

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001958-MR

SHIRLEY MCVAY LACH, INDIVIDUALLY;
SHIRLEY MCVAY LACH, ON BEHALF OF
MAN O' WAR LIMITED PARTNERSHIP

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 02-CI-02853

MAN O' WAR, LLC, A KENTUCKY
LIMITED LIABILITY COMPANY;
LYNWOOD WISEMAN, INDIVIDUALLY;
LYNWOOD WISEMAN, GENERAL PARTNER
OF MAN O' WAR LIMITED PARTNERSHIP;
MAN O' WAR LIMITED PARTNERSHIP,
A KENTUCKY LIMITED PARTNERSHIP;
PENNY M. MILLER, EXECUTRIX OF THE
WILL OF ROBERT S. MILLER, DECEASED;
HARRY B. MILLER, JR.; JENNIFER B.
MILLER; JONATHAN S. MILLER; PENNY M.
MILLER; HARVEY MORGAN; JEFFREY I. MULLENS;
SOPHIE WISEMAN; FORTUNE TRADE CENTER, LLC,
A KENTUCKY LIMITED LIABILITY COMPANY; AND
ROBERT S. MILLER, GENERAL PARTNER OF
MAN O' WAR LIMITED PARTNERSHIP

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: Shirley McVay Lach appeals from an order of the Fayette Circuit Court granting summary judgment against her and denying a motion for summary judgment in her favor. We affirm.

In 1986, Lach and her then husband, Lynwood Wiseman, entered into a joint venture with other individuals to acquire a piece of real estate for development in Lexington, Kentucky. The joint venture leased a shopping center on the property to M.O.W. Place, Ltd. In 1986, Man O' War Limited Partnership ("partnership") was formed for the purpose of leasing real property as well as developing and operating shopping centers. Robert Miller and Wiseman were the general partners and Lach was one of several limited partners. The partnership was also the sole general partner of M.O.W. until May 16, 2002.

The partnership experienced several difficulties in 2002, including the grave illness of Miller, the strained working relationship between Lach and Wiseman, and the defalcation of partnership assets by one of Wiseman's non-partnership employees. As result of these problems, a professional management company was retained to actively manage the partnership. Additionally, Miller proposed that two of the limited partners, Jonathan Miller and Jeffrey Mullens, replace him as general partner in the view that having three general partners would eliminate deadlocks on partnership business. Lach objected to this change and proposed that her daughter, who

was not a limited partner, be added instead of Mullens. The partners objected to that proposal as well.

Miller and Wiseman decided to reorganize the business as a consequence of the internal difficulties they were facing. First, Miller and Wiseman formed a new entity, Man O' War, LLC (LLC). Next, they transferred the partnership's interest as the general partner in M.O.W. to the LLC in exchange for an interest as the sole member of the LLC. Finally, after the transfer, Miller and Wiseman dissolved and terminated the partnership. The partnership's assets, as sole member of the LLC, were then distributed to the partners in identical proportion to their ownership interest in the partnership.

Lach brought this action in Fayette Circuit Court alleging that the reorganization of the partnership was invalid without her consent and that the general partners breached their fiduciary duties to the partnership. After the parties moved for summary judgment, the court denied Lach's motion and granted the appellees' motion. This appeal followed.

The standard of review for summary judgments is whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). The court should view the record in a light most favorable to the

party opposing summary judgment. Id. Summary judgment should only be granted if it appears impossible for the non-movant to produce evidence at trial that warrants a judgment in its favor. Hoke v. Cullinan, 914 S.W.2d 335 (Ky. 1995).

Lach argues that the reorganization of the partnership was invalid without her consent for two reasons: 1) the reorganization was an improper conversion in violation of KRS 275.370; and 2) the reorganization made it impossible for the partnership to carry on business in violation of KRS 362.490.

A limited partnership may seamlessly convert into a limited liability company pursuant to KRS 275.370. KRS 275.370(2) provides in pertinent part that the terms and conditions of the conversion of a limited liability company must be approved by all the partners, "notwithstanding any provision to the contrary in the limited partnership agreement." Once conversion is approved as required by subsection (2), KRS 275.370(3)-(5) sets forth the procedure for effecting a conversion and the legal ramifications thereof.

Upon these facts, we find that there was no "conversion" within the meaning of KRS 275.370. The dissolution of the partnership did not flow into the formation of the LLC. Instead, the formation of the LLC was an event that was separate from the existence of the partnership. The limited partnership agreement did not carry over into the operating agreement of the

LLC. Finally, the partnership did not evince an intention to "convert," evidenced by the absence of KRS 275.370(3)-(4) steps taken towards that end.

Lach also argues that the effect of the partnership's actions constitutes an "indirect" conversion in violation of KRS 275.370. However, a conversion event did not occur simply because the LLC retained some of the same business purposes as the partnership and was capitalized by some of the partnership's assets. In fact, the transfer of partnership assets as well as the termination of the partnership itself was within the authority of the general partners as set out in the limited partnership agreement.

Next, Lach argues that the transfer of partnership assets to the LLC violated KRS 362.490(2) because the transfer made it impossible for the partnership to carry on business. KRS 362.490(2) was repealed in 1988, but nevertheless applies to this case because the partnership was formed prior to and continued through July 15, 1988. KRS 362.525.

KRS 362.490 provided that a general partner could not undertake any action that would make it impossible to carry on the ordinary business of the partnership without the consent or ratification of all of the partners. We cannot conclude that the transfer of assets made it impossible for the partnership to carry on business because the partnership's interest as the sole

general partner of M.O.W. was not simply funneled into the LLC, but was exchanged for an interest that made the partnership the sole member of the LLC. The purpose of the partnership was not limited to being the sole general partner of M.O.W., but included the leasing of real property and the development and operation of shopping centers. Also, the LLC and the partnership coexisted for a period of time before the partnership was terminated. At no time was the partnership without some form of asset. Therefore, we cannot conclude that the transfer violated KRS 362.490(2).

Next, Lach argues that the general partners breached their fiduciary duty by transferring partnership assets to the LLC. Partners have the duty to act with the utmost good faith to all other partners. Axton v. Kentucky Bottlers Supply Co., 159 Ky. 51, ___, 166 S.W. 776, 778 (1914). Again, the general partners acted within their authority under the partnership agreement and the transaction was not a bare transfer of assets, but rather an exchange. There is no allegation of misrepresentation or concealment. Also, Lach was not "frozen out" of the partnership because it was terminated. There was no allegation that Lach did not receive her proper distribution upon termination. In fact, Lach was offered the opportunity to become a substitute member of the LLC with the same ownership percentage she had in the partnership.

Finally, Lach argues that the trial court erred by overruling her motion to compel the production of all communications between the general partners and counsel regarding the reorganization of the partnership. Lach asserts that the production of these documents will provide evidence that the general partners impermissibly "froze" her out of the partnership. However, this contention is moot based on our conclusion that the reorganization was valid under Kentucky law and that there was no breach of fiduciary duty.

Therefore, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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