Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-356
Lower Tribunal No. 15-29334

Project Development Enterprise, LLC, etc., et al.,
Appellants,

vs.

Elka Holdings, LLC, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Samantha Ruiz Cohen, Judge.

Squire Patton Boggs and Alvin B. Davis and Beatriz E. Jaramillo, for appellants.

Nason, Yeager, Gerson, White & Lioce, P.A., and Michael H. Nullman and Jonelle M. Rainford (Palm Beach Gardens), for appellee.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

SALTER, J.

Project Development Enterprise, LLC ("PDE"), as manager of Capital Tract, LLC ("Capital Tract"), and Tanios Khalil ("Khalil"), the principal of PDE, appeal a final circuit court judgment against them entered following a non-jury trial. We affirm in part and reverse in part.

The appellee, plaintiff below, is Elka Holdings, LLC ("Elka"). PDE and Elka were essentially 50%-50% partners[1] in Capital Tract, an entity formed to develop 475 homes in the "Whispering Oaks" development in St. Lucie County (the "Project"). The Project did not progress as intended. Elka filed a derivative suit in the Miami-Dade Circuit Court on behalf of Capital Tract and against PDE and Khalil, claiming a breach of the operating agreement, breach of statutory and common law fiduciary duty, and a demand for an accounting.[2]

The gist of these claims was an allegation that Elka was overcharged by PDE and Khalil for the operating expenses of the Project. On behalf of Capital Tract, PDE filed counterclaims against Elka for Elka's alleged wrongful retention of a Capital Tract computer and for some $10,000.00 in money damages.

[1] PDE's interest was 10%, but Khalil (through a non-party intermediary company) and PDE together controlled 50% of Capital Tract.

[2] An additional claim, seeking to pierce the corporate veil, was dropped before trial.

After a four-day bench trial, the court entered a detailed order finding PDE and Khalil jointly and severally liable to Elka for $217,369.00 in money damages, plus statutory interest, and finding for Elka on the counterclaims by PDE.

On appeal, PDE and Khalil point to numerous alleged errors in the final judgment. We address only one of those alleged errors, concluding that it turns on a legal issue and is reviewable de novo. We find no merit to the other points raised by PDE and Khalil.

"Under Florida law, '[w]hen reviewing a judgment rendered after a nonjury trial, the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous.'" Emaminejad v. Ocwen Loan Servicing, LLC, 156 So. 3d 534, 535 (Fla. 3d DCA 2015) (alteration in original) (quoting Stone v. BankUnited, 115 So. 3d 411, 412 (Fla. 2d DCA 2013)). As to the interpretation of a contract, however, this Court's review is de novo. See Real Estate Value Co. v. Carnival Corp., 92 So. 3d 255, 260 (Fla. 3d DCA 2012).

Computation of Damages Recovered Derivatively for Capital Tract

Elka's claim was asserted derivatively on behalf of Capital Tract, a Florida limited liability company. Elka's evidence, particularly its accounting evidence, was controverted by the appellants but accepted by the trial court. That evidence determined that $217,369.00 in fees, expenses, and interest were improperly charged

by PDE as manager to Capital Tract for the operation and management of Capital Tract.

The recovery for certain allegedly-improper payments was required, as a matter of law, to be paid to Capital Tract, not to Elka. Section 605.0805(1)(a), Florida Statutes (2017), provides that the proceeds of a derivative action based, as here, on section 605.0802, "belong to the limited liability company and not to the plaintiff."

Elka's claims were asserted derivatively, not directly. See Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 738-40 (Fla. 3d DCA 2014). Elka's accountant's "Summary Estimate of Economic Damages" was admitted into evidence at trial as part of a more detailed report. Five categories of alleged overcharges were correctly reduced by 50% to reflect Elka's share of the amount overpaid by Capital Tract. But of these five categories, the fifth was designated "Interest on Invested Capital," with $70,238 (50% of the total) allegedly payable to Elka as damages.

In including this amount in the damages formulation, however, the accountant's report contravened a provision within section 2.2.4(a) of the Capital Tract Limited Liability Company Operating Agreement, specifying that "[n]o Member is entitled to interest on any Capital Contribution, except as provided in Article 4."[3] In response, Elka argues that section 2.2.3 applied to PDE as Elka was

[3] Article 4 does not apply to the claims asserted by Elka.

in effect required to make "Additional Capital Contribution[s]" to cover the defaults by PDE. The accountant's report on this point, the subject of specific objection by the appellants at trial, noted that this element of the damages was prepared at Elka's request and "I have been advised by [Elka's counsel]" to add the interest. This amount should not have been included in the damages awarded.

The trial court properly excluded $116,000.00 of the damages amount (as provided in the final judgment prepared by Elka's counsel) representing "[o]ut of pocket expenses,"[4] bringing the damages awarded to $217,369.00. However, the final judgment failed to exclude the "[i]nterest on invested capital" amount and another accrued interest amount, $5,800.00, in doing so. Elka's accountant recorded this amount as "Accrued Interest on Elka Loan Account," again in violation of the Operating Agreement.[5]

Excluding these two interest amounts in conformance with the Operating Agreement, the total awarded to Elka is $217,369.00 less $76,038.00, or $141,331.00. As the damage components of this adjusted award were established by competent, substantial evidence and rely as well on credibility determinations (as

[4] The Operating Agreement provides no basis for such a claim, and Elka did not cross-appeal the exclusion.

[5] The amount on which the accrual was computed was paid to a trust account on behalf of Elka, not to Capital Tract, "pending resolution of this dispute."

does the judgment in favor of Elka on the counterclaims), that resulting award is affirmed.

Affirmed in part, reversed in part, and remanded for the correction of the final judgment amount as detailed in this opinion.