THIRD DIVISION
June 27, 2012

No. 1-11-1477

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BLUEGRASS INVESTORS, LLC, an Illinois Limited Liability Company, Plaintiff-Appellant, v. RICHARD A . HANSON, an Individual, MESA MPT, LLC, a Delaware Limited Liability Company, and THE HERITAGE AT MILLENNIUM PARK MEZZANINE LLC, a Delaware Limited Liability Company, Certificate, Series 2001-C1, Successor to First Union National Bank, Defendants-Appellees (Shawn Hunt, Plaintiff).	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 07 CH 06351 HONORABLE MICHAEL B. HYMAN, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: In a case arising out of the dilution of plaintiffs' interests in a real estate development and following a bench trial, the trial court entered judgment in favor of defendants. The trial judge did not err in ruling that literal compliance with the

written notice provision of the parties' operating agreement was not required as a matter of law. The trial judge also did not err in concluding that a defendant real estate developer, substantially and to the extent reasonably practicable, complied with the notice provision of the parties' operating agreement. The judgment of the circuit court of Cook County is affirmed.

¶ 2 Following a bench trial in the circuit court of Cook County, the trial judge entered judgment in favor of defendants, Richard A. Hanson, Mesa MPT, LLC (Mesa Delaware), and The Heritage at Millennium Park Mezzanine, LLC (Heritage Mezzanine), on claims brought by plaintiffs Shawn Hunt and Bluegrass Investors, LLC (Bluegrass).[1] Plaintiffs' third amended complaint, arising out of the dilution of their interests in a real estate development, alleged breach of contract, breach of fiduciary duty and fraud, and sought damages, an accounting and injunctive relief. On appeal, Bluegrass argues that the trial judge erroneously disregarded the effective date of Mesa Delaware's operating agreement and the judge's other rulings depended on the erroneous rejection of the breach of contract claim. For the following reasons, we disagree and affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The evidence adduced at trial discloses the following facts. Hunt, who was involved in real estate development since 1989, was the managing member of Bluegrass. Hanson, a certified public accountant involved in real estate development since 1984, was the managing member and

[1] Hunt's claims largely duplicated Bluegrass's claims, in the event that the court found the assignment of his interest to Bluegrass ineffective. However, the trial judge found the assignment effective and Hunt is not a party to this appeal.

tax affairs partner of Mesa Delaware. Hunt and Hanson met in 1989, when both worked at Mesirow Stein Real Estate.

¶ 5 In 1999, Hanson learned about a potential real estate project that would become known as the Heritage Project. The Heritage Project is a multi-use real estate development project located at Wabash Avenue and Randolph Street in Chicago, Illinois. The project includes the development of approximately 360 condominium units, 600 structured parking spaces, and 127,000 square feet of retail commercial space. Hanson invited Hunt to become involved in the Heritage Project; Hunt accepted the invitation in 2000.

¶ 6 Mesa MPT, an Illinois limited liability company (Mesa Illinois), was formed on June 8, 2000. Hanson was the managing member of Mesa Illinois. The Heritage at Millennium Park, LLC (Heritage), a Delaware limited liability company, was organized on July 1, 2000, for the purpose of acquiring, financing and developing the Heritage Project. Mesa Illinois was a member of Heritage.

¶ 7 Mesa Development LLC, a Delaware limited liability company (Mesa Development), was formed on January 28, 2001. The members of Mesa Development were intended to be members of Mesa Illinois, although Mesa Illinois would have additional investors. Hunt was made a member of Mesa Development on March 27, 2001. Mesa Development's operating agreement, as amended, provided that the managing member could require additional capital contributions from the members, without details regarding how any such request would be made.

¶ 8 The Heritage Project was initially funded by $8 million in member capital. On or about May 31, 2001, Heritage entered into a $17 million land loan with Bank of America, which

expired by its terms on January 1, 2002. The land loan was personally guaranteed by Hanson and other Heritage Project investors (the Walshes).

¶ 9 As of September 2001, Heritage had not secured a construction or mezzanine lender for the project, but was negotiating for a lender and anticipated securing a $27 million loan for the project. On September 6, 2001, Hanson received a financing proposal from LaSalle Bank N.A. for a $190 million revolving construction loan. The next day, Hanson delivered a copy of the proposal to Hunt, along with a memorandum which stated in part:

> "This is LaSalle term sheet. It has everything we asked for except it is only 75% not 80%. That means we need $8,000,000 more equity/mezz loan *** we will set up a meeting *** to ask for 80%."

Hunt received a memorandum dated November 6, 2001, from Hanson, addressed to Hunt and the Walshes. The memorandum analyzed the return on capital if they continued to use the land loan or used a mezzanine loan to pay off the land loan, which concluded the return would be higher if they continued to use the land loan. In November 2001, Hanson also sent Hunt and the Walshes a memorandum containing a copy of the final terms of a mezzanine loan offered by Lehman Brothers, which required a minimum cash equity of $25 million, none of which could be made up of by a loan from the members to the Heritage Project.

¶ 10 On December 31, 2001, Hanson and the Walshes personally guaranteed another $17 million loan from Bank of America, the proceeds of which were used for Heritage to satisfy the conditions of the LaSalle Bank construction loan and the Lehman Brothers mezzanine loan.

¶ 11 Hunt and Hanson offered conflicting testimony as to whether Hanson notified Hunt of a request for $8 million in additional capital in late 2001. Hunt testified he never received an oral or written capital call from Hanson for any part of the $17 million. Hanson testified that when he delivered the LaSalle Bank financing proposal, he told Hunt they would likely have to borrow the $17 million. When he asked whether Hunt wanted to participate, Hunt replied that he "couldn't do it." Hanson also testified that Hunt declined to participate on subsequent occasions. Based on the consistency of Hanson's testimony, Hunt's demeanor while testifying and the totality of the evidence regarding Hunt's knowledge and finances, the trial judge concluded Hanson gave Hunt oral notice of the $8 million capital request.

¶ 12 The Mesa Illinois operating agreement stated that it was governed by Illinois law and "made and entered into this 1st day of November, 2001 and effective as of the first day of July ('Effective Date')." Hunt and Hanson also offered conflicting testimony about the date the Mesa Illinois operating agreement was signed. Hunt maintained he signed the document on or about November 1, 2001. Hanson testified he and Hunt signed the document no earlier than December 31, 2001. Hanson noted that the "footer" at the bottom of each page of the agreement stated "12/31/01," representing the date the document was printed. The trial judge deemed Hanson's testimony more credible and found the agreement was signed no earlier than December 31, 2001.

¶ 13 The Mesa Illinois operating agreement also provided that Hunt had a 21.4% interest in Mesa Illinois, while Hanson had a 78.6% interest, based on their initial capital contributions. Section 3.4 of the agreement provided that no member shall be required to make additional capital contributions "[e]xcept as shall be expressly set forth herein." Section 3.4.1 stated the

managing member had the right to require additional capital contributions by delivering written notice to each member, stating the total amount required and the member's portion of the required amount. Section 3.4.1 further provided the member must elect to contribute the specified amount within a specified time or accept dilution of the member's percentage interest, according to specified calculations. Further, section 13.15 of the agreement provided that the failure of any party to insist on strict compliance of any condition of the agreement did not constitute a waiver of any breach or future breach unless waived in writing.

¶ 14 Heritage Mezzanine was formed on January, 22, 2002, and would ultimately become the sole member of Heritage. On March 5, 2002, Hunt directed Mesa Development's attorney to amend the Mesa Illinois operating agreement to reflect that the minority member was Bluegrass, not Hunt. Mesa Delaware was formed on June 10, 2002. Mesa Illinois was merged into Mesa Delaware on June 26, 2002. Mesa Delaware is the managing member of Heritage Mezzanine. Before June 28, 2002, Mesa Delaware had a 43.75% interest in Heritage.

¶ 15 On June 28, 2002, Hanson and Bluegrass became parties to a restated operating agreement for Mesa Delaware. The restated operating agreement provides that it is governed by Delaware law, but was otherwise substantially identical to the prior agreement in reflecting an effective date of July 1, 2000, the members' percentage interests, and provisions for additional capital contribution, dilution of interests and waiver of rights.

¶ 16 Shortly after February 28, 2002, Hunt received and reviewed the 2001 Heritage audited financial statements, which indicated that the members' equity was $31 million and that the land loan matured, "but was assumed by certain of the members and recorded as member capital

contributions." Hanson testified that he spoke to Hunt in 2002 about the 2001 Mesa Illinois tax returns and explained that Hanson's capital account would exceed $10 million, while Hunt's would be approximately $750,000. Hanson also testified he told Hunt in 2003 that Hunt would be allocated 6% of the losses. Michael Sher, who was involved in preparing the tax returns, testified that Hanson told Hunt in 2002 that Hanson contributed more capital. The 2001-04 tax returns stated the percentage interests in Mesa Illinois and Delaware in accord with the original figures stated in the operating agreements. However, the members' capital balances, profits and losses were allocated differently and no amended returns were filed. Hunt received Bluegrass's copies of the federal and state K-1 forms for Mesa Delaware's 2005 tax returns, which stated that Bluegrass had a 6.12% interest. Hunt testified he did not know Bluegrass's interest had been diluted to 6.12% until he received a January 16, 2007, memorandum from Sher regarding a projected profit distribution.

¶ 17 Plaintiffs did not present expert testimony regarding damages. Based on calculations from a non-testifying accountant, Hunt testified that if the ownership interests were calculated properly, Bluegrass should have received approximately $2,569,000 in additional income from its investment. The trial judge found that Hunt did not present credible evidence that Hunt or other Bluegrass members would have contributed to a $8 million request from Mesa Illinois in late 2001.

¶ 18 On May 10, 2011, following the close of evidence, the submission of closing arguments and posttrial briefs containing proposed findings of facts and conclusions of law, the circuit court issued a memorandum opinion and order entering judgment against plaintiffs and in favor of

defendants on all counts. On May 23, 2011, Bluegrass filed a timely notice of appeal to this court.

¶ 19 DISCUSSION

¶ 20 On appeal, Bluegrass maintains the trial judge erred in his interpretation of the Mesa Delaware operating agreement and that this error provided a faulty premise for the rejection of its claims against the defendants. In the memorandum opinion and order, the trial judge ruled that Hanson did not provide the written notice to Hunt demanding an additional capital contribution required under section 3.4 of the agreement. However, the trial judge reasoned that Hanson did not have a contractual obligation to provide such notice on or before December 31, 2001, when Hanson (and other investors) made the additional capital contribution. Although the Mesa Delaware operating agreement includes an effective date of July 1, 2000, the trial judge applied an equitable exception because neither the Mesa Illinois nor Mesa Delaware operating agreements physically existed when the additional capital was requested and contributed. Bluegrass argues that the application of an equitable exception was erroneous and that Hanson's failure to provide Hunt with written notice of the additional capital contribution breached the operating agreement, resulting in an improper dilution of Bluegrass's interest.

¶ 21 The Mesa Delaware operating agreement states it is governed by Delaware law. To prevail on a claim for breach of contract, Bluegrass must demonstrate: (1) existence of the contract, whether express or implied; (2) breach of an obligation imposed by that contract; and (3) resulting damages. See *Kuroda v. SPJS Holdings, L.L.C.* , 971 A.2d 872, 884 (Del. Ch. 2009). In an appeal from the trial court's interpretation of a written agreement, we review

conclusions of law *de novo*. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999). However, where the trial court's interpretation of an agreement rests on findings concerning extrinsic evidence, a reviewing court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process. *Id.* When reviewing decisions based on live testimony of witnesses, determinations of credibility, and expert witness presentations, this court affords the lower court's decision substantial deference. *Id.*

¶ 22 Bluegrass relies on the rule that "[a]ssigning a date to a contract which antedates the execution, in the absence of express language showing a contrary intention, makes the contract effective on that date which the contract bears." *Sweetman v. Strescon Industries, Inc.*, 389 A.2d 1319, 1322 (Del. Super. 1978). The body of case law upon which *Sweetman* relies makes clear that this rule is generally intended to validate a pre-existing and partially performed oral contract. Compare *id.* (and cases cited therein) with *Debreceni v. Outlet Co.*, 784 F.2d 13, 19 (1st Cir. 1986) (and cases cited therein). Thus, "[w]hen a party executes a contract which is effective on a prior date the party establishes its contractual obligations as of the prior date, *it accepts the events which have occurred since that prior date*." (Emphasis added.) *Sweetman*, 389 A.2d at 1322. Here, Bluegrass seeks to validate the prior dealings of the parties without accepting the events that actually occurred prior to the execution of the Mesa Delaware operating agreement.

¶ 23 Moreover, the case before us involves the alleged breach of a notice provision in a contract. On this point, we find *Corporate Property Associates 6 v. Hallwood Group Inc.*, 792 A.2d 993 (Del. Ch. 2002), *rev'd on other grounds*, 817 A.2d 777 (Del. 2003), instructive. In that case, the plaintiffs, Corporate Property Associates 6 and Corporate Property Associates 7 (CPA),

argued that an agreement between CPA and Hallwood was invalid because it was procured in violation of a prior settlement agreement between the parties, which required all notices and other communications under the settlement be provided in writing to specified entities and directed to specified individuals associated with those entities. *Id.* at 1000. The Delaware court rejected the claim, reasoning:

> "This argument is infirm, both legally and factually. Legally, the argument founders because the notice provision does not specify any consequence, adverse or otherwise, of a failure to abide by that provision's literal terms. Specifically, nowhere does the Settlement Agreement provide that a failure to conform to the literal requirements of the notice provision will invalidate any legal obligation of CPA resulting from the nonconforming communication. Moreover, CPA cites no case authority supporting that result." *Id.*

The court added that factually, "literal compliance with that provision would have been impossible," because by the time the agreement was negotiated, one of the people specified in the settlement had left the entity to which notice was required. *Id.* The court ultimately concluded that Hallwood, substantially and to the extent reasonably practicable, complied with the notice provision of the settlement agreement, and did not breach it. *Id.* at 1001.

¶ 24 Here, as in *Corporate Property Associates 6*, the notice provision of the Mesa Delaware operating agreement does not specify any consequence, adverse or otherwise, of a failure to abide by that provision's literal terms. The operating agreement later provides that a failure to insist on strict compliance with the terms of the agreement does not constitute a waiver of any breach.

However, that provision does not require strict compliance with the notice provision in the first instance.

¶ 25 Moreover, as in *Corporate Property Associates 6*, when the operating agreement here was executed, literal compliance with the notice provision would have been factually impossible, as the additional capital request and ultimate contribution had already occurred. The trial court found that Hanson actually notified Hunt of the requirement for an additional capital contribution and that Hunt clearly communicated that no such contribution would be forthcoming. Bluegrass does not challenge those findings on appeal. Accordingly, as in *Corporate Property Associates 6*, Bluegrass's argument fails not only legally, but also factually. See *id.* at 1000-01. Thus, we conclude that the trial judge did not err in entering judgment for the defendants on the breach of contract claim.

¶ 26 Bluegrass states that the trial judge's rejection of the remaining counts of the third amended complaint were based on his rejection of the breach of contract claim. Having concluded that the trial judge's ruling on the breach of contract claim was not erroneous, it follows that the rejection of the remaining counts of the third amended complaint was also not in error.

¶ 27 CONCLUSION

¶ 28 In short, we conclude that the trial judge did not err in ruling that literal compliance with the written notice provision of the Mesa Delaware operating agreement was not required as a matter of law. The trial judge also did not err in concluding that Hanson, substantially and to the extent reasonably practicable, complied with the notice provision of the Mesa Delaware

operating agreement. Lastly, insofar as the judgment on the third amended complaint rested on those rulings, the trial judge did not err in entering judgment for the defendants on all counts of the third amended complaint. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.