lovingood, Jr., Victor Apat, Eric Wade, Anthony McAllister, and Pearl Co. SC, LLC were members of PPC12, LLC, a South Carolina Limited Liability Company. Appellants Lovingood, C3 Investments, Inc., and PPC12, LLC filed this action on August 29, 2013, to recoup certain losses relating to an aircraft that was owned by PPC12, LLC. Respondents Wade, McAllister, and Pearl Co. alleged counterclaims for fraud and negligent misrepresentation.

Following a period of discovery, Wade, McAllister, and Pearl Co. filed a Motion for Summary Judgment on May 22, 2015.[1] Lovingood, PPC12, and C3 Investments moved for Partial Summary Judgment on September 8, 2015. The Hon. J.C. Nicholson, Jr. heard all motions on October 19, 2015, requested additional materials and proposed Orders from the parties, and ultimately issued a written order granting both motions for summary judgment on December 1, 2015. That order ended all claims and counter claims between Appellants and Respondents.

Appellants filed a Motion for New Trial or to Alter and Amend on December 16, 2015. Judge Nicholson denied that motion by Form 4 Order on January 27, 2016. This Appeal of Judge Nicholson's ruling against Lovingood, C3 Investments, and PPC12 was timely appealed. The Respondents have not appealed.

[1] On June 30, 2015, the case was dismissed pursuant to Rule 40(j), SCRCP, and was restored soon thereafter. Appellants question whether the Respondents' Motion for Summary Judgment was properly heard by the Circuit Court, as the case had been stricken and restored following the filing of that Motion. This issue was not raised below, but is noted in the event the Court believes this may involve any issue of subject matter jurisdiction. Cf. Stevens Aviation, Inc. v. DynCorp Int'l, LLC, 756 S.E.2d 148 (S.C. 2014) (Noting open question in South Carolina whether a court may grant summary judgment to a non-movant).

STATEMENT OF FACTS

C. Gordon Lovingood, Jr. and Victor Apat organized PPC12, LLC in 2007 to purchase, own, and operate a 1996 Pilatus PC-12 aircraft. (Lovingood, R. p.145, line 6-p. 146, line 8). The PPC12 aircraft was financed with a loan from Cessna Finance Corporation. (Lovingood, R. p. 146, line 13-p. 148, line 2). Lovingood and C3 Investments, Inc., a real estate development corporation owned by Lovingood, both guaranteed the note to Cessna Finance (Lovingood, R. p. 146, line 13-p. 148, line 2).

Lovingood and Apat were equal members in PPC12, LLC, and contributed equally to the aircraft's fixed and variable expenses. (Lovingood, R. p. 146, line 9-p. 148, line 14). East Shore Aviation ("East Shore") managed the aircraft for PPC12 and used it for charter flights. (Lovingood p. 150, line 10-p. 151, line 5, p. 152, line 8-p. 153, line 3.)

Due to economic conditions and a decrease in their personal use of the aircraft, Lovingood and Apat decided to admit more members to the LLC. In early 2011, Lovingood asked J. Eric Wade to become a member of PPC12. In turn, Wade solicited Edwin Pearlstine and Anthony McAllister to become members (Wade, R. p. 313, line 23-p. 314, line 2; R. p. 315, lines 1-10; R. p. 316, lines 6-22; McAlister, R. p. 288, lines 4-13, R. p. 289, line 7-p. 291, line 5). In April, May, and June of 2011 respectively, Wade, McAlister, and Pearl Co. SC, LLC[2] became members of PPC12, respectively. Pearlstine and McAlister each paid an initial contribution of $40,000 for respective twenty-five percent (25%) interests in the company. (McAlister, R. p. 292, line 19-p. 23, line 1, R. p. 294, lines 8-15; Pearlstine, R. p. 327, lines 13-24). Wade paid a $20,000 initial contribution for a twelve and one-half percent (12.5%) interest. (Wade, R. p. 321, line 25-p. 118, line 4; Lovingood Ex. 5., R. p. 234).

[2] Pearl Co SC, LLC, is a property holding entity that is owned by Edwin Pearlstine. For clarity, that membership interest is hereafter referred to as "Pearlstine", although have not sought relief directly against Mr. Pearlstine to date.

When Defendants joined PPC12, PPC12 amended its operating agreement (the "Operating Agreement") to govern the ownership and operation of the aircraft. (Lovingood Ex. 4., R. p. 224) Among its provisions, Articles 3.6 and 3.7 of the Operating Agreement required the members to pay their share of the aircraft's fixed and variable expenses. (Lovingood Ex. 4., R. p. 226). Article 8.2(c) required the LLC to indemnify the members for "all liabilities and expenses incurred . . . in the ordinary course of business of the Company or for the preservation of the Company's business or property." (Lovingood Ex. 4, R. p. 230). Wade, McAllister, and Pearlstine were aware that Lovingood was a guarantor of the loan on the aircraft and that he wanted to reduce his ownership interest in PPC12. (Lovingood, R. p. 163, lines 4-5, R. p. 164, lines 12-22). As such, the parties anticipated that if Defendants became members of the aircraft, they would work together to refinance the loan on the aircraft. (Lovingood, R. p. 167, line 25-p. 171, line 1). The new members' obligations in that regard were explicitly recognized in Article 4.3(f) of the Operating Agreement. (Lovingood Ex. 4, R. pp. 227-228). There are no provisions of the Operating Agreement addressing or governing the dissociation of a member. (Lovingood Ex. 4, R. p. 224; R. p. 174, lines 13-21).

Sometime in the spring or early summer of 2012, Wade, McAllister, Pearlstine, and others formed a second LLC, CP Aviation, LLC, with the intent of purchasing a replacement aircraft for personal use and charter that would not be associated with PPC12, LLC. (McAllister, R. p. 301, line 19-p. 304, line 20; Wade, R. p. 310, line 8-p. 312, line 22). CP Aviation thereafter purchased the aircraft, and it was relocated from England to the United States in September or October 2012. (Wade, R. p. 317, line 25-p. 318, line 7; D. Gibbons, R. p. 248, line 16-p. 249, line 3).

On September 4, 2012, Wade contacted Lovingood by telephone and stated that the other partners had "decided to move in a different direction" (Lovingood, R. p. 175, lines 3-18). According to Wade, this statement was made because he, McAllister, and Pearlstine planned to use the new aircraft owned by CP Aviation. (Wade R. p. 312, lines 9-22, R. p. 323, line 16-p. 123, line 24; Lovingood, R. p. 175 line 3-p. 186, line 2). Lovingood's description of this telephone call was was as follows:

Q. Let's go back to that phone conversation you had with Eric. And he told you that the partners were going in a different direction, right?
A. That's all he said.
Q. And he told you that they were buying another airplane?
A. I think he said that. I think he just said -- I might have just thrown that in. But I think all he said was we're moving in another direction. That's all I really remember. And I might have just thrown in, through frustration and being -- getting fired on, that. But I don't really recall other than the fact that the main thing was that we have decided to move in a different direction. That was it.
Q. And –
A. He never said whether they're leaving the LLC, never, never -- never mentioned anything about PPC12 at all.
Q. Okay. He didn't have any other reason to call you about anything other than PPC12, LLC,correct?
A. I don't know. You know, we were friends and that's why I answered the phone when I saw his number.
Q. And he was referring to a partnership. You don't have any other partnerships with him, do you?
A. I don't know. All I'm saying is what he said.
Q. Okay.
A. I don't know what his intent was.
Q. Isn't it true that you understood Eric to mean that they were disassociating or getting out of the LLC? (Objection to relevance, asked and answered)
A. I know -- no, I don't know they were going to get out of the LLC.

(Lovingood, R. p. 180, line 14-p. 182, line 6).

Shortly after this conversation, Lovingood emailed David Gibbons, the Director of Operations of East Shore Aviation, stating that he "[j]ust got a call from Eric. I think we need to

meet on this soon.[3] No one has told me anything about this situation. So, I am asking you to get everyone together so we can get this resolved without any problems." (Lovingood, R. p. 183, line 17- p. 186, line 2, Ex. 7, R. p. 237). David Gibbons responded to that email on October 22, 2012, stating that East Shore Aviation was "only recently informed by the other members that they notified you by phone of their intention to leave PPC12 effective October 1st." (Lovingood Ex. 8., R. p. 239). Notably, Apat, who Gibbons identified as the managing member, responded to the email in a manner that clearly shows that he also had no prior indication of any member's intent to dissociate.

On October 28, 2012, the PPC12 aircraft suffered major engine failure leaving Peachtree-Dekalb airport in Atlanta on an East Shore charter flight and was forced to make an emergency landing. (M. Gibbons, R. p. 272, line 4-p. 278, line 11, R. p. 282, line 7-11; D. Gibbons, R. p. 250, line 7-p. 251, line 6, R. p. 269, lines 2-4). David Gibbons testified that, as of October 28, 2012, on the date the aircraft suffered a catastrophic engine failure, Wade, McAllister, and Pearlstine had not advised him of any change in their relationship to PPC12, LLC. (D. Gibbons, R. p. 358, line 9-p.359, line 2; p. 360, lines 1-6). As far as Gibbons knew, all of the defendants were members of the LLC on that date. (D. Gibbons, R. p. 362, line 20-p. 363, line 8). In fact, as late as February, 2013, Defendant McAllister was still paying off his flight time balance with PPC12, LLC, even though the aircraft was not flying. (D. Gibbons, R. p. 361, lines 2-9).

As a result of the engine failure, the aircraft was inoperable, needed major engine repairs, and remained at Peachtree-Dekalb airport for months. (Lovingood, R. p. 191, line 5-p. 196, line 10). Lovingood undertook efforts to repair the engine, and he and/or C3 Investments, Inc. paid all of the repairs, along with the interest payments on the note to Cessna Finance. (Lovingood R. p. 197, line 13-p. 207, line 11; R. p. 208, line 22-p. 212, line 13; D. Gibbons Dep., R. p. 260, line

[3] East Shore Aviation was contracted by PPC12, LLC to manage, operate, and maintain the aircraft.

10-p. 266, line 6). Those costs exceeded $500,000. Once it had been repaired, the aircraft was marketed, and ultimately sold in February 2014. (Lovingood, R. p. 213, line 25-p. 214, line 14).

LAW AND ARGUMENT

I. Standard of Review

Summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When the circuit court grants summary judgment on a question of law, we review the ruling de novo. Town of Summerville v. City of N. Charleston, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. Cnty. of Richland, 692 S.E.2d 499, 505 (2010); Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. Zurich Am. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010). When reviewing a grant of summary judgment, this Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014).

II. The Circuit Court erred in holding that McAllister, Wade, and Pearlstine properly dissociated from PPC12, LLC.

The Circuit Court held that Wade, McAllister, and Pearlstine dissociated from PPC12, LLC prior to the October 28, 2012 incident in accordance with S.C. Code § 33-44-601(1). That provision of the South Carolina Limited Liability Act states that "[a] member is dissociated from a limited liability company upon . . . (1) the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member.

The Circuit Court erred in this holding because there were facts on both sides of the question, leaving a jury question as to whether Wade, McAllister, and Pearlstine had, in fact, dissociated. Section 33-44-601(1) requires that a dissociating member must give notice of that express will to "the company". Under Section 33-44-102(c) of the Act, a person gives notice by "taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact." Therefore, the question before the Circuit Court was whether Wade, McAllister, and Pearlstine took any active step that was reasonably calculated to inform PPC12, LLC that they intended to dissociate.

The only evidence supporting the Circuit Court's holding is the testimony from Wade and Lovingood that, during a brief telephone call on September 4, 2012, Wade indicated that he was "going in a different direction", along with the October 22, 2012 email from the aircraft manager, David Gibbons, in which Mr. Gibbons indicating that the defendants had recently expressed "their intention to leave PPC12, LLC effective October 1st." Upon inquiry, both Lovingood and Gibbons clearly testified that neither witness believed that any member had actually dissociated from the LLC.

There simply is no fair reading of Lovingood's testimony that supports the concept that Wade's telephone call constituted "notice of [his] express will to withdraw", as notice is defined under the Act. Even if it did, that call to Lovingood was not notice to the LLC, as would otherwise be required by Section 33-44-601(1). Finally, neither the phone call or Gibbons' email complies with the plain language of the statute, which requires notice of dissociation to be effective on the date of notice or a later date. That is, while a member of an LLC can give notice on October 1 that he or she intends to dissociate effective October 22, a member can not give

notice on October 22 that he or she intended to dissociate on October 1. The latter notice is wholly ineffective to comply with the terms of the statute.

Arguably, the facts of this case require a ruling that, as a matter of law, none of the Respondents took any action sufficient to dissociate from PPC12, LLC. At a minimum, this Court must recognize that there was sufficient evidence before the Circuit Court to prevent it from holding that the Respondents did dissociate as a matter of law. There is clearly a jury question on that issue, and this Court must therefore reverse the Circuit Court and remand this matter for trial.

III. The Circuit Court Erred in Holding that Lovingood and PPC12, LLC Failed to Establish that Wade, McAllister, and Pearlstine Breached their Fiduciary Duties to the Other Members and the LLC.

Based on its erroneous conclusion that Wade, McAllister, and Pearlstine properly dissociated from PPC12, LLC, the Circuit Court erroneously held that Lovingood and PPC12 had failed to establish their claims for breach of fiduciary duty. Lovingood and PPC12 filed those claims pursuant to S.C. Code. § 33-44-409, which states as follows:

> (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).
>
> (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;(2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and(3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

> (c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
>
> (d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

S.C. Code Ann. § 33-44-409.

The facts supporting Lovingood and PPC12's claim are simple and undisputed. PPC12, LLC was formed to purchase, own, and operate a Pilatus PC12 aircraft for the members' use and for charter. (Lovingood Ex. 4, Article 2.4, R. p. 225). While they were members of PPC12, LLC, and rather than fully discharging their obligations to that entity under the Operating Agreement, Wade, McAllister, and Pearlstine chose to form CP Aviation, LLC for the purpose of purchasing, owning, and operating a Pilatus PC12 aircraft for the members of that LLC and for charter. (Hearing Transcript, R. p. 75, line 21-p.76, line 22; McAllister, R. p. 301, line 19-p. 304, line 20; Wade, R. p. 310, line 8-p. 312, line 22; R. p. 312, lines 9-22, R. p. 324, line 16-p. 325, line 24). Once that purpose had come to fruition, after he had been a member of PPC12, LLC for eighteen months, flying the PPC12 aircraft on a regular basis, Wade told Lovingood that he was going "in a different direction".

Wade, McAllister, and Pearlstine owed Lovingood and PPC12, LLC a statutory fiduciary duty to 1) refrain from competing with the company in the conduct of the company's business before the dissolution of the company and 2) exercise any rights consistently with the obligation of good faith and fair dealing. Under the admitted facts, Wade, McAllister, and Pearlstine clearly breached those duties when they chose to form a second LLC with the exact same

purpose as PPC12, LLC, to purchase a competing aircraft and attempt to divest themselves of their obligations to pay the fixed and variable expenses of the PPC12 aircraft. The damages in this action are also clear, as Wade, McAllister, and Pearlstine's failure to pay their share of the expenses to repair the aircraft have left Lovingood to pay for nearly $500,000 of PPC12, LLC obligations.

The Circuit court erred in finding that Lovingood and PPC12, LLC failed to establish a claim of breach of fiduciary duties sufficient to defeat Respondent's Motion for Summary Judgment. Accordingly, this Court must reverse the Circuit Court, and remand this matter for trial.

IV. The Circuit Court Erred in Holding that the Operating Agreement did not Provide Lovingood or PPC12, LLC a Right of Indemnity.

The Circuit Court held that Lovingood did not have a right to contractual indemnity under the Operating Agreement because there is no provision of that Agreement that allows one member to claim direct indemnity against another member. That ruling misconstrued the nature of the cause of action and the argument below. As a ruling of law, this court may review this question *de novo.*

The Operating Agreement clearly requires PPC12, LLC to indemnify its members for "all liabilities and expenses incurred . . . in the ordinary course of business of the Company or for the preservation of the Company's business or property." (Lovingood Ex. 4, Article 8.2, R. p. 230). The Operating Agreement also requires all members to pay their share of the aircraft's "fixed and variable expenses". (Lovingood Ex. 4., Articles 3.6-3.7, R. p. 226).

There can be no questioning the fact that the $500,000 that Lovingood spent following the October 28, 2012 engine failure were "expenses incurred in the ordinary course of business

of the Company and for the preservation of the Company's business or property." The Circuit Court even recognized this fact in its Order, but concluded that Lovingood's only remedy was to sue PPC12, LLC.

That conclusion is erroneous because it ignores the fact that PPC12, LLC was named as a plaintiff in this case pursuant to S.C. Code. § 33-44-1101, which allows Lovingood to bring an action in the right of the LLC.[4] PPC12, LLC has a right of action under Articles 3.6 and 3.7 of the Operating Agreement, which require the members to pay the fixed and variable expenses of the aircraft. Wade, McAllister, and Pearlstine have refused to perform that duty, which has prevented PPC12, LLC from performing its obligations under Article 8.2 of the Operating Agreement. Therefore, while it may be technically correct that there is no provision of the Operating Agreement that provides for direct indemnity amongst the members, there are provisions that require the LLC to indemnify the individual members for their expenses. Likewise, there are provisions that require the other members to indemnify the LLC for those expenses.

The Court's interpretation of the Operating Agreement ignored the fact that Lovingood has the right to, and did, bring a claim on behalf of PPC12, LLC pursuant to S.C. Code Ann § 33-44-1101. Lovingood is entitled to indemnity for his expenditures under the Agreement. Wade, McAllister, and Pearlstine are required to pay PPC12, LLC for those expenditures. Accordingly, Lovingood and PPC12, LLC have a claim for contractual indemnity, the facts of

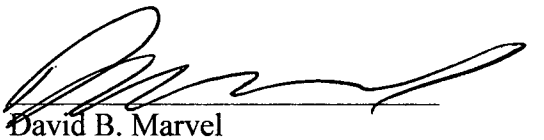
[4] Likewise, paragraph 38 of the Complaint asserts what the Circuit Court deemed the Plaintiff's equitable subrogation claim. Lovingood and C3 Investments, Inc. actually never argued or asserted a separate claim against the Respondents for equitable subrogation. Rather, as Lovingood was the member of the LLC, and certain payments for repairs to the aircraft were made from accounts held by C3 Investments made certain payments on behalf of Lovingood which are due from PPC12 and the other members, C3 Investments was named as a separate plaintiff which would be equitably subrogated to any claim that could be made by Lovingood, to prevent the argument that Lovingood was foreclosed from claiming indemnity because the payments were made by his company.

which are undisputed. The Circuit Court's Order must therefore be reversed, and this claim remanded for trial.

CONCLUSION

The Circuit Court erred in granting summary judgment to Wade, McAllister, and Pearlstine. There remains a significant factual question of whether the Respondents properly dissociated from the LLC at any time. Even if they did, their actions prior to dissociation were a breach of their statutory fiduciary duties as members of the LLC. Further, the Operating Agreement provides PPC12 and Lovingood a clear remedy to recover the expenses that were required to preserve and sell the assets of the LLC, which could be recovered from the other members in the winding down process that would have followed a proper dissociation. For all of these reasons, Appellants C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC respectfully request that this Honorable Court reverse the Order of the Charleston County Court of Common Pleas, and remand this case for trial.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that on this Second day of November, 2016, I served respondents' counsel with Appellant's Final Brief and Final Reply Brief by mailing a copy addressed to their counsel, Trudy H. Robertson and Brandon Gaskins, Moore & Van Allen, PLLC, P.O. Box 22828, Charleston, South Carolina 29413, by U.S. Mail, postage prepaid.

The Undersigned further certifies, pursuant to Rule 211(b), SCACR, that the Final Brief and the Final Reply Brief is identical to the Initial Brief and Initial Reply Brief with the exception of References to the Record and correction of minor typographical errors.

David B. Marvel

November 2, 2016
Charleston, South Carolina