

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2019-001814

RECEIVED

Oct 01 2020

SC Court of Appeals

Shaul Levy and Meir Levy,.....Appellants,

v.

Carolinian, LLC,.....Respondent.

**RETURN TO RESPONDENT’S MOTION TO DISMISS AND ALTERNATIVE
MOTION TO STAY OR SUPPLEMENT APPEAL**

Pursuant to Rule 240(e), SCACR, the Appellants respectfully submit this Return to the Respondent’s Motion to Dismiss Appeal and Alternative Motion to Stay or Supplement Appeal.

PRELIMINARY STATEMENT

The Respondent’s motion asks the Court to dismiss or stay this appeal based on its assertion that rulings related specifically to the WVR Transaction in a completely independent and separate case pending in South Carolina’s Business Court¹ have made this appeal moot. However, the Respondent’s motion tries to limit this appeal solely to the question of access to specific information related to the Wyndham transaction. In doing that, the motion ignores the

¹ *Bhupendra Patel and Pradipkumar Patel, individually and as members of and on behalf of CN Resort, LLC, v. J. Patrick Lowe, Loyd R. Daniel, Charles Daniel, and CN Resort, LLC, 2015-CP-26-6515, (the “Patel case”)*

foundational issue in dispute in this appeal, which is the nature and extent of the Appellants' rights to obtain information under an existing permanent injunction. Even if the fairness of the Wyndham Transaction is adjudicated in the Patel case, which the Appellants deny would be controlling in this inquiry, that would not end the dispute in the current appeal. Regardless of the outcome in the Patel case, this Court still must determine whether the trial court improperly restricted the Appellant's rights to information under the Permanent Injunction. *That* question is the real and overriding issue on appeal.

Procedural Background

Levys v. CN Resort (the Respondent)

The parties appear to agree on the procedural background that is relevant to this appeal. This case involves an ongoing dispute between the two sides that began in 2012 and has been the subject of two prior appeals. It is necessary for the Court to learn the full history of the relationship between the parties to understand the current issues on appeal and the issues raised in the Respondent's motion.

This case originally arose from a dispute related to the Respondent's attempt to compel the purchase and sale of the Appellants' distributional interest in the Respondent that they obtained from Bhupendra Patel ("Bhupi") following a judicial foreclosure sale. As a result of that dispute, the Appellants commenced an action seeking a declaratory judgment, as well as a temporary restraining order and a temporary and permanent injunction. The trial court eventually granted a temporary restraining order and an injunction, which was to remain in place while the case was pending.

The case was originally called for a non-jury trial in January of 2013. The parties stipulated to the material facts prior that proceeding. After the trial, the court issued an Order

denying the Appellants' request for a permanent injunction and granting a declaratory judgment in the Respondent's favor. The Appellants filed a timely appeal of that order, and the parties entered into a consent order that kept the injunction in place during the appeal.

In September of 2014, the South Carolina Supreme Court issued an opinion reversing the trial court's decision based on the grounds set forth in its opinion, *Shaul Levy and Meir Levy v. Carolinian, LLC*, 410 S.C. 140, 763 S.E.2d 594 (2014) ("*Levy I*"). The Supreme Court remitted the case to the trial court for further action.

Based on that reversal, a second bench trial took place in May of 2015, based on the same stipulated facts from the original trial. At the conclusion of the new trial, the court issued an order adopting the Supreme Court's decision and reasoning from *Levy I*, and concluding that the Appellants were entitled to some of the declaratory and injunctive relief requested in their Complaint ("the Permanent Injunction"). Specifically, the Permanent Injunction enjoined the Respondent from:

1. maintaining unauthorized and sole dominion and control over the distributional interest rights rightfully belonging to the Appellants;
2. making unauthorized and wrongful distributions of the Respondent's funds in a manner inconsistent with or adverse to the distributional interests of the Appellants;
3. taking any actions to sell or attempting to force the sale of the Appellants' distributional interest in the Respondent; and
4. taking any actions inconsistent with the requirements set forth in the South Carolina Uniform Limited Liability Company Act, including provisions of S.C. Code Ann. 33-44-503(e) and the Operating Agreement.

The Respondent appealed this second trial court ruling, arguing that the court lacked jurisdiction to hold the second trial because *Levy I* merely reversed that court's original decision. The Respondent further contended that *Levy I* contained no specific language remanding the case for further proceedings, and that *Levy I* rendered the remainder of the case moot, leaving no remaining case or controversy for adjudication.

On March 7, 2018, this Court affirmed the Permanent Injunction. *Levy v. Carolinian, LLC*, 2018 S.C. App. Unpub. 101 (“*Levy II*”). The *Levy II* opinion recognized that the “[Appellants] and [the Respondent] remain in an ongoing adversarial relationship – the [Appellants] own the distributional interest associated with Patel’s membership in [the Respondent], which [the Respondent] wants but failed to purchase pursuant to the terms of the Operating Agreement. Thus, there is a real substantial risk that without the circuit court’s order, [the Respondent] will continue to seek ways to circumvent or undermine the [Appellants’] distributional interest. The record illustrates that at the time of the second nonjury trial, [the Respondent] was still attempting to use the language of the Operating Agreement to interfere with the Levys’ distributions.”

In September of 2018, the Supreme Court issued an Order denying the Respondent’s Petition for Writ of Certiorari in *Levy II*, thereby making the Permanent Injunction final. After the Respondent’s appellate options were exhausted, the Appellants moved forward by requesting information from the Respondent ensuring that it had appropriately followed the injunctions that had continually been in place since July 27, 2012. Following extended negotiations between counsel for both parties, on or about February 27, 2019, the Appellants were given access to inspect and copy certain records. During this inspection, the Respondent provided the Appellants

a redacted version of the Asset Purchase Agreement involving the Respondent, several other entities (names redacted), and WVR South Carolina, LLC (the “WVR Transaction”).

The Respondent denied the Appellants’ request for any additional information related to the WVR Transaction, including an un-redacted version of the Asset Purchase Agreement or any additional financial documents necessary to evaluate the fairness of the WVR Transaction. After the Respondent refused voluntarily to allow them to review the WVR Transaction, the Appellants issued deposition notices and subpoenas for Loyd R. Daniel, Jr., and J. Patrick Lowe and subpoenas *duces tecum* to Strand Capital Group, LLC, (management company for the Respondent and the other entities involved in the WVR Transaction), King Cunningham, LLC (the law firm that handled the closing of the WVR Transaction), Daniel Professional Group (the accounting firm that handles the accounting for CN Resort), and WVR South Carolina, LLC. The purpose was to obtain the necessary testimony and documentation that would allow the Appellants to investigate fully the fairness of the WVR Transaction.

The Respondent objected to the deposition notices and subpoenas *duces tecum* and requested all recipients await an “Order of the Court before attempting to comply” with any subpoena. On March 16, 2019, the Appellants filed a Motion for Contempt that sought an order that would (a) require Loyd Daniel, Jr., and J. Patrick Lowe to comply with their deposition subpoena, (b) require all entities to respond fully to the properly served subpoenas, and (c) find that the Respondent should be held in contempt for preventing the Appellants access to the financial documents necessary to evaluate the WVR Transaction because such conduct violated the Permanent Injunction.

Following a hearing on the Motion for Contempt, the trial court denied that motion in an Order entered on July 1, 2019. The Appellants filed a timely Motion to Alter or Amend pursuant

to Rule 59(e), SCRCF, which the court denied on October 3, 2019. The Appellants then filed the current appeal, which involves the issue of whether the Permanent Injunction grants them the right to conduct the discovery necessary to determine whether violations of the Permanent Injunction have occurred.

Patel v. CN Resort (the Respondent)

The Appellants assert that consideration of the Patel case is neither properly before this Court, nor relevant to the issues in this appeal. Yet, to understand the deficiencies in the Respondent's motion, Court needs to have a basic understanding of the Patel case. The motion goes through a detailed history of Patel case. In the interest of brevity, the Appellants will not repeat the entire history of that case. Rather, the Appellants will highlight the portions of the procedural history set forth in the motion with which they agree or disagree.

The Patel case was filed in 2015 by Bhupi and Pradipkumar Patel ("Nick") (collectively the "Patels")² against the Respondent, J. Patrick Lowe ("Patrick"), Loyd R. Daniel ("Loyd") and Charles Daniel ("Charles").³ The Patels alleged causes of action for: (1) declaratory relief related to their voting rights in the Respondent; (2) declaratory relief related to their removal from the Respondent's Management Committee; (3) Judicial Dissolution and Removal of Patrick, Loyd and Charles as managers; (4) Accounting; (5) Breach of Fiduciary Duty; (6) Liability for Unlawful Distributions, and (7) Negligence. Paragraphs 23, 24 and 29 of the Patels' Complaint specifically allege wrongful acts by the Respondent, Loyd, Patrick and Charles related to the WVR Transaction, and Paragraphs 70, 72, and 74 set forth the inappropriate conflict of interest transactions and self-dealing at issue in the WVR Transaction.

² The Patels were both members of the Respondent and previously served on its Management Committee.

³ Upon current information and belief, Patrick, Loyd and Charles are the current members of the Respondent's Management Committee.

The Patels filed a motion to compel on February 12, 2018, based on the defendants' failure to provide responses to the Patels' production requests, including, but not limited to, requests seeking all communication between Wyndham and the Respondent relating to the WVR Transaction and un-redacted versions of the Wyndham Transaction Agreement. The motion to compel came *after* the Respondent had moved to quash a subpoena to WVR South Carolina for all documents relating to the Wyndham Transaction. The parties reached an agreement as to the production of certain Wyndham Transaction documents prior to a hearing on the motion to compel.

As the preceding paragraph demonstrates, the August 2, 2019, motion to compel referenced in the Respondent's motion was *not* the first time the Respondent was aware of the WVR Transaction being at issue. That second motion came after the voluntary production stemming from the first, and it sought the removal of redactions and basic source documentation. Thus, the Respondent clearly knew the WVR Transaction was a matter in dispute long before the date of the order giving rise to the current appeal (July 1, 2019). The Respondent's insinuation to the contrary in its motion is simply incorrect.

The Appellants acknowledge that they unsuccessfully sought to intervene in the Patel case in February of 2017. However, the Appellants disagree with the Respondent's arguments as to any effect that attempt to intervene has on the instant case. The court based its order denying the motion to intervene on the Appellants' limited rights as non-members of the company at that time, as well as a belief that the Patels were already protecting those rights.

When that order was filed, the Permanent Injunction was on appeal and, thus, not final. Further, at that time, the Appellants owned Bhupi's 23.35% distributional interest in the Respondent, but only had a *charging lien* on Nick's 23.35% distributional interest in the

Respondent. It is undisputed that Nick still held his Voting Rights at the time the court denied the motion to intervene. The Appellants did eventually become the owner of Nick's 23.35% distributional interest in the Respondent, but that acquisition occurred later, and it lends no support to the Respondent's position.

Further, the assertion that this appeal is moot because the Appellants would have access to any of the information from the WVR Transaction produced in the Patel case is patently false. The court in that case entered a consent confidentiality agreement that specifically prevents the sharing with the Appellants of any information produced during discovery. Indeed, an order compelling the production of additional documents related to the WVR Transaction, filed on March 19, 2020, specifically states that "the production by Defendants shall be confidential and strictly subject to the terms of the Consent Confidentiality Order."

ARGUMENT

I. The issues raised in Respondent's Motion to Dismiss are untimely.

The Appellants filed their Notice of Appeal on October 25, 2019, and filed their Initial Appellants' Brief on April 8, 2020. Therefore, Respondent's Initial Brief was originally due by May 7, 2020. As a courtesy, the Appellants consented to multiple extension requests related to the filing of the Respondent's Initial Brief. However, after receiving those multiple extensions, the Respondent did not file its Initial Brief. Instead, the Respondent filed a Motion to Strike and Motion to Stay Respondent's Deadline to File its Respondent's Brief on June 26, 2020. The Court denied that motion on August 12, 2020. Yet, once again, rather than submitting its Initial Brief, the Respondent filed the pending motion on September 21, 2020.

The Respondent suggests that it could not have previously raised any arguments based on the Patel case because those assertions are based on newly obtained information. That position is

wholly without merit. The Respondent has been well aware of the issues in the Patel case (including the dispute over materials relating to the WVR Transaction) for more than two years now. As discussed above, that dispute arose in the Patel case as early as February 2018. Thus, if the Respondent genuinely believed the Patel case had some impact on the current appeal, it easily could have – and *should have* – raised those arguments in its June 26, 2020 motion.⁴

Although the process is instructive, it is not even necessary to go back to 2018 to see that the Respondent should have raised its argument sooner. As discussed above, after the Patels received initial materials in response to their motion to compel, a subsequent order required the production of more documents. The court entered that order on March 19, 2020 – more than three months before the Respondent filed its original motion to strike. Yet, the Respondent chose not to raise its current argument in that motion. That decision is akin to knowing there are facts to support a certain cause of action, but not including that cause of action in an original Complaint. The Respondent should have asserted all arguments it felt it had as to the viability of the current appeal in its original motion. But the Respondent chose not to do that, and the Court should not consider that issue at this late stage.

The Respondent has now twice allowed the time for filing its Initial Brief draw near, only to file a supposedly substantive motion at the eleventh hour. Given that the Respondent could have raised the current issue in its first motion, but chose not to, the question arises as to whether the second motion is merely an attempt to stall the progress of this appeal. The Respondent's

⁴ In the Respondent's Motion, its counsel indicates that he just became aware that the WVR Transaction is at issue in the Patel case. The Appellants acknowledge that the Respondent's counsel in this appeal is not counsel of record in the Patel case. The Appellant is not asserting that the Respondent's current counsel had prior knowledge that the WVR Transaction is at issue in the Patel case. However, the question is not whether *counsel* had that information, but whether *the Respondent* had it. Clearly the Respondent knew long ago that information about the WVR Transaction was a source of conflict in the Patel case.

Initial Brief was originally due almost five months ago. Granted, the Appellants consented to extensions that accounted for some of that time, but they would not have done so had they known the Respondent would use those extensions to ponder attacks on the appeal itself, rather than to develop and brief its substantive positions.

As discussed below, the arguments in the Respondent's motion are erroneous and do not provide any basis for dismissing or staying this appeal. But the Court need not reach the merits because this threshold matter is a sufficient basis for denying the motion. The Respondent has chosen to make piecemeal challenges to the appeal, rather than raising its supposed issues in one motion and at the earliest possible time. The Court should reject those tactics by denying the motion.

II. The Respondent never raised the issue of the Patel case to the trial court in the current action.

Despite the Respondent's assertion to the contrary, at the time of the Appellants' motion that ultimately led to this appeal, the Respondent was well aware that the Patels were seeking information related to the WVR Transaction in the Patel case. The Patel's Complaint specifically mentions the WVR Transaction, and the Patels issued a subpoena to WVR South Carolina, LLC, for all documents related to the WVR Transaction on *November 21, 2016*. Counsel representing the Respondent attended a hearing on a motion to quash that subpoena to WVR South Carolina on *October 20, 2017*. Further, the Patels' initial discovery requests to the Respondent asked for certain documents related to the WVR Transaction. The Patels filed a motion to compel responses to those discovery requests as early as *February 12, 2018*. In response to the Patel's initial discovery requests, the Respondent produced certain information related to the WVR Transaction in *2018*.

Thus, the Respondent knew perfectly well that it produced certain documentation related to the WVR Transaction⁵ to the Patels as early as 2018. The Respondent was also well aware that the Patels were seeking *additional* documents related to the WVR Transaction when the Patels filed a second motion to compel. All of that occurred prior to the filing of the Appellants' motion that led to the order currently on appeal.

This timeline is significant because it demonstrates that the Respondent easily could have raised its arguments regarding the Patel case during the proceedings in the trial court. The Appellants filed a Motion for Contempt and, after that was denied, a Motion to Alter or Amend. The presiding judge conducted hearings for both motions. The Respondent, therefore, had numerous opportunities to assert arguments based on the Patel case, either in person or in written submissions. The Respondent could have argued that the issues raised in the Motion for Contempt were moot, or the Respondent could have asked the judge to stay any decision on that motion until the conclusion of the Patel case. The Respondent did neither. The record contains not even a hint of such arguments. Thus, the Court should decline to consider the issue raised in the pending motion.

Although the Respondent is not technically forbidden from making arguments on appeal for the first time, that tactic is strongly discouraged. As former Chief Justice Toal explains in her treatise on appellate practice:

[W]hile it is not required that the respondent present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. *In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the*

⁵ Due to the Confidentiality Order in the Patel case, the Appellants have no knowledge as to what documents related to the WVR Transaction have been produced or even when that production occurred.

respondent prior to appeal. State another way, the present may raise an additional sustaining ground that was not presented to the trial court, but the appellate court is likely to ignore it.

Toal, et al. *Appellate Practice in South Carolina* (2nd Ed.) at 62 (emphasis added). The Respondent might claim that its assertion is not technically an “additional sustaining ground” because it comes in a motion to dismiss, rather than in a brief. But this is a distinction without a difference. The Respondent is making a substantive argument in opposition to the Appellants’ appellate issues. It is of no consequence that the Respondent has raised that argument in a motion, rather than simply including it in a brief. The “method of delivery” is not the point. What matters is that the Respondent is raising an argument that it could have made to the trial court, but chose not to. For the reasons explained by Chief Justice Toal, the Court should decline to address that argument under these circumstances. Therefore, the Court should deny the motion.

III. The Patel case does not address the Appellant’s right to certain information under to the Permanent Injunction.

While the Respondent’s motion argues that a decision related to the reasonableness and fairness of the WVR Transaction in the Patel case would make this appeal moot, that position ignores the true issue that was before the trial court and is the crux of this appeal. The Appellants’ Motion for Contempt was directly related to the Respondent’s refusal to grant the Appellants access to documents necessary to ensure that the Respondent had not violated, or was not violating, the Permanent Injunction. The Appellants did not ask the trial court to determine whether the WVR Transaction itself was fair and reasonable, which is an issue in dispute in the Patel case. Rather, the Appellants asked the trial court to rule that they have the right, under the Permanent Injunction, to seek and obtain information that will allow the Appellants to discover whether the Respondent has violated that standing order. The trial court concluded the Permanent Injunction does not give that right, and the Appellants contend that ruling is legally

erroneous. *That* is the real issue on appeal, and it is larger and broader than any dispute over information about one specific transaction.

The Appellants acknowledge that their rights as transferee of the Respondent, under both the Operating Agreement and South Carolina Limited Liability Company Act, would normally be limited to receiving the distributions which the transferor would be entitled.⁶ The Appellants' relationship to the Respondent, however, hardly qualifies as "normal." In addition to the statute and the Operating Agreement, the Permanent Injunction also governs that relationship. If that Permanent Injunction is appropriate and necessary – and the settled law of this case holds that it is – then it must include the right to determine whether or not the Respondent is obeying it. Otherwise, the Permanent Injunction would be a paper tiger, unable to serve its intended function.

"It is a maxim of law that there can be no right without a remedy." *W.W. Burrows v. M'Whann*, 1 Des. 409 (S.C. Court of Chancery 1794). *See also Wilkes v. S. Ry.*, 85 S.C. 346, 349, 67 S.E.2d 292, 293 (1910) ("The boast of the law is that there is no right without a remedy."); *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 359 (1908) ("That the law confers no right without a remedy to secure is a maxim of law."). Here, the Permanent Injunction obviously grants the Appellants certain rights. It necessarily follows that it also creates the remedies required to enforce those rights. The Appellants contend those remedies include the ability to seek and obtain information needed to evaluate the Respondent's compliance (or noncompliance) with the Permanent Injunction.

Of course, this goes to the merits of the issue raised in the current appeal, which the Court is not yet deciding at this stage of the appeal. The Appellants include this discussion

⁶ See S.C. Code Ann. § 33-44-503(d) and (e) and Section 3.4 of the Operating Agreement.

merely to demonstrate the flaw in the Respondent's motion. The issue on appeal is broader, and more fundamental, than a request to obtain certain information related to one specific transaction. The appeal involves the interpretation of the Permanent Injunction and the nature of the rights and remedies it grants to the Appellants. This larger issue has nothing to do with the Patel case. Therefore, the Respondent's motion to dismiss based on that other case must fail.

CONCLUSION

For these reasons, the Court should deny the motion to dismiss and motion to stay and instruct the Respondent to immediately file and serve its initial brief and designation of matter.

Respectfully submitted,

s/ Mark B. Goddard

Mark B. Goddard (SC Bar #73965)
R. Hawthorne Barrett (SC Bar #16973)
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200
mgoddard@turnerpadget.com
tbarrett@turnerpadget.com

R. Wayne Byrd
Turner Padget Graham & Laney, P.A.
P.O. Box 2116
Myrtle Beach, SC 29578

Attorneys for Appellants

October 1, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2019-001814

RECEIVED

Oct 01 2020

SC Court of Appeals

Shaul Levy and Meir Levy,.....Appellants,

vs.

Carolinian, LLC,.....Respondent.

PROOF OF SERVICE

The undersigned, an attorney for the Appellants, certifies that I have this **1st day of October, 2020**, served a copy of the **Return to Motion to Dismiss and Alternative Motion to Stay or Supplement Appeal** by causing it to be deposited in the U.S. mail with sufficient postage attached, addressed to: Benjamin A. Barody; The Bellamy Law Firm; P.O. Box 357; Myrtle Beach. SC 29578.

s/Mark B. Goddard

Mark B. Goddard (SC Bar #73965)
R. Hawthorne Barrett (SC Bar #16973)
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200
mgoddard@turnerpadget.com
tbarrett@turnerpadget.com

R. Wayne Byrd
Turner Padget Graham & Laney, P.A.
P.O. Box 2116
Myrtle Beach, SC 29578

October 1, 2020

Attorneys for Appellants

Mark B. Goddard

REPLY TO:

E-Mail: MGoddard@TurnerPadget.com
Writer's Direct Dial: (843) 213-5542
Direct Fax: (843) 213-5555

October 1, 2020

VIA EMAIL: ctappfilings@sccourts.org

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Oct 01 2020

SC Court of Appeals

Re: Shaul Levy and Meir Levy, Appellants, v. Carolinian, LLC, Respondent
Appellate Case No.: 2019-001814
Appeal from Horry County Court of Common Pleas (Case No.: 2012-CP-26-5610)
Our C/M#: 11816.00101

Dear Ms. Kitchings:

Please find attached for filing with the Court **Appellants' Return to Motion to Dismiss and Alternative Motion to Stay or Supplement Appeal and Proof of Service** in connection with the above-referenced matter.

By copy of this letter I am serving a copy of same on all counsel of record.

Thank you for your assistance and should you have any questions, please do not hesitate to contact us.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Mark B. Goddard

Attachments as stated

cc: Benjamin A. Baroody Esq. (w/encls.)

TPGL 10629493v1