

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

AUG 01 2017

SC Court of Appeals

Athan Fokas,.....Appellant,

v.

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

APPELLANT’S REPLY TO RESPONDENTS’ RETURN IN OPPOSITION TO PETITION
FOR SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS

I.

INTRODUCTION

Despite the length and weight of Respondents’ Return in opposition to Appellant’s Petition for Supersdeas staying the Order at issue in this appeal, there is little substance to their argument. Much of the Return is characterized by what amounts to a personal attack on Appellant, which has been common in this and related litigation between these parties. These attacks and many of the other assertions of fact by Respondents are simply inaccurate. Contrary to Respondents hyperbolic denial, there is no question from the record as to several seminal facts:

- Respondents knew from the beginning of the formation of the LLC that the original bank account for handling the LLC's funds was at First Citizens as they received their distribution from this account;
- One of the Respondents, Jacob Ferderigos, accessed the First Citizens account routinely when he managed the books for the LLC every other quarter;
- There is no evidence whatsoever of self-dealing by Appellant with respect to the LLC; and
- There is no evidence whatsoever that any of the Respondents has incurred any loss or damage related to anything Appellant has done as a member of the LLC.

The key remaining question with respect to staying the Order concerning the LLC is whether leaving the Order's provisions in place that provide for management decisions by a majority vote of the four members, regardless of their interest in the LLC, poses a significant risk that Appellant's right to appellate review of that decision will be rendered moot by actions of Respondents taken under the authority of that ruling. Recent actions of the Respondents leave no doubt that this risk is real and imminent. Left in place, this portion of the Order will deprive Appellant of meaningful review of this issue, which Appellant maintains is a question of first impression in South Carolina.

II.

THE MAJORITY VOTE PROVISION WILL ALLOW RESPONDENTS TO DESTROY APPELLANT'S INTEREST IN THE LLC, THEREBY DEPRIVING HIM OF MEANINGFUL REVIEW IN THIS COURT

Contrary to Respondents' unsupported assertion, the issue of the legal import of the operating agreement of the LLC is not at all clearly in their favor. Indeed, they essentially ignore the wording of the operating agreement which provides that Appellant, "is a member and has fifty

(50) percent interest in Old Towne Suites, LLC.” The majority vote provision of the LLC statute only applies if there is no operating agreement which otherwise defines voting power. S.C. Code 33-44-404 (Comment). Exhibit B. There is some law indicating that the type of language above does, in fact, define voting power as coequal with ownership interest. *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.” Respondents do not cite any law supporting their position to the contrary. This issue is, therefore, essentially one of first impression to which Appellant is entitled to review.

Under umbrella of the Order at issue, Respondents can take any number of actions that would destroy Appellant’s interest in this LLC. They could order a cash call for which Appellant would be obligated for half as opposed to their shared half, one sixth each. Such a power could easily be used to impose an impossible obligation on Appellant for the purpose of forcing him out of the LLC. There is every indication this result is exactly what Respondents intend to achieve. Attached as Exhibit A is document presented to Appellant by Respondents as an action they have elected to take by majority vote. This action is replace all the existing furniture in the rental suites with new furniture. While this action alone may not be enough to impose a crushing burden on Appellant, it evidences determination to use the power improperly conferred on them by the trial court to override Appellant’s decisions. It also evidences disregard for the same LLC statute Respondents claim as their authority. Section 33-44-404(c)(12) of the code provides that unanimous consent is required for “the sale, lease, exchange, or other disposal of all, or substantially all, of the company's property with or without goodwill.” The furniture in the LLC is the only property it owns. The building where the rental suites are located and all of its fixtures is owned by the parties as tenants in common and not by the LLC.

In the past weeks, two of the Respondents have filed three additional lawsuits against Appellant. Two claim that Respondents, as tenants in common, have the unilateral right to cancel the lease between the parties and the company that operates the restaurant on the building's first floor. That business is owned half by Appellant and half by the third Respondent, Jacob Ferderigos. The suits also seek to impose rent so high that the restaurant would have to close. These suits are a transparent effort by two of the Respondents to do harm to Appellant, even at the expense of causing harm to their brother, Jacob. A third suit has been filed by the same two Respondents against Appellant claiming that he is competing against the LLC by operating rental suites elsewhere in Charleston, but which are, in fact, in a different market because of their location and their size and configuration. Finally, while the bank account issue is now resolved for the pendency of this appeal, Respondents have filed motions to hold both Appellant and the property manager in contempt of court because distributions of LLC profit were not placed into the new bank account referenced in the Order immediately. These motions are made despite the uncontested fact that none of the Respondents lost any part of their distributional interest.

All of the actions taken by Respondents leave no doubt that they intend to harm Appellant in any way they can. Enmity can be a motivation more powerful than profit. It is that enmity which poses a real and imminent threat that Appellant will have his one half interest in the LLC destroyed by the Respondents before this appeal can be resolved. If this provision continues in effect, Appellant will not be able to receive meaningful relief in this appeal, but would need to file an action to dissolve the LLC pursuant to S.C. Code 33-44-801(4).

On the other hand, Respondents have pointed to absolutely no harm they have suffered or are likely to suffer if the majority vote provision in the Order is stayed. Staying that provision leaves the parties where they have been since the LLC was formed, with consensus between the

two family half interest being necessary to take action. That will allow the business to continue so long as the parties do not decide to end it. There is no inequity in allowing Appellant's appeal of this Order to go forward in a meaningful way by staying the majority vote provision.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the majority vote provision of the Order be stayed for the pendency of this appeal in order that his appeal is not rendered moot.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

Stan Barnett
305 North Civitas Street
Mt. Pleasant, South Carolina 29464
Telephone: (843) 884-1031/(843) 708-4887
Attorney for Appellant

July 30, 2017
Mt. Pleasant, South Carolina

EXHIBIT A

OLD TOWNE SUITES, LLC

ACTION BY CONSENT IN LIEU OF A MEETING

The undersigned members of Old Towne Suites, LLC, a South Carolina limited liability company (the "Company"), consent to and authorize and direct the Company to take the following action(s) pursuant to S.C. Code Ann. §§ 33-44-404(a) and 33-44-404(d):

1. The Company hereby authorizes and shall cause and direct Walk Away Stays, LLC, for this specific instance, to replace the furniture, make repairs to the furniture, professionally clean the furniture, and apply paint as detailed and in the manner set forth in Allie Johnson's (employee of Walk Away Stays, LLC) emails dated July 11, 2017 and July 13, 2017, attached hereto and incorporated herein.
2. This action by consent in lieu of a meeting shall be placed with and form a part of the records of the Company but such placement shall not be a condition to the effectiveness hereof.
3. A copy of this action by consent in lieu of a meeting shall be delivered to any member of the Company who has not consented, but such delivery shall not be a condition to the effectiveness hereof.

This action by consent in lieu of a meeting shall be effective at such time as it has been executed by three members, being a majority of the members of the Company.

MEMBERS:

DATE: _____

DATE: _____

DATE: _____

DATE: _____

EXHIBIT B

Code 1976 § 33-44-404

§ 33-44-404. Management of limited liability company.

Currentness

(a) In a member-managed company:

- (1) each member has equal rights in the management and conduct of the company's business; and
- (2) except as otherwise provided in subsection (c), any matter relating to the business of the company may be decided by a majority of the members.

(b) In a manager-managed company:

- (1) each manager has equal rights in the management and conduct of the company's business;
- (2) except as otherwise provided in subsection (c), any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers; and

(3) a manager:

- (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members; and
- (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed.

(c) The only matters of a member or manager-managed company's business requiring the consent of all of the members are:

- (1) the amendment of the operating agreement under Section 33-44-103;
- (2) the authorization or ratification of acts or transactions under Section 33-44-103(b)(2)(ii) which would otherwise violate the duty of loyalty;
- (3) an amendment to the articles of organization under Section 33-44-204;
- (4) the compromise of an obligation to make a contribution under Section 33-44-402(b);
- (5) the compromise, as among members, of an obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter;
- (6) the making of interim distributions under Section 33-44-405(a), including the redemption of an interest;
- (7) the admission of a new member;
- (8) the use of the company's property to redeem an interest subject to a charging order;
- (9) the consent to dissolve the company pursuant to Section 33-44-801(2);
- (10) a waiver of the right to have the company's business wound up and the company terminated under Section 33-44-802(b);
- (11) the consent of members to merge with another entity under Section 33-44-904(c)(1); and

(12) the sale, lease, exchange, or other disposal of all, or substantially all, of the company's property with or without goodwill.

(d) action requiring the consent of members or managers under this chapter may be taken without a meeting.

(e) A member or manager may appoint a proxy to vote or otherwise act for the member or manager by signing an appointment instrument, either personally or by the member's or manager's attorney-in-fact.

Credits

HISTORY: 1996 Act No. 343, § 2; 1998 Act No. 442, § 8; 2004 Act No. 221, § 28.

Editors' Notes

COMMENT

In a member-managed company, each member has equal rights in the management and conduct of the company's business unless otherwise provided in an operating agreement. For example, an operating agreement may allocate voting rights based upon capital contributions rather than the subsection (a) per capita rule. Also, member disputes as to any matter relating to the company's business may be resolved by a majority of the members unless the matter relates to a matter specified either in subsection (c) (unanimous consent required) or in Section 33-44-801(b)(3)(i) (special consent required). Regardless of how the members allocate management rights, each member is an agent of the company with the apparent authority to bind the company in the ordinary course of its business. See Comments to Section 33-44-301(a). A member's right to participate in management terminates upon dissociation. See Section 33-44-603(b)(1).

In a manager-managed company, the members, unless also managers, have no rights in the management and conduct of the company's business unless otherwise provided in an operating agreement. If there is more than one manager, manager disputes as to any matter relating to the company's business may be resolved by a majority of the managers unless the matter relates to a matter specified either in subsection (c) (unanimous member consent required) or Section 33-44-801(b)(3)(i) (special consent required). Managers must be designated, appointed, or elected by a majority of the members. A manager need not be a member and is an agent of the company with the apparent authority to bind the company in the ordinary course of its business. See Sections 33-44-101(10) and 33-44-301(b).

To promote clarity and certainty, subsection (c) specifies those exclusive matters requiring the unanimous consent of the members, whether the company is member- or manager-managed. For

example, interim distributions, including redemptions, may not be made without the unanimous consent of all the members. Unless otherwise agreed, all other company matters are to be determined under the majority of members or managers rules of subsections (a) and (b).

COPYRIGHT (C) 2017 BY THE STATE OF SOUTH CAROLINA

Code 1976 § 33-44-404, SC ST § 33-44-404

Current through 2017 Act No. 86, 88 to 94, and 95 to 96, subject to technical revisions by the Code Commissioner as authorized by law before official publication.

End of Document

© 2017

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
AUG 01 2017
SC Court of Appeals

Athan Fokas,.....Appellant,

v.

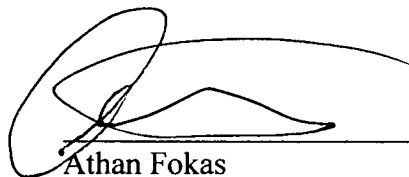
Phillip Ferderigos, Jacob Ferderigos, and Spiros Ferderigos,.....Respondents.

APPELLANT'S VERIFICATION TO PETITION FOR SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS

I, Athan Fokas, am the Appellant in the foregoing Petition for Supersedeas and the Petitioner. I have reviewed the Petition, and the matters alleged therein are true of my own knowledge or from my review of documents, except those matters stated upon information and belief, and as to those matters, I believe them to be true.

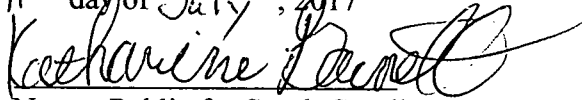
I declare under penalty of perjury under the laws if the State of South Carolina that the foregoing is true and correct.



Athan Fokas

SWORN to before me this

11th day of July, 2017



Notary Public for South Carolina

My Commission Expires 7/18/26

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

AUG 01 2017

SC Court of Appeals

Athan Fokas,.....Appellant,

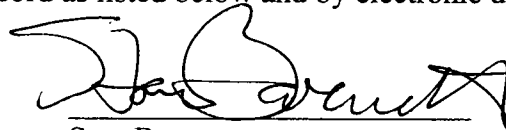
v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Reply to Respondents' Return in Opposition to Petition for Supersedeas by depositing a copy of it in the United States Mail, postage prepaid on July 31, 2017 addressed to their attorneys of record as listed below and by electronic delivery to the same.

July 31, 2017



Stan Barnett
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/(843) 708-4887
stan.barnett@yahoo.com
Attorney for Appellant

STAN BARNETT

Attorney at Law
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/(843)708-4887
stan.barnett@yahoo.com

RECEIVED

AUG 01 2017

SC Court of Appeals

July 31, 2017

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

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 Reply to Respondents' Return in Opposition to Petition for Supersedeas in the above appeal and proof of service. Also enclosed is the original of the Verification executed by Appellant. I very much appreciate your office allowing me to file this now and apologize again for inadvertently leaving it out when the Petition was filed.

With kindest regards, I remain

Sincerely,


Stan Barnett

Cc: Counsel of Record

RECEIVED

AUG 01 2017

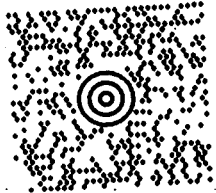
SC Court of Appeals

STAN BARNETT
(843) 708-4887
THE UPS STORE #2130
STE 103
1000 JOHNNIE DODDS BLVD
MOUNT PLEASANT SC 29464

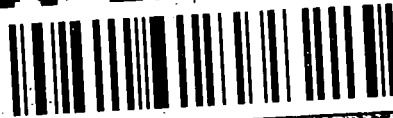
1 LBS 1 OF 1
SHP WT: 1 LBS
DWT: 12.9.2
DATE: 31 JUL 2017

SHIP CLERK SC COURT APPEALS
TO: THE HONORABLE JENNY ABBOTT. KITCHENS
1220 SENATE ST

COLUMBIA SC 29201-3769



SC 292 9-01



UPS NEXT DAY AIR SAVER
TRACKING #: 1Z 2E5 094 13 1019 6770

1P



BILLING: P/P

ISH 13.00N E2844 90.5V 07/2017

SEE NOTICE ON REVERSE regarding UPS Terms, and notice of limitation of liability. Where allowed by law, Shipper authorizes UPS to act as forwarding agent for express control and customs purposes. If separated from the US, Shipper certifies that the commodities, technology or software were exported from the US in accordance with the Export Administration Regulations. Violation contrary to law is prohibited.

P. GREEN S. TOPIVEL GR2
X
1220 SE 1500
42A-3820
SANITIS AUG01/2017