RENDERED: AUGUST 24, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000097-MR

TROY VANWINKLE — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT,
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 13-CI-00394

LYLE WALKER and
CARL DAVID CRAWFORD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

KRAMER, JUDGE: Troy VanWinkle brings this appeal from two judgments of the Madison Circuit Court involving a Limited Liability Company (LLC) wherein VanWinkle is one of three members.[1] Lyle Walker and Carl David Crawford are

[1] On October 18, 2017, this Court ordered this appeal to be held in abeyance pending resolution of ongoing bankruptcy proceedings concerning VanWinkle. Thereafter, on February 26, 2018, the appeal was ordered returned to the Court's active docket following receipt of a notice of

the other two members. The first judgment held VanWinkle liable for one-third of the company's liabilities. The second judgment determined the dollar amount of his liability.

The primary issue on appeal is whether the operating agreement mandated that the members were to be personally liable for the company's liabilities. For the reasons explained below, we conclude that the operating agreement unambiguously states the three members are to split both company's profits and the company's liabilities equally. Accordingly, we affirm the circuit court.

VanWinkle, Walker, and Crawford formed TLC Developers, LLC, in 2004. They executed an operating agreement to govern the internal operations of the business. TLC's business purpose was to develop and build residential structures throughout Madison County.

Eventually, due in large part to the recession in 2008, TLC experienced severe cash-flow problems. During this period, TLC was unable to pay its expenses. To meet the business expenses, Walker and Crawford deposited personal sums into TLC's account. In their view, in the event TLC did not have the cash on hand to pay the liabilities itself, the operating agreement mandated that the three members would pay the liabilities of TLC equally. On the other hand,

---

termination of the bankruptcy proceedings filed by the Chapter 7 trustee of VanWinkle's bankruptcy estate.

VanWinkle believed the operating agreement did not require him to personally pay the liabilities of TLC. However, he did pay a third of TLC's property taxes on at least two occasions.

In 2013, Walker and Crawford filed a complaint seeking a declaration of their rights. They requested the circuit court resolve the members' dispute over the agreement to equally pay TLC's liabilities. In July 2015, following a period of discovery and a bench trial on the matter, the circuit court determined that the operating agreement unambiguously stated that the three members agreed to split the liabilities of the company in thirds and entered a judgment to that effect. In December 2015, following a bench trial on the amount of damages, the circuit court ordered VanWinkle to pay $87,300 as his share of TLC's liabilities. VanWinkle timely filed a notice of appeal.

The facts of this appeal are undisputed; therefore, the only issue concerns the interpretation of TLC's operating agreement. The "Kentucky Limited Liability Company Act" is codified as KRS[2] Chapter 275. "[O]ur standard of review as to interpretation of the provisions of both KRS Chapter 275 and the Operating Agreement is *de novo*." *Racing Inv. Fund 2000 v. Clay Ward Agency*, 320 S.W.3d 654, 657 (Ky. 2010) (citing *Cumberland Valley Contrs., Inc. v. Bell*

[2] Kentucky Revised Statutes.

Cty. Coal Corp., 238 S.W.3d 644, 647 (Ky. 2007)). Accordingly, the legal conclusions of the circuit court are entitled to no deference.

On appeal, VanWinkle argues the circuit court erred because: (1) there is an express provision in the operating agreement which precludes the members from all personal liability; and (2) holding the members personally liable for TLC's debts is inconsistent with the intent of KRS Chapter 275. We will address each argument in turn.

Regarding VanWinkle's first argument, this controversy primarily turns on two respective provisions in the operating agreement titled "Immunity from Personal Liability" and "Division of Profits and Liabilities." Those provisions respectively state the following:

> IMMUNITY FROM PERSONAL LIABILITY
>
> As provided in KRS 275.150, no member, employee or agent of the Company will be personally liable by reason of such status under a judgment, decree, or order of a court or agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the Company, whether arising in contract, tort, or otherwise. The status of a person as a Member, employee or agent of the Company shall not subject the person to personal liability for the acts or omissions, including any negligence, wrongful act, or actionable misconduct, of any other Member employee of agent of the company.

DIVISION OF PROFITS AND LIABILITIES

> The profits and liabilities of the Company shall be divided as follows: Carl David Crawford = thirty-three and one-third (33 1/3%), Lyle A. Walker = thirty-three and one-third (33 1/3%) percent and Troy Van Winkle [sic] thirty-three and one-third (33 1/3%).

VanWinkle contends that the first provision acts as a shield against *any* personal liability arising from the liabilities of the company, despite the existence of the second provision. We disagree. The first provision is almost identical to the text of KRS 275.150(1),[3] which does limit personal liability of members of an LLC. In fact, the provision starts with, "[a]s provided in KRS 275.150[.]" Thus, the intent is clearly to mimic KRS 275.150. However, VanWinkle ignores subsection two of that very statute, which states:

[3] KRS 275.150(1) states:

> Except as provided in subsection (2) of this section or as otherwise specifically set forth in other sections in this chapter, no member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall be personally liable by reason of being a member, manager, employee, or agent of the limited liability company, under a judgment, decree, or order of a court, agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise. The status of a person as a member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall not subject the person to personal liability for the acts or omissions, including any negligence, wrongful act, or actionable misconduct, of any other member, manager, agent, or employee of the limited liability company. That a limited liability company has a single member or a single manager is not a basis for setting aside the rule otherwise recited in this subsection.

"Notwithstanding the provisions of subsection (1) of this section, under a written operating agreement or under another written agreement, a member or manager may agree to be obligated personally for any of the debts, obligations, and liabilities of the limited liability company." KRS 275.150(2). That is exactly what TLC's members did when they agreed to split the liabilities of the company in the "Division of Profits and Liabilities" provision.

However, the Court is mindful that "[a]ny such assumption of personal liability, which is contrary to the very business advantage reflected in the name 'limited liability company', must be stated clearly in *unequivocal language* which leaves no room for doubt about the parties' intent." *Racing Inv. Fund 2000,* 320 S.W.3d at 659 (emphasis added). The provision at issue in *Racing Fund* and the provision in this case are markedly different. In *Racing Fund*, there was a provision in the operating agreement "designed to provide on-going capital infusion as necessary, at the Manager's discretion." *Id*. The pertinent part of the provision stated:

> The Investor Members . . . shall be obligated to contribute to the capital of the Company, on a prorata basis in accordance with their respective Percentage Interests, such amounts as may be reasonably deemed advisable by the Manager from time to time in order to pay operating, administrative, or other business expenses of the Company which have been incurred, or which the Manager reasonably anticipates will be incurred, by the Company.

Id. at 658. Using this provision, a creditor of the LLC at issue successfully convinced the circuit court to order the members to make additional capital contributions to satisfy the LLC's debt. Put another way, the creditor used that provision to render the members of the LLC personally liable for the LLC's debts. The Kentucky Supreme Court eventually reversed this order and stated the provision at issue "is not a post-judgment collection device by which any legitimate business debt of the LLC can be transferred to individual members by a court-ordered capital call." *Id*. at 660. In so holding, the Court stated the above capital call provision did not meet the unequivocal language standard for the LLC's members to assume personal liability. *Id.* at 659.

On the other hand, the language in TLC's operating agreement is indeed unequivocal, especially when compared to the provision at issue in *Racing Fund*. In *Racing Fund*, the provision referenced capital calls, which were to be ordered by the manager. This was hardly unequivocal language of liability assumption. In the case at bar, the provision mandates that the "liabilities of the Company shall be divided" evenly between the three members. This was unambiguously stated on page four of the operating agreement, which VanWinkle signed, and leaves no doubt that it was the members' intent to be personally liable for the debts of the TLC. In fact, on at least two occasions VanWinkle paid his

share of TLC's property taxes; so, it would appear he understood this provision at one point in time. Therefore, VanWinkle's first argument fails.

Turning to VanWinkle's second argument, throughout this litigation he has argued he cannot be personally liable for TLC's debts because the hallmark of an LLC—and KRS Chapter 275—is to limit the liability of LLC members. And while this is true, KRS 275.003, titled "Construction of Chapter[,]" states: "It shall be the policy of the General Assembly through this chapter to give maximum effect to the principles of freedom of contract and the enforceability of operating agreements." While holding the members personally liable for the TLC's liabilities may seem contrary to the very point of establishing an LLC, it adheres to the intent of the General Assembly: namely, to allow business partners the freedom to contract and establish an LLC that fits the needs of the respective members. Here, following a meeting of the minds, TLC's three members each decided to split the liabilities of the company in equal shares. Therefore, the circuit court did not err when it ordered VanWinkle to pay his agreed-upon share of TLC's liabilities.

Accordingly, the judgment of the Madison Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael R. Eaves
Morgan H. Eaves
Richmond, Kentucky

BRIEF FOR APPELLEES:

Rodney G. Davis
Richmond, Kentucky