NO. 49069-2-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

LLRIG TWO, LLC, ET AL.

v.

LEE AND LORI WILSON, APPELLANTS

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Cases

Statutes

Rules of Court

Treatises

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

We allege that the trial court erred when it:

1. Ordered on summary judgment that the documents conferring effective ownership of Lost Lake Resort (the "Sterling Notes" and accompanying deed of trust) were the property of plaintiffs;

2. Declined in that Order to examine a properly presented issue of equitable ownership of the Sterling Notes;

3. Misconstrued the operating agreement under which the Sterling Notes were transferred to plaintiffs; and

4. Turned that Order, originally made pursuant to Civil Rule 54(b), into a permanent Order.

Issues pertaining to our assignments of error are the following:

A. May a manager of a limited liability company transfer LLC assets to himself regardless of fiduciary duty if the LLC's operating agreement does not specifically disallow it? (See ARGUMENT *infra*, sec. A.)

E. Is distribution to an LLC member's wholly owned entity (another LLC) the equivalent of distribution to that member? (See ARGUMENT *infra*, sec. B.)

B. Is the good faith requirement of contractual dealing (regarding notice of an upcoming vote) suspended because a clause in the contract (the operating agreement) could be read to contradict it? (See ARGUMENT *infra*, sec. C.)

C. May an LLC manager use his position to benefit himself as a creditor without getting majority approval of the disinterested members? (See ARGUMENT *infra*, sec. C.)

D. Is equitable title sufficiently pled by a party who alleges invalidity of transfer, declares that the property still belongs to him, and cites conversion and unjust enrichment as causes of action? (See ARGUMENT *infra*, sec. D.)

F. Is it reasonable to entrust the management and proceeds of property to a party, pending trial, when the other party's counterclaim against that party is for mismanagement and bad-faith management when that party previously had control of the property? (See ARGUMENT *infra*, sec. E.)

STATEMENT OF THE CASE

A. The Sale and Purported Transfer of the Notes

In 2012 plaintiffs McCausland and Block attempted to buy for themselves from Sterling Bank $5 million worth of notes (hereinafter the "Sterling Notes" or "the notes") and deed of trust covering the Lost Lake Resort property at a substantial discount ($500,000.00 or 10 cents on the dollar). The bank rejected their offer, insisting it would only sell the property to Lost Lake Resort Investment Group, LLC (hereinafter "LLRIG One"). This was because LLRIG One had claims for damages against the bank, and only LLRIG One could release the claims. Defendants Lee and Lori Wilson (hereinafter "Wilson" for short) believe these claims were in excess of $3 million; but even if the size of the claims is arguable, there is no dispute that the bank took them very seriously--seriously enough to demand the releases as a condition precedent to selling the notes.

In April 2012 LLRIG One signed the releases; McCausland and Block on its behalf, as its managers, tendered the $500,000; and the bank duly assigned the notes and deed of trust exclusively to LLRIG One. At this point, legally, each member of the LLC had an undivided proportionate share of this asset. McCausland and Block together had about 35% of the shares in LLRIG One, and in addition were its creditors for the $500,000 they loaned it for the purchase.

Wilson's share in the asset was 49 percent, as a 49 percent shareholder of LLRIG One.

Plaintiffs' version of events is that the legalities should be ignored, and they were the equitable owners, because it was intended all along that the notes be theirs and the LLC was a straw man in the deal, involved only because Sterling would not sign over the notes to anyone else. This ignores the fact that the LLC tendered something of great value—the releases of the $3 million in claims—to get the notes.

McCausland and Block—on the same day that LLRIG One signed the releases, before the bank had even signed off on the transfer—enacted a resolution of LLRIG One as its managers, transferring the notes to their wholly owned entity that they had named LLRIG Two, LLC. They claim to have had the yes votes of two minority members of LLRIG One, Monette and Deutsch, which gave them a 51% majority. Wilson had no share in LLRIG Two and didn't even know it existed. It is not disputed that he knew nothing of the vote or the transfer, which wiped out his 49% share in the notes with no notice and no compensation. Verbatim Report of Proceedings (VRP) at 33. Without the Sterling Notes, LLRIG One was left with assets that today are worth less than 5% of the value of those notes.

B. The Purported Authority under the Operating Agreement

McCausland and Block justify failing to inform Wilson of the vote and the transfer because it is ostensibly allowed under the following clause of LLRIG One's operating agreement:

> **7.4. Meetings of Members.** Actions of the Members may be taken with or without a formal meeting or notice to the Members. Actions taken by Members may be, but are not required to be, evidenced by a writing signed by the requisite number of Members necessary to approve the particular action. Any such writing need not be presented to nor approved by all Members: such writing need be approved by only the requisite number of Members necessary in order to approve the action in accordance with the provisions of this agreement.

There is no dispute that whoever owned the notes, since the notes were in default, effectively had Lost Lake Resort because the resort's value at that time was less than the approximately $5 million face value of the notes. Needless to say, Wilson did not consent, then or later, to having his approximately $2,500,000 share of the Sterling Notes reduced to zero. Since then, LLRIG Two has illegally taken control of the resort via a Deed in Lieu of Forfeiture, sold off lots, and not accounted to Wilson for any of the income received.

C. The Particular Damage to Wilson

One might ask why Monette and Deutsch went along with the giveaway when, as far as is known, they also lost any interest they had in the Sterling Notes. The probable answer is that there is no evidence that they were ever told of the contribution (the release of claims worth millions) that LLRIG One made to effect the transaction. Both have declared that they were always told by Block and McCausland that Block and McCausland really owned the Sterling Notes because they put up the money and that LLRIG One was merely a passthrough entity.

While McCausland and Block may have misled Deutsch and Monette about the value of LLRIG One's contribution to the Sterling purchase, Wilson, on the other hand, believed, as Sterling Bank believed, that LLRIG One's claims were significant and may have been worth as much as $3,000,000. Wilson's contribution to LLRIG One when he joined, Sep. 17, 2010, was a promissory note and first deed of trust with a balance of $392,000.00. If the Block-McCausland self-dealing transfer is valid, he has lost 95% of what he bargained for. LLRIG One, as stated above, today has remaining assets worth only about 5% of the value of the Sterling Notes.

D. Procedural History

In September 2013 LLRIG Two, McCausland, Block, and LLRIG Two brought suit in Thurston County Superior Court against Wilson, LLRIG One, and RV Resort Management, LLC (RVRM). The chief aim of the suit was to stop Wilson from claiming that the notes belong to him and RVRM. He makes that claim because in the interim since 2012 he bought LLRIG One in its entirety with all its assets and claims, formed RVRM, and transferred his interest in the notes to

RVRM. Wilson counterclaimed that McCausland and Block's purported transfer of the notes to LLRIG Two was illegal and therefore invalid.

Jury trial was set for June 10, 2017. In the meantime plaintiffs sought a hearing on their motion to have themselves, pending trial, declared the legal owners of the notes. The CR 54(b) judgment came down on Dec. 18, 2015. On motion of plaintiffs, it was made final April 22, 2016, and so is now appealable.

Wilson took this appeal June 20, 2016, and review was granted July 6, 2016.

E. Standard of Review

The summary judgment of Dec. 18, 2015, was subject to CR 54(b) because it adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties." Thus it could be revised anytime before the end of trial. CR 54(b). However, in April 2016 plaintiffs came back to court asking to finalize the judgment because there was no just reason for delay. The judge granted it, and that made the judgment final and immediately appealable. The Appeals Court may review whether there in fact is no just reason for delay, and may also review the arguments presented for the original summary judgment hearing of Dec. 18, 2015. RAP 2.2(d).

ARGUMENT

A. An LLC Manager Is a Trustee of LLC Assets and Must Consider the LLC's Interests First

The transfer of the notes was a unique event, where Block and McCausland wore two hats vis-à-vis LLRIG One: as managers and as creditors. As the LLC's managers, they were its trustees under RCW 25.15.155 and therefore had a duty to put its interests first. Their fiduciary duty also derives from partnership law, which is applicable to LLCs. *Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC*, 138 Wn.App. 443, 456, 158 P.3d 1183 (Div. II 2007). Partners owe each other fiduciary duties and are obligated to deal with each other with candor and the utmost good faith. *Bovy v. Graham,* 17 Wash.App. 567, 570, 564 P.2d 1175 (1977). A partner owes a fiduciary duty of loyalty and care to both the partnership and to other partners. RCW 25.05.165. A partner owes a duty of loyalty to avoid secret profits, self-dealing, and conflicts of interest. RCW 25.05.165(2)(a)-(c). A partner must avoid self-dealing by refraining from dealing with the partnership on behalf of a party having an interest adverse to the partnership. RCW 25.05.165(2)(b). And a partner must avoid conflicts of interest in refraining from competing with the partnership. RCW 25.05.165(2)(c).

It was in the LLC's interests to protect the investment it made in the notes when it gave up its claims in consideration for them. Instead, its managers Block and McCausland made the assignment to LLRIG Two, ostensibly because LLRIG

One "is presently without funds needed to complete the purchase," and "in consideration of funding advanced by David Block." Consent of Managers Lost Lake Investment Group L.L.C.

This is language evidencing a debtor-creditor relation: LLRIG One was borrowing money advanced by Block and McCausland. They had a right to repayment and, if LLRIG One couldn't or wouldn't repay, they had a right to sue for repayment. Being creditors did not give them ownership of the asset. The legal recourse of any other creditor who was not a member of LLRIG One would be to sue and get a judgment to recoup the amount of his loan. Instead, Block and McCausland, wearing their manager hats, awarded themselves as creditors not only the amount they put in, but also the entire $3-million-or-so value of the release, invested by the LLC..

Block and McCausland used their manager role to give themselves, in their creditor role, advantages beyond those of an ordinary creditor. This is a clear violation of the Washington Limited Liability Company Act (the "LLC Act"):

> **25.15.035 Business transactions of member or manager with the limited liability company.**
> Except as provided in a limited liability company agreement, a member or manager may lend money to, act as a surety, guarantor, or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with a limited liability company and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager.

Had Block and McCausland been ordinary third-party creditors, they could sue, get a judgment, and force a sheriff's sale. But if the winning bid exceeded $500,000 plus interest, they would not get the surplus. The remainder of the $5 million value of the notes would still be the property of LLRIG One. They circumvented this result by their act as managers, taking all the value for themselves. They took far more than their transferable interest.

B. The Operating Agreement Bars Noncash Distributions to Members

In addition to RCW 25.15.035, the transfer also violated the operating agreement, where it says:

> **7.6 No Right to Property.** No Member shall have any right to demand or receive any distribution from the Company in any form other than cash, upon dissolution or otherwise.

Plaintiffs' attorneys argued that "distribution" here means only payments to members as members and that this doesn't count because it went to another entity. VRP at 9. The judge considered 7.6 and disposed of it rather cursorily, as follows:

> I disagree that paragraph 7.6 applies.... It's my view that a transfer to a LLRIG Two was not a distribution to a member. Now, whether or not the fact that LLRIG Two was wholly owned by Mr. McCausland and Block is relevant. It may be relevant to a breach of fiduciary duty by Mr. McCausland by that transfer. VRP at 42.

He did not discuss any other reason for relevancy, and went on to deny it on any grounds. VRP at 43. Our view, on the contrary (which was also put forth in the proceedings below, VRP at 41-42), is that it is quite relevant: if McCausland and

Block were sole owners of LLRIG Two, and LLRIG Two got sole ownership of the notes, as purportedly happened, the member-nonmember distinction is lost. Another section of the Act applies here:

> **25.15.060 Piercing the veil.**
> Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances. In this regard, the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil, except that the failure to hold meetings of members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish that the members have personal liability for any act, debt, obligation, or liability of the limited liability company if the certificate of formation and limited liability company agreement do not expressly require the holding of meetings of members or managers.

Piercing the veil in Washington requires that the LLC form "was used to violate or evade a duty and ... must be disregarded to prevent loss to an innocent party." *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 200, 207 P.3d 1251 (2009). Establishing the first element requires the plaintiff to show "an abuse of the corporate form." *Meisel v. M& N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982). Typically this involves some manner of "'fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment.'" *Meisel, supra* at 410 (quoting *Truckweld Equip. Co. v. Olson*, 26 Wn.App. 638, 645, 618 P.2d 1017 (1980)). Establishing the second element requires the plaintiff to show that disregarding the corporate form is necessary to avoid the consequences of intentional misconduct harmful to the plaintiff. *Meisel, supra.*

Wilson's contentions address these requirements, and on summary judgment all inferences from the evidence must be considered most favorably to the non-moving party. See, e.g., *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960). Thus the corporate form of LLRIG Two should be disregarded for purposes of Section 7.6.

Otherwise, as the defense pointed out (VRP at 31), Section 7.6 has no teeth. A member-manager need only set up his own LLC and could then transfer to it any asset of LLRIG One, cash or noncash. Or he could transfer it to his living trust, or to his spouse. This would make Section 7.6 ineffectual. However, a contract must be construed, as much as possible, to give effect to all of its language. *Fry v. Hestwood*, 21 Wash. 424, 58 P. 206 (1899).

C. The Operating Agreement Had to Be Interpreted in Light of Existing Law

The basic question brought on appeal is: Can you contract away your right to fair treatment as a minority member of a limited liability company? The judge's order implies that you can, if you assent to an LLC's operating agreement that has that effect. Defendant Wilson says that under the LLC Act in effect when he joined LLRIG One, you cannot—and that he never assented to the proposition that you could.

The operating agreement of LLRIG One is silent on the specific situation where LLC managers are transferring a substantial portion of the LLC assets to themselves. This is an extraordinary act outside the normal course of business. Where an operating agreement is silent, the LLC Act fills in the blanks, and its provisions govern. See, e.g., *Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 161 P.3d 173 (Div. II 2007) (interpretation of RCW Ch. 25.15 used to determine non-manager members' fiduciary duties where operating agreement was silent). This is even made explicit in LLRIG One's operating agreement, as follows:

> **6.2 Powers of Managers.** ... In addition to the specific rights and powers granted by this Agreement to the Managers, the Managers shall possess and may exercise all the rights and powers, and shall be subject to all the duties and responsibilities, of a manager provided in the Washington Limited Liability Company Act.
>
> **7.1 General Provisions.** Except as specifically provided herein, each Member of the Company shall have such powers, rights, duties and obligations as provided from in the Washington Limited Liability Company Act.

Section 7.4 of the operating agreement, quoted earlier, is a recipe for theft if used without reference to Section 6.2 or 7.1. It lets the majority do what they want with the minority's interest *without even telling the minority*. And that is exactly what happened. The reason it should not have happened is embodied in this passage from the LLC Act as it existed Sep. 17, 2010, the date on which Wilson became a member, thereby (presumably) buying into the operating agreement:

> **RCW 25.15.155. Liability of managers and members.**

> ...
>
> (2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the *disinterested* managers or members, ... from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member. (Emphasis added)

The key word here is "disinterested." This section was put in the LLC Act specifically to protect the property rights of minority members. However, Section 7.4 of the LLRIG One operating agreement, taken alone, does not protect minority property rights because it allows a general vote of the members with no notice to a minority member who may be affected; this is in direct conflict with RCW 25.15.155(2). Block and McCausland as the beneficiaries of the transfer of the Sterling Notes were certainly "interested," and if their votes are subtracted, the percentage in their favor could not have been more than about 16%, not 51%. They could never have a majority because Wilson owned 49%.

Another provision of the LLC Act comes into play here:

> **25.15.050. Member agreements.**
>
> In addition to agreeing among themselves with respect to the provisions of this chapter, the members of a limited liability company ... may agree among themselves to any *otherwise lawful* provision governing the company which is *not in conflict with this chapter....*[3] (Emphasis added)

[3] Repealed by 2015 c 188 § 108, effective January 1, 2016.

The emphasized phrases are key here. This doesn't say they may agree to "any other provision." On the contrary, any provision of the operating agreement had to be "otherwise lawful" *and* not in conflict with the Act. It seems clear that omitting "disinterested" where minority property rights are concerned generates a conflict with the Act. Furthermore, the good faith requirement of all contracts does not go away just because the parties do not explicitly provide for it.[4]

Centuries of legal precedent have determined that a deed or transfer, although valid under the formalities of the law, will be held invalid if inequitable. One maxim of equity is "Equity considers as done that which ought to be done." Dobbs, REMEDIES, § 2.3 at 44 (West 1973). Equity would say this transfer ought to have been reversed when Wilson protested. Therefore, in equity the notes belong to LLRIG One, and it is a mere formality to assign them back.

For at least one century and more, law and equity have been combined in Washington state courts. Judges must consider any argument fairly presented, be it legal or equitable, when entering an order. Yet the judge here set aside the equitable arguments. His reasoning does not appear from the laconic Order on

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[4] Good faith has since been codified in the LLC Act as RCW 25.15.038(6)(b): "(6) To the extent that, at law or in equity, a member or manager has duties (including fiduciary duties) to a limited liability company or to another member ..., the member's or manager's duties may be modified, expanded, restricted, or eliminated by the provisions of a limited liability company agreement; provided that such provisions are not inconsistent with law and do not eliminate or limit: ... (b) The implied contractual duty of good faith and fair dealing.

Summary Judgment, but insights are available from reading the Verbatim Report of Proceedings from the 2015 CR 54(b) hearing:

> MR. KYLER: The two matters I'm going to address for the Court is the fact that this was a proper transfer under the operating agreement ..., and that the assignment ... is valid under the terms of the agreement. VRP at 14.
>
> THE COURT: ... I do not find that paragraph 7.3 barred the transaction when the Sterling Notes were transferred to LLRIG Two.
>
> Again, whether or not this violated the fiduciary duties that the members had to one another, that the manager had to the members and so forth, is not a question that I am being asked to decide, but that's where, not only I see this dispute, but I also see the disputed facts from the defendants as they talk about how there is some dispute here.
>
> ... So the question specifically of whether or not the assignment of the Sterling Notes from LLRIG 1 to LLRIG Two concretely voided the operating agreement – and I use the word "concretely," because I'm not talking about the emanating duties of corporate law – but concretely violated the operating agreement. I determine that it did not.
>
> ... To the extent there may be issues of fact on fiduciary duty breaches, I think there may be questions of fact on unclean hands as they may or may not apply to these equitable theories. In any event, I think the decisions I made with respect to the operating agreement make the decision on the equitable theories unnecessary. So, accordingly, I will grant plaintiffs' motion for summary judgment on this point. VRP at 45-46.

Clearly, from these quotations, the judge makes his Order looking only at the four corners of the operating agreement and deliberately leaves the equity question unanswered.

Our first criticism is that the order apparently does not consider Sections 6.2 and 7.1 of the agreement (see above) and, we contend, misconstrues Section 7.3. That section reads as follows:

> **7.3 Action by Members.** All voting by Members of the Company shall be by units, with each Member having as many votes as units owned by the Member. Unless otherwise specifically provided herein or required by the Washington Limited Liability Company Act, any decision or action of the Members in their capacity as such requiring a vote of the Members under the terms of this Agreement or the Washington Limited Liability Company Act must receive consent or approval of Members holding more than fifty percent of the units owned at the time of the votes. In addition to any other matters requiring a Member vote pursuant to this Agreement, the Members' vote shall be required to effect the following:
>
> (a) The sale, lease, exchange, mortgage, pledge or other transfer or disposition of all or substantially all of the assets of the Company.
>
> (b) The merger of the Company with another entity.
>
> (c) An amendment to the Certificate of Formation or this Agreement.
>
> (d) The incurrence of indebtedness by the Company other than in the ordinary course of business.
>
> (e) Any transaction involving an actual or potential conflict of interests between a Member or Manager and the Company.
>
> (f) A change in the nature of the Company's business.
>
> Any vote, consent or approval of the Members shall be taken at a *meeting of the Members* as provided in Section 7.4, or be evidenced by a written consent *signed by all Members.* (Emphasis added)

Subsections (a) and (e) apply here. Contrary to the last sentence of 7.3, there was no meeting of the members, and the written consent, if any (none has been produced), of course would not have had Wilson's signature.

This part of 7.3 sets up a conflict with Section 7.4, which allows a vote without a meeting and allows the written consent to be signed by fewer than all the members. The conflict seems not reconcilable without blue-penciling one clause or the other. The judge, if he saw the conflict, chose to go with 7.4. Yet there are excellent reasons why 7.3 should govern. One reason, already discussed above, is that the "disinterested" requirement of RCW 25.15.155 should be read into the operating agreement. Another reason is that good faith was required.

A third reason is that 7.3 can be construed as a special case of 7.4. That is, in the ordinary case of a member vote, 7.4 governs. However, the six specific situations itemized in 7.3 require higher scrutiny and therefore a specific, more stringent voting procedure. When a manager transfers substantially all the LLC's assets to himself, there clearly is the potential of a conflict with the company. As is well established in contract law, the specific provision usually supersedes the general. RESTATEMENT (SECOND) OF CONTRACTS § 203c.

Our third criticism is, why does the judge avoid an equity analysis? He says he is not being asked to decide it. However, he was asked to decide title, and an equity question, if brought up, is part of that decision. The issue of equity is brought up specifically in the defense's response:

> Plaintiffs' reading of the Operating Agreement would simply undercut and make meaningless all of the fiduciary duties owed to minority members and would totally gut minority rights by allowing a majority to approve their own conflicted action. Respondse [sic] to Plaintiff's (Renewed) Motion for Summary Judgment at 3.

Violation of fiduciary duty in an instrument otherwise legal on its face is an argument in equity, was timely advanced, and thus should not have been ignored.

Fiduciary duty is again referred to in defendant's response to the Motion for CR 54(b) Certification:

> The court ruled that the LLRIG Operating Agreement did not prevent moving the bank notes, but did not resolve all of the claims in the case, including claims for breach of fiduciary duties and related claims. Accordingly, the ruling does not even begin to resolve all of the claims between any of the parties. Response to Plaintiffs' Motion for CR 54(b) Certification.

Finally, getting back to how law and equity act together, may a judge decide on the basis of one and ignore the other? Not where law and equity are seamlessly combined, as here. The form of an action is immaterial if the party demonstrates entitlement to relief. *Dunlap v. Rauch*, 24 Wash. 620, 64 P. 807 (1901). One of the maxims of equity is "Equity delights to do justice and that not by halves." The judge said he did not need to address equity arguments because his decision on the legal arguments (that the transfer was valid) made it unnecessary. VRP at 46. That may be true for the plaintiffs, but not for the defendants.

D. Constructive Trust Need Not Be Pled in Those Exact Words

In the transcript from the April 22 hearing, the court commented as follows:

> THE COURT: ... let me stop you there and just ask you to respond to something that I did see, I believe I saw in the defendant's response.... it's been determined that LLRIG Two owns legal title to the notes, but there are some equitable claims here that might, according to them, change title, give them essentially constructive title or equitable title or whatever and that

would then change the dynamic of all these remaining claims because title would actually equitably be moved back. Transcript from Audio Recording (TAR) at 7.

Plaintiffs attorney responded:

> MR. ADAMS: Well, if they had a claim for constructive or resulting trust, that is a claim to ownership. That's already been decided by the summary judgment. That is not – while it's an equitable remedy, it changes title to the property.... They didn't raise it in response to the summary judgment. If they wanted to make that claim that we own it by constructive resulting trust, they should have raised that in response to the summary judgment order.
>
> THE COURT: I recall, I guess it was plaintiffs that made the argument that even if we don't own it, we get a constructive resulting trust.
>
> MR. ADAMS: Absolutely.
>
> THE COURT: That's where those issues came up from plaintiffs' claims is what you're saying.
>
> MR. ADAMS: Exactly. And if that was one of their defenses to our ownership in LLRIG Two, they needed to raise it and that – they didn't.... They haven't pleaded --
>
> THE COURT: Equitable relief that would change title. They do have unjust enrichment claims and so on.
>
> MR. ADAMS: But that's for money judgment. TAR at 7-8.

Note that Mr. Adams admits that a finding of constructive or resulting trust changes title to the property. Defendant's attorney then responded:

> MR. OSINSKI: ... We have pled unjust enrichment, other things that sound in equity. The way we position our counterclaims was based on the idea that 100 percent in those pleadings at that time, three years ago, L-One owned the notes so even though there was some pleading in the alternative, I don't think this idea that we didn't plead constructive resulting rescission, I don't think that eliminates equitable remedies under, like I said, unjust enrichment which is claimed, et cetera. TAR at 15-17.

Also refer to the quote above from Mr. Osinski's response brief.

From these exchanges it is clear that the judge knew he was making an incomplete determination of title, and he knew that arguments in equity had been advanced. We say he should have completed the determination because—contrary to what Mr. Adams asserted—equitable relief was sufficiently pled. Although the defense may not have used the exact words "constructive trust" or "equitable title," Wilson's counterclaims alleged "conversion" and in the Prayer for Relief asked the court to declare that "the Sterling Notes belong to RV Resort Management." Answer and Counterclaims at 12, 18.

Question: If a party raises the issue of violation of fiduciary duty as voiding an LLC manager's transfer, and also raises the issue of unjust enrichment (for which the remedy is a constructive trust), is the concept of constructive trust nevertheless not before the court because that term was not explicitly used? Our answer is no. It's the elephant in the room, and it can't be ignored without doing incomplete justice.

E. There Is Just Reason for Delay

Clearly the judge knows that the equity issue is there and that it remains after his order, still to be determined at trial. Why, then, issue an order that purports to settle title but really doesn't? Plaintiffs want the order because, as stated in the conclusions of law, this will "simplify the trial and expedite the date in which the owner of the property can obtain clear title for sales." Findings of Fact, Conclusions of Law, and Order at p.4. Plaintiffs stated their reasons at the hearing as follows:

> MR. ADAMS: ... We are asking that you certify as final and the primary reason is we need to get this finalized as quickly as possible for the sale of the lots because of title insurance issues and ability to sell and finance. TAR at pp. 4-5.

We are not convinced that the lawyers will have a significantly easier time explaining the case to the jury as a result of this order. In addition, we contend that the advantage of the order to the plaintiffs in their business venture can be a serious disadvantage to Wilson.

Ostensibly it will allow the lots to be sold with proper title insurance. So who's going to make these sales? Plaintiffs will make them with no interference from defendants, because they are now "officially" the owners and title companies will respect that ruling. And what happens if ownership is reversed under equitable considerations at the conclusion of the trial, sometime in 2017? Then LLRIG One gets the Sterling Notes back, and the proceeds from them. So LLRIG One has not suffered any damage, right?

Wrong. By the end of the trial, over nine months from now, all the lots may have been sold and all the development completed. Will they have been sold at a reasonable price, or dumped on the market? Will the remaining development have been done properly, so there is no liability to unpaid contractors or to the government for violating ecological regulations? Will the contractors be the best bidders rather than cronies of the developers? Will the profits be accessible, or will they have been dissipated into a multitude of deals where they cannot be traced?

Mismanagement of Lost Lake in this interim period, where LLRIG Two gets to make all the decisions and LLRIG One can make none, can result in LLRIG One being awarded title in the end to a valueless asset—or even worse, a valueless asset burdened with heavy debts and fines, with no recourse except more lawsuits. The trial court's discretion should be exercised in the interest of sound judicial administration. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980).

CONCLUSION

To sum up our arguments:

- Governing provisions of the LLC Act were not considered;
- Parts of the operating agreement applying the LLC Act were not considered;
- The phrase "distribution to a member" was construed overly narrowly;
- A general provision of the operating agreement was wrongly held to override a specific provision on the same subject matter (voting);
- Equitable claims must be considered in deciding title to property;
- Equitable claims were sufficiently presented here but left out of consideration; and
- The potential of further damage to defendant is just reason for delay.

Wilson cannot trust Block or McCausland to manage sales at Lost Lake with his best interests in mind. He trusted them once, and he asserts that his trust was violated. If this judgment is upheld, he is being told to trust them again. That's what the case is all about: breach of trust! If the fox is put in charge of the henhouse (again), the result could be disastrous for Wilson, and that's why this Order of Summary Judgment should be reversed and remanded with a direction to consider *all* the law, *all* parts of the operating agreement, and *all* the arguments, both legal and equitable.[6]

The review on appeal should also consider that, as mentioned above, to allow the Lost Lake development to be mismanaged could well result in more years of litigation.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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Thomas T. Osinski, WSBA #34154
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[6] The result would likely be that summary judgment is inappropriate because the parties present conflicting testimony.