

RENDERED: NOVEMBER 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001608-MR

EDDY CREEK MARINA RESORT, LLC

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 07-CI-00236

MARTIN TABOR

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,¹ SENIOR JUDGE.

STUMBO, JUDGE: Appellant Eddy Creek Marina Resort, LLC appeals from a judgment of the Lyon Circuit Court which found that a disassociated member, Martin Tabor, was entitled to \$324,000, reflecting his 10% interest in the resort.

¹ Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Eddy Creek argues that the trial court did not take into account the company's debt when it determined Tabor's interest. Eddy Creek claims the trial court should have deducted the debt from the fair market value before ultimately determining how much Tabor's interest was worth. Tabor argues that the court properly determined his interest in the company and that the amount relied upon was based on the evidence presented during the bench trial. We find the trial court did err and reverse and remand.

Eddy Creek was organized as a limited liability company in 1998. Tabor was one of the organizing members and has a 10% minority interest in the company. Tabor ceased being a member of the company in 2007, and brought suit seeking his 10% share in the company. A bench trial was held and both sides had expert witnesses who valued the company. Estimates of the fair market value of the company ranged from approximately \$3 million dollars to over \$5 million dollars. There was also a mortgage on the resort in the amount of approximately \$2.3 million dollars. Tabor testified that he is liable on the marina's debt.

The trial court found that the fair market value of the company was \$4 million dollars. The trial court also applied two discounts to this amount, a 10% marketability discount and a 10% minority discount. The trial court concluded that Tabor's 10% interest in the company was worth \$324,000.

Eddy Creek moved to amend the judgment because the trial court did not take into consideration the \$2.3 million dollars in debt the company had. Eddy Creek wanted Tabor to be responsible for his *pro rata* share of the debt, thereby

lowering the amount his interest would be worth. In essence, Eddy Creek wanted the court to subtract the \$2.3 million in debt from the \$4 million fair market value and then determine how much Tabor's interest was worth. The trial court denied the motion and this appeal followed.

The company's operating agreement states that when a member leaves the company "[t]he disassociated Member . . . shall be entitled to receive the fair value of the Member's Company interest as of the date of the disassociation based on the Member's right to share in the distributions of the Company." The term "fair value" is not defined in the operating agreement. The operating agreement also does not set forth any preferred method for determining the fair value of a disassociating member's interest. The finder of fact, in this case the trial court, must determine the fair value based on the evidence before it.

Because this was a bench trial, the trial court's "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. In the case at hand, the trial court determined the fair value of Tabor's interest by establishing the fair market value as \$4 million dollars. This amount is within the range of values testified to at trial. The court then applied the two discounts and concluded that Tabor's 10% interest was worth \$324,000. However, the appraisal utilized by the trial court did not take into account the debt owed by Eddy Creek.

Profits and losses of a limited liability company shall be allocated among the members and among classes of members in the manner provided in the operating

agreement. If a written operating agreement does not otherwise provide, profits and losses shall be allocated on the basis of the agreed value, as stated in the records of the limited liability company as required by KRS 275.185, of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned.

KRS 275.205.

Not taking into account the debt was clearly erroneous. KRS 275.205 requires the consideration of losses (the debt) when allocating value to a member. Furthermore, as stated above, Tabor testified that he was a signatory to the mortgage and thus liable for his portion of the debt. It would be a waste of time and resources to give Tabor the full amount he seeks for his minority interest and then later require payment of his portion of the debt. In the interest of judicial economy, we will make no such requirement.

Based on the foregoing, we find it was clearly erroneous for the trial court not to take into consideration the amount of debt owed by Tabor. We therefore reverse and remand this case for a hearing to determine the *pro rata* amount of debt Tabor owes. That amount will then be deducted from the value of his minority interest.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT
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