Circuit Court for Baltimore County
Case No. 03-C-16-002086

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1363

September Term, 2017

STEPHEN A. GEPPI

v.

RICHARD S. PINEAU, ET AL.

Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 14, 2019

In 2004, Stephen A. Geppi ("Geppi") and Richard S. Pineau ("Pineau") formed two LLCs to develop a 557-acre property known as Bracebridge Hall ("Bracebridge"). The development project did not work out: Bracebridge ended up in foreclosure, and the estranged business partners ultimately filed suit against each other. A jury in Baltimore County awarded Pineau roughly $1.3 million in damages against Geppi for breach of contract.

On appeal, Geppi seeks credit for certain payments he made related to the parties' common liability. He asserts: (1) he is entitled to contribution for the relevant payments, and (2) notwithstanding his earlier attempt to abandon the LLCs, he contractually deserves compensation for the payments in question. On this second point, Geppi argues that his purported abandonment was ineffective as a matter of law.

Although the Circuit Court for Baltimore County correctly dismissed Geppi's contribution claim, it erred with respect to abandonment. Because the abandonment issue could have impacted the damages awarded to Pineau, we vacate the judgment and remand to allow for further proceedings.

BACKGROUND & PROCEDURAL HISTORY

Geppi, Pineau, and a third business partner formed two related LLCs ("Bracebridge Estates, LLC" and "Bracebridge Hall, LLC")[1] in 2004 to pursue the land

[1] As Geppi notes, Bracebridge Estates, LLC was formed to own and develop the property; Bracebridge Hall, LLC was formed to own the membership interests in Bracebridge Estates, LLC.

development project at Bracebridge. The Bracebridge property comprises approximately 557 acres on the Sassafras River in Cecil County, complete with a 31,500 square-foot Georgian mansion.

In 2007, the other business partner involved at the time ("Edward St. John") abandoned the Bracebridge Hall, LLC ("the Company"). A written amendment to the Company's Operating Agreement memorialized Edward St. John's abandonment and explained that, as a result of the departure, Geppi and Pineau would be the two co-managers of the Company, with each owning a 50% membership interest.[2] (Previously, Geppi, Pineau, and Edward St. John each owned a one-third membership interest.).

In December 2007, Geppi and Pineau took out a $10 million loan from BB&T. They secured the loan with a mortgage on the Bracebridge property. The BB&T loan was further guaranteed by six guarantors: the Bracebridge Estates, LLC; the Bracebridge Hall, LLC; Pineau and his wife, Anne Pineau; and Geppi and his wife, Melinda Geppi.

Following the 2008 global financial downturn, the BB&T loan was in default by 2012. After obtaining confessed judgments against the Geppis and the Pineaus from the Circuit Court for Baltimore City, BB&T sold its Bracebridge loan to RREF BB Acquisitions, LLC ("Rialto Capital" or "Rialto") in December 2012.

[2] The First Amendment to the Operating Agreement occurred in November 2007, upon Edward St. John's departure. Subsequently, the Operating Agreement was amended for the second time in October 2009.

In April 2013, Rialto initiated foreclosure proceedings against the Bracebridge property. At an August 2013 public auction, Rialto was the only bidder and successfully bought the property for $7.7 million. Subtracting the amount of Rialto's $7.7 million bid from the approximately $11 million owed to Rialto by Geppi and Pineau,[3] Rialto claimed a deficiency of $4,096,904.15. (Due to the foreclosure, Bracebridge Estates, LLC and Bracebridge Hall, LLC were rendered insolvent.).

Of central importance on appeal: in a letter dated December 29, 2013, Geppi told Pineau that he was abandoning his interest in the LLCs, effective two days later on December 31, 2013. The letter went on to say that Geppi expected no further benefit from the LLCs. The letter stated in its entirety:

> Dear Rick,
>
> I herewith abandon all of my right, title and interest in and to Bracebridge Hall, LLC and Bracebridge Estates, LLC effective midnight on December 31, 2013. I intend to have no additional dealings with Bracebridge Hall[,] LLC and Bracebridge Estates, LLC and expect no further benefit from Bracebridge Hall, LLC and Bracebridge Estates, LLC.
>
> Sincerely,
>
> Stephen A. Geppi

Pineau did not reply to Geppi's letter.

As we will explain further, Geppi argues that Pineau's non-responsiveness means Pineau never consented to Geppi's purported abandonment; as a result, Geppi claims his

[3] The auditor's report that was filed in the foreclosure action showed that $11,072,798.06 was owed to Rialto: $9,823,946.70 in principal debt and $1,248,851.36 in interest.

"abandonment" was legally invalid, given that the Company's Operating Agreement expressly prohibited members from voluntarily withdrawing from the LLC, or disposing of their interests without prior written consent.[4] In contrast, Pineau contends that his silence indicated acquiescence to Geppi's abandonment. In any event, no written document memorialized or formally approved Geppi's purported abandonment. In comparison (and as mentioned above), when Edward St. John abandoned the Company in

[4] Section 10 of the Operating Agreement sets forth:

> (a) No member may transfer, sell, assign, alienate, encumber, mortgage, pledge or otherwise dispose of all or any portion of its interest in the Company without the prior written consent of the Manager and the Required Majority of non-transferring Members.
>
> . . .
>
> (g) A Member does not have the right to voluntarily withdraw from the Company.

Additionally, Section 9 of the Second Amendment to the Operating Agreement states:

> Section 10 of the Operating Agreement is amended to provide that no Defaulting Member may transfer all or any part of his interest in the Company until all Member Loans (including accrued interest) are paid in full.

We note that although, practically speaking, it may be unwise for a two-member LLC to prohibit voluntary withdrawal (given that, as seen here, one party could effectively "bind" an estranged partner), the Corporations and Associations Article permits such a provision: "The operating agreement may provide that a member may not withdraw or otherwise place limits on the ability of a member to withdraw." Md. Code (2014 Repl. Vol., 2018 Cum. Supp.), Corps. & Ass'ns, § 4A-605(b).

2007, the parties signed a written amendment to the Operating Agreement acknowledging Edward St. John's abandonment.

After the foreclosure, Geppi (and Melinda Geppi) entered into a settlement agreement with Rialto, pursuant to which Geppi paid $1,930,000 total to Rialto. Geppi notes that he paid $355,000 to Rialto prior to the date of his purported abandonment, and $1,575,000 afterwards. Under the terms of the settlement agreement, the Geppis and Rialto "unconditionally and irrevocably" released each other from "any and all claims, causes of actions, demands, damages, liabilities, losses, obligations, costs, fees, and expenses of whatsoever nature, character and kind . . . arising out of, based upon or in any manner connected with any transaction [or] event . . . prior to the date of this Agreement." The agreement went on to state that as a settlement between the Geppis and Rialto, it had "no effect on the obligations of Bracebridge Hall, LLC, Bracebridge Estates, LLC, the Pineaus (if any) . . . or claims which the Lender may have relating to the Loan."

In February 2016, Pineau filed suit against Geppi in the Circuit Court for Baltimore County, ultimately asserting breach of contract, detrimental reliance, negligence, gross negligence, and breach of fiduciary duty. Bracebridge Estates, LLC and Bracebridge Hall, LLC were joined as plaintiffs. Geppi filed counterclaims for contribution and breach of fiduciary duty.

After a four-day trial in August 2017, the circuit court judge dismissed every claim except for Pineau's breach of contract claim and Geppi's claim for breach of fiduciary

duty. As we shall describe further in the discussion below, the circuit court declined to rule as a matter of law whether Geppi's purported abandonment was valid under the Operating Agreement. Nor was the jury asked to specifically answer whether Geppi's abandonment was effective.

The jury awarded Pineau $1,327,230.04 in damages for Geppi's breach of contract. Notably for the purposes of appeal: it was not Geppi's "abandonment" *per se* that constituted the relevant breach. Rather, the "breach" consisted of Geppi's failure to continue making capital contributions to the Bracebridge project. (The Company's Operating Agreement specified how members were to make—and be compensated for—their capital contributions to the Company.). Therefore, barring any other considerations by the jury, the damages for breach of contract would reflect that Pineau made greater capital contributions to the Company than Geppi—under the Operating Agreement, Pineau was entitled to compensation for any such difference. As it turned out, the jury's award precisely matched the difference (according to the exhibit sheet submitted by Pineau without objection) in contributions as of December 2013, when Geppi purportedly abandoned the Company. In other words: the jury award did not appear to credit Geppi for payments made to Rialto after December 2013.

Though the jury separately found that Pineau breached his fiduciary duty, the jury did not award any damages to Geppi.

Geppi filed a timely appeal.

DISCUSSION

Geppi raises two contentions on appeal—each of which would entitle him to receive compensation for the settlement payments he made to Rialto. Geppi argues that he should be credited for the Rialto payments because: (1) he is entitled to contribution for the amount that he paid in excess of his share of the co-guarantors' common liability (*i.e.*, the common debt owed to Rialto); and/or (2) his purported abandonment of the LLCs was ineffective as a matter of law, so his payments to settle with Rialto should have counted toward his capital contributions to the Company.

A circuit court's interpretation of a LLC's Operating Agreement, or any contract, is a legal decision reviewed *de novo*. *Tower Oaks Blvd., LLC v. Procida*, 219 Md. App. 376, 395 (2014). With respect to whether a party waived a contractual right: "When the determination of waiver turns on factual analysis, we inquire whether that finding was clearly erroneous . . . [but] when questions of waiver turn on law rather than fact, we ask whether the trial court's decision was legally correct." *Cain v. Midland Funding, LLC*, 452 Md. 141, 150 (2017) (Citations omitted).

I. THE GUARANTY AGREEMENT SIGNED BY GEPPI EXPRESSLY WAIVED CONTRIBUTION.

Geppi claims that he is entitled to contribution (with interest) because "he paid more than his proportionate share of the common liability" when he paid $1.93 million to settle with Rialto. Specifically, Geppi contends: (1) the $4,096,904.15 owed to Rialto following the foreclosure was a common liability owed by the six co-guarantors (Mr. and Mrs. Geppi; Mr. and Mrs. Pineau; and the two LLCs) of the loan that BB&T transferred

to Rialto; and (2) because the two LLCs had become insolvent, the common liability should be divided four-ways between Mr. and Mrs. Geppi and Mr. and Mrs. Pineau. On this second point, Geppi argues that the circuit court erred when it dismissed his claim for contribution on the basis that Geppi had not proven that Mrs. Geppi and Mrs. Pineau were solvent. According to Geppi, by doing so the circuit court improperly shifted the burden to require that a party be proved solvent, rather than insolvent.

Regardless of whether or not Mrs. Geppi and Mrs. Pineau were actually solvent, and regardless of whether the circuit court may have shifted the burden of proving solvency, Geppi's contribution claim overlooks the straightforward fact that he expressly waived the right to seek contribution when he signed the guaranty agreement to the BB&T loan.

Section 7 of the guaranty agreement that was signed by the Geppis and the Pineaus stated:

> Each guarantor hereby irrevocably waives (a) all rights such Guarantor may have at law or in equity to seek subrogation, contribution, indemnification or any other form of reimbursement from the Borrowers, any other guarantor or any other person now or hereafter primarily or secondarily liable for any of the Liabilities . . . .

Geppi argues that this issue of waiver has itself been waived because Pineau did not raise it in the circuit court. Be that as it may, given that Geppi's entire argument with respect to the separate abandonment issue (discussed further below) implores us to rule in his favor on account of plain contractual text in the Operating Agreement, we decline to ignore plain contractual text in the guaranty agreement that Geppi relies upon for his

desired end result (*i.e.*, getting compensated for his settlement payments). Md. Rule 8-131(a); *see, e.g., Janusz v. Gilliam*, 404 Md. 524, 540 (2008) ("When we interpret a contract, we examine the contract as a whole, in order to determine the intention of the parties . . . [w]e also examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution.") (Citations and quotation marks omitted).

Geppi's further attempts to avoid the guaranty agreement's waiver provision are all unavailing. Geppi argues that the guaranty agreement's waiver of contribution is unenforceable because there was no consideration between the co-guarantors, and because the agreement was made for the benefit and protection of Rialto and not the guarantors. If that were the case, however, Geppi's attempt to *seek* contribution as a co-guarantor would be unenforceable for the same exact reasons. We are similarly unpersuaded by Geppi's attempt to claim that he is free from the guaranty agreement's obligations (because those obligations "terminated . . . when he finalized his settlement with Rialto and received a release") while simultaneously seeking to claim the benefits of the guaranty agreement against the other guarantors.

Alternatively, Geppi asserts that he is only seeking contribution from the other guarantors through his status as a primary obligor, and not as a fellow guarantor. However, the Court of Appeals has noted that in such a situation, an accommodating party—"which includes a guarantor"—cannot be liable to a principal obligor, as Geppi is claiming to be: "Since the accommodating party lends his credit by request to the party

accommodated upon the assumption that the latter will discharge the debt when due, it is an implied term of this agreement that the party accommodated cannot acquire any right of action against the accommodating party." *Fithian v. Jamar*, 286 Md. 161, 167-68 (1979) (quoting *Crothers v. Nat'l Bank*, 158 Md. 587, 593 (1930)).

Indeed, accepting Geppi's alternative argument would transform the entire notion of guarantorship: guarantors would no longer be a backstop for occasions when primary obligors fail to pay back deficiencies, but called upon for contribution whenever an obligor actually pays a deficiency (*i.e.*, when an obligor does what an obligor is supposed to do, and pays back an obligation). In effect, Geppi would elevate guarantors to the status of co-primary obligors, because they would be called upon to help pay for an obligation whenever the primary obligors make good on *their* obligations.

In short, we do not believe that Geppi can circumvent the express waiver of contribution in the guaranty agreement. The circuit court did not err in dismissing his contribution claim.

II. THE CIRCUIT COURT ERRED WITH RESPECT TO THE ABANDONMENT ISSUE.

Geppi contends that his purported abandonment of the LLCs in December 2013 was impermissible as a matter of law because the Company's Operating Agreement prohibited a member from voluntarily withdrawing or disposing of an interest in the Company without written consent. *See* Md. Code (2014 Repl. Vol., 2018 Cum. Supp.), Corps. & Ass'ns, § 4A-402(d)(5) ("An operating agreement that is duly adopted or amended is binding on each person who is or becomes a member of the limited liability

company[.]"); *see also George Wasserman & Janice Wasserman Goldsten Family LLC v. Kay*, 197 Md. App. 586, 623 (2011) ("[M]embers of an LLC are frequently parties to operating agreements. Thus, members, like partners, are in contractual privity with each other.").

If Geppi is correct that his purported abandonment was legally invalid, and thus he remained a member of the LLCs, his payments to Rialto could have constituted capital contributions for which he deserved compensation. In turn, this dynamic would implicate the damages awarded to Pineau by the jury, given that the award precisely corresponded to the difference ($1,327,230.04) between Geppi and Pineau's capital contributions at the time of Geppi's purported abandonment in 2013.

A. It Was Erroneous to Liken Geppi's Letter with Edward St. John's Abandonment.

At the close of Pineau's case in chief, Geppi's counsel asked the circuit court to rule as a matter of law that the purported abandonment was ineffective, because the plain text of the Company's Operating Agreement prohibited Geppi from either voluntarily withdrawing or disposing of his interest without written approval. The circuit court declined to do so. Instead, the circuit court reasoned that Geppi's purported abandonment was similar to the manner in which Edward St. John withdrew from the LLCs in 2007:

> [Counsel]: Your Honor, we—we believe that the Court can and should rule as a matter of law that Mr. Geppi's purported abandonment of his membership interest never became effective.
>
> The Court: I'm not inclined to rule—so rule. Appears that he handled it the same way Mr. St. John handled it, and Mr. Geppi recognized that voluntary abandonment withdrawal.

> . . .
>
> Mr. Geppi sent a – a notice. Mr. Pineau did nothing to challenge his abandonment or withdraw, and is consistent with the way that Mr. St. John withdrew. Mr. St. John didn't withdraw contingent on a new operating agreement.
>
> . . .
>
> So I'm just not inclined to not permit Mr. Geppi to have his way. He sent a letter and an e-mail saying, I withdraw. He withdrew, he abandoned his interest.

As Geppi points out, the circuit court overlooked the fact that when Edward St. John left the Company, a written amendment to the Operating Agreement was drafted and signed by all three members—Geppi, Pineau, and Edward St. John—to memorialize the abandonment.[5] No such written amendment or memorialization occurred with respect to Geppi's purported abandonment in December 2013. A memorialized writing signed by all relevant parties is entirely inapposite to Pineau's silent "acquiescence," and we

[5] Pineau contends that Edward St. John did not withdraw "contingent upon a new operating agreement," but rather abandoned preemptively, as evidenced by language in the First Amendment to the Operating Agreement which stated, in the past tense, that Edward St. John "has abandoned" (*i.e.*, has already abandoned) the project. We think Pineau makes too much of the Amendment's intermittent use of the past tense, given that other language in the same document described Edward St. John's abandonment as prospective.

Moreover, even if the First Amendment happened to be written retrospectively, it explicitly affirmed that, as a signed document, it was "acknowledg[ing] that ESJ has taken all necessary steps to abandon the Abandoned Interest and withdraw from the Company as a member thereof." In short, the First Amendment's written memorialization of Edward St. John's abandonment was far more explicit, extensive, and official than anything that occurred with respect to Geppi's purported abandonment. The circuit court erred in likening the two.

believe the circuit court erred in likening Geppi's letter to Edward St. John's abandonment.

B. The Jury Should Have Been Instructed on Whether the Operating Agreement Was Modified by Conduct.

Later, at the close of trial, the circuit court once again declined to decide whether Geppi's purported abandonment was invalid under the terms of the Operating Agreement. At a conference held prior to the next morning's jury instructions and closing arguments, Geppi's counsel made another request for a legal ruling from the court. The circuit court responded that it was "declin[ing] to make a declaratory judgment"[6] because "[Pineau's] case does not depend . . . on this issue of abandonment." The court then added: "it's not part of one of [Pineau's] causes of action. So I don't—I don't see why it would be incumbent upon me to make a legal ruling on that."[7]

Immediately after Geppi's counsel's request, Pineau's counsel asked the court to rule the other way—*i.e.*, to determine that Geppi could not be entitled to credit for any capital contributions made after the date of abandonment in December 2013, because "someone [] can't get capital credit for payments they allegedly make after they're no longer a member." The circuit court declined to rule in Pineau's favor, stating: "One

[6] Geppi's complaints did not specifically seek a declaratory judgment. We believe the circuit court was speaking more colloquially at that moment in response to Geppi's request for a legal determination on the issue of abandonment.

[7] By so stating, the circuit court apparently overlooked that the issue of abandonment could affect the calculation of capital contributions and the subsequent jury award.

thing that I know is that neither of these parties followed their own operating agreement in many respects. So I'm not going to make a ruling on that . . . the jury actually can rule against both parties on this record. It's possible. And I think I'll remind [the jury] that that is something they can do."

It is undeniable that, as a matter of law, the plain text of the Company's Operating Agreement prohibited voluntary withdrawal or the disposal of one's interest without written approval. *Tower Oaks Blvd*, 219 Md. App. at 395; *see, e.g., Cain*, 452 Md. at 151 (Whether a party had waived a right to arbitrate depended, in part, on the "question[] of law" of whether it *had* the option to arbitrate under a certain contract).

And yet, even though the Operating Agreement's plain language meant that Geppi *could not* withdraw without written approval, the jury still had the power to find that he *did* withdraw validly—*if* the jury were to find that Geppi and Pineau had modified the Operating Agreement by their conduct. *See Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 122 (2011) ("[W]hether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact.") (Citation and quotation marks omitted); *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.*, 165 Md. App. 262, 277-78 (2005) ("Parties to a contract may waive the requirements of the contract by subsequent oral agreement or conduct, notwithstanding any provision in the contract that modifications must be in writing."); *Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 522 (1977) ("[P]arties by their conduct may waive the requirements of a written contract . . .

notwithstanding a written agreement that any change to a contract must be in writing . . . a subsequent modification of a written contract may be established by a preponderance of the evidence.") (Citations omitted).[8]

Here, it is unclear whether the jury made such a finding. The jury was not asked to answer on the verdict sheet whether Geppi's abandonment was valid. Nor was the jury specifically instructed on the issue of abandonment. Indeed, the jury was not even instructed that parties can modify a contract by conduct: the circuit court only generally instructed the jury that "[a] contract may be changed, terminated or rescinded by oral agreement. This is true even though a contract states that any change to the contract must be in writing." Then, during closing arguments, Pineau's counsel did not frame the abandonment issue as one of contract modification, but rather in estoppel-like terms.[9]

Because the question of whether the Operating Agreement was in fact modified—and, thus, whether Geppi's abandonment was valid—was not squarely put before the jury, *see Hovnanian*, 421 Md. at 122; *Kline*, 165 Md. App. at 277-78; *Wolfe*, 279 Md. at

[8] For this reason, we shall not reverse outright, even though the Operating Agreement otherwise prohibited voluntary withdrawal. We are further wary of reversal just in case the jury did, in fact, base its verdict (or damages) on a determination that the Operating Agreement was modified to make the abandonment effective. Given that the jury was not specifically asked, we have no way of knowing for sure.

[9] Pineau's counsel stated: ". . . what does he say now? Oh, it's not effective. Well, what do you mean it's not effective? Well, I – I've decided now that I'm – I'm still in the company. Well, that – that's a first. I mean, that's like saying, Well, I violated the agreement, but you didn't sue me for violating the contract, so you're in the wrong. Well, Mr. Pineau's not in the wrong. This is the man that deserted the company."

522, we shall vacate the judgment and remand so that a trier of fact may make that determination. If, however, on remand it is determined that Geppi's abandonment remained invalid under the Operating Agreement, a reconsideration of damages could be in order, given that the jury's award did not appear to give Geppi credit for any payments made to Rialto after December 2013.[10]

In closing, we note that our remand is meant to provide the parties and the circuit court with the greatest flexibility. It is not intended to restrict the circuit court from

[10] Still, even if Geppi is correct that the purported abandonment was not valid, it is not entirely clear to us whether Geppi's payments to Rialto should be counted as a capital contribution to the Bracebridge Hall, LLC. Section 5 of the Second Amendment to the Operating Agreement required any member making a capital contribution to provide notice to the other member within 30 days of the contribution. Additionally, that same section of the Second Amendment only characterized capital payments as "contributions of additional capital to the Company in order to pay liabilities or expenses of the Company or Bracebridge Estates, LLC[.]" Section 7.12 of Geppi's settlement agreement with Rialto stated that "[t]his Agreement shall have no effect on the obligations of Bracebridge Hall, LLC, Bracebridge Estates, LLC, the Pineaus (if any) or any other obligors of the Loan or claims which [Rialto] may have relating to the Loan." And Section 8.16 of the BB&T loan agreement (which was sold to Rialto) stated: "The Lender may, without notice to or consent of any of the Borrowers . . . release, discharge, compromise or settle with . . . any of the Borrowers without in any way affecting, limiting, modifying, discharging or releasing any of the obligations and liabilities under this Agreement or any other Financing Documents of the other Borrowers."

On the other hand, the exhibit sheet submitted by Pineau (which tallied his and Geppi's capital contributions, and which formed the basis of the jury award) gave Geppi credit for the $575,000 that Geppi claims to have paid to Rialto prior to December 31, 2013.

Of course, if Geppi's post-2013 payments to Rialto should count toward his capital contribution balance, presumably any contributions made by Pineau since 2013 should then be counted toward *Pineau's* balance.

considering any issues or conducting any proceedings that might be useful in light of our holding.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY.