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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1117

Filed 16 July 2024

Mecklenburg County, No. 22-CvS-8597

BRUCE U. CLAYTON, Plaintiff,

v.

PETER J. WIRTH, Defendant.

Appeal by Defendant from order entered 28 September 2023 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

Cranfill Sumner LLP, by Steven A. Bader, for Defendant-Appellant.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for Plaintiff-Appellee.

COLLINS, Judge.

This appeal arises from a dispute between members of a limited liability company who disagree as to how the company's funds should be distributed upon its dissolution. Defendant Peter J. Wirth appeals from an order granting summary judgment to Plaintiff Bruce U. Clayton on Defendant's counterclaims for declaratory judgment, breach of fiduciary duty, and constructive fraud and dismissing those

claims. Defendant argues that summary judgment was improper because genuine issues of material fact exist as to each of his counterclaims. We reverse and remand in part and affirm in part.

I. Background

Plaintiff and Defendant formed Old Hickory Farm, LLC, (“LLC”) in 2005. Each contributed an equal amount to capitalize the LLC, and each received a 50% membership interest in the LLC. The LLC functioned pursuant to an Operating Agreement, which provided the following rules and procedures relevant to this appeal:

ARTICLE II

CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS

....

SECTION 2.2. Additional Capital Contributions; Loans. No Member shall be required or permitted to make additional Capital Contributions unless such additional Capital Contributions are (i) agreed to by a unanimous vote of the Members and (ii) made in proportion to the Member’s initial Capital Contributions. No Member shall be obligated to lend money to the LLC.

....

ARTICLE V

MANAGEMENT

SECTION 5.1. Management by the Members; Limitations on Actual Authority. The Members shall have complete authority and exclusive control over the management of the business and affairs of the LLC. Except to the extent delegated pursuant to Section 5.2 below and except for those matters described in Section 5.3 below, all management decisions shall require the vote, consent,

approval or ratification of a majority in Interest of the Members.

. . . .

SECTION 5.3. Restrictions on Authority of Members and Others.

(a) Unanimous Consent Required. Without the unanimous consent of the Members, no Member and no Person to whom the Members have delegated management authority shall have authority to do any of the following:

- (i) do any act in contravention of this Agreement.
- (ii) amend this Agreement, except as expressly provided otherwise in this Agreement.
- (iii) possess any property or assign, transfer, or pledge the rights of the LLC in specific property, for other than the exclusive benefit of the LLC.
- (iv) employ, permit to be employed, the funds or assets of the LLC in any manner except for the exclusive benefit of the LLC.
- (v) commingle the LLC's funds with its own or any other Person's funds.
- (vi) admit any Person as a Member.

(b) Supermajority Vote Required. Without a vote of a Supermajority in Interest of the Members, no Member and no Person to whom the Members have delegated management authority shall have the authority to do any of the following:

- (i) cause the LLC (a) to incur indebtedness, (b) to enter into any contract or agreement or series of related contracts or agreements, whether oral or written, obligating the LLC to expend money or to render services, or (c) to obligate the LLC in any other manner, for an amount in excess of \$5,000.00.
- (ii) cause the LLC to sell, transfer, lease, or otherwise dispose of any assets of the LLC with a value in excess of \$5,000.00, other than distributions permitted under this Agreement and the sale of

inventory or the leasing of the LLC's property in the ordinary course of business.

(iii) cause the LLC to enter into any contract, agreement or loan or engage in any transaction with any Member, with any affiliate of or related party to any Member, or with any Person to whom the Members have delegated management authority or any affiliate of or related party to such Person.

(iv) cause the LLC to merge with or into any other entity or any entity to merge with or into it the LLC.

(v) cause the LLC to pay or become obligated to pay compensation of any type to any Member or any Person to whom the Members have delegated management authority.

(vi) admit any Person as a Member.

....

ARTICLE VIII

CESSATION OF MEMBERSHIP

....

SECTION 8.3. Removal of Members. Any Member shall be removed as a Member upon the vote of all of the Members other than the Member whose removal is at issue. If the removed Member has breached this Agreement or has otherwise caused damage to the LLC, the LLC shall have all available rights and remedies against the removed Member, including the right to offset the amount of the LLC's damages against amounts otherwise distributable to the removed Member.

....

ARTICLE IX

DISSOLUTION, WINDING UP AND LIQUIDATING DISTRIBUTIONS

SECTION 9.1. Dissolution Triggers. The LLC shall dissolve only upon the first to occur of any of the following events:

....

(d) Except as provided in the following Section, the sale of all or substantially all of the assets of the LLC.

....

Section 9.2. Dissolution Release.

Notwithstanding the occurrence of any events described in Subsections 9.1(d) or (e) above, the LLC shall not be dissolved and the business of the LLC shall continue to be carried on by the remaining Member or Members, if (i) there is at least one remaining Member, and (ii) within ninety (90) days following the occurrence of such event, a majority in Interest of the remaining Members vote that the LLC shall not be dissolved and that its business shall continue.

....

SECTION 9.4. Liquidating Distributions. Upon the disposition of the LLC's noncash assets, the LLC's cash and the proceeds from the disposition of the LLC's noncash assets shall be distributed in the following order:

....

(c) To the Members in accordance with their credit (i.e., positive) Capital Account balances.

The LLC owned real property in South Carolina, which it leased to a tenant. In 2008, Defendant discovered that the tenant had been paying substantially lower rent than the lease called for, and that Plaintiff had been subsidizing the shortfall by making payments to the LLC for the difference on the mortgage. These subsidies were reflected as capital contributions to the LLC on the LLC's K-1 tax forms, which were prepared for and provided to the parties each tax year. Plaintiff requested that Defendant make payments to the LLC to help cover the rent shortfall, which Defendant did.

In January 2010, the parties agreed that Plaintiff would make a capital contribution to the LLC in the amount of \$269,187.89 “plus any additional payments from [Plaintiff] related to the mortgage loans” on the LLC’s property, and that the parties’ percentage ownership in the LLC would change as determined by binding arbitration. In April 2010, Defendant notified Plaintiff that he was “not going to put any more money into this venture, while [the tenant was] so far behind in [its] payments” and stopped making payments to the LLC to cover the rent shortfall.

In 2011, the arbitrator determined that Plaintiff’s ownership would increase to 53.71% and Defendant’s ownership would decrease to 46.29%. Plaintiff continued to make capital contributions to the LLC, while Defendant did not, which led to a significant increase in Plaintiff’s capital account balance relative to Defendant’s as reflected by the LLC’s K-1 forms. In 2021, the LLC sold all of its non-cash assets, triggering the LLC’s dissolution.

Plaintiff filed a complaint seeking a declaratory judgment that the LLC’s cash assets should be distributed in accordance with the parties’ capital account balances pursuant to Section 9.4 of the Operating Agreement. Defendant answered, and ultimately filed counterclaims against Plaintiff for declaratory judgment, breach of fiduciary duty, and constructive fraud. Plaintiff moved for summary judgment as to Defendant’s counterclaims, which the trial court granted. Defendant timely appealed.

II. Discussion

A. Appellate Jurisdiction

Defendant appeals from an order granting summary judgment to Plaintiff on all of Defendant's counterclaims. Because the order does not address Plaintiff's claim for declaratory judgment, the order is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal" pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quotation marks and citations omitted); N.C. Gen. Stat. § 1A-1, Rule 54(b) (2023).

Here, the trial court's order represents a final judgment as to one or more but fewer than all of the claims. Furthermore, the trial court certified that there is no just reason to delay appeal. Accordingly, this Court has jurisdiction to consider the

merits of Defendant's appeal.¹ *See id.*

B. Standard of Review

"We review de novo an appeal of a summary judgment order." *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 285, 851 S.E.2d 891, 895 (2020) (citation omitted). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Id.* (citation omitted). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023).

C. Declaratory Judgment

Defendant argues that the trial court erred by granting summary judgment to Plaintiff on Defendant's claim for declaratory judgment. Plaintiff argues that summary judgment was proper because Defendant's declaratory judgment action was barred by the statute of limitations.

The Uniform Declaratory Judgment Act provides, in pertinent part, that any person interested under a contract "may have determined any question of

¹ Defendant filed a petition for writ of certiorari, asking this Court to issue the writ if appellate review is not available by right. Because Defendant's appeal is properly before this Court, Defendant's petition for writ of certiorari is dismissed as moot.

construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254 (2023). A party’s claims are properly dismissed under the Act if the statute of limitations bars any claim, because “jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (citations omitted). Thus, if the statute of limitations was properly applied to Defendant’s underlying claims, “no relief can be afforded under the Declaratory Judgment Act.” *Ludlum v. State*, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013).

Claims arising from contracts are subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(1) (2023). Thus, a party “must commence any action based on a contract within three years from the time the cause of action accrues, absent the existence of circumstances which would toll the running of the statute of limitations.” *Pearce v. N.C. St. Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984) (citation omitted). The cause of action accrues “at the time of notice of the breach.” *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002) (citations omitted).

Here, Defendant seeks a declaratory judgment that Plaintiff’s contributions to the LLC were not capital contributions because they were made without Defendant’s

consent, in violation of the Operating Agreement.² Defendant does not dispute that the applicable statute of limitations in this case is three years. Rather, this issue concerns when Defendant's right of action to file a claim accrued and commenced the running of the statute of limitations.

Defendant first learned that Plaintiff had made capital contributions to the LLC without his consent in 2008, when he discovered that Plaintiff was making payments to the LLC to subsidize rent shortfalls. Plaintiff continued to make capital contributions periodically through 2021 as reflected on the LLC's K-1 forms. These K-1 forms were provided to both parties and, therefore, Defendant had notice of Plaintiff's capital contributions for a given year when he received the K-1 form for that year. Thus, any claim concerning contributions made more than three years before the filing of Defendant's counterclaims is barred by the statute of limitations. *See Ludlum*, 227 N.C. App. at 94, 742 S.E.2d at 582.

The statute of limitations does not, however, preclude Defendant from seeking declaratory judgment regarding capital contributions for which Defendant received notice within three years before the filing of his counterclaims. Furthermore, we are not persuaded by Plaintiff's argument that Defendant's declaratory judgment claim should be decided at summary judgment based on the doctrine of laches. Accordingly,

² Defendant's declaratory judgment claim stated several additional grounds for relief, none of which have been advanced on appeal. Accordingly, those issues are deemed abandoned. *See* N.C. R. App. P. 28(b)(6).

the trial court's order granting summary judgment on Defendant's counterclaim for declaratory judgment is reversed and the matter is remanded to consider the claim as it applies to Plaintiff's contributions to the LLC for which Defendant received notice within three years before the filing of his counterclaims.

D. Breach of Fiduciary Duty/Constructive Fraud

Defendant argues that the trial court erred by granting summary judgment to Plaintiff on Defendant's claims for breach of fiduciary duty and constructive fraud.

Breach of fiduciary duty and constructive fraud are related, though distinct, causes of action. *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004) (citation omitted). Each requires the existence and subsequent breach of a fiduciary duty resulting in the plaintiff's injury. *See id.* at 293-94, 603 S.E.2d at 155-56. Constructive fraud requires the additional element that the breaching party benefit himself from the breach. *Id.* at 294, 603 S.E.2d at 156.

Fiduciary duties may arise by operation of law or based on the facts and circumstances of the relationship between the parties. *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635-36, 794 S.E.2d 346, 351 (2016) (citation omitted). "The North Carolina Limited Liability Company Act, N.C. Gen. Stat. § 57C-1-01 *et seq.*, does not create fiduciary duties among members." *Kaplan v. O.K. Technologies, LLC*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). Instead, "[t]he operating agreement governs the internal affairs of an LLC and the rights, duties, and obligations of . . . the interest owners . . . in relation to each other[.]" N.C.

Gen. Stat. § 57D-2-30(a) (2023). Thus, members of a North Carolina LLC do not owe each other fiduciary duties by operation of law.

However, a fiduciary duty may arise from a relationship “where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Lockerman*, 250 N.C. App. at 635, 794 S.E.2d at 351 (citation omitted). The standard for such a relationship is demanding; “[o]nly when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.” *Id.* at 636-37, 794 S.E.2d at 352 (citations omitted).

Here, the Operating Agreement provides several safeguards to ensure that no one Member figuratively held all the cards, including, but not limited to: (1) requiring unanimous consent of the Members before amending or acting in contravention of the Operating Agreement; (2) requiring a supermajority in interest vote before transacting business over \$5,000; (3) authorizing any Member to call a meeting to vote on LLC business; (4) allowing for any Member to be removed upon the vote of all of the Members other than the Member whose removal is at issue; and (5) protecting Members’ rights to inspect books, records, and other financial documents. Plaintiff and Defendant each had the authority pursuant to the Operating Agreement to enforce any of these provisions; consequently, no fiduciary relationship existed between them. Thus, Defendant cannot maintain a claim dependent on the existence

of such a duty. Accordingly, the trial court properly granted summary judgment to Plaintiff on these claims.

III. Conclusion

Because summary judgment was improper as to Defendant's declaratory judgment counterclaim regarding Plaintiff's capital contributions for which Defendant received notice within the three-year limitation period, that portion of the trial court's order is reversed and remanded for further proceedings. However, because no fiduciary relationship existed between the parties, the trial court properly granted Plaintiff summary judgment on Defendant's breach of fiduciary duty and constructive fraud counterclaims.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges STROUD and STADING concur.

Report per Rule 30(e).