

NOT DESIGNATED FOR PUBLICATION

JVF FOOD, LLC

*

NO. 2004-CA-0741

VERSUS

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COURT OF APPEAL

JOAN M. FERRARA

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-12319, DIVISION "D"
Honorable Lloyd J. Medley, Judge**

Judge Edwin A. Lombard

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard)

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**AFFIRMED IN PART;
REMANDED**

PERTINENT FACTS AND PROCEDURAL HISTORY

In September 1999, Joan M. Ferrara founded JVF Food, LLC (JVF), a Louisiana limited liability company domiciled in Orleans Parish. She secured a lease on a building at 3331 St. Charles Ave. for the location of the business. In May 2001, JVF officially opened its doors as a delicatessen doing business under the trade name of “Fortissimo, the Food and Wine Emporium.”

Mrs. Ferrara solicited investors for cash contributions into JVF in exchange for a percentage of ownership in the business directly proportionate to each investor’s cash contribution. Five investors contributed money to JVF: Edward Callan, Pamela J. and Robert Raybourn, and Cecilia and David Radcliffe. No operating agreement or other document governing JVF was ever adopted and Mrs. Ferrara continued to maintain exclusive control over the business as Manager of the LLC. On or about November 19,

2001, a special meeting of the members of JVF was held, at which a resolution was adopted to remove Mrs. Ferrara as Manager of JVF.

On August 5, 2002, the investors filed a petition for declaratory judgment in Civil District Court in the name of JVF seeking to declare Mrs. Ferrara's interest in the LLC at zero percent. An amended petition was filed on October 1, 2002, adding the investors in their individual capacities as plaintiffs and adding Ann C. Ferrara, another investor, as an additional defendant. Trial on the merits was scheduled for March 29, 2004.

Mrs. Ferrara's counsel of record, Vincent Booth, advised her by certified mail, received November 4, 2003, that he intended to withdraw and that her file was available for retrieval at any time. On November 19, 2003, the investors filed a Motion for Summary Judgment, which was originally set for hearing in the trial court on December 5, 2003. Booth was served the motion on November 24, 2003; however, on November 26, 2003, he moved the court to withdraw from the case. On December 1, 2003, the trial court signed an order granting Booth permission to withdraw from the case and continued the Motion for Summary Judgment to January 9, 2004.

On January 6, 2004, Mrs. Ferrara obtained new counsel. On January

8, 2004, after the plaintiffs refused to continue the Summary Judgment hearing, Mrs. Ferrara's new counsel moved the court for a continuance. The trial court denied the motion for continuance and proceeded with the hearing on the merits of the Motion for Summary Judgment. The trial court granted the plaintiffs' Motion for Summary Judgment without issuing reasons, declaring that Joan Ferrara, Vincent Ferrara, and Leslie Ferrara have zero percent interest in JVF Food, LLC.

Mrs. Ferrara timely filed a Motion for Devolutive Appeal on February 17, 2004. On March 15, 2004, the trial court granted her leave to proceed in forma pauperis in light of her poverty and lack of means.

LAW AND ARGUMENT

In Defendant's first assignment of error, she argues that the trial court committed manifest error in denying a continuance.

According to La. C.C.P. art. 1601, "a continuance may be granted in any case if there is good ground therefor." La. C.C.P. art. 1602 provides, in pertinent part, that "[a] continuance shall be granted if at the time a case is to be tried, the party applying for the continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his

case." When not mandated by article 1602, the granting of a motion to continue is discretionary with the trial court. Further, the trial judge has wide discretion in controlling his docket, in case management, and in determining whether a motion for continuance should be granted. Therefore, this court, absent a showing of abuse of that discretion, will not disturb a decision on a motion for continuance. *Krepps v. Hindelang*, 97-980 (La.App. 5 Cir 4/15/98), 713 So.2d 519, 527 [Citations omitted].

In deciding whether to grant or deny a continuance, fairness to both parties and the need for orderly administration of justice are proper considerations to be taken into account by the trial court. *Norwood v. Winn Dixie*, 95-2123 (La.App. 1 Cir. 5/10/96), 673 So.2d 360, 362. [Citations omitted].

Defendant asserts that she did not have enough time to prepare because she did not have access to her file and that she recently acquired new counsel. Contrary to Defendant's argument, the record reflects that Defendant's former counsel advised Defendants by certified mail more than two months prior to the scheduled January 9, 2004 hearing date and more than three weeks prior to counsel's actual withdrawal that their file was available for their retrieval at anytime. The record is also devoid of any evidence setting forth any action taken in an effort to obtain new counsel. Defendant failed to provide any basis upon which this Court could find an

abuse of discretion. Defendant sets forth in her second argument the assertion that the trial court erred in granting declaratory relief and improperly divesting her of her ownership interest. We agree.

In all cases of cessation of membership, whether voluntary or involuntary, the former partner or other interested person is entitled to be paid an amount equal to the former partner's interest at the time of cessation. La. C.C. art 2823, et seq. As is clearly set forth in the record, Defendant was properly removed as manager under Louisiana Corporate Law Title 12 Section 1313. Defendant, however, has neither withdrawn nor been expelled as a member. Ferrara should not be divested of ownership interest until cessation of membership; and, until cessation of membership, the trial court cannot properly determine the value of Defendant's share.

Accordingly, we uphold the decision of the trial court with regard to the denial of the continuance and remand the Motion for Summary Judgment to the trial court for further proceedings.

AFFIRMED IN PART;

REMANDED