

APPELLATE NO. 44823-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

NORTHWEST HUNTER TV, LLC,

Appellant,

v.

RIVERS WEST APPAREL, INC.,

Respondent.

FILED
STATE OF WASHINGTON
JAN 11 2 19 13
COURT OF APPEALS

APPELLANT'S REPLY BRIEF

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I.
REPLY ARGUMENT

Despite RWA's attempt to complicate this appeal, the issues are simple and straightforward. NWH asserts that resolution is governed by long-standing *black letter law* principles such as (1) the legal *effect* of a stipulated dismissal with prejudice upon prior orders, rulings and judgments in a given case (i.e., they are a nullity); (2) the NWH Operating Agreement; and (3) the court's role on summary judgment and its obligation to construe all facts and reasonable inferences therefrom in favor of the non-moving party. The trial court failed to correctly apply the law or construe the facts in NWH's favor.

A. The Company Did Not Dissolve Automatically under its Operating Agreement.

RWA asserts that "dissolution" was self-executing and automatic once Young submitted his resignation or demanded dissolution, or substantially all of the company's assets were sold is not accurate. (RWA Responsive Brief at 11 - 16). In making this assertion, RWA ignores both the qualifying language set forth in Article X of the company's Operating Agreement (entitled "Dissolution and Termination"), as well as the parties' subsequent settlement, the

buy-out of Young's membership interest and the decision to continue the business as allowed under Article X.

I. Article X of the Operating Agreement

Article X of the company's Operating Agreement entitled "Dissolution and Termination" (see CP 52-53; or Appendix E to RWA's Responsive Brief) sets forth various factors that *can* result in dissolution, but dissolution is not self-executing nor automatic nor inevitable. The members can elect to continue the business, which is what occurred. (CP 133, Boyer Dec. at ¶ 10) ("At all times ...NWH has continued to operate and conduct business as that was the intent of all parties to the [Young Lawsuit]").

Article X expressly states that the company "shall dissolve and wind up its affairs, *upon the first to occur of the following events, UNLESS* the Members unanimously agree to continue the business". *Id.* (emphasis added). Obviously, if dissolution under Article X was self-executing and automatic as RWA asserts, then how or when would the qualifying proviso be implemented if the members resolved their dispute or agreed to continue the business after a "triggering" event had occurred? RWA's position makes little or no sense, nor does it have any support either in the Operating Agreement, under the

facts of the case, or under Washington's Limited Liability Company Act (the "ACT").

Moreover, even if Young tendered his resignation, such an act does NOT automatically result in dissolution. As set forth in Article X, the "resignation" MUST TERMINATE the member's interest and a mere unilateral "resignation" does not do so. Under Article III (2)(e) of the Operating Agreement (CP 39), Young could not "voluntarily withdraw as a Member from the Company, except as otherwise provided in this agreement."

II. Boyer's Testimony Refutes RWA's Position.

Boyer testified to the facts and circumstances of the settlement, buyout and dismissal as follows:

3. In 2006, NWH filed suit against Mr. Young for alleged misconduct and other claims. In response, Mr. Young asserted a counterclaim against NWH

4. The suit was entitled *Northwest Hunter TV, LLC v. Rick M. Young* (Case No. 06-2-00168-4), and was filed in Clark County Superior Court (hereinafter the "Action").

5. As part of the Action, Mr. Young sought judicial dissolution of NWH. He also expressly requested dissolution of the company in May 2007 pursuant to NWH's Operating Agreement while the Action was pending.

6. On May 30, 2008, all parties agreed to a settlement of the Action. Rick Young's interest in NWH would be purchased for a designated amount of cash and certain assets and equipment were to be transferred to Mr. Young

7. On July 11, 2008, as a result of the settlement, and pursuant to consent of all parties to the Action, **Judge Lewis entered a "Judgment and Order of Dismissal" in the Action** -- terminating the case and dismissing all claims, counterclaims, third-party claims and related matters with prejudice.

8. **The settlement and buy-out** of Mr. Young's membership interest in NWH, coupled with the dismissal of the Action with prejudice, **mooted all prior claims and demands** between the parties. **Dissolution was no longer required or demanded**

9. NWH acquired Young's membership interest leaving Sundance Magnetics, Inc., a separate corporation owned by my wife a member of NWH at that time. . . .

10. At all times from 2004 to present, **NWH has continued to operate and conduct business as that was the intent of all parties to the Action.** NWH is and has been a duly licensed company in Washington at all times from 2004 to present.

Id. (emphasis added). The trial court ignored this testimony which, when combined with the undisputed buyout of Young's membership interest in NWH and the parties' stipulated dismissal of the Young Lawsuit and all claims and related matters therein with prejudice, created at least a genuine issue of fact as to whether dissolution had been abandoned under Article X of the Operating Agreement, and the

members agreeing to continue the business. Why else would the company buy Young's membership interest if not to continue the business with the sole remaining member?

III. RCW 25.15.800 Refutes RWA's Position

Washington's limited liability company Act (the "Act"), codified at RCW 25.15 *et seq.*, which RWA selectively references, expressly states, in pertinent part:

(2) *It is the intent [of the Act] to give the maximum effect to the principle of freedom of contract* and to the enforceability of limited liability company agreements.

Id. (emphasis added). The Legislature wisely left it up to the owners of an LLC to determine what, when, how and/or if the LLC would dissolve or be forced to do so. Under NWH's Operating Agreement, dissolution was neither required nor mandated if, following a triggering event, the members elected to continue the business, which they did. Boyer's testimony alone clearly stated that the parties' intent was to continue the business.

B. The Stipulated Dismissal Rendered the Partial Summary Judgment Order a Nullity.

First, to be clear, there are no reported or unreported cases in Washington or elsewhere that could be found that are factually similar

to the instant case. Hence, RWA's attempt to distinguish each cited case on factual grounds is unavailing. Either the stipulated dismissal of the Young Lawsuit rendered the case and all prior orders, rulings and judgments therein a nullity, or it did not. NWH asserts that it did.

Second, the "nullity" effect of a voluntary dismissal upon prior rulings, orders and judgments in a case appears to be universally accepted and acknowledged. This result not only comports with common sense, but appears to be the rule in Division II as well. Evidentiary rulings, discovery orders and even partial summary judgments become moot and a nullity upon the litigants' stipulated dismissal of the case with prejudice.

Why would Judge Lewis' partial summary judgment order survive and mandate dissolution if Young opted to sell his membership interest and settle all claims and disputes? It makes no logical or practical sense that, despite these events, NWH still had to dissolve. This would run contrary to the parties' intentions, the provisions of the company's Operating Agreement and those set forth in the Act. The trial court erred in ruling that NWH was dissolved.

RWA focuses solely on the August 17, 2007 interlocutory order that granted *partial* summary judgment in Rick Young's favor

confirming NWH's dissolution pursuant to the company's Operating Agreement, but then ignores the *qualifying proviso* in Article X that the members can otherwise agree and thereby avoid dissolution, as well as the court's subsequent two orders dated December 14, 2007 (i.e., the time line for dissolution and sale of assets, which were ignored,) and the July 8, 2008 order dismissing the entire case and *all claims and related matters therein* with prejudice.

C. Issue Preclusion Does Not Apply.

Either the partial summary judgment became a nullity upon the parties' settlement, buyout of Young's membership interest and stipulated dismissal of the action, or it did not. If dissolution was no longer required, either pursuant to Article X of the Operating Agreement, or by settlement and dismissal, then collateral estoppel or issue preclusion is inapplicable. The trial court erred in this regard as well.

CONCLUSION

The trial court should be reversed and the case remanded for trial. NWH was not required to dissolve pursuant to the Operating Agreement or the Act. Young and NWH settled their dispute; Young's membership interest was bought out, and the parties'

stipulated to the dismissal of the case with prejudice – all of which superseded, mooted and annulled all prior orders and ruling in the Young Lawsuit. At the very least, factual issues existed as to whether the parties abandoned dissolution pursuant to Article X of the Operating Agreement, thus relieving the company of any requirement to dissolve or cease business.

RESPECTFULLY SUBMITTED this 2nd day of January, 2014.


Larry E. Hazen, WSB #31046
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Larry E. Hazen, hereby certify under penalty of perjury under the laws of the State of Washington that, on **January 2, 2014**, I served the foregoing APPELLANT'S REPLY BRIEF upon the following individuals or entities via the method indicated:

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SIGNED and DATED this 2 day of January, 2014 at
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U.S. DISTRICT COURT
Vancouver, WA