

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1268

THEODORE A. BROUSSARD
AND CAJUN TEDDY, L.L.C.

VERSUS

MICHAEL R. TIPTON, REEVES ELECTRICAL SERVICES, L.L.C.,
AND THE TIPTON GROUP, L.L.C.

Judgment Rendered: APR 24 2014

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Assumption
State of Louisiana
Suit Number 33394

Honorable Alvin Turner, Jr., Judge

J. Bryan Jones, III
Lake Charles, LA

Counsel for
Plaintiffs/Appellants
Theodore A. Broussard
and Cajun Teddy, L.L.C.

Martin S. Triche
Sarah A. Legendre
Napoleonville, LA

Counsel for
Defendants/Appellees
Michael R. Tipton,
Reeves Electrical
Services, L.L.C., and The
Tipton Goup, L.L.C.

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Handwritten signatures:
Jury
RHP
C. Turner, Jr.

GUIDRY, J.

This is an appeal of a summary judgment wherein the trial court dismissed plaintiffs' petition for damages, which alleged that the defendants breached fiduciary duties owed to a limited liability company and its members. Finding no error in the trial court's ruling, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2009, Theodore Broussard and Michael Tipton decided to form a company to produce, market, and sell seasoning products that Mr. Broussard had been developing since 1999. To that end, articles of organization were drafted and filed with the Louisiana Secretary of State to establish the True Cajun Seasoning Company, L.L.C. (TCSC). According to the initial report, TCSC is a member-managed company comprised of two members: Cajun Teddy, L.L.C., represented by Mr. Broussard, and The Tipton Group, L.L.C., represented by Mr. Tipton. According to a memorandum of understanding signed by Mr. Broussard and Mr. Tipton, Cajun Teddy, L.L.C., through Mr. Broussard, would provide the seasoning recipes and the day-to-day management of the company.

In the course of starting up the business, the services of various marketing and business professionals were engaged to assist in developing and marketing the seasoning products to be produced by TCSC, but over a year later, TCSC still had not commenced full-scale operations. Frustrated by the lack of progress in developing TCSC and seeking additional funding for his own financial needs, Mr. Broussard emailed Mr. Tipton in December 2010, asking Mr. Tipton to purchase some or all of his rights to the seasoning products Mr. Broussard had developed or to arrange for other investors to help provide the additional financing Mr. Broussard was requesting. In response to the email, Mr. Tipton advised Mr. Broussard that he could not agree to any of his requests and further advised Mr. Broussard that he could no longer financially afford to contribute to the

development of TCSC. Consequently, Mr. Tipton informed Mr. Broussard that his attorney was "putting the paperwork together to dissolve" TCSC and that he would seek repayment of the living expenses that had been paid to Mr. Broussard. Mr. Tipton also informed Mr. Broussard that his attorney had "already taken care of the filing with the Secretary of State[']s office."

Despite this email exchange between Mr. Broussard and Mr. Tipton, the next day Mr. Broussard and Mr. Tipton agreed to continue working together to develop TCSC. They decided to reject a new marketing design that TCSC had used, attempting market the seasoning products under the name "SUKFACE," and to re-establish some of Mr. Broussard's original ideas to market the products under the "True Cajun" name. Mr. Broussard, upon request, granted TCSC and Mr. Tipton access to a website that he owned to use in marketing TCSC. Mr. Tipton also sought to register a trademark of the company's name with the U.S. Patent and Trade Commission on behalf of TCSC, but he abandoned the application after being informed that Mr. Broussard had already trademarked the phrase "True Cajun." Although the two had resumed a working relationship, Mr. Tipton did not revoke the filing he had submitted to the Secretary of State, which removed Mr. Broussard as a registered agent and Cajun Teddy, L.L.C. as a member of TCSC, as recorded with the Secretary of State.

Thus, Mr. Broussard and Mr. Tipton continued working together to make TCSC operational until August 2011, when Mr. Tipton, on behalf of The Tipton Group, L.L.C., sent Mr. Broussard and Cajun Teddy, L.L.C. formal notice that The Tipton Group, L.L.C. was resigning from TCSC. Thereafter, Mr. Broussard and Cajun Teddy, L.L.C. filed a petition for damages against Mr. Tipton, The Tipton Group, L.L.C., and Reeves Electrical Services, L.L.C., a construction company wholly owned by Mr. Tipton, for breach of fiduciary duty. In the petition, the plaintiffs alleged that all of the named defendants were liable for "breaching their

fiduciary duty of trust and loyalty to the plaintiffs by unilaterally removing plaintiffs from being a member/manager of True Cajun Seasoning [Company], L.L.C., by attempting to steal plaintiffs' trademark and tradename by unilaterally creating and registering www.truecajunseasoning.com, and by unilaterally attempting to register 'Broussard's True Cajun All Purpose Seasoning' with the United States Patent and Trademark Office, all without the knowledge of plaintiffs."

The defendants answered the plaintiffs' petition, asserted various affirmative defenses, and asserted peremptory exceptions urging the objections of no right of action and no cause of action on behalf of Reeves Electrical Services, L.L.C. The defendants also included a reconventional demand against the plaintiffs and TCSC in their answer, by which they demanded reimbursement from the plaintiffs and TCSC for money allegedly loaned to Mr. Broussard, in the amount of \$78,500.00, and for \$68,731.48, representing half of the amount Mr. Tipton and Reeves Electrical Services, L.L.C. had paid towards the expenses of TCSC. The plaintiffs answered the reconventional demand, denying liability and also asserting various affirmative defenses.¹

On December 3, 2012, the defendants filed a motion for summary judgment seeking dismissal of the plaintiffs' claims. In the motion, the defendants sought dismissal of the claims asserted against Reeves Electrical Services, L.L.C., alleging that the plaintiffs had no cause of action against Reeves Electrical Services, L.L.C., as it was never a member of TCSC. Defendants also asserted in the motion that there was no breach of any fiduciary duty owed, and even if there was a breach, the articles of organization provided indemnification for any such breach. Following a hearing on the motion for summary judgment, the trial court granted the motion

¹ The plaintiffs also filed supplemental petitions asserting claims against Michael J. Poirrier, the attorney who drafted and filed the paperwork for the formation of TCSC, but those claims are not at issue in this appeal.

in favor of the defendants and dismissed the plaintiffs' claims against them. It is from this judgment that the plaintiffs now appeal.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs assert that the trial court improperly granted summary judgment in this matter based on the following alleged errors:

1. The trial court erred in holding that there was no disputed issue of fact [that] there was no breach of fiduciary duty when the defendant, Michael R. Tipton, deceived his business partner, Theodore [A.] Broussard, by telling Mr. Broussard that he was going to resign from the L.L.C., but instead filed paperwork putting the company in his own name without ever telling Mr. Broussard and told another individual by e-mail that Mr. Broussard was resigning and that he was going 100% on his own.

2. The trial court erred in holding that there was no disputed issue of fact that there was no breach of fiduciary duty when the defendant, Michael R. Tipton, later told his business partner, Theodore A. Broussard, that he changed his mind about resigning under the condition that he needed to have Mr. Broussard transfer ownership of his seasoning recipes to the company without ever disclosing to Mr. Broussard the paperwork that he filed putting the company in his own name.

3. The trial court erred in holding that defendant's company, Reeves Electrical Services, L.L.C. (RES Contractors), owed no fiduciary duty to the plaintiff, Theodore A. Broussard, because it was not a member of the L.L.C., when RES Contractors, through its president, Michael R. Tipton, conducted all the business of the L.L.C.

DISCUSSION

In their first two assignments of error, the plaintiffs assert that the trial court erred in failing to find that there are genuine issues of material fact relative to whether Mr. Tipton/The Tipton Group, L.L.C. breached their fiduciary duty. The fiduciary duty owed by members of an L.L.C. is described in La. R.S. 12:1314, which provides, in pertinent part:

A. *Subject to the provisions of R.S. 12:1315*, a member, if management is reserved to the members....:

(1) Shall be deemed to stand in a fiduciary relationship to the limited liability company and its members and shall discharge his duties in good faith, with the diligence, care, judgment, and skill which an ordinary prudent person in a like position would exercise under

similar circumstances. *Nothing contained in this Section shall derogate from any indemnification authorized by R.S. 12:1315.*

(2) In discharging his duties, shall be fully protected in relying in good faith upon the records of the limited liability company and upon such information, opinions, reports, or statements presented to the limited liability company, the members, managers, or any committee thereof by any of the limited liability company's members, managers, employees, or by any committee of the members or managers, or by any legal counsel, appraiser, engineer, including a petroleum reservoir engineer, or independent or certified public accountant selected with reasonable care by the members, managers, any committee thereof, any agent having the authority to make such selection, or by any other person as to matters the member, if management is reserved to the members, or manager, if management is vested in one or more managers pursuant to R.S. 12:1312, reasonably believes are within such other person's professional or expert competence and which person is selected with reasonable care by the members, managers, any committee thereof, or any agent having the authority to make such selection.

(3) Is not protected by Paragraph (2) of this Subsection if he has knowledge concerning the matter in question that makes reliance otherwise permitted by Paragraph (2) of this Subsection unwarranted.

(4) Shall not be liable for any action taken on behalf of the limited liability company or any failure to take any action if he performed the duties of his office in compliance with this Section.

....

B. Notwithstanding the provisions of Subsection A of this Section, a member or manager shall not be personally liable to the limited liability company or the members thereof for monetary damages unless the member or manager acted in a grossly negligent manner as defined in Subsection C of this Section, or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence, including but not limited to intentional tortious conduct or intentional breach of his duty of loyalty.

C. As used in this Section, "gross negligence" shall be defined as a reckless disregard of or a carelessness amounting to indifference to the best interests of the limited liability company or the members thereof.

D. A member or manager who makes a business judgment in good faith fulfills the duty of diligence, care, judgment, and skill under Subsection A of this Section if the member or manager:

(1) Does not have a conflict of interest with respect to the subject of the business judgment.

(2) Is informed with respect to the subject of the business judgment to the extent the member or manager reasonably believes to be appropriate under the circumstances.

(3) Rationally believes that the business judgment is in the best interests of the limited liability company and its members.

E. A person alleging a breach of the duty of diligence, care, judgment, and skill owed by a member or manager under Subsection A has the burden of proving the alleged breach of duty, including the inapplicability of the provisions as to the fulfillment of the duty under Paragraph A(2) and Subsection D, and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the limited liability company. [Emphasis added.]

Louisiana Revised Statute 12:1315(A)(1) provides that the articles of organization may "[e]liminate or limit the personal liability of a member or members, if management is reserved to the members, ... for monetary damages for breach of any duty provided for in R.S. 12:1314."

The parties do not dispute that Mr. Tipton committed the specified acts to which the plaintiffs object; rather, the plaintiffs allege that the determination of whether those acts constitute a breach of any fiduciary duty owed is the disputed issue of fact. In moving for summary judgment, the defendants argued that Mr. Tipton/The Tipton Group, L.L.C. did not breach any fiduciary duty owed, but even if a breach should be found, it would not be actionable, because (1) any such breach did not amount to gross negligence; and (2) Mr. Tipton/The Tipton Group, L.L.C. cannot be held liable based on the express provision of indemnification contained in the articles of organization.

No reasons for judgment were provided by the trial court in granting the summary judgment. However, considering that we review summary judgments *de novo*, we find no basis to reverse the trial court's ruling. Pretermitted a discussion of whether the conduct of Mr. Tipton/The Tipton Group, L.L.C. constituted a breach of any fiduciary duty owed or was even an actionable breach, the provision

for indemnity in the articles of organization² clearly eliminates any liability Mr. Tipton/The Tipton Group, L.L.C. would have. Hence, we find no merit in the plaintiffs' first two assignments of error. See In re Provenza, 316 B.R. 225, 232-33 (Bankr. E.D. La. 2003).

As for the plaintiffs' final assignment of error, claiming that the trial court erred in finding that Reeves Electrical Services, L.L.C. was not a member of TCSC and owed no fiduciary duty to the plaintiffs, we reject the plaintiffs' argument.

A "member" is defined under the Limited Liability Company Law, as "a person with a membership interest in a limited liability company with the rights and obligations specified under this Chapter." La. R.S. 12:1301(A)(13). A "membership interest" is defined as "a member's rights in a limited liability company, collectively, including the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company's assets, and any right to vote or participate in management." La. R.S. 12:1301(A)(14).

In opposition to the motion for summary judgment, the plaintiffs submitted correspondence showing Reeves Electrical Services, L.L.C., acting through Mr. Tipton, engaged and terminated various professionals who performed business services for TCSC. It is undisputed that Reeves Electrical Services, L.L.C. paid for the services of those professionals. It is the plaintiffs' contention that this evidence is proof that Reeves Electrical Services, L.L.C. participated in the management of TCSC.

² Article 6 of the articles of organization states:

No member shall have any liability for damages for any duty breached or activity performed in connection with the management of the company. Further, each member shall be fully indemnified by the company for any judgments, settlements, penalties, fines or expenses incurred because he or she is or was a member of the company. It is the intention of this provision to afford members of the company the most complete elimination of liability and the fullest rights to indemnification possible under the laws of the State of Louisiana and particularly Title 12, Section 1315 of the Revised Statutes of Louisiana and this provision shall be so construed.

We observe that La. R.S. 12:1301(A)(14) specifically defines "membership interest" as a "member's rights" in the company and lists the "right" to participate in the management of the company as an example of such rights. The evidence presented, without more, does not demonstrate that Reeves Electrical Services, L.L.C. had a "right" to participate in the management of TCSC. While Reeves Electrical Services, L.L.C. was allowed to pay or assume some of the expenses of TCSC by paying for the business professionals that provided services to TCSC, this is not evidence that Reeves Electrical Services, L.L.C. had any rights in TCSC.

In Destiny Services, L.L.C. v. Cost Containment Services, L.L.C., 10-1895 (La. App. 1st Cir. 9/20/11), 2011 WL 4375318(unpublished opinion), this court found that an email sent to the plaintiffs specifically offering them the "right" to share in the equity of the company, which offer the plaintiffs accepted, was sufficient to confer a membership interest in the company to the plaintiffs and thereby make them members of the company to whom fiduciary duties were owed pursuant to La. R.S. 12:1314. The evidence presented by the plaintiffs herein makes no such showing.

Moreover, even if we were to construe the evidence presented by the plaintiffs as conferring a membership interest in TCSC on Reeves Electrical Services, L.L.C., we observe that the plaintiffs have not made any allegations asserting that Reeves Electrical Services, L.L.C. breached any fiduciary duty, if any should have been owed.

CONCLUSION

Therefore, finding no merit in the arguments urged by the plaintiffs on appeal, we affirm the summary judgment rendered by the trial court. All costs of this appeal are cast to the plaintiffs, Theodore A. Broussard and Cajun Teddy, L.L.C.

AFFIRMED.