75226-0

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DIVISION ONE
OCT 3 - 2016

NO. 75226-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THOMAS F. BANGASSER,
Plaintiff/Appellant,

v.

MIDTOWN LIMITED PARTNERSHIP, a Washington limited partnership,
Defendant/Respondent

APPELLANT THOMAS F. BANGASSER'S INITIAL BRIEF

Thomas F. Bangasser
20704 Vashon Highway SW
Vashon Island, Washington 98070
Telephone: (206) 323-7575
Email: tfb@bangasser.com
Pro Se Plaintiff/Appellant

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A. ASSIGNMENT OF ERRORS

First, the trial court failed to properly recognize the "liquidation" strategy being pursued by the partnership contrary to its partnership agreement which required a majority vote "to continue the business" if removing a general partner. Immediately seeking to sell off all partnership real estate is "liquidation" and not grounds for removal of a general partner.

Second, the trial court incorrectly denied Plaintiff standing to file a lis pendens intended to protect not only his interests but the "continuing" business interests.

B. STATEMENT OF THE CASE

CONTEXT: This appeal has evolved from only the first of five pending state and federal lawsuits which will determine the economic justice and equity for future black ownership of a key 2.4 acre block of commercial real estate in Seattle's Central Area.

Essential to a black lives, black neighborhoods matter initiative is ownership of the subject real estate and a centerstone to a win-win outcome for all affected parties in these five cases. The "lis pendens" provides a prudent "pause" and judicial wisdom.

FIRST CASE TO BE APPEALED: KING COUNTY NO. 15-2-23045-0 SEA

The Complaint (Sub No. 1 / CP 1-4) was filed on September 21, 2015 and included copies of the 1988 MidTown Limited Partnership Agreement (Exh A / CP 5-17), a copy of the June 2015 MidTown Value Proposition (Exh B / CP 18); and a copy of the June 22, 2015 MidTown "Notice of Limited Partners" (Exh C / CP 19) purporting to remove Thomas F. Bangasser ("Bangasser") as General Partner by electing to "continue the partnership

business" (CP 9 Article 8.1(b)(4). Exhibits A and C set forth the context and requirement for a "continuing business" and Exhibit B sets forth the MidTown Value Proposition (CP 18) context that "Black Lives, Black Neighborhoods and Black Ownership Matter". Exhibit C fails to identify a successor general partner and when later identified, failed to tendered required payment (CP 9 – Article 8.2.

Concurrently a lis pendens (Sub No. 5 / CP 20-21) was filed to provide the necessary statutory public notice concerning the lawsuit and the unique historical and legacy significance of these real estate holdings in Seattle's Central Area. The intent was to create an intelligent "pause" while the partnership determined its "continuing" business strategy.

Within days, in an attempt to liquidate the company assets, MidTown's new general partner and new replacement counsel filed a Motion to Strike the Lis Pendens (Sub No. 8 / CP 22-26) and both parties began filing associated argumentative papers (CP 27-101). Bangasser and MidTown continue to disagreed as to Bangasser's partnership status, his number of partnership units (and corresponding ownership percentage) and MidTown's assertion that Bangasser had abandoned any limited partnership units that he might have owned. Most pleadings were filed by MidTown the prior evening.

Without oral argument, the trial court signed MidTown's proposed order (CP 102-105). Bangasser subsequently requested reconsideration (CP 106-147), which was rejected. It is significant to note that MidTown however waited another 198 days (until April 6, 2016) before filing its "Answer, Affirmative Defenses, Counterclaims and Third-Party Complaint" (Sub No. 56).

On April 18, 2016 the trial court entered a CR 54(b) Judgment ("Judgment") (Sub No. 61 / CP 391-393) submitted by Bangasser in favor of MidTown which incorporated all prior judgments and orders.

On May 17, 2016 Bangasser filed a Notice of Appeal to the Court of Appeals, Division I (CP 394-400) seeking review and reversal of the trial court's Judgment and "all other orders and rulings of the Court prejudicially affecting the Judgment" and Bangasser, including, but not limited to, the following orders:

(1) Order entered October 1, 2015 (Sub No. 16 / CP 102-105) granting MidTown's "Motion to Cancel/Strike Lis Pendens and for Fees" plus related Bangasser motion for reconsideration;

(2) based on the previous order, an Order entered November 19, 2015 setting MidTown's "attorney fees" (Sub No. 34 / CP 172-174) related to the previous Order and related Bangasser motion for reconsideration; and the

(3) Order entered January 7, 2016 granting "Partial Summary Judgment" (Sub No. 50 / CP 389-390) incorporating the previous orders.

C. SUMMARY OF ARGUMENT

First: "Continue" vs "Liquidate" - an election "to continue" the partnership business by designating a new General Partner is significantly different from "dissolving" the partnership by disposition of all partnership assets (i.e., a "liquidation"). It is a violation of the partnership agreement, a misrepresentation and a conflict of interest for either a new general

partner or newly selected counsel(s) either (a) to pursue both strategies; or (b) to state one strategy while actually pursuing the other.

Second: Who can file a Lis Pendens – an owner within a business organization (whether as a member, partner, general partner, limited partner, shareholder, beneficiary, etc.) has standing to protect not only that their individual interests but also the organization's interest in the assets of the organization. This right of standing extends to the public notice and ownership protection of the organization's real estate holdings by filing a lis pendens (which is effectively a public notice "pause" button).

D. ARGUMENT

Issue 1: "Continue" vs "Liquidate"

Is there a legal distinction between "to continue" verses "to liquidate" an organization? Is the fiduciary authority, fiduciary care, duty and accountability for management and counsel differ under these two strategies?

RCW 25.10.081(1) of the Washington State Uniform Limited Partnership Act states that "the partnership agreement governs relations among the partners and between the partners and the partnership." The required procedure and sequence for removal and replacement of MidTown's General Partner is covered in the Agreement under Articles 7.7 Removal of General Partner (CP 8); then 8.1(b)(4) Dissolution of the Partnership (CP 9) subject to the remaining partners right *"to continue the partnership pursuant to Section 8.2"* Election of Remaining Partners to Continue Partnership (CP 9). However, Exhibit C to the Complaint does not does not

designate or name the new General Partner (CP 19) ... *"by delegating a new General Partner or Partners ... Such new General Partner* <u>*shall purchase*</u> *the general partnership interest of the withdrawing General Partner, as provided in Section 9.3"* (emphasis added) (CP 9) Purchase and Sale of General Partnership which states that *"the successor General Partner(s) shall be obligated to purchase, and the withdrawing partner or successor of such partner, as the case may be shall be required to sell, such General Partner's general partnership interest and all units of general partnership owned by it, at a price and on the terms specified in Sections 9.4 and 9.5.".* (CP 11) Section 9.4 Payment for Partnership Interest and 9.5 Value of Partnership (CP 11).

The successor General Partner failed to tendered the required payments to the removed General Partner per Section 9.4; MidTown has failed to timely value the partnership as required by the Agreement per Section 9.5; and the successor General Partner replaced long term partnership counsel with new counsel(s) who has pursued a special interest "liquidation strategy" by some limited partners. This is contrary to the expressed *"continue the partnership business"* strategy (CP 19).

Thus, one can only conclude that Bangasser remains the sole General Partner and that the new counsel has a significant conflict of interest and should have recused himself from representing the partnership.

<u>Issue #2: Standing to file Lis Pendens</u>

Does a partner (either general, limited or dissociated) have any standing to file a "lis pendens" affecting partnership real estate?

The expressed MidTown *"continue the partnership business"* strategy (CP 19) conflicts with MidTown counsel's "liquidation strategy" whereby all partnership assets are being sold or disposed. Under the guise of a "continuing business", counsel is effectively liquidating the partnership and the filing of a lis pendens is appropriate. Bangasser may maintain a derivative action under RCW 25.10.706(2) to enforce a right of a limited partnership if a *"... demand would be futile"*. RCW 25.10.711 further qualifies Bangasser's standing as a proper plaintiff to maintain the derivative action on behalf of the "continuing" partnership.

The trial court issued no "findings of fact" in its October 1, 2015 order and provided little indication that the pro se Bangasser's materials submitted had been evaluated or understood. The conclusions reached by the trial court exacted mirrored those contained in counsel's September 23, 2015 "proposed" order (CP 102-105). MidTown's new counsel asserted that Bangasser no longer had any interest in the partnership which indicated his "conflict of interest" as counsel representing both the partnership and competing partner special interests. The following orders and judgments illustrate counsel's flip-flop flow contested "undisputed facts":

ORDER: October 1, 2015

MidTown's proposed order dated September 23, 2015 was signed October 1, 2015 without oral argument and with only minor annotations (Sub No. 16 / CP 102-105).

Legal questions regarding a lis pendens are quite straight forward: What constitutes a "right, title or interest" in the MidTown real estate?

Does any individual (as a limited partner, general partner, shareholder, etc.) or organization have any direct or derivative right to protect the real estate assets of an organization? A similar argument can be made as to the rights of a third party beneficiary. Is this organization actually being "liquidated" then do "continuing partnership business" interests acquire additional rights in order to protect their respective interests? Both equity and justice would say Yes.

Here, the trial court summarily dismissed Bangasser's standing and rendered a judgment that his position had no "substantial justification" implying that it was frivolous and then awarded counsel legal fees. The case cites as *South Kitsap Family Worship Ctr. V. Weir*, 135 Wash. App. 900, 146 P.3d 935 (2006) supports Bangasser position. RCW 4.28 and RCW 7.28 guide judicial application of lis pendens decisions.

What is the purpose of a lis pendens? It is intended to provide not only public "due diligence" notice to prospective purchasers but also to provide future protection for owners that their assets have not been squandered or their company has not been prematurely or secretly liquidated. Such notices and protections are not frivolous! They insure transparence by alerting <u>all</u> parties to obtain full disclosure with adequate time to make informed decisions and remedies. Bangasser has contended that he had standing to file the lis pendens either through his indirect ownership interest in the real estate but also his right to file as a derivative party.

The premature uninformed decision by the trial judge was an abuse of discretion and his order that the "Lis Pendens may not be refiled or re-recorded" (CP 103) was excessive, too far reaching and must be reversed.

MidTown's new counsel's actions warranted Bangasser timely derivative response per RCW 25.10.706(2) and RCW 25.10.711.

SUBSEQUENT ORDERS: November 19, 2015 and January 6, 2016

These orders run contrary to a "continuing business" strategy and instead purport justification for a full partnership liquidation: (1) the $15,886.45 attorney fees (Sub No. 34 / CP 172-174) entered November 19, 2015 against Bangasser is without justification and punitive; and the (2) partial summary judgment (Sub No. 50 / CP 389-390) entered January 6, 2016 endorses full liquidation of a "continuing business".

E. CONCLUSION

For the reasons stated above, the Court should reinstate Bangasser's lis pendens and rescind all associated judgments and orders entered by the trial judge. Also, Bangasser should be reimbursed for all attorney fees, associated fees, costs and any sanctions.

Thomas F. Bangasser
20704 Vashon Highway SW
Vashon Island, Washington 98070
Telephone: (206) 323-7575
Email: tfb@bangasser.com
Pro Se Plaintiff/Appellant

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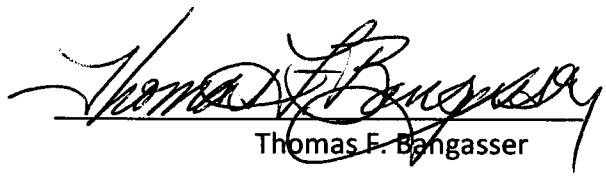
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on this day I served a copy of this document on all parties/counsel of record as indicated below:

Stephen J. Sirianni (WSBA #6957)	☑ By United States Mail
Sirianni Youtz Spoonemore Hamburger	☐ By Federal Express
999 Third Avenue, Suite 3650	☐ By Legal Messenger
Seattle, Washington 98104	☑ By Email
ssirianni@sylaw.com (206) 223-0303	ssirianni@sylaw.com

DATED: September 30, 2016, at Vashon Island, Washington 98070



Thomas F. Bangasser