CAMBRIDGE REALTY WEST, L.L.C.	*	**NO. 2005-CA-0356**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
GENTILLY SHOPPING CENTER, L.L.C., FULTON PLACE, L.L.C., EDWARD M. HASPEL, INDIVIDUALLY, EDWARD M. HASPEL IN HIS CAPACITY AS MANAGER OF GENTILLY SHOPPING CENTER, L.L.C., EDWARD M. HASPEL IN HIS CAPACITY AS MANAGER OF FULTON PLACE, L.L.C., ET AL.	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-3108, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

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AFFIRMED

Plaintiff and defendant, Mr. Maurice Kansas and Mr. Edward Haspel respectively, both appeal the trial court's judgment, which declared Cambridge Realty West, L.L.C. had the right to enforce the Agreement of Purchase and Sale between Cambridge Realty West, L.L.C. and Fulton Place, L.L.C., and that the price required under the contract was $8,500,000. We find the trial court was not manifestly erroneous in entering judgment based on the findings of the jury. The decision of the trial court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of a dispute between two business partners, Edward Haspel (hereinafter "Mr. Haspel") and Maurice Kansas (hereinafter "Mr. Kansas"), concerning the offers of Cambridge Realty West, L.L.C. (hereinafter "Cambridge"), a limited liability company created and owned solely by Mr. Kansas, to purchase two pieces of real property. The two pieces of property that were the subject of these offers were Fulton Place Property and Gentilly Shopping Center, which were owned by two limited liability companies, Fulton Place, L.L.C. and Gentilly Shopping Center,

L.L.C., respectively. However, only the Fulton Place Property and Fulton Place, L.L.C. are the subject of this appeal.

At issue in this case is the agreement that Cambridge executed with Fulton Place, L.L.C. to purchase the Fulton Place Property, a retail and parking facility located at 901 Convention Center Boulevard, allegedly for $8,500,000. Mr. Haspel and Mr. Kansas are the managers of Fulton Place, L.L.C. An offer to purchase the Fulton Place Property was made by Cambridge, and Mr. Kansas, acting unilaterally as the manager of Fulton Place, L.L.C. *and* the manager of Cambridge, executed an Agreement of Purchase and Sale for the Project. So, Mr. Kansas signed the offer to purchase as manager of both the selling and purchasing entities. Mr. Haspel was not a party to the agreement to purchase and opposed the sale. Cambridge's efforts to close on the Project and Mr. Haspel's resulting efforts to block the closing resulted in litigation.

After trial, a unanimous jury ruled in favor of Cambridge. The trial court issued a Declaratory Judgment confirming the jury verdict, which declared that Cambridge had the right to enforce the Agreement of Purchase and Sale, and that the price required under the contract was $8,500,000. The court's judgment further ordered that the Orleans Parish Recorder of Mortgages cancel and erase any relevant Notice of Lis Pendens filed by

Haspel affecting the property in question and the Clerk of Court distribute the $800,250.00 deposited into the Registry of the trial court to Gentilly Shopping Center, L.L.C. Both parties contested the judgment and this appeal ensued.

STANDARD OF REVIEW

Appellate courts review factual determinations made by the trier of fact with the manifestly erroneous or clearly wrong standard. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). "[R]easonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Id*. Furthermore, unless there is no reasonable factual basis for the trier of facts and findings and the findings are manifestly erroneous, the reviewing court must affirm. *Mart v. Hill*, 505 So. 2d 1120, 1127 (La. 1987).

Use of the manifest error standard means that the court presumes that the jury utilized the correct law. *Chaisson v. Avondale Indus., Inc.*, 05-1511, p. 27 (La. App. 4 Cir. 12/20/06), 947 So. 2d 171, 190, (*citing Rathey v. Priority EMS, Inc.*, 04-0199, p. 27 (La. App. 4 Cir. 1/12/05), 894 So. 2d 438, 458, *reh'g denied*, (2/24/05), *writ denied*, 05-0789 (La. 5/6/05), 901 So. 2d 1107, *writ denied*, 05-0802 (La. 5/6/05), 901 So. 2d 1108). A *de novo*

review will be conducted "if the jury applied the incorrect law because of erroneous jury instructions" and it "could have affected the jury's decision." *Chaisson*, 05-1511, pp. 27-28, 894 So. 2d at 459.

Legal errors are reviewed using the *de novo* standard. *Overton v. Shell Oil Co.*, 05-1001, p. 8 (La. App. 4 Cir. 7/19/06), 937 So. 2d 404, 410. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Lasha v. Olin Corp.*, 625 So. 2d 1002, 1006 (La.1993). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id*.

We find that no legal errors occurred at the trial of this matter that materially affected the jury's decision and were, therefore, prejudicial. As such, this Court will not conduct a *de novo* review of the record. Assignments of error are decided herein applying the manifestly erroneous or clearly wrong standard.

AUTHORITY TO SELL

The trial court determined that Mr. Kansas was vested with full authority to execute an act of sale from Fulton Place, L.L.C. to Cambridge. Mr. Haspel argues that the trial court erred in this determination because Mr.

Kansas acted alone and without his consent. Also, Mr. Haspel avers that Mr. Kansas' unilateral actions run afoul of the provisions of the operating agreement of Fulton Place, L.L.C. and that because of this, the Agreement of Purchase and Sale for the Fulton Place Property is invalid.

Louisiana law provides that "[u]nless otherwise provided in the articles of organization or a written operating agreement," a majority vote of the members shall be required to approve, among other matters, the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited liability company or the alienation, lease, or encumbrance of any immovables of the limited liability company, whether or not management is vested in one or more managers. La. Rev. Stat. 12:1318(B). The written operating agreement between the parties in the case at bar reads as follows:

> "7.3. Consent of the Managers- Except as expressly provided otherwise herein, the authority of the Managers shall be exercised by consent of both of the managers, if there is more than one Manager. If there is more than one Manager, the consent of the Managers may be evidenced by whatever means they may agree upon, including, without limitation, by formal resolution or written consent signed by the Managers, by vote at a meeting of the Managers or by joint execution of a contract, instrument, or other document in their capacities as Managers of the Company. The Managers agree to exercise the authority granted to them under this Agreement for the benefit of the Company and in a professional businesslike manner. ..."

> "7.4. Unilateral Action of a Manager- If the company has more than one Manager, then **notwithstanding Section 7.3 hereof** (emphasis added), a Manager shall have authority, without the Consent of the other Manager, for and on behalf of the Company, in the following matters: …(c) To sell the Project, including a sale to a Manager or an Affiliate of a Manager, provided that the following terms and conditions are satisfied. …"

The written language of the operating agreement, provides for the very instance that Mr. Haspel herein protests. Mr. Haspel argues that section 7.3 requires his consent to Mr. Kansas' sale of the Fulton Place Project. However, section 7.4 includes the wording "notwithstanding section 7.3 hereof," which we read to exclude the unilateral action of a manager from this requirement of consent. Section 7.4 further provides specific authority for a sale from a manager to a manager under provided terms and conditions.

Even a cursory reading of the Agreement would have put Mr. Haspel on notice that Mr. Kansas was a Manager of the business entity who had the authority to sell the property in question. Mr. Haspel's argument that the unilateral action of Mr. Kansas in selling the Fulton Place Property was unauthorized is without merit. Mr. Haspel has failed to establish a lack of authority for the actions of Mr. Kansas that would give rise to invalidating the Fulton Place Property agreements of purchase and sale. Given that, we find no error in the trial court's decision.

VALIDITY OF THE SALE

Mr. Haspel contends that the sale of the Fulton Place Property was invalid, fundamentally unfair to Fulton Place, L.L.C. and against public policy because it was in the best interest of the company to sell the Fulton Place Property at a higher price. He argues that the sale was not fair because the property was worth substantially more as of the time of Cambridge's offer than the value set by the formula that had been adopted six years earlier.

"An operating agreement is contractual in nature; thus, it binds members of the limited liability company (LLC) as written and is interpreted pursuant to contract law." *Kinkle v. R.D.C., L.L.C.*, 04-1092, p. 7 (La. App. 3 Cir. 12/8/04) 889 So.2d 405, 409. A valid contract requires the parties' consent. La. Civ. Code art. 1927. "The presumption is that parties are aware of the contents of writings to which they have affixed their signatures ... [t]he burden of proof is upon them to establish with reasonable certainty that they have been deceived." *Tweedel v. Brasseaux*, 433 So. 2d 133, 137 (La. 1983), (*citing*, *Bagneris v. Oddo*, 2 Pelt. 278, 285 (La. App. 1919)).

The operating agreement is the best evidence of what the company believed to be in its own best interest. What is "fair" to the company was decided by the parties and memorialized in the operating agreement. The

record reveals that Mr. Haspel and Mr. Kansas contracted to have a formula serve as their property valuation tool, and Mr. Haspel failed to establish that he and Mr. Kansas intended to rely on an understanding other than the formula as to how the property held by Fulton Place, L.L.C. would be valued other than what was set forth in the agreement.

As an alternative to his arguments negating the authority of Mr. Kansas to sell the Fulton Place Property and challenging the fairness of the sale, Mr. Haspel claims that the Agreement of Purchase and Sale is absolutely null. He argues that Mr. Kansas' agreement to unilaterally sell Fulton Place Property at a price significantly below fair market value, does not pass muster under the mandates of state law on self-dealing, good faith and fiduciary duty as they relate to participants in a business entity.

Louisiana law imposes a fiduciary duty to the corporation and its shareholders on corporate officers and directors. *Quartana v. Jenks*, 436 So. 2d 1335, 1337 (La. App. 5 Cir.), writ denied, 441 So. 2d 1224 (La. 1983). "One is said to act in a 'fiduciary capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a

high degree of good faith on the other part. … ” Black's Law Dictionary, Fourth Edition (1951), Fiduciary Capacity. Cf. *Oldland v. Gray*, 10 Cir., 179 F. 2d 408; *Emery & Kaufman, Ltd. v. Heyl*, 227 La. 616, 80 So. 2d 95; *Wofford v. Wofford*, 244 Miss. 442, 142 So. 2d 188. In La. Rev. Stat. 12:91 (A), it is provided that “[o]fficers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment, and skill which ordinarily prudent men would exercise under similar circumstances in like positions. ...”

Mr. Haspel maintains that according to La. Civ. Code art. 1983 and La. Rev. Stat 12:1314, participants in a business entity are required to act in good faith and honor their fiduciary duties in all relations with their companies. A contract such as an operating agreement has the effect of law for the parties and “may be dissolved only through the consent of the parties or on grounds provided by law.” La. Civ. Code art. 1983. “A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral.” La. Civ. Code art. 2030.

Mr. Haspel also claims that La. Rev. Stat. 12:1318(C) mandates that managers of limited liability companies who self-deal with the company’s assets must show the contract or transaction was “fair to the limited liability

company as of the time it was authorized, approved, or ratified by the members." "A questioned officer or director has the burden to establish that the transaction was fair and in good faith, essentially that it was at arms length." *House of Campbell, Inc. v. Campbell*, 172 So. 2d 727 (La. App. 4th Cir. 1965); *Noe v. Roussel*, 310 So. 2d 806, 818-19 (La.1975). In pertinent part, La. Rev. Stat. 12:1318(C) reads:

> "C. No contract or transaction between a limited liability company and one or more of its members, if management is reserved to the members, or managers, if management is vested in one or more managers pursuant to R.S. 12:1312, or a person in which such a member or manager has a financial interest, shall be void or voidable solely for this reason, solely because the interested member or manager was present at or participated in the meeting which authorized the contract or transaction, or solely because his or their votes were counted for such purpose, if the material facts as to his interest and to the contract or transaction was disclosed or known to the members and the contract or transaction was approved by a majority vote of the members without counting the vote of the interested member, or if the contract or transaction was *fair to the limited liability company as of the time it was authorized, approved, or ratified by the members*. Interested members may be counted in determining the presence of a quorum at a meeting which authorized the contract or transaction. …"

The operating agreement of the limited liability company in this case

is a contract between Mr. Haspel and Mr. Kansas, which reflects the law as between the parties. The contract does not account for the temporal element "as of the time it was authorized, approved, or ratified by the members" that Mr. Haspel claims invalidates the sale of the Fulton Place Project.

Mr. Kansas testified that he and Mr. Haspel negotiated the contents of the operating agreement at arms-length with representation by counsel before signing. Mr. Haspel did not tesify to the contrary nor did he otherwise establish the contrary with evidence, nor has Mr. Haspel proven that he and Mr. Kansas intended the time element to be the underlying principle of the buy-out clause. On the contrary, the record shows that Mr. Haspel and Mr. Kansas approved a written formula as a method of property valuation and specifically included it in the buy-out clause outlined in Article 7 of their operating agreement on "Management of the Company."

The litigants signed the operating agreement. Thus, they are presumed to know the contents of the agreement. *Tweedel v. Brasseaux*, 433 So. 2d 133, 137 (La. 1983).

The agreement is explicit in the manner in which the buy-out clause is to be applied and the vast powers it gives to the Manager of the company in doing so. Mr. Haspel, therefore, cannot now be given relief for what he could and should have known before signing the agreement-the information

was easily discernible. We find no error in the decision by the trial court.

EBIDA FORMULA CALCULATION AND PROPERTY PURCHASE PRICE

Mr. Haspel asserts that the trial court erred in entering judgment based on the jury's finding that, based on the EBIDA formula contained in the operating agreement, the purchase price of the Fulton Place Property was $8,500,000. He contends that the revenue from Park & Ride, Inc. (hereinafter "Park & Ride") should be included as earnings, which would allegedly raise the price to $8,910,183.

The EBIDA formula was to be used when setting a buy-out purchase price for Fulton Place Property. The operating agreement offers the specific following guidance on the manner in which buy-out is to be conducted and the applicable method of valuation:

> Article 7.
> Management of the Company
>
> . . . .
>
> 7.4. Unilateral Action of the Manager – If the Company has more than one Manager, then notwithstanding Section 7.3 hereof, a Manager shall have authority, without the Consent of the other Manager, for and on behalf of the Company, in the following matters:
>
> . . . .
>
> (c) To sell the Project, including a sale to a Manager or an Affiliate of a Manager, provided that the following terms and conditions are satisfied:
>
> The terms of the sale of the Project shall be all cash at the closing and the selling

> price of the Project shall be not less than the greater of (i) $8,500,000.00, or (ii) point nine seven (.97) multiplied by the sum of (x) $2,500,000.00 and (y) the quotient obtained by dividing (A) the earnings of the Project before interest, depreciation and amortization ("EDIBA") for the twelve months preceding the month in which the contract for purchase and sale of the Project is to be entered into, by (B) point one (.1). For purposes of the computation under clause (ii), the addition of $2,500,000.00 shall be included in the formula only so long as the Project does not include an operating hotel, apartments or office space (on other then the ground floor of the Project).

As applied to the subject purchase, the operating agreement provides that the selling price cannot be less than the greater of $8,500,000 or .97 X ($2,500,000 + EBIDA for twelve months/.1). EBIDA is based on the earnings of Fulton Place, L.L.C. ("the Project"). Thus, the jury must have made a determination based on the Operating Agreement and testimony presented at trial as to what the earnings of the Project included.

Mr. Kansas testified that he and Mr. Haspel each owned fifty percent of Park & Ride, a separate business entity managed by an outside firm named AMPCO. While Park & Ride has income of approximately $50,000 to $60,000 a month, Mr. Kansas stated that the EBIDA formula contained in

the buy-out provision was based on the earnings of the Project. Mr. Kansas defined the earnings of the Project as the rent from the tenants of the Project. He stated that a lease between the Project and he and Mr. Haspel, and later, Park & Ride, was initially in writing, but the original written lease was continually reconducted pursuant to La. Civ. Code art. 2721. Mr. Kansas stated that the rent received by the Project from Park & Ride was $6,000 a month. Mr. Kansas also testified that the Project and Park & Ride filed separate tax returns.

Mr. William Legier (hereinafter "Accountant Legier"), an independent expert certified public accountant who worked for the Project, testified that the Project and Park & Ride had separate financial revenue, tax returns, and incorporation articles. He stated that the Project revenue was kept separate from Park & Ride's revenue. When asked if Park & Ride was part of the Project, Accountant Legier said it "appears that way," and added that the decision was left up to the trial court because it had the benefit of all testimony. Mr. Gregory Jordan (hereinafter "Mr. Jordan"), a First Vice President of Bank One Corporation stated that Park & Ride's income was used to determine the operations income of the Project when Mr. Haspel and Mr. Kansas attempted to secure financing for Cambridge's purchase of the Project.

Mr. Haspel avers that Park & Ride's $50,000 to $60,000 a month income should have been included in the EBIDA calculations as part of the "earnings of the Project." He argues that Park & Ride is a phony company. Cambridge asserts that the Project is a landlord and that only the rent derived from Park & Ride should be included in the "earnings of the Project" like the other tenants' rent.

A written lease with a fixed term can be tacitly reconducted. La. Civ. Code art. 2721. A reconducted lease cannot be terminated without giving notice. La. Civ. Code art. 2724. Additionally, notice of termination must be given in writing because the "leased thing," here seven floors of the Project, is an immovable. La. Civ. Code. art. 2729. The record is devoid of a written termination of the tacit reconduction of Park & Ride's lease.

The jury was in a better position to weigh the testimony and credibility of Mr. Kansas, Accountant Legier, Mr. Jordan, and the evidence regarding the intent of the parties as to the "earnings of the Project." Mr. Haspel did not testify. Having taken into account Mr. Kansas' testimony that earnings constituted the rent received from tenants located in the Project, the alleged separate revenue, tax returns, operating agreement, the reconducted lease, and Mr. Haspel's failure to prove otherwise, we do not find that the jury erred in finding that the purchase price, using the EBIDA

formula, did not include revenues derived from Park & Ride, and was $8,500,000. Further, the trial court did not commit manifest error in entering judgment based on the finding of the jury.

JURY INSTRUCTIONS

Mr. Haspel assigns error to the trial court's refusal to instruct the jury as to La. Rev. Stat. 12:1318(C). Mr. Haspel argues that the general jury charge did not instruct the jury that in special circumstances such as self-dealing transactions, managers have a more onerous burden of proof that they must carry so as to discharge their fiduciary duties. He maintains that without the benefit of the specific and controlling self-dealing burden of proof requirements, the jury impermissibly relieved Cambridge/Kansas of the duty to prove that the contract was for a sale at market value.

A trial court's decision to exclude requested jury instructions constitutes an error of law when it is "prejudicial" because it "materially" affects the result of a case by depriving "a party of substantial rights." *Lam v. State Farm Mutual Auto. Ins. Co.*, 03-0180, p. 4 (La. App. 4 Cir. 4/1/05), 901 So. 2d 559, 564; *rev'd in part on other grounds*, 06-2361 (La. 11/29/06), 946 So. 2d 133. However, *de novo* review occurs only if the jury charges precluded the jury from reaching a verdict based on the law and the facts. *Jones v. Liberty Mut. Ins. Co.*, 568 So. 2d 1091, 1094 (La. App. 5th

Cir.1990). "Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice." *Nicholas v. Allstate Ins. Co.*, 99-2522, p. 8 (La. 8/31/00), 765 So. 2d 1017, 1023.

At trial, counsel for Mr. Haspel argued that the trial judge should give a jury instruction with respect to contractual interpretation on what counsel categorized as self-dealing. The proposed jury instruction stated that a manager's dealings are subject to rigorous scrutiny in cases such as this one where a manager contracts with a company that he owns or in which he has a financial interest to acquire the property of the company. Additionally, by way of counsel, Mr. Haspel argued to include in the jury instruction that the manager must prove that the contract was an arm's-length sale in which the property was sold at least for fair market value.

Counsel for Mr. Kansas argued that the proposed instructions were not permissible given that there existed a written contract or operating agreement between Mr. Kansas and Mr. Haspel that specifically provided for either of the managers to buy the property owned by the limited liability company provided that certain conditions are met. In response, counsel for Mr. Haspel argued that as a matter of public policy, parties may not contract out of their fiduciary duties.

The trial judge decided to exclude Mr. Haspel's proposed instructions on contractual interpretation and stated that the parties to the agreement understood that they had a fiduciary duty to the company and that they could not contract to do something against public policy. The jury concluded that Mr. Kansas was vested with the authority to sell the Fulton Place Property to Cambridge Realty West, L.L.C., Mr. Kansas' sale of the property was valid, and the purchase price was $8,500,000. Given the jury's conclusion, we do not find that the jury instructions misled the jury to the extent that it was prevented from dispensing justice.

SUSPENSIVE VERSUS DEVOLUTIVE APPEAL

Mr. Haspel voluntarily converted this appeal to a devolutive appeal after deciding not to post the bond required for a suspensive appeal. The nature of a suspensive appeal is that it suspends the judgment being appealed. La. Code Civ. Proc. art. 2123. Subsequent to the conversion, the judgment ordering the sale of the Project was executed. Cambridge asserts that the conversion of the appeal dictates that the sale cannot be undone. However, because we find that the trial court did not commit error in upholding the sale, we pretermit the discussion of the effect of converting the appeal.

DECREE

We conclude that the trial court was not manifestly erroneous in its decision to uphold the sale of the Fulton Place Property to Cambridge Realty West, L.L.C. Mr. Kansas was vested with the authority to sell the Fulton Place Property and his sale of the property was valid. Also, the trial court did not err in entering judgment based on the decision of the jury, finding that the purchase price, based on the EBIDA formula, was $8,500,000. The judgment of the trial court is affirmed.

AFFIRMED