

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2015-CP-10-3919

Appeal No. 2017-001107

RECEIVED

JUL 14 2017

SC Court of Appeals

Athan Fokas,.....Appellant,

v.

Phillip Ferderigos, Jacob Ferderigos, and Spiros Ferderigos,.....Respondents.

APPELLANT'S PETITION FOR SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS

PLEASE TAKE NOTICE that the Appellant, Athan Fokas, by and through his undersigned attorneys, hereby petitions the Court, pursuant to S.C. Appellate Court Rule 241(c), for an order imposing a writ of supersedeas of all matters decided in the Order Granting Defendant Spiros Ferderigos' Amended Motion to Amend Tax Returns and Change Checking Account and For Restraining Order, entered April 11, 2017. Such supersedeas is necessary in order to prevent this appeal from being rendered entirely moot and meaningless and such supersedeas is appropriate under the legal authority laid out herein.

I.

INTRODUCTION

Respondent, Spiros Ferderigos, was granted an order requiring that he be allowed to file a new tax return for an LLC in which he and Appellant as well as Respondent's two brothers, Jacob and Phillip, are members – Old Towne Suites, LLC. (Exh. A.) This LLC owns no property and its sole business is management of the rental of short term suites on the second floor of a building the parties own together as tenants in common at 229 King Street. The order also requires that a new bank account be established for the LLC and restrains Appellant from taking unilateral and unauthorized actions with respect to the LLC, specifically requiring written agreement of three of the LLC members, regardless of ownership interest, prior to any action being taken by the LLC. The Order also provides for the appointment of a receiver, to be chosen by Respondent's counsel. As the result of Appellant's Petition for Supersedeas to Stay this Order, the trial court modified the order by eliminating the provision for appointment of a receiver. (Exh. B.)

Respondent's motion was filed on January 9, 2017 and was amended on February 16, 2017. (Exh. C.) Appellant filed a memorandum and materials in opposition. (Exh. D.) In response to the trial court's Order of April 11, 2017, granting Respondent's motion, Appellant moved to alter or amend the order on April 20, 2017, which motion was denied on May 4, 2017. Appellant filed a notice of appeal with this Court on May 8, 2017 and a Petition with the trial court for Supersedeas to stay the Order on April 11, 2017. (Exh. E.) The trial court denied the Petition for Supersedeas on July 7, 2017.

This case is not one involving any of the issues which are the subject of the mandates in the trial court's order. Rather, it is one involving claims by Appellant of breach of contract, for specific performance and for breach of the duty of loyalty provided for in the LLC statute – all

arising from the refusal of Respondents to carry out their obligations under a contract they formed and commenced performance of to add two floors to 229 King Street so as to add more rental suites. It should be noted that the LLC at issue in this motion does not own 229 King Street. It is owned by the Appellant and Respondents as tenants in common, Appellant owning fifty percent and Respondents owning equal shares of the other fifty percent.

Respondent's Answer includes counterclaims for breach of the duty of loyalty in the LLC statute, negligent misrepresentation, concealment and promissory estoppel – all based on allegations in the Answer related to the parties' communications and actions in furtherance of adding two floors to 229 King Street. The Answer also includes counterclaims unrelated to the parties' communications surrounding the plan to add additional floors to 229 King Street – defamation, abuse of process and frivolous proceedings. Nothing in the complaint or answer in any way touches on how Old Towne Suites is managed or how its taxes are filed.

As to the substance of the tax return request, Appellant argued repeatedly that he was prepared to correct the one aspect of the return Respondent complains of, the issuance of a K-1 to a non-member, this being the wrong way to document an otherwise valid transfer of part of Appellant's distributional interest pursuant to S.C. Code 33-44-501. Appellant sought, but the trial court denied, a request that he be allowed to review any draft of a new tax return for the purpose of insuring that the new return did not unnecessarily harm either himself or his father, Spiros Fokas, who was transferred part of his distributional interest. At the hearing of this matter, the trial judge opined that he could see no harm to Respondent or to any party from the error in the

original tax return. No harm has ever been identified by Respondent supposedly incurred by this error.¹

Regarding the request to force use of a new bank account, Respondent has taken steps to confirm with the property manager that pending this appeal, income from the LLC will be deposited in the new bank account established by Respondent. Respondent continues to be willing to continue this arrangement pending conclusion of this appeal. It is undisputed that the current bank account was established by Respondent, with the knowledge of Respondent and the other members of the LLC, and was used without any complaint until the dispute between the parties arose over the agreement to expand the building at 229 King Street. It is also undisputed that Jacob Ferderigos has shared management of the books for the LLC, trading this duty with Appellant every quarter. Jacob Ferderigos has written checks for the original LLC bank account ever since the LLC account was established in 2011, including checks for distribution of the income to his brothers, Phillip and the Respondent. (Exh. F.)

The underlying rationale for Respondent's motion and for the trial court's order is the assertion that in a member managed LLC, "each member has equal rights in the management and conduct of the company's business" unless "otherwise provided in an operating agreement." S.C.

¹ The LLC statute at S.C. Code 33-44-501 allows without reservation the transfer or a distributional interest of a member to a non-member. That is what Appellant did in 2015 by transferring one half of his fifty percent distribution to his father, Spiros Fokas. The tax preparer filed a K-1 indicating that Spiros Fokas was receiving 25% of the distribution, but not indicating that he was an owner of any part of the LLC. The K-1 does not indicate Spiros Fokas owns any of the capital in the LLC and, in fact, the return correctly reflects the proper ownership interest of each member as set forth in the LLC operating agreement. This was correct information and the income of all parties was properly reported to the IRS. Appellant has confirmed the proper filing of the return with the tax preparer, Tony Roe at Pinnacle One.

Code 33-44-404(a)(1) and Comment. Respondent argues that the LLC operating agreement does not provide for other than equal voting rights within the meaning of the statute.

The operating agreement to this LLC (Exhibit 1 to Exhibit A) provides as follows:

“This operating agreement confirms the members and interest of each member in Old Towne Suites, LLC and those members an interest are as follows:

- (1) Athan Fokas is a member and has fifty (50) percent interest in Old Towne Suites, LLC,
- (2) Iakovos Ferderigos, Phillip Ferderigos and Spiros Ferderigos are members and have an equally combined fifty (50) percent interest in Old Towne Suites, LLC.”

As the operating agreement specifies a specific interest, of each member, Appellant has argued that the interest of each LLC member includes the voting power of that member. Appellant’s fifty percent interest would, therefore, include fifty percent of the voting rights. No party cited any law directly on point from South Carolina. Appellant cited a Bankruptcy Court decision from the District of South Carolina. In the context of an LLC, that court held that a member’s “interest” denotes two types of interests, ownership of property and a contract right of the member to participate in the management of the business. *In re Hankel*, 512 B.R. 539, 548 (U.S. Bankcy Ct, D.S.C. 2014), holding that an interest in Hanckel Marine “consisted of both his management rights and distributional interest.” This is consistent with the definition of “interest” in Blacks’s Law Dictionary, “More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share.” This is how the LLC was managed from its inception until Respondents raised the issues involved in this motion in late 2016 – each family side, Appellant with a 50% ownership interest, and the Ferderigos with a shared 50% ownership interest made decisions jointly concerning the LLC with neither side able to impose its decision on the other.

Respondent's motion has been consistent with the approach of all of the defendants in this case and two other suits between the parties. Respondent and his brothers, the other two defendants, have "discovered" improper actions by the Appellant in his co-management of the LLC and of the corporation which operates the Old Towne Restaurant, located on the first floor of 229 King Street. Long standing practices associated with both have suddenly been deemed "illegal" and "unauthorized" by the other parties.

Outrageous mischaracterizations of facts have been made by the Respondent and his brothers. In the course of arguments concerning this motion, Respondent claimed falsely that Appellant had made a distribution of income of the LLC only to himself. The records filed by Appellant in response to this outrageous claim show this to be untrue. He followed the same practice for writing a check for the other LLC members' distribution as has been followed since the LLC was established. Jacob Ferderigos simply and inexplicably did not pick it up as had been the practice and deposit into an account he shared with Respondent and Phillip Ferderigos. Such has been the tone of argument between the parties in this case.

II.

LEGAL STANDARD

In a typical case, "matters under appeal to this Court are automatically stayed, so as to preserve the effectuality of this Court's Order. See SCACR Rule 241a) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment or decree.") However, such automatic stay does not apply to appeals from eleven categories of mandates, including, "An appeal from an order granting an injunction or temporary restraining order." SCACR Rule 241(b)(8). Two of the mandates in the Order of April 11, 2017 are injunctions, the

requirement for use of the new LLC bank account and the prohibition imposed on Appellant not to take unilateral action. The other mandates are not in the nature of an injunction or any of the other listed exceptions. Appeals of mandates included in an exception such as for an injunction may be stayed pursuant to an order imposing supersedeas of such matters. SCACR Rule 241(c)(1).

The basis on which a Court should grant supersedeas is straightforward and not particularly onerous, “the appellate court should consider whether such an order is necessary to *preserve jurisdiction of the appeal* or to *prevent a contested issue from becoming moot*.” SCACR Rule 241(c)(2). Emphasis supplied. The Supreme Court has held that, “the general rule is that the relief of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error” and to prevent an appeal from becoming moot. Melton v. Walker, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946), citing 4 C.J.S., Appeal and Error §§ 626, 662.) Thus, preserving the status quo is equated with preserving the Court’s jurisdiction.

III.

STAYING THE TRIAL COURT’S ORDER IS NECESSARY TO PRESERVE THE STATUS QUO

Respondent’s agreement to use only the new bank account for the pendency of this appeal removes that issue from consideration in this Petition.

If Respondent is permitted to file a new tax return, that, for all practical purposes, forecloses the issue and renders Appellant’s appeal of that portion of the April 11, 2017 Order meaningless. Moreover, that portion of the trial court’s Order is also not an exception to the automatic stay which arises from the appeal filed by Appellant. If a new tax return is filed with the State and with the Federal IRS and that return damages Appellant and/or his father, Spiros Fokas, that harm cannot be undone without expensive effort by the injured party. The refusal of Respondent to agree to limit the amended return to one which does not harm either Appellant or his father gives

rise the very real likelihood that harm to Appellant and his father is precisely what Respondent intends. The vitriolic tone of Respondent's filings in this matter and the lack of any identifiable harm to Respondent or other members of the LLC from the original tax returns lends further credence to that as the goal of Respondent. Moreover, this part of the trial court Order does not fall within any exception to the automatic stay provided by the SCACR.

The portion of the April 11, 2017 Order which provides that no action of the LLC may be taken "without the ongoing consent of the majority of the members of the LLC. Any such consent shall be in writing," creates the very real possibility that the three members of the LLC who are defendants in this action will take action that so alters operation of the LLC as to harm Appellant. Under the logic of the Order, each of the three have one vote, to Appellant's one vote, despite the fact that Appellant owns one half interest in the LLC pursuant to the operating agreement. S.C. Code 33-44-404 (c) provides twelve types of decisions which require the consent of all members of an LLC, all relating to adding new members merger of the LLC with another entity, disposal of the LLC's property or altering distributional rights. All other decisions, under the provisions of the trial court's order of April 11, 2017 may be taken by a majority of the members regardless of ownership interest.

The breadth of actions that could thereby be taken include many that would irrevocably deprive Appellant of any meaningful appeal of this specific mandate. The management contract could be terminated. Time for rentals could be limited, or, potentially, suspended completely. A minimum deposit amount for the LLC bank account could be set at an exorbitant level. A cash call could be issued for extravagant expenses. In short, the other three LLC members are empowered by the trial court's Order to run the business into the ground, thereby destroying Appellant's ownership interest in the LLC. The particularly bitter, vitriolic nature of the disputes

between the parties makes this otherwise unreasonable course of conduct entirely possible as a means of simple spite aimed at Appellant.

Staying the trial court's order so as to require that a majority of the ownership interest consent to actions of the LLC acts to preserve the status quo, that being in the way in which the LLC has been managed since its creation, and this Court's jurisdiction of Appellant's appeal of this portion of the order. There is a public interest in preserving jurisdiction over this issue – whether ownership interest as spelled out in an LLC operating agreement is equivalent to voting interest – which is an issue of first impression in South Carolina.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court grant an Order of Supersedeas staying the effect of the trial court's Order of April 11, 2017 so as to preserve the status quo and this Court's jurisdiction over the issues raised by Appellant in his appeal.

Respectfully submitted,



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July 12, 2017
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
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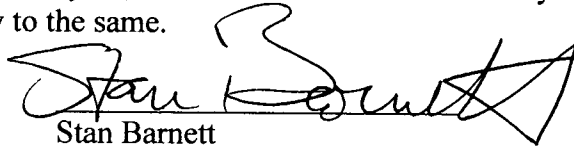
v.

Phillip Ferderigos, Jacob Ferderigos, and Spiros Ferderigos,.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Supersedeas by depositing a copy of it in the United States Mail, postage prepaid on July 13, 2017 addressed to their attorneys of record as listed below and by electronic delivery to the same.

July 13, 2017



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SC Court of Appeals

July 13, 2017

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
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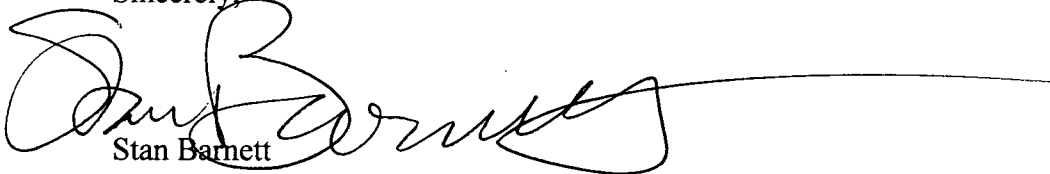
RE: Athan Fokas v. Phillip Ferderigos, Jacob Ferderigos and Spiros Ferderigos
Appeal No. 2017-001107
Case No. 2015-CP-10-3919

Dear Ms Kitchings:

Enclosed for filing is the Appellant's Petition for Supersedeas in the above appeal, proof of service and the filing fee of \$25.00.

With kindest regards, I remain

Sincerely,


Stan Barnett

Cc: Counsel of Record