CCNO MCDONOUGH 16, LLC	*	**NO. 2018-CA-0490**
VERSUS	*	
		COURT OF APPEAL
R4 MCNO ACQUISITION, LLC; RIVERSIDE DRIVE PARTNERS, LLC; AND JACK T. HAMMER, ET AL	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-05291, DIVISION "B-1"
Honorable Rachael Johnson,
* * * * * *
Judge Edwin A. Lombard
* * * * * *

(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Tiffany G. Chase)

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AFFIRMED

The defendant, Riverside Drive Partners, LLC ("Riverside") appeals the district court judgment denying its motion for a new trial related to its order of January 8, 2018, dismissing all pending claims against three parties in this multiparty litigation: (1) CCNO McDonough 16, LLC ("CCNO"); (2) R4 MCNO Acquisition LLC ("R4"); and (3) Joseph A. Stebbins, II. After review of the record in light of the applicable law and arguments of the parties, the district court judgment is affirmed.

Relevant Facts and Procedural History

This litigation arises out of a dispute among partners in a real estate development related to the conversion of an existing historic building into an affordable housing complex. Pursuant to the Operating Agreement signed on September 30, 2013, McDonough 16, LLC, was formed to acquire, rehabilitate, and ultimately lease and operate a multi-family apartment project consisting of the historic building and a new construction building. In turn, McDonough 16, LLC had two members, also limited liability entities: (1) the "Managing Member,"

CCNO and (2), the "Investor Member," R4, a Delaware limited liability company with its principal place of business in New York. Likewise, CCNO had two limited liability partnerships as members: (1) CCNO Partners 2, LLC, which was formed by two members who were residents of and domiciled in Orleans Parish: Mr. Stebbins and Michael Mattax; and (2) the appellant, Riverside, a Florida limited liability company with its principal place of business in Florida whose sole member, Jack Hammer, is a resident of and domiciled in Georgia. Iberia Bank was lender for the project.[1]

Work on the project proceeded, but on May 25, 2016, a petition for a temporary restraining order and preliminary and permanent injunctive relief was filed by CCNO (the managing member of the project) against R4[2] (the investor member of the project) to prohibit its removal as manager of the project. On May 24, 2017, R4 filed an amended answer and a reconventional demand against CCNO, a cross-claim against Riverside, and a third-party claim against CCNO Development, LLC ("CCNO Development").

On October 10, 2017, the parties involved in the litigation (CCNO, R4, Mr. Stebbins, and, initially, Mr. Hammer on behalf of Riverside) converged for a mediation conducted by John Perry. Mr. Hammer subsequently left and a settlement agreement was executed between CCNO, CCNO Development, R4, and Mr. Stebbins. Based on this settlement agreement, an *ex parte* motion to dismiss

[1] In addition, Low Income Housing Tax Credits in the amount of $10 million and historic tax credits in the amount of $3.5 million for the project were obtained for the project.

[2] Riverside and Jack Hammer were also named as defendants in the petition but were voluntarily dismissed as defendants without prejudice on October 19, 2016.

with prejudice was filed by the settling parties, informing the district court that the claims between them had been amicably resolved and seeking dismissal of the lawsuit while reserving "any and all claims and rights" any of the settling parties "may" have against Riverside. Accordingly, on January 8, 2018, the district court signed an order dismissing with prejudice the claims between CCNO, R4, CCNO Development, and Mr. Stebbins, but reserving any and all claims and rights the settling parties may have against Riverside.

On January 16, 2018, Riverside filed a "Motion for a New Trial on the Ex Parte Partial Motion to Dismiss with Prejudice," arguing that CCNO lacked the authority to enter into any settlement without Riverside's consent under the terms of the CCNO operating agreement.[3] After a hearing, the district court denied the motion on March 29, 2018. This devolutive appeal follows.

Applicable Law

La. Code Civ. Proc. art.1971 provides that "[a] new trial may be granted, upon contradictory motion of any party . . . to all or any of the parties and on all or part of the issues, or for reargument only." Peremptory grounds for a new trial include a judgment clearly contrary to the law and the evidence, newly discovered evidence, or jury improprieties. La. Code Civ. Proc. art. 1972. The district court has the discretionary authority to grant a new trial "in any case if there is good ground therefor, except as otherwise provided by law." La. Code Civ. Proc. art. 1973.

[3] Notably, in their motion, Riverside cites La. Civ. Code art. 1971 which provides that "parties are free to contract for any object that is lawful, possible, and determined or determinable."

"When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ. Code art. 2046. "A party who asserts that an obligation . . . has been modified must prove the facts or acts giving rise to the . . . modification." La. Civ. Code art. 1831.

Discussion

The only issue before the court in this appeal is whether Riverside's approval was required in order for CCNO, R4, and Mr. Stebbins to settle their claims against each other in this litigation and, concomitantly, whether the district court abused its discretion in denying the appellant's motion for a new trial.

Although Riverside asserts that under the CCNO Operating Agreement, neither member (Riverside or CCNO Partners 2, *i.e.* Mr. Stebbins) can enter into an agreement unilaterally, this proposition is not supported in the clear language of the CCNO Operating Agreement. Rather, Section 3. 13 of the CCNO Operating Agreement provides:

> Overall Management Vested in Members and Managers. Except as expressly provided otherwise in this Operating Agreement or otherwise agreed in writing at a meeting, *management of the Company is vested in the Members in proportion to their initial Capital Contributions*, and every Member is hereby made a Manager. All powers of the Company are exercised by or under the authority of the Managers and Members and the business and affairs of the Company are managed under the direction of the Members and Managers. The Managers may engage in other activities of any nature. (Emphasis added).

In addition, the CCNO Operating Agreement defines "Majority in Interest" as "any referenced group of Managers, Members or persons who are both, a

combination who, in aggregate, own more than fifty percent (50%) of the Membership Interests owned by all of such referenced group of Managers and Members." Notably, Section 2.05 of the CCNO Operating Agreement specifically provides that any amendment to the agreement requires the approval of the beneficiary of any mortgage lien, *i.e.*, Iberia Bank.

Riverside does not dispute that it owns less than fifty per cent of the CCNO shares or that CCNO Partners 2, of which Mr. Stebbins is a member, owns proportionally more of the membership interest in CCNO. Rather, Riverside asserts that this does not matter because, although the CCNO Operating Agreement clearly established CCNO Partners 2 owned 66.67% of CCNO (and, concomitantly, that Riverside only 33.33%), a subsequent amendment altered the proportion of ownership to 60% (CCNO Partners 2) and 40% (Riverside) and redefined "Majority in Interest" to mean "more than 60%," thereby making any settlement agreement reached without the appellant's consent invalid. Riverside argues that this amendment is operative and fully applicable in this matter because, although there is no written approval of the amendment by Iberia Bank, the amendment was included in the documents in Iberia Banks's possession at the time of the closing and release of funds for the project. Thus, Riverside argues that Iberia Bank's approval of the amendment was *de facto* and, therefore, its terms are applicable in this matter. Further, according to Riverside, the settlement agreement between the parties of this litigation without Riverside's specific approval is invalid and the district court erred in denying its motion for a new trial.

Riverside's position is not supported by the record in this case or the applicable law. The burden is on Riverside, as the party asserting that the CCNO Operating Agreement had been amended, to show the existence and validity of

such an amendment. As previously observed, there is no evidence in the record to show that Iberia Bank approved the amendment as holder of the mortgage lien (as required by the CCNO Operating Agreement) or even that its approval was ever sought. Riverside's assertion of *de facto* approval is not persuasive, particularly in light of the ambiguity as to whether the amendment was drafted before or after the mortgage loan was executed. Moreover, there is no indication in the record that Riverside had previously objected or interceded in management decisions regarding CCNO or any other evidence that Riverside's consent was a necessary component of CCNO's agreement to settle this litigation. Riverside does not dispute that CCNO Partners 2 previously managed CCNO without Riverside's input or objection, or that the settlement agreement was in the best interest of CCNO. Finally, even accepting *arguendo* that the amendment was valid and applicable in this matter, Riverside has not shown the amendment required approval by the "Majority of Interest" to approve an agreement to settle litigation.

On the record before the court, we do not find that the district court abused its discretion in issuing the order as requested by the settling parties in this litigation or in denying Riverside's motion for a new trial.

Conclusion

The judgment of the district court order is affirmed.

AFFIRMED