

RENDERED: AUGUST 30, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2018-CA-001092-MR

BLUE EQUITY HOLDINGS  
KENTUCKY, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 17-CI-004630

COBALT RIVERFRONT PROPERTIES,  
LLC; AND COBALT ENTERPRISES, LLC

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Blue Equity Holdings Kentucky, LLC, brings this appeal from a July 11, 2018, order dismissing Blue Equity's petition for judicial dissolution of Cobalt Riverfront Properties, LLC. We affirm.

Cobalt Riverfront Properties, LLC (Cobalt Riverfront) was organized as an LLC in 2000 and has three members – Blue Equity Holdings Kentucky, LLC (Blue Equity), Cobalt Enterprises, LLC (Cobalt Enterprises), and Brent Blue. Blue

Equity owns 46.3071 percent of Cobalt Riverfront and has one member, Johnathan Blue. Cobalt Enterprises owns 46.3071 percent of Cobalt Riverfront and has one member, Todd Blue. And, Brent Blue owns 7.3858 percent of Cobalt Riverfront. Cobalt Riverfront owns a single piece of real property located between the Yum! Center and Slugger Field in downtown Louisville. The parties entered into an Amended and Restated Operating Agreement (Amended Operating Agreement) concerning Cobalt Riverfront in November 2004.

On September 1, 2017, Blue Equity filed a petition for judicial dissolution of Cobalt Riverfront and named as respondents - Cobalt Riverfront, Cobalt Enterprises and Brent Blue. In the petition, Blue Equity acknowledged that Todd Blue was the sole managing director of Cobalt Riverfront but maintained that judicial dissolution was necessary “because it is not reasonably practicable to carry on its business in conformity with its operating agreement.” Petition at 2. In particular, Blue Equity claimed:

7. Respondent Cobalt Riverfront was founded in October of 2000. Its sole asset is a parcel of real estate with two adjoining addresses listed as 124 N. Preston, 300 E. Witherspoon St., and 123 N. Floyd in downtown Louisville (the “**Property**”).

....

12. At that time in November of 2004, the parties had exchanged various ideas and plans for the development of the Property and it was always

understood and intended that the Property would be developed, leased and sold.

13. As a result, at the time the Amended Operating Agreement was entered into, the parties revised and clarified their understandings and specifically agreed that the purpose of the Company was to “purchase, acquire, invest in, own, improve, develop, maintain, lease, sell, exchange, and otherwise deal in and with respect to the [Property] . . . including, without limitation, operating a parking lot, and holding and conducting corporate and other special events, such as concerts and sporting events, in, on and around the Property” (collectively, the “**Required Purpose**”).

14. This Required Purpose for the Company was more specific than in the company’s initial Operating Agreement as it now requires the development, lease and sale of the Property.

15. In addition, in relevant parts the Amended Operating Agreement provides that Todd Blue would be the sole managing director, president and chief executive officer. In exchange for his position as managing director, Todd Blue was entitled to a “reasonable” management fee. Currently the fee he pays himself in exchange for directing the company’s fulfillment of this Required Purpose, including developing, selling and leasing the Property, is \$138,000 annually.

16. The Amended Operating Agreement provides that during the “Pre-Development Period” the Respondent Cobalt Enterprises, controlled by Todd Blue, would pay both Cobalt Enterprises and Petitioner’s pro rata share of expenses arising out of the Company’s operations.

17. The effect of this is that on a temporary basis Cobalt Enterprises is to be charged with 92.614% of the expenses of the Company. However, during this same

period, Cobalt Enterprises also receives both its and Petitioner's pro rata share of the income from the Property. As such, if profitable, Cobalt Enterprises receives 92.614% of the net income, while the remainder goes to Respondent Brent Blue.

18. Pursuant to the Amended Operating Agreement, the "Pre-Development Period" is defined to be "the period prior to the Sale or Development of the Property, including without limitation, the period during which the Property is operated as a parking lot."

....

22. At the time the Amended Operating Agreement was entered into in 2004, the Property of Cobalt Riverfront was being used on an "interim" or temporary basis for overflow parking in the downtown area as the Property was prepared and marketed for development, lease and sale.

23. Since the Amended Operating Agreement was signed, Respondent Cobalt Riverfront has entered into serial [sic] one-year leases of some or all of the Property to two different third parties for purposes of parking. As a result, the gross income from using the Property for parking now annually exceeds [redacted] with minimal expenses except for the \$138,000 management fee paid to Todd Blue. Because Cobalt Enterprises receives 92.614% of the net income during this interim use as a parking lot, but would only receive 46.3071% of any net income after the end of the Pre-Development Period (including the proceeds upon any sale of the Property), Todd Blue and Respondent Cobalt Enterprises have caused Cobalt Riverfront to permanently use the Property as a parking lot rather than develop, lease and sell the Property. In fact, Cobalt Riverfront has previously refused to list and/or market the Property for development, lease and sale.

24. In addition, and as a further effort to avoid ending the Pre-Development Period, expressions of interest regarding the price for the Property have resulted in Cobalt Riverfront either not pursuing such interest or providing a list price far in excess of the highest and best use value for the Property. Most recently, the price for the Property provided to an interested party was \$40,000,000. The interested party is now believed to have lost interest. These steps are taken without the best interests of the Company and its other members in mind. They are taken solely to avoid any action that would end the Pre-Development Period and result in Petitioner receiving its pro rata portion of the Company's net income or sale proceeds (the 46.3071%) as opposed to the 92.614% of the net income during this interim use as a parking lot.

....

27. Despite the Required Purpose of Cobalt Riverfront being to develop, lease and sell the Property, and despite repeated demands to actually list the Property for lease or sale (as Todd Blue and Cobalt Enterprises are no longer developing property in Louisville), Cobalt Riverfront has effectively refused to take appropriate steps toward developing, leasing and selling the Property. In addition to not listing the Property, Cobalt Riverfront has taken no steps to solicit equity partners or lenders for the development of the Property (including hoteliers), and has not hired architects or engineers to work on any project for the Property. In fact, financial records confirm that no expenses have been incurred toward the development and sale of the Property in the last 5 years or more. This is despite the fact that Cobalt Enterprises or Todd Blue listed and/or aggressively marketed each and every one of their other properties (and has sold several) that they owned or controlled in and around the Louisville market when they ceased being a developer in Louisville and/or moved away from Louisville.

....

29. It is obvious from the actions of Cobalt Riverfront that its only purpose or the only stated purpose being pursued is the continued use of the Property as a parking lot, thereby continuing the Pre-Development Period without developing and selling the Property as was intended by the parties at the time the Amended Operating Agreement was signed.

30. Pursuant to KRS 275.290, a court may order a limited liability company to be dissolved when “it is not reasonably practicable to carry on the business of the limited liability company in conformity with the Operating Agreement.” These facts exist here.

....

34. The Required Purpose of Respondent Cobalt Riverfront includes developing, leasing and selling the Property and this is not being pursued and has not been pursued.

35. Because Cobalt Enterprises and Todd Blue are no longer in the development business in Louisville and Todd Blue no longer resides in Louisville, Kentucky[,] and they have otherwise refused to list and/or market the Property for development, lease and sale, they have engaged in wrongful conduct or there exist other reasons to dissolve the Property.

Petition at 3-9. Subsequently, on September 28, 2017, Cobalt Riverfront and Cobalt Enterprises filed an answer denying that Cobalt Riverfront could no longer carry on its business per the Amended Operating Agreement.

Cobalt Riverfront and Cobalt Enterprises filed a motion to dismiss the petition under Kentucky Rules of Civil Procedure (CR) 12.02 for failure to state a

claim upon which relief could be granted. Therein, Cobalt Riverfront and Cobalt Enterprises maintained that the real property at issue was currently operated as a parking lot, had been so utilized for thirteen years, and that such use was consistent with the stated purposes of Cobalt Enterprises as set forth in its Amended Operating Agreement. Additionally, Cobalt Riverfront and Cobalt Enterprises emphasized that all decision-making authority was vested in the managing director, Todd Blue, and that Blue Equity gave its proxy to vote on any corporate matter to Cobalt Enterprises per the Amended Operating Agreement.

By order entered July 11, 2018, the circuit court granted the motion to dismiss under CR 12.02. In so doing, the circuit court reasoned:

KRS 275.290(1) provides for judicial dissolution only upon a showing by Blue Equity that “it is not reasonably practicable to carry on the business of the limited liability company *in conformity with the operating agreement.*” (Emphasis added.) The Operating Agreement governs in this case, and the Court must assume it reflects the intent of the parties, and that the words the parties chose to place in the Operating Agreement fully and completely express that intent. *See Siler v. White Star Coal Co.*, 226 S.W. 102 (Ky. 1920); *See also City of Louisa v. Newland*, 705 S.W.2d 916 (Ky. 1986); *Jones v. Riddell*, 5 S.W.2d 1077 (Ky. 1928); *Martin Oil & Gas Co. v. Fyffe*, 65 S.W.2d 686 (Ky. 1933); *Muncey Coal Mining Co. v. Muncey*, 268 S.W. 293 (Ky. 1925). Petitioner’s allegations do not support a finding that the LLC is not and cannot continue to function “in conformity with the operating agreement.”

Cobalt Riverfront owns and maintains a single parcel of property (“the Property”) in downtown

Louisville, which has been operated as a parking lot since the parties entered into the Operating Agreement (Petition, Paragraphs 7 and 23). In support of its Petition, Blue Equity asserts that “*the* required” and/or “ultimate” purpose of Cobalt Riverfront is to “develop and sell” the Property. (Petition, Paragraphs 14, 27, 34, 36; Petitioner’s Response to Motion to Dismiss, pp. 2, 3, 10, 13, 14, 15, and 17). Because Cobalt Riverfront has been operating the Property as a parking lot, and the Property has not been developed or sold *yet*, Blue Equity argues *the purpose* of the LLC has been frustrated and judicial dissolution is warranted.

Blue Equity’s position is not supported by the plain language of the parties’ Operating Agreement, however. The Purposes, plural, of the LLC are set forth in the Operating Agreement and they include the following:

To purchase, acquire, invest in, own, improve, develop, maintain, lease, sell, exchange, and otherwise deal in and with respect to the property described on EXHIBIT A (the “Property”), including, ***without limitation***, operating a parking lot, and holding and conducting corporate and other special events, such as concerts and sporting events, in, on and around the Property.

Operating Agreement, Article 3.1(a) (emphasis added), and

To use, invest, and distribute the funds of the Company as contemplated in this Agreement . . .

*Id.*, Article 3.1(b). Further, the LLC is vested with “the power to do any and all things whatsoever necessary, appropriate or advisable in connection with such ***purposes.***” *Id.*, Article 3.2 (emphasis added). There is



no dispute that Respondents have operated a parking lot on the Property and held special events there since entering into the Operating Agreement, and that the proceeds arising from these activities have sustained the Property and have been distributed as contemplated in the Operating Agreement. (Petition, Paragraph 23). Plainly, by operating the Property as a parking lot, Cobalt Riverfront is operating the LLC in conformity with the Operating Agreement.

. . . .

Despite the fact that the Operating Agreement vests complete discretion and authority in Respondents as to when and under what circumstances to develop, lease or sell the Property, and there are no set deadlines or triggering events establishing a mandatory or even implied timeline in which to do so, it appears Blue Equity desires to expedite this process, and to force a sale of the Property pursuant to judicial dissolution. However, Blue Equity's desire is not the standard to be applied. The Court "must consider" the dispute between the parties "in light of the Operating Agreement" and, where Cobalt Enterprises has engaged and is engaged in activities permitted and contemplated by the Operating Agreement, Blue Equity's asserted dissatisfaction with Cobalt Enterprises' rightful exercise of its discretion is not a basis for dissolution. *See Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (N.Y. App. Div.2d 2010); *In re Arrow Inv. Advisors, LLC*, 2009 Del. Ch. LEXIS 66 (Ch. Del. 2009). The plain language of the Operating Agreement does not support Petitioner's attempt to substitute its opinion as to when the Property should be sold for that of Respondents, and Petitioner may not invoke KRS 275.290 to accomplish that end. . . .

The Operating Agreement allows for the use of the Property as a parking lot, *without limitation*. Nowhere does the Operating Agreement specify a date or triggering event which renders this use inferior or

secondary to the development, lease or sale of the Property, or which establishes an effective deadline by which the Property is to be developed or sold. Indeed, even dissolution of the LLC is not compelled by a set term, but is simply effected by the decision of the Board or the sale of the Property, whichever first occurs. Operating Agreement, Articles 3.3 and 11.1. To find in favor of Petitioner, the Court would be forced to read language into the Operating Agreement which is simply not there. Neither KRS 275.290, Kentucky law nor the foreign authority cited by the parties allows this Court to do so. Petitioner can establish no basis for the Court to undo the deal these parties made with one another, as expressed by their Operating Agreement.

Petitioner's argument that continuing to operate the Property as a parking lot is inconsistent with developing, leasing and selling it is similarly unpersuasive. Petitioner has not alleged that there is some preclusion to developing, leasing and selling the Property, it simply seeks to usurp the authority it granted Cobalt Enterprises and Todd Blue to decide when to do so, and to force a sale now. This is not required by any term contained in or reading of the Operating Agreement itself. Further, developing, leasing and selling the Property are inconsistent with owning and maintaining it, and operating it as a parking lot. To suggest that each and every purpose permitted by the Operating Agreement must be pursued simultaneously and all times to effect the intent of the parties is nonsensical and would result in the judicial dissolution of any LLC with a broad purposes clause. This is contrary to the plain wording of the Operating Agreement and the broad purposes clause which allows flexibility in the exercise of the discretion granted to management, in this case, Cobalt Enterprises and Todd Blue. . . .

Order at 2, 3, 5, 6, and 8. This appeal follows.

To begin, a motion to dismiss under CR 12.02 is granted only if “the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *James v. Wilson*, 95 S.W.3d 875, 883 (Ky. App. 2002) (quoting *Pari-Mutuel Clerks’ Union v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). When considering a motion to dismiss pursuant to CR 12.02, plaintiff’s factual allegations must be accepted as true, and all reasonable inferences therefrom must be viewed in a light most favorable to plaintiff. *Hardin v. Jefferson Cty. Bd. of Educ.*, 558 S.W.3d 1, 5 (Ky. App. 2018). Our review proceeds accordingly.

Blue Equity contends that the circuit court improperly granted the motion to dismiss pursuant to CR 12.02. Blue Equity asserts that it alleged facts that would entitle it to relief. Specifically, Blue Equity maintains that Cobalt Riverfront is not carrying on its business in conformity with the stated purposes expressed in its Amended Operating Agreement. Blue Equity argues that the underlying intent of the parties and Cobalt Riverfront’s purposes as found in the Amended Operating Agreement were to develop and sell the real property. It points out that the real property has been used as a parking lot for many years and that the managing director, Todd Blue, has abandoned any effort to develop or sell the real property. Blue Equity believes that the circuit court misinterpreted

ambiguous language contained in the Amended Operating Agreement as to Cobalt Riverfront's purposes.

The judicial dissolution of a limited liability company is set forth in Kentucky Revised Statutes (KRS) 275.290(1), which reads, in relevant part:

The Circuit Court for the county in which the principal office of the limited liability company is located, or, if none, in the county of the registered office, may dissolve a limited liability company in a proceeding by a member if it is established that it is not reasonably practicable to carry on the business of the limited liability company in conformity with the operating agreement.

Under KRS 275.290(1), a limited liability company may be dissolved by a court if “it is not **reasonably practicable** to carry on the business of the limited liability company in conformity with the operating agreement.” (Emphasis added.) The “not reasonably practicable” standard may be implicated in various circumstances.

1 F. Hodge O’Neal and Robert B. Thompson, *Close Corp and LLCs: Law and Practice* § 5:22 (Rev. 3d ed. 2018). Relevant to this appeal, it must be determined whether the managing director, Todd Blue, has been unwilling to promote the purposes of Cobalt Riverfront as set forth in the Amended Operating Agreement.

Article 3.1 of the Amended Operating Agreement sets forth the purposes of Cobalt Riverfront:

**3.1. Purposes.**

The purposes of the Company are as follows:

(a) To purchase, acquire, invest in, own, improve, develop, maintain, lease, sell, exchange, and otherwise deal in and with respect to the property described on **EXHIBIT A** (the “**Property**”), including, without limitation, operating a parking lot, and holding and conducting corporate and other special events, such as concerts and sporting events, in, on and around the Property;

(b) To use, invest, and distribute the funds of the Company as contemplated in this Agreement; and

(c) To do all other things necessary or desirable in connection with the foregoing or otherwise contemplated in this Agreement.

Blue Equity urges this Court to view Article 3.1(a) as ambiguous. Blue Equity believes that “[i]n order to give effect to all parts and every word of the Amended Operating Agreement . . . Cobalt Riverfront cannot be prevented from operating the Property as a surface lot *as long as it is also trying to develop, lease, and sell the Property.*” Blue Equity’s Brief at 16. We reject Blue Equity’s argument.

Rather, the stated purposes of Cobalt Riverfront, as set forth in Article 3.1(a) of the Amended Operating Agreement, are clear and unambiguous. Article 3.1(a) plainly sets forth myriad purposes, including to develop, to sell, and to operate a parking lot on the real property. Simply stated, Article 3.1(a) envisions multiple purposes of Cobalt Riverfront directly related to the real property. These purposes specifically include operating a parking lot. And, under the Amended Operating Agreement, Todd Blue is the sole managing director, president, and

CEO of Cobalt Riverfront. Amended Operating Agreement, Articles 10.2, 10.11. The Amended Operating Agreement vests sole decision-making authority concerning Cobalt Riverfront in Todd Blue.<sup>1</sup> So, Todd Blue possesses the discretion to utilize the real property in accordance with any of the stated purposes set forth in Article 3.1(a), and the undisputed facts indicate that Todd Blue has done so by operating a parking lot thereupon.

Additionally, we reject Blue Equity's argument that the Amended Operating Agreement defines a pre-development period<sup>2, 3</sup> and, thus, impliedly necessitates a development period when the real property would be developed or sold. As previously set forth, the Amended Operating Agreement clearly and unambiguously states the purposes of Cobalt Riverfront. By providing for a pre-development period in connection with the real property, the Amended Operating Agreement merely addresses the rights and obligations of the parties during such a period; it is simply a thorough Amended Operating Agreement. And, we are unable to create an ambiguity where none exists or to add terms to an unambiguous

---

<sup>1</sup> Under the Amended Operating Agreement for Cobalt Riverfront Properties, LLC, the complete control of the company was vested in its managing director, Todd Blue. Amended Operating Agreement, Articles 10.1, 10.2, and 10.11.

<sup>2</sup> The pre-development period is defined as "the period prior to the Sale or Development of the Property, including without limitation, the period during which the Property is operated as a parking lot." Amended Operating Agreement, Article 4.2(e)(5).

<sup>3</sup> Blue Equity Holdings Kentucky, LLC, argues that the July 11, 2018, order must be reversed based upon *Venture Sales, LLC v. Perkins*, 86 So.3d 910 (Miss. 2012). However, we are not bound by a decision from Mississippi. In any event, the case is distinguishable.

contract. *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006); *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 836 (Ky. App. 2000). Therefore, we conclude that Blue Equity has failed to demonstrate that Cobalt Riverfront is not pursuing its business in accordance with the purposes set forth in the Amended Operating Agreement.

We view any remaining contentions of error as either moot or without merit.

In sum, we are of the opinion that the circuit court properly dismissed Blue Equity's petition to dissolve Cobalt Riverfront. KRS 275.290(1).

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

SPALDING, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

SPALDING, JUDGE, DISSENTING. I respectfully dissent. In my view, the allegations made by the appellant's petition were sufficient to survive a motion for judgment on the pleadings. The core of the matter is the plain language of Kentucky Revised Statute ("KRS") 275.290(1).

KRS 275.290(1) states as follows:

The Circuit Court for the county in which the principal office of the limited liability company is located, or, if

none, in the county of the registered office, **may dissolve** a limited liability company in a proceeding by a member if it is established that it is not **reasonably practicable** to carry on the business of the limited liability company in conformity with the operating agreement.

KRS 275.290(1) (emphasis added). Here, the appellant sets forth allegations which could entitle it to the relief afforded by the statute. For example, the appellant's petition states, in paragraph 13, that the Amended Operating Agreement entered by the parties provided that "the purpose of the Company was to 'purchase, acquire, invest in, own, improve, develop, maintain, lease, sell, exchange, and otherwise deal in and with respect to the [Property] . . . including, without limitation, operating a parking lot, and holding and conducting corporate and other special events, such as concerts and sporting events, in, on and around the Property.'" (emphasis omitted). Paragraph 27 consists of the following language: "[d]espite the required Purpose of [ . . . ] being to develop, lease and sell the Property, and despite repeated demands to actually list the Property for lease or sale [ . . . ], Cobalt Riverfront has effectively refused to take appropriate steps toward developing, leasing and selling the Property."

The statute provides that a circuit court may dissolve an LLC only if "it is established that it is not *reasonably practicable* to carry on the business of the limited liability company in conformity with the operating agreement." KRS 275.290(1) (emphasis added). The statute does not state if it is impossible for the



business to be carried on in conformity with the operating agreement. The question posed by the statute is whether it is reasonably practical to do so. In this matter, the minority shareholder allegedly receives no benefit for its ownership of the property in question, a situation that may last forever. While it may be possible for the business to continue thusly, is it reasonably practical? The appellant was entitled to a hearing to determine that question.

The “reasonableness” standard has, in many legal contexts, been interpreted to necessarily involve questions of fact. *See, e.g., Davis v. Howard*, 276 S.W.2d 460, 461 (Ky. 1955) (recognizing that, when considering the question of whether a lessee of oil and gas lands has removed all fixtures and machinery placed on the premises during the lease within a reasonable time, the question of reasonableness is a question of fact); *Brown v. Noland Co.*, 403 S.W.2d 33, 36 (Ky. 1966) (acknowledging that, in the context of contract formation, an offer may be accepted within a reasonable time, and that what is “reasonable” is a question of fact, not one of law). I believe, in this matter, whether it is reasonably practical for the business to continue as alleged was a question of fact requiring a full hearing.

BRIEFS FOR APPELLANT:

John D. Cox  
Petersen S. Thomas  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLANT:

John D. Cox  
Louisville, Kentucky

BRIEFS FOR APPELLEES:

Glenn A. Cohen  
Lynn M. Watson  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLEES:

Lynn M. Watson  
Louisville, Kentucky