BOURBON INVESTMENTS, LLC AND 209 REALTY, LLC	*	**NO. 2015-CA-1234**
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VERSUS		**COURT OF APPEAL**
	*	
NEW ORLEANS EQUITY LLC, ET AL	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-09869, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard, Judge Roland L. Belsome, Judge Daniel L. Dysart, Judge Madeleine M. Landrieu)

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AFFIRMED

DECEMBER 21, 2016

Plaintiffs, Bourbon Investments, L.L.C. and 209 Realty, L.L.C., appeal the dismissal of their action upon the granting of Defendants' exceptions of lack of procedural capacity and no right of action. Plaintiffs also appeal the trial court's denial of their motion for new trial. For the reasons that follow, we affirm the trial court's judgments.

FACTS AND PROCEDURAL HISTORY

This case arises out of Plaintiffs' failed attempt to purchase Galatoire's Restaurant in New Orleans. Since its founding in 1905, Galatoire's had been owned and operated by members of the Galatoire family. In 2005, the Galatoire family opened a second restaurant, Galatoire's Bistro, in Baton Rouge.

In 2008, certain members of the Galatoire family decided to sell both Galatoire's Restaurant and Galatoire's Bistro. These family members approached Mr. Melvin Rodrigue and asked him to contact potential purchasers. At that time, Mr. Rodrigue had worked for the Galatoire family for over twelve years, was the Chief Operating Officer of Galatoire's Restaurant, and owned a thirty-percent

interest in the limited liability company that owned and operated Galatoire's Bistro. Mr. Rodrigue contacted two potential investors, Mr. Daniel O. Conwill, IV and Mr. John C. Simpson. With Mr. Rodrigue's permission, Mr. Conwill then recruited Mr. H. Hunter White and Mr. Simpson recruited Mr. Donald T. Bollinger. Mr. Rodrigue, along with these four investors, formed Bourbon Investments, L.L.C. for the purpose of purchasing the two restaurants. Bourbon Investments filed articles of organization with the Louisiana Secretary of State on October 15, 2008. About that same time, 209 Realty L.L.C., of which Bourbon Investments is the sole member, was formed for the purpose of purchasing the real property on which the New Orleans based Galatoire's Restaurant was located.

In September 2009, following negotiations, Bourbon Investments submitted an Asset Purchase Agreement ("APA") outlining the proposed purchase of the two restaurants to the boards of Galatoire's Restaurant, L.L.C. ("GRLLC") and Baton Rouge Restaurant, L.L.C. ("BRLLC"), the entity that owned Galatoire's Bistro. At the same time, 209 Realty submitted a Real Estate Purchase Agreement ("RPA") for the purchase of the land upon which Galatoire's Restaurant is located. Twelve members of the Galatoire family, who collectively owned seventy-five percent of the assets to be sold, approved the purchase agreements. The three remaining family members, represented by attorney Henry W. Kinney, III (hereinafter referred to as the "Kinney clients"), refused to approve the sale. Instead, on October 9, 2009, the Kinney clients chose to exercise a right of first refusal that

they retained over the real property. On October 21, 2009, Mr. Conwill notified the sellers that 209 Realty had elected not to go through with the purchase.

On December 8, 2009, the Kinney clients exercised their right of first refusal and purchased the real property and both restaurants.[1] That same day, the Kinney clients sold the restaurants and land to Defendant New Orleans Equity, L.L.C., of which Mr. Rodrigue is a board member and the Chief Operating Officer.

Shortly thereafter, two members of Bourbon Investments and 209 Realty, Mr. Conwill and Mr. White, decided to file suit against Defendants for breach of contract.[2] Two other members, Mr. Bollinger and Mr. Simpson did not wish to be involved in the suit, so they completed documents purporting to transfer their membership interests in Bourbon Investments and 209 Realty to Mr. Conwill and Mr. White. The final member of Bourbon Investments, Mr. Rodrigue, was not informed of the membership transfers. The day after the alleged membership transfer, Mr. Conwill and Mr. White instituted the action on behalf of Bourbon Investments and 209 Realty requesting a declaratory judgment, specific performance of the APA and RPA, and/or damages for breach of contract. Plaintiffs named multiple Defendants in the suit, including New Orleans Equity, L.L.C., the Kinney clients, and various other members of the Galatoire family.

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[1] In a separate decision, the trial court found that the Kinney clients had not properly exercised their right of first refusal because of several changes that had been negotiated in the purchase agreement. The principal change being that the Kinney clients would not be required to pay off half of Mr. Rodrigue's share of the bank debt owed on Galatoire's, as Bourbon Investments had agreed to assume under the APA and RPA. The trial court determined that Galatoire's would not be permitted to enforce the payment provision against Mr. Rodrigue considering that Galatoire's had breached its obligations with Bourbon Investments, 209 Realty, and Mr. Rodrigue. No appeal was taken from this judgment.

[2] The claim concerned the changes in the terms of the sale to the Kinney clients from those included in the APA and RPA.

Defendants filed multiple exceptions, including the two exceptions at issue in this appeal: 1) a peremptory exception of no right of action and 2) a dilatory exception of lack of procedural capacity. The hearing on the exceptions took place on April 30, 2015. Defendants argued that Plaintiffs lacked the necessary authorization from a majority of members of the LLCs to authorize the filing of the lawsuit. Specifically, Defendants argued that Mr. White and Mr. Conwill were the only two members given an opportunity to vote on the lawsuit, although the companies had six total members.[3] Plaintiffs contended that Mr. Rodrigue and Mr. Nugent were never members of the LLCs and that following the membership transfer Mr. White and Mr. Conwill were the only members of the LLCs at the time the suit was filed. Therefore, Plaintiffs argued, Mr. White and Mr. Conwill had full authority to file the lawsuits.

At the hearing, the trial court stated on the record that it was granting the exception of lack of procedural capacity. The trial judge found that Mr. Rodrigue was a member of Bourbon Investments, and as a member he was entitled to notice and opportunity to consent to the transfer of membership interests. As Mr. Rodrigue had not voted, there was no unanimity in the decision so the full membership interests of Mr. Simpson and Mr. Bollinger were not transferred. Rather, Mr. Simpson and Mr. Bollinger retained their voting and management participation rights in the LLCs until the time there was a unanimous vote of all members to transfer the full interests. The trial judge went on to state that Mr.

[3] The other four alleged members were Mr. Rodrigue, Mr. James Nugent, Mr. Bollinger, and Mr. Simpson. It was later determined that Mr. Nugent was never a member of either LLC.

Rodrigue also had a right to participate in the decision to proceed with the lawsuit. The trial judge concluded that the finding that Plaintiffs lacked procedural capacity "moots out everything else" and dismissed the matter.

In the court's June 22, 2015 written judgment, the court granted both the exception of lack of procedural capacity and the exception of no right of action. The court declared the other exceptions to be moot and dismissed the action with prejudice.

Plaintiffs filed a motion for new trial, which was denied. This appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Plaintiffs assert that the trial court erred in granting the exceptions of lack of procedural capacity and no right of action. Plaintiffs also contend that the trial court erred in denying their motion for new trial.

STANDARD OF REVIEW

Appellate courts review the trial court's factual findings under the manifest error standard of review. *Gordon v. Gordon*, 2016-0008, p. 2 (La.App. 4 Cir. 6/8/16), 195 So.3d 687, 688–89, *writ denied*, 2016-1282 (La. 10/28/16). This standard precludes a reviewing court from setting aside the trial court's finding of fact unless the finding is clearly wrong in light of the record as a whole. *Id.* So long as the trial court's factual findings are reasonable, a reviewing court may not reverse even if it would have weighed the evidence differently had it been the trier of fact. *Id.* (citing *Stobart v. State, Department of Transportation and*

Development, 617 So.2d 880, 882 (La.1993). "Consequently, when there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous." *Ardoin v. Firestone Polymers, L.L.C.*, 2010-0245, p. 6 (La. 1/19/11), 56 So.3d 215, 219.

Legal issues are reviewed using the *de novo* standard of review. *Harper v. State ex rel. Its Dep't of Health & Hosps.*, 14–0110, p. 7 (La.App. 4 Cir. 9/9/15), 176 So.3d 479, 486. Additionally, "[w]hen the law is erroneously applied by the trial court, the de novo standard of review is also used." *Id.*

LAW AND DISCUSSION

The assignments of error presented on appeal by Plaintiffs all rely on their contention that the LLC membership transfers from Mr. Simpson and Mr. Bollinger to Mr. Conwill and Mr. White were effective and that Bourbon Investments had only two – or at most three – members at the time the lawsuit was filed.

Transfer of Membership Interests

Plaintiffs first argue that Mr. Rodrigue was not a member of Bourbon Investments and thus his consent was not needed for the transfer of membership interests. Plaintiffs then claim that even if Mr. Rodrigue were a member, his consent was not needed for the transfer to be valid. Plaintiffs maintain that the general rule that requires unanimous consent for the transfer of full membership interests in an LLC does not apply where such transfer takes place between current members.

With regard to the assertion that Mr. Rodrigue was not a member of Bourbon Investments, we find that he became a member at the inception of the company and never resigned from the position.

At the exception hearing, Mr. Rodrigue testified to his extensive involvement with Bourbon Investments. He stated that he was contacted in 2008 by some members of the older generation of the Galatoire family who asked him to put together a group of people to purchase Galatoire's Restaurant. He indicated that the family members expected him to lead the group because of his history of involvement with Galatoire's. Mr. Rodrigue testified that he approached Mr. Conwill and Mr. Simpson, who with his permission reached out to Mr. White and Mr. Bollinger, and together the five men formed Bourbon Investments for the sole purpose of purchasing the restaurants. Mr. Rodrigue stated that he was the member of the LLC who primarily spoke with the Galatoire family on behalf of Bourbon Investments regarding negotiations for the sale. Additionally, evidence was presented showing that he signed documents on behalf of Bourbon Investments. His was the sole signature on the confidentiality agreement that accompanied the purchase agreement. He also signed the letter of intent to purchase, along with Mr. Conwill.

Mr. Conwill testified at the hearing that, in his opinion, Mr. Rodrigue did not have a membership interest in Bourbon Investments because Mr. Rodrigue made no initial capital contribution. Mr. Conwill stated that because Mr. Rodrigue's contribution was to be future services, including effectuating the

purchase and acting as CEO of Bourbon Investments, the failure of the purchase precluded him from ever becoming an official member of the LLC. However, as he admitted, these assertions were based on the terms of an operating agreement that never came in to existence. While Bourbon Investments was in the process of drafting an operating agreement setting forth proposed classes and terms of membership at the time the APA and RPA were completed, the operating agreement was never signed and thus never became effective. Mr. Conwill also acknowledged that Mr. Rodrigue had negotiated with the Galatoire family on behalf of Bourbon Investments, and he admitted that he had never disavowed Mr. Rodrigue's authority to act on behalf of the LLC.

After an examination of the record as a whole, we find no manifest error in the trial court's determination that Mr. Rodrigue became a member of Bourbon Investments at its inception and remained a member and as such had a right to vote on any transfer of membership interests in the LLC.

In light of our affirmation of the trial court's finding that Mr. Rodrigue was a member of Bourbon Investments, we find that the alleged transfer of membership interests was not properly effectuated because the requisite unanimous written consent of all members was not given. We also find that because the membership transfer was incomplete, Mr. Simpson and Mr. Bollinger remained members of the LLCs.

The issue of whether membership interests may be freely transferred between members of a limited liability company without the need for unanimous

consent of all current members concerns the interpretation of Louisiana LLC law. Therefore, it presents a question of law and is reviewed by this Court under a *de novo* standard of review. *See Broussard v. Hilcorp Energy Co*., 2009-0449 (La. 10/20/09), 24 So.3d 813, 815–16.

La. R.S. 12:1330 provides that a membership interest in a limited liability company is assignable, but such assignment entitles the assignee to only "receive such distribution or distributions, to share in such profits and losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled to the extent assigned." La. R.S.12:1332 provides that, except as otherwise provided in the articles of organization or in an operating agreement, "[a]n assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing." The statute further states that an assignor continues to be a member unless and until the assignee becomes a member.

It is undisputed that Bourbon Investments had no written, signed operating agreement. Absent an operating agreement, we are restrained by the statutory language of La. R.S. 12:1332 requiring unanimous written consent for an assignee of LLC membership to become a member or fully participate in the management of the LLC.

When a law is clear and unambiguous as written, no further interpretation may be made in search of legislative intent. La. C.C. art. 9; *Cleco Evangeline, LLC*

v. Louisiana Tax Comm'n, 2001-2162 (La. 4/3/02), 813 So.2d 351, 354. "Varying from the literal language of a statute and finding 'room for construction' or interpretation of the statute is done infrequently by courts and only under limited circumstances." *Abuan ex rel. Valdez v. Smedvig Tankships, Ltd.*, 2000-1120 (La.App. 4 Cir. 4/11/01), 786 So.2d 827, 831, *writ denied sub nom. Abuan v. Smedvig Tankships, Ltd.*, 2001-1752 (La. 9/28/01), 798 So.2d 117. Only where the plain language of a statute would defeat the clear purpose of the lawmakers may a court "consider the spirit and reason of a statute." *Id.*

Plaintiffs argue that the transfer restrictions set forth in La. R.S. 12:1332 apply only when the assignment is made to a third party who wishes to become a member of the LLC. Plaintiffs cite to *Destiny Servs., L.L.C. v. Cost Containment Servs., L.L.C.*, 2010-1895, 2011 WL 4375318 (La.App. 1 Cir. 9/20/11) in support of their position. However, that case is clearly distinguishable from the present case in that it did not involve the assignment of interest to individuals who were already members. The court in the *Destiny Servs.* case noted as dicta that La. R.S. 12:1332 generally applies when a member sells his interest to a third party, but the court did not hold that the statute fails to apply to assignments between members. *Id.* at *4.

The literal language of the statute does not support Plaintiffs' interpretation of La. R.S. 12:1332. The plain language of the statute requires unanimous written consent of all members for an assignee to become a member of or participate in the management of the LLC. The statute does not differentiate between a third party

assignee and a current LLC member assignee. The fact that the legislature did not draft a separate set of rules for membership transfers between current LLC members further supports the conclusion that the default transfer restrictions apply regardless of whether the assignee is a third party or a current member.

While LLCs are free to alter the default rules regarding transfer of membership through their articles of organization or through an operating agreement, in this case neither was done. Therefore, unanimous written consent of all current members was required for Mr. Conwill and Mr. White to assume the full membership interests of Mr. Simpson and Mr. Bollinger. Mr. Rodrigue was not informed that Mr. Simpson and Mr. Bollinger intended to transfer their membership interests, and was not provided an opportunity to vote on the transfers. Therefore, unanimous written consent of all members for the transfer was not given as is required for a full transfer of membership interest per Louisiana LLC law. Because the requisite unanimous written consent was not given in this case, Mr. Conwill and Mr. White did not assume the full membership interests of Mr. Simpson and Mr. Bollinger, principally their voting rights. Rather, Mr. Simpson and Mr. Bollinger maintained their membership interests insofar as they retained their right to participate in the management of the LLC.

For these reasons, we find that absent provisions in an operating agreement or articles of organization that provide otherwise, unanimous written consent of all members is required to fully transfer membership interest between LLC members. This finding leads to our determination that at the time the lawsuit was filed,

Bourbon Investments had five members, a majority of which would have been required to approve the filing of the lawsuit on behalf of Plaintiffs.

Dilatory Exception of Lack of Procedural Capacity

Considering our finding that there were five members of Bourbon Investments at the time the lawsuit was filed, we affirm the trial court's finding that Mr. Conwill and Mr. White lacked the procedural capacity to file this lawsuit on behalf of Plaintiffs.

The lack of procedural capacity is a dilatory exception which generally merely delays the progress of an action. *See* La. C.C.P. arts. 923, 926. When the grounds of the objection pleaded in a dilatory exception can be removed by amendment of the petition, a judgment sustaining the exception should order the plaintiff to remove the grounds for objection. La. C.C.P. art. 933. However, if the grounds of the objection cannot be removed the action may be dismissed. *Id.*; *Louisiana Power & Light Co. v. Ursin*, 334 So.2d 559, 560 (La. Ct. App. 1976).

Plaintiffs claim that even if a procedural capacity defect existed at the time of the April hearing, they cured such deficiencies and amended their petition to reflect the new facts supporting procedural capacity. They assert that on May 7, 2015, a properly noticed meeting of members of Bourbon Investments including Mr. Conwill, Mr. White, and Mr. Rodrigue was held. During that meeting, a formal motion was made to adopt a resolution that would ratify all actions in the litigation including the original petition, approve continued prosecution against Defendants, and provide Mr. Conwill and Mr. White the authority to continue to

supervise and manage litigation on behalf of Bourbon Investments and 209 Realty. Mr. Conwill and Mr. White voted in favor of the resolution, while Mr. Rodrigue voted against it.

We find these actions insufficient to cure the procedural defects in this case. La. R.S. 12:1318(A) states: "Unless otherwise provided in the articles of organization or a written operating agreement, each member of a limited liability company shall be entitled to cast a single vote on all matters properly brought before the members, and all decisions of the members shall be made by majority vote of the members."

As previously determined, at the time the ratification meeting was held the LLCs had five voting members. Only three of these members were given proper notice of the meeting, and only two of the members present voted in favor of the resolution. Therefore, a majority of the members did not vote to approve the resolution as required by LLC law, resulting in the resolution failing.

The failure of the resolution precludes any cure that may have been possible to remedy Plaintiffs lack of procedural capacity. As such, we affirm the trial court's judgment granting the exception of lack of procedural capacity.

Peremptory Exception of No Right of Action

For the reasons discussed above, the right of Plaintiffs to file the lawsuit did not exist under LLC law because Mr. Conwill and Mr. White lacked proper authority to bring the lawsuit on behalf of Bourbon Investments and 209 Realty.

The law concerning a peremptory exception of no right of action was set forth in the recent case *Alden v. Louisiana Citizens Prop. Ins. Co.*, 2016-0044 (La.App. 4 Cir. 6/29/16), 197 So.3d 312, 315:

> This court reviews an appeal of an exception of no right of action de novo. *Hope v. S & J Diving, Inc*., 08–0282, p. 4 (La.App. 4 Cir. 9/24/08), 996 So.2d 50, 53. The peremptory exception of no right of action, La. C.C.P. art. 927 A(5), raises the question of whether the plaintiff has the capacity or legal interest in judicially enforcing the right asserted. *Babineaux v. Pernie–Bailey Drilling Co.*, 261 La. 1080, 1096–98, 262 So.2d 328, 334 (1972). Moreover, "[a]n action can be brought only by a person having a real and actual interest which he asserts." La. C.C.P. art. 681.

In this case, it has been established that Plaintiffs did not have the capacity to file this suit. Therefore, we find that the trial court properly granted the exception of no right of action.

CONCLUSION

For these reasons, we affirm the trial court's granting of the exceptions of lack of procedural capacity and no right of action and the subsequent dismissal of the case. Accordingly, we find no error in the trial court's denial of the motion for new trial.

AFFIRMED