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Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

CHRISTINE LEE, as Independent ) 1 CA-CV 08-0575  
Administrator of the Estate of )  
Paul Lee, ) DEPARTMENT B  
)  
Plaintiff/Appellee, ) **MEMORANDUM DECISION**  
)  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
SANGWON "SAM" YUM, HORACE H. KIM, ) Civil Appellate Procedure)  
NORTHSTAR CABLE, L.L.C., and )  
MERIDIEN TELECOM SOLUTIONS, )  
L.L.C., )  
)  
Defendants/Appellants. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-050740

The Honorable Michael D. Jones, Judge

**AFFIRMED**

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Titus Brueckner & Berry PC ) Scottsdale  
By Jon A. Titus )  
and Patrick J. Davis )  
Attorneys for Plaintiff/Appellee )

The Nathanson Law Firm ) Scottsdale  
By Philip J. Nathanson )  
Attorneys for Defendants/Appellants )

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**N O R R I S**, Judge

¶1 Defendants/Appellants Sangwon "Sam" Yum, Horace H. Kim, Northstar Cable, L.L.C., and Meridien Telecom Solutions, L.L.C. (collectively, "Defendants") appeal the superior court's order granting Plaintiff/Appellee Christine Lee's application for a preliminary injunction. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>

¶2 In August 2005, Paul Lee, Sam Yum, and Horace Kim organized Northstar as an Arizona limited liability company. Paul and Yum each held 42.5% of the membership interests and Kim held the remaining 15% interest. Northstar's revenue was derived from a contract with Coxcom, Inc., dba Cox Communications ("Cox contract"), under which Northstar provided construction and installation services for Cox's broadband communication systems.

¶3 Kim acted as Northstar's general manager, running the day-to-day operations of the company, and Paul performed management duties at the company; both received a salary. The members also received periodic distributions from the company.

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<sup>1</sup>In the exercise of our discretion, we deny Christine's motion to strike the opening brief's statement of the case and of the facts; we rely on our review of the record for our recitation of the facts. On appeal from an order granting a preliminary injunction, we view the facts in the light most favorable to sustaining the order. *Lane v. Bisceglia*, 15 Ariz. App. 269, 270, 488 P.2d 474, 475 (1971).

¶14 Paul died on October 4, 2007. On January 7, 2008, an Illinois circuit court appointed his wife, Christine Lee, as Independent Administrator of his Estate. Soon thereafter, Christine began requesting financial information from Northstar, which Yum and Kim refused to provide. Yum and Kim received distributions from Northstar after Paul's death, but Northstar did not make any distributions to the Estate. In January 2008, Yum and Kim dissolved Northstar and filed articles of organization for Meridien.

¶15 On February 29, 2008, Christine, as Independent Administrator for the Estate, filed a Verified Complaint and Application for Preliminary Injunction and/or Appointment of a Receiver. The Estate alleged Kim, Yum, and Northstar had denied or harmed its right to receive distributions from Northstar and asked the court to enjoin them from (1) transferring any asset to any third party except in the ordinary course of business, (2) taking any action that might detrimentally affect the ability of Northstar to continue to do business or to produce revenue, (3) distributing any money or other consideration to Kim or Yum without making a distribution to the Estate, (4) winding up or dissolving Northstar, (5) destroying or causing spoliation of any Northstar business records, or (6) taking any action that might detrimentally affect the Estate's rights in Northstar. It also asked the court to appoint a receiver to

take possession of and manage Northstar's assets pending further court order; order an accounting of Northstar's assets and profits; declare the existence, nature, and extent of the Estate's right to receive distributions from Northstar; and declare Meridien was the continuation of Northstar and therefore liable for Northstar's debts and obligations. Finally, the Estate alleged claims against Kim and Yum for breach of the duty of fairness they owed to the Estate, and breach of contract against Northstar and Meridien for their failure to properly make distributions to the Estate. Christine submitted a declaration in support of the application. After meeting with the parties, the court set an evidentiary hearing on the Estate's request for a preliminary injunction and appointment of a receiver.

¶16 Defendants filed a verified answer in which they denied the Estate had a right to receive Northstar distributions, and raised various defenses. Defendants also filed the affidavits of Yum and Kim in opposition to the Verified Complaint and Application for Preliminary Injunction and/or Appointment of a Receiver.

¶17 Before the evidentiary hearing, Defendants requested the court order the Estate to adduce testimony at the hearing rather than simply relying on the declaration submitted by

Christine in support of her application. The court denied the motion.

¶18 At the hearing, the Estate presented argument in support of its application, but did not present any evidence beyond Christine's declaration and the exhibits thereto, which the court deemed admitted into evidence. Defendants cross-examined Christine at the hearing and presented Kim's testimony. In addition, they submitted numerous exhibits into evidence.

¶19 The court found that under Arizona law, the Estate was entitled to a distribution from Northstar upon its winding up, but that all of Northstar's assets, including the Cox contract, had been transferred to Meridien without a valuation of the Estate's interest in Northstar. It ruled the Estate had established a likelihood that it would prevail on the merits of its claims and, unless the court issued an order to preserve the Northstar assets that had been transferred to Meridien, irreparable and immediate injury would result to the Estate. The court granted the Estate's request for a preliminary injunction and ordered Northstar and Meridien to:

1. "maintain all assets and not encumber, dispose, or sell said assets" without a court order.
2. "preserve the quarterly net profits amounting to 42.5% of the total net profits of each [company] pendente lite. . . . [and] deposit said 42.5% of their net profits in an interest-

bearing trust account supervised by Defense counsel. No withdrawal from these monies shall be permitted without Court Order."

3. "provide a quarterly accounting of all monies received and disbursed, as well as an accounting and inventory of [their] assets."

The court also barred Northstar and Meridien from making further distribution of assets without court order, but denied the Estate's request for the appointment of a receiver, with leave to re-urge the request at a later time.

¶10 On June 6, 2008, the court entered a signed order granting the preliminary injunction. Defendants timely appealed.

¶11 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(F)(2) (2003).

#### **DISCUSSION**

¶12 We review a superior court's issuance of a preliminary injunction for an abuse of discretion. *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, ¶ 9, 982 P.2d 1277, 1280 (1999). An abuse of discretion occurs if the superior court bases its decision on a clearly erroneous factual finding, applies an incorrect standard for a preliminary injunction, or misapplies the correct standard for a preliminary injunction. *McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.*, 169 Ariz. 520, 523, 821 P.2d 181, 184 (App. 1991).

*I. Presentation of Testimony at the Evidentiary Hearing*

¶13 We reject Defendants' argument the superior court erroneously based its ruling on Christine's declaration and the exhibits thereto, without requiring the Estate to present testimony at the evidentiary hearing. Under Arizona law, an injunction may be based upon affidavits. A.R.S. § 12-1803 (2003). Further, Defendants argument that under *McCarthy*, the Estate was required to present live witness testimony to properly resolve the disputed material facts is not well taken.

¶14 In that case, we held a "party opposing a preliminary injunction must be given a reasonable opportunity to present oral testimony where there are disputed issues of material facts." *McCarthy W. Constructors*, 169 Ariz. at 526, 821 P.2d at 187. We did not hold, as Defendants argue, a superior court may only issue a preliminary injunction when its findings are based on oral testimony presented to it. *Cf. Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994) ("In this circuit, the refusal to hear oral testimony at a preliminary injunction hearing is not an abuse of discretion if the parties have a full opportunity to submit written testimony and to argue the matter."). The Estate was not obliged to present live testimony to establish its entitlement to a preliminary injunction.

¶15 Additionally, Defendants cross-examined Christine at the evidentiary hearing regarding her declaration, and presented Kim's testimony. Yum was present at the hearing and available to testify. There is no indication, and Defendants do not argue, the court denied them a reasonable opportunity to present their evidence. *McCarthy W. Constructors*, 169 Ariz. at 525-26, 821 P.2d at 186-87.

## *II. Merits of the Preliminary Injunction*

¶16 A party seeking a preliminary injunction must establish a balance of the following four factors weighs in its favor: (1) a strong likelihood of success on the merits, (2) possibility of irreparable harm not remediable by damages if the injunction is not granted, (3) the balance of hardships weighs in favor of the requesting party, and (4) public policy favors granting the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990) (citation omitted). The moving party may meet this burden by establishing (1) a probability of success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions and that "the balance of hardships tip sharply" in its favor. *Id.* (citation omitted).

### *A. Likelihood of Success on the Merits*

¶17 Defendants argue the relief preliminarily granted by the court was improper because (1) Paul ceased to be a Northstar member upon his death and his Estate therefore did not hold any



membership or ongoing interest in Northstar, (2) Defendants properly dissolved Northstar, and (3) the Estate has no continuing right to participate in the revenues of Meridien. We review the court's determination of the parties' rights and obligations under Arizona's limited liability statutes de novo as a matter of law. See *Libra Group, Inc. v. State*, 167 Ariz. 176, 179, 805 P.2d 409, 412 (App. 1991).

¶18 Under Arizona law, a person ceases to be a member of a limited liability company upon his or her death, which is deemed an event of withdrawal. A.R.S. § 29-733(6)(a) (1998). A withdrawn member (or his or her personal representative, successor, or assignee) does not have the right to receive a distribution by reason of the withdrawal, but does have the right to receive distributions during any continuation of the business and upon completion of winding up. A.R.S. § 29-707 (Supp. 2009).<sup>2</sup> Thus, Paul ceased to be a member of Northstar upon his death, and, as Defendants concede, the Estate became entitled to receive distributions from Northstar during any continuation of the business and upon completion of winding up. However, the undisputed evidence showed although Northstar made

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<sup>2</sup>The withdrawn member (or his or her personal representative, successor, or assignee) has the rights of an assignee of the withdrawn member's interest in the limited liability company, A.R.S. § 29-707, and is therefore not entitled to participate in the management of the business or exercise the rights of a member, but is entitled to receive distributions from the business. A.R.S. § 29-732(A) (1998).

distributions to Yum and Kim after Paul's death, no corresponding distributions were made to the Estate. In addition, Northstar's assets (including the Cox contract) were transferred to Meridien without a valuation or a determination of the Estate's interest in Northstar.

¶19 Nevertheless, Defendants contend because they were the sole remaining members of Northstar after Paul's death, they were entitled to dissolve Northstar and, thus, the Estate has no interest in Meridien. A limited liability company may be dissolved upon the written consent of more than one-half of the members. A.R.S. § 29-781(2) (Supp. 2009). As Yum and Kim were the only Northstar members after Paul's death, A.R.S. § 29-733(6)(a), they were entitled to dissolve Northstar and attempted to do so through a written agreement. Although Kim and Yum were entitled to dissolve Northstar, they nevertheless were obligated to act consistent with the implied covenant of good faith and fair dealing which the law implies in every contract. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, ¶ 59, 38 P.3d 12, 28 (2002).<sup>3</sup> Because the Estate presented evidence Kim and Yum had acted in violation of the implied

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<sup>3</sup>Although Kim, Yum, and Paul did not adopt a written operating agreement for Northstar, they entered into one, and perhaps more oral agreements (the record before us is unclear) regarding its operation.

covenant, *see supra* ¶ 18, the superior court did not abuse its discretion in determining the Estate had shown a strong likelihood of success on the merits.

*B. Possibility of Irreparable Harm*

¶20 Defendants also contend the court's finding irreparable and immediate injury would result to the Estate unless the court issued a preliminary injunction was erroneous because, they argue, the Estate's only claim is one for damages based on its right to receive distributions from Northstar prior to and upon winding up.

¶21 In making this argument, however, Defendants ignore Northstar made distributions to Yum and Kim after Paul's death, but made no corresponding distributions to the Estate, and transferred Northstar's assets, including the Cox contract, to Meridien. These actions deprived Northstar of assets it could use for distributions to the Estate and created a likelihood Northstar would be unable to satisfy any judgment for damages entered in favor of the Estate. The superior court did not abuse its discretion in determining the Estate faced the possibility of irreparable harm if it did not enjoin further dissipation of what had been Northstar's assets.

*C. Contribution of Alleged Illegal Contract*

¶22 Finally, Defendants argue Paul contributed an "illegal contract" to Northstar. We disagree. The record reflects Paul

was an officer in an Illinois corporation that had, through Paul's efforts, obtained a contract with Coxcom, Inc. The record also reflects the contractual relationship between the Illinois corporation and Coxcom, Inc. was essentially transferred to Northstar. Paul did not, thus, contribute an "illegal contract" to Northstar and the superior court correctly found Northstar's revenue "was derived from a lucrative contract with Cox Cable that was obtained by Paul Lee in 2005."

**CONCLUSION**

¶23 For the foregoing reasons, we affirm. The Estate requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003). As the underlying issues arise out of contract, we award the Estate its reasonable attorneys' fees on appeal upon its compliance with Arizona Rule of Civil Appellate Procedure 21(c). We also award the Estate its reasonable costs on appeal subject to its compliance with Rule 21.

/s/

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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

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DANIEL A. BARKER, Judge

/s/

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PETER B. SWANN, Judge