COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0528 **Cir. Ct. No. 00-CV-1957**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DANIEL LYNCH AND JUDITH O. LYNCH,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

CARRIAGE RIDGE, LLC,

DEFENDANT-RESPONDENT,

THOMAS F. BUNBURY AND RONALD T. RESTAINO,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Daniel and Judith Lynch appeal the circuit court's judgment, following a trial to the court, in this dispute concerning Carriage Ridge, LLC. Thomas Bunbury and Ronald Restaino cross-appeal. The issues are: (1) whether Restaino and Bunbury breached the Operating Agreement for Carriage Ridge by paying Bunbury fees for the sale and development of lots within the Carriage Ridge development; (2) whether Restaino and Bunbury engaged in improper self-dealing as managing members of Carriage Ridge; (3) whether the circuit court should have ordered Restaino and Bunbury to buy the Lynches' interest in Carriage Ridge as a remedy; and (4) whether the Lynches were entitled to attorney fees or costs under either the Operating Agreement for Carriage Ridge or under WIS. STAT. § 814.01 (2001-02).[1] On cross-appeal, Restaino and Bunbury challenge the portion of the circuit court's decision that faults their decision as managing members of Carriage Ridge to make a capital call in October 1999. We affirm both the appeal and the cross-appeal.

Background

¶2 Daniel and Judith Lynch are professional horsemen. They formed Northern Cross Partnership with two other people for the purpose of developing an equestrian-themed subdivision on 200 acres in the Town of Westport and the Village of Waunakee, Wisconsin. Ronald Restaino and Thomas Bunbury became interested in the project and purchased the interest of the partners other than the Lynches. Thereafter, in June of 1994, Carriage Ridge, LLC, was organized and acquired the assets of Northern Cross Partnership. Restaino and Bunbury each

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

acquired 37.5% of Carriage Ridge and the Lynches acquired 25%. They intended to develop the land and equestrian center together, with Restaino and Bunbury acting as managing members of the LLC.

¶3 After Restaino and Bunbury assumed responsibility for operating Carriage Ridge, Bunbury began to question whether the Lynches had the skills necessary to run a horse boarding, training, and riding facility. In particular, he was concerned about the Lynches' ability to run the financial aspects of the business. As a result, the parties had a falling out. The Lynches then brought this lawsuit, seeking judicial dissolution of the company pursuant to WIS. STAT. § 183.0902.

Breach of Operating Agreement

¶4 The Lynches first argue that Restaino and Bunbury, as managing members of Carriage Ridge, have breached its "Operating Agreement" because they paid Bunbury a management fee, contrary to an express provision of the agreement that prohibits compensation to managing members of Carriage Ridge for management activities.

¶5 A limited liability company may be dissolved if it acts contrary to its operating agreement. *See* WIS. STAT. § 183.0902(2). Where, as here, the dispositive facts are not in dispute, whether those facts constitute a breach of contract is a question of law. ***Northern States Power Co. v. National Gas Co.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613.

¶6 Article VII, § 5 of the operating agreement provides: "Each managing member shall be reimbursed all reasonable expenses incurred in

managing the Company but shall not be entitled to any compensation for management activities." Article VII, § 8 of the operating agreement provides:

> **Limitations on Authority of Managing Members.** Notwithstanding any contrary provision in this Article VII, the managing member(s) shall not have the authority to cause the Company to pay them compensation for management of the Company *or the authority to modify the material financial terms of the listing contract with Restaino, Bunbury & Associates, Inc. with respect to the Company's Property*.

(Emphasis added.) The listing contract referred to in this section was entered into by Northern Cross Partnership on January 6, 1993, with Restaino, Bunbury & Associates, Inc., a real estate company owned by Restaino and Bunbury. Effective until January 6, 1995, it gave Restaino, Bunbury & Associates the right to develop and sell lots for a 15% commission.

¶7 In support of their argument that the operating agreement was breached, the Lynches point to a document entered into on November 12, 1994, by Restaino and Bunbury, in their capacity as managing members of Carriage Ridge, with Bunbury personally, entitled "Management Fee Agreement."[2] The agreement, they argue, violates the prohibition on payment of management fees. It provides:

> 1. Management fee, payable to Thomas F. Bunbury, is to be a 7% fee based on the sale price of each lot. Such management fee is for the current development of Carriage Ridge and the continued overall management, development, and marketing of Carriage Ridge. Such fee is in addition to the 6% Brokerage fee contracted November 12, 1994, in attached Listing Contract.

[2] There is a discrepancy between the circuit court's factual findings and the exhibits regarding the date the management fee agreement was signed. We rely on the exhibits, but the exact timing of this event does not affect our decision.

¶8 Although the new agreement is titled "Management Fee Agreement," we reject the Lynches' argument that it operates to provide a prohibited management fee to Bunbury. We conclude, as did the circuit court, that Bunbury was paid a commission to develop and sell lots in Carriage Ridge, not to manage it. A second listing contract, entered into on November 12, 1994, provided that Bunbury would receive a 6% commission on lots sold. The Management Fee Agreement provided a 7% fee "for the current development of Carriage Ridge." Coupled with the second listing contract, the Management Fee Agreement did nothing more than require the same services from Bunbury—development and sale of lots in Carriage Ridge—for a commission totaling 13%, a reduction from the 15% commission provided for in the first listing contract. Bunbury was not being paid to manage, but to develop and sell lots. Therefore, the fees paid to Bunbury were not barred by the prohibition of management fees in the operating agreement. There was no breach of contract.

¶9 The Lynches contend that the circuit court erred in interpreting the operating agreement because the court relied on "extrinsic evidence" consisting of the 1993 listing contract. The Lynches rely on the dissent in ***Just v. Land Reclamation, Ltd.***, 155 Wis. 2d 737, 765, 456 N.W.2d 570 (1990) (if a contract is unambiguous, a court may not rely on extrinsic evidence in construing it). We reject the argument. First, we are reviewing the construction of the agreement *de novo* and we need not concern ourselves with whether the circuit court relied on the listing contract. Second, we do not use the listing contract to construe the agreement. Rather, the existence and plain language of the listing contract are simply uncontested facts for purposes of determining whether the agreement has been breached and, therefore, whether the judgment is appropriate.

Improper Self-Dealing

¶10 The Lynches argue that Restaino and Bunbury were engaged in improper self-dealing. "[T]he existence of a fiduciary duty does not prevent a fiduciary from dealing in transactions in which he or she has an interest adverse to the object of his or her fiduciary duty as long as, in the final analysis, the transaction can be said to be fair." ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 397, 588 N.W.2d 67 (Ct. App. 1998). A transaction that benefits a fiduciary should provide for compensation that "is reasonable and not based on fraud or bad faith." ***Id.*** (citation omitted).

Listing Contract

¶11 The Lynches first argue that Restaino and Bunbury's decision as managing members to enter into the listing contract with Bunbury to sell lots was improper self-dealing. We disagree. To the contrary, the second listing contract, together with the Management Fee Agreement, *reduced* the total commission for development and sale of lots from the commission provided in the first listing contract. The circuit court properly concluded that there was no improper self-dealing in this regard.

Lease

¶12 The Lynches next argue that Restaino and Bunbury improperly leased the equestrian facility to Bunbury for only $500 a month. We conclude the evidence presented to the circuit court supports its conclusion that the rent was reasonable and, therefore, its implicit conclusion that the rent was "fair." *See* ***id.*** at 397. Although Bunbury paid only $500 a month in rent, he assumed responsibility for paying expenses for the operation of the facility, including heat, electricity,

water, phone, machinery, wages for employees, and the purchase of horses. In addition, Bunbury agreed to split with Carriage Ridge all profits made by the stable, which he had organized as a separate company, while not holding Carriage Ridge liable for losses. We agree with the circuit court's conclusion that there was no improper self-dealing.

Loan Repayment

¶13 The Lynches also contend that Restaino and Bunbury were engaged in self-dealing when they fraudulently lent Carriage Ridge money at 8.5% interest, but repaid themselves at 9% interest. After hearing the evidence, the circuit court concluded that this had not been an instance of improper self-dealing, but a mistake. The circuit court ordered that the additional .5% interest be repaid to Carriage Ridge. The Lynches have not met their burden of showing that the circuit court's finding that there had been a mistake, not fraud, was clearly erroneous.

Remedy

¶14 The Lynches next argue that the circuit court should have ordered Restaino and Bunbury to buy the Lynches' interest in Carriage Ridge as a remedy for their wrongs. This argument fails for two reasons. First, the statute under which this action was commenced, WIS. STAT. § 183.0902, permits dissolution and distribution of the assets of a limited liability corporation. It does not provide for a buy-out of the minority members in this type of situation. Second, the circuit court rejected most of the Lynches' claims of wrongdoing on behalf of Restaino and Bunbury. Even if a buy-out were allowed, the Lynches were largely unsuccessful in their claims, making such a drastic remedy inappropriate.

Attorney Fees and Costs

¶15 The Lynches argue that Carriage Ridge, LLC, should have been ordered to reimburse them for their attorney fees and costs in prosecuting this action based on the terms of the operating agreement. The operating agreement provides that the company will indemnify "members, managing members, and agents for all costs … accrued … in connection with the business of the Company." When the Lynches sued Carriage Ridge and its managing members, they were acting in their personal interest, not engaging in "the business of the Company." Therefore, they were not entitled to attorney fees and costs under the operating agreement.

¶16 Finally, the Lynches also argue that they are entitled to costs under WIS. STAT. § 814.01. They have not, however, adequately briefed this argument. Therefore, we do not consider it. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

Cross-Appeal

¶17 The circuit court issued an order prohibiting Restaino and Bunbury from taking any action to enforce a capital call against the Lynches and prohibiting Restaino and Bunbury from preventing the Lynches from transferring their interest in Carriage Ridge, LLC, to any other party. Restaino and Bunbury do not challenge the court's underlying authority to issue this order. Rather, they argue that certain factual findings underpinning this order were clearly erroneous and, in the alternative, that the actions of Restaino and Bunbury did not constitute "oppression."

¶18 Restaino and Bunbury argue that some of the circuit court's factual findings were clearly erroneous. They challenge the findings regarding the capital call made of the owners of Carriage Ridge in October 1999 seeking a proportional contribution from the Lynches toward a total capital call of $246,000. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2). Testimony and other evidence showed that Carriage Ridge did not immediately need the money when the capital call was made, that Carriage Ridge had alternative means of procuring money, and that the timing of the capital call coincided with a period of time when Bunbury was considering how he might obtain the Lynches' interest. The circuit court's factual findings about the capital call are supported by evidence in the record and, as such, are not clearly erroneous.

¶19 Restaino and Bunbury also argue that, even accepting the factual findings, their conduct was not "oppressive" to the Lynches, as that term is used in ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 582 N.W.2d 98 (Ct. App. 1998), which defines oppressive conduct as follows:

> "[B]urdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Id. at 783 (quoting ***Baker v. Commercial Body Builders, Inc.***, 507 P.2d 387, 393 (Or. 1973)).[3] Restaino and Bunbury argue that their conduct was not "oppressive"

[3] The parties assume that if the conduct of Restaino and Bunbury was "oppressive" within the meaning of ***Jorgensen***, then the judge had the authority to grant the relief contained in the order. We do not address this legal issue.

because the capital call was never pursued, so the Lynches suffered no direct harm as a result of the capital call. In our view, a subterfuge by a managing member intended to influence a minority member to sell is obviously a violation of the rules of "fair play." We reject this argument.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.