

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2318

SEPTEMBER TERM, 2014

REMUS ENTERPRISES, LLC

v.

FREEDOM EQUITY, LLC

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 7, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

In the Circuit Court for Washington County, Remus Enterprises, LLC (“Remus DE”), the appellant, a Delaware Limited Liability Company that also was registered as a foreign Limited Liability Company in Maryland, brought suit against Freedom Equity, LLC (“Freedom”), the appellee, for breach of contract, unjust enrichment, and tortious interference with contractual relations. In an amended complaint, Remus DE added a count alleging violation of the Land Installment Contract Act, Md. Code (1974, 2105 Repl. Vol.), sections 10-102 and 10-103 of the Real Property Article (“RP”).

Remus DE moved for partial summary judgment on the Land Installment Contract Act count, which the court denied. Ultimately, the trial court granted a motion by Freedom to dismiss all counts on the ground that Remus DE lacked the capacity to sue.

On appeal, Remus DE challenges both these rulings. We hold that the trial court properly granted Freedom’s motion to dismiss for lack of capacity to sue and that, because Remus DE still lacked capacity when it filed its notice of appeal, this appeal must be dismissed. Our holding makes it unnecessary to address whether the court erred in denying Remus DE’s motion for partial summary judgment.

FACTS AND PROCEEDINGS

On June 19, 2007, Salon Phillips formed Remus DE. Phillips registered the LLC with the Delaware Division of Corporations. In September of 2007, Phillips registered Remus DE with the Maryland State Department of Taxation (“SDAT”) to conduct business in the state.

A business that registers with the SDAT is assigned a Department ID number. *See* SDAT, *Assessment and Taxation of Business Personal Property in Maryland*, 2 (July

2011). That ID number consists of a letter followed by 8 random numbers. The letter identifies the type of business being registered. The letters and their corresponding classifications are as follows:

- A – Domestic Limited Liability Partnership
- B – Domestic Statutory Trust
- D – Domestic Stock or Non-Stock Corporation
- E – Foreign Limited Liability Partnership
- F – Foreign Stock or Non-Stock Corporation
- L – Sole Proprietor / General Partnership
- M – Domestic Limited Partnership
- P – Foreign Limited Partnership
- S – Foreign Statutory Trust
- W – Domestic Limited Liability Company
- Z – Foreign Limited Liability Company.

Id. The SDAT issued Remus DE Department ID Z12246773, indicating it was a Foreign Limited Liability Company.¹

On January 23, 2012, Remus DE and Freedom executed a real estate purchase contract for property located at 200 East Antietam Street, in Hagerstown (“the Property”). The Property is a multi-unit residential dwelling that also includes a single commercial unit. The contract (entitled a “Contract for Deed”) was for a total sale price of \$335,000.00. It required Remus DE to make a down payment of \$35,000, followed by monthly installments of \$1,928.53, for 60 months. Freedom retained ownership of the property. Remus DE had the right to possess and manage the Property, and to receive

¹ An SDAT brochure states: “A domestic entity is organized and exists under the laws of the State of Maryland. A foreign entity is formed in another state or country and is qualified or registered to do business in Maryland.” See SDAT, *Assessment and Taxation of Business Personal Property in Maryland*, 2 (July 2011).

rental income. After 60 months, Remus DE was required to pay the remaining balance.

At that point, it would take ownership of the Property.

One provision in the contract read as follows:

The Maryland Land Installment Contract Act requires that within 15 days after the contract has been signed by both parties, [Freedom] shall cause the contract to be recorded among the land records of the County where the property lies and shall mail the recorder's receipt to [Remus DE] (or a copy thereof).

Freedom did not record the contract in the county land records.²

Remus DE intended to rehabilitate the property and manage it or, upon obtaining ownership, sell it for a profit. For 21 months after the contract was signed, Remus DE managed the property. Remus DE alleges it spent more than \$100,000 in building repairs, maintenance, and expenses.

Disputes arose between Freedom and Remus DE about Remus DE's management of the Property and its compliance with the terms of the contract. Specifically, Freedom maintained that Remus DE had failed to properly maintain utilities for tenants, had failed to maintain the interior and exterior of the Property, had on several occasions made installment payments by checks that were returned for insufficient funds, had failed to pay property taxes, resulting in Freedom having to pay the taxes due to save the Property from being sold at tax sale, had failed to make the August 2013 installment payment, and

² The parties disagree as to why the contract was not recorded. Remus DE maintains Freedom refused to record it; Freedom maintains that Remus DE did not pay the taxes and recordation fees required in the contract, and that is why the contract was not recorded.

had failed to complete a number of construction projects at the Property. Freedom further maintained that it had given Remus DE the opportunity to cure its defaults but it had failed to do so.

On September 16, 2013, Freedom repossessed the Property. It placed signs on the building's entrances stating:

EFFECTIVE TODAY: This Building is Under New Ownership and Management. Each tenant is responsible for getting in touch with above management company and providing a copy of current lease. We also will be changing locks on each unit and front door effective tomorrow so arrangements will need to be made.

Locks were changed the following day. Remus DE was not permitted to reenter the Property.

On October 28, 2013, Remus DE filed suit against Freedom. It alleged that “Remus Enterprises is a Maryland limited liability corporation headquartered in Bowie, Maryland.” It did not mention that Remus DE was a Delaware LLC that was registered to do business in Maryland as a foreign LLC.

On November 18, 2013, Remus DE forfeited its LLC status in both Delaware and Maryland for failure to file its 2013 property tax return.

Freedom filed its answer to the complaint on December 4, 2013. As a negative defense, it asserted that “Remus [DE] lacks the capacity to sue and/or seek affirmative relief through this litigation.” On January 3, 2014, Freedom filed a counter-complaint, stating claims for breach of contract, negligence, tortious interference with economic

relations, and constructive fraud. It also requested an accounting “for all rent and/or payments due under any lease for the Property from August 1, 2013 to the date of trial[.]”

By order of the circuit court, all additional parties were to be joined by August 1, 2014. The discovery deadline was September 30, 2014. Trial was set to begin on November 24, 2014. The parties engaged in discovery. Remus DE’s status remained forfeited.

On September 19, 2014, Remus DE filed an amended complaint, adding a count for violation of the Land Installment Contract Act based on Freedom’s failure to record the contract. When the amended complaint was filed, Remus DE’s status remained forfeited.

On October 3, 2014, Freedom filed an answer to Remus DE’s amended complaint. It asserted, again, that “Remus [DE] lacks the capacity to sue and/or seek affirmative relief through this litigation.” That same day Remus DE filed a motion for partial summary judgment on the Land Installment Contract Act claim in the amended complaint. Freedom filed an opposition. Again, Remus DE’s status remained forfeited.

A few weeks before the trial date, Phillips attempted, unsuccessfully, to revive Remus DE in Delaware and Maryland. Then, on November 7, 2014, he formed a second Remus LLC (“Remus MD”), which he registered as a Maryland domestic LLC only. The SDAT issued Remus MD Department ID W16182222, identifying it as a Domestic Limited Liability Corporation.

Trial commenced on November 24, 2014, as scheduled. After a jury was selected, the court addressed pending motions. It denied Remus DE’s motion for partial summary judgment, finding that RP sections 10-102 and 10-103 were inapplicable. The court interpreted the statute to apply only to land installment contracts involving a purchaser who is a “natural person,” not an LLC, and involving the property to be used as a personal dwelling and not for commercial use.

In the course of arguing in favor of motions in limine concerning documents not disclosed in discovery, counsel for Freedom raised the topic of the existence and status of the two Remus LLCs. Counsel for Remus DE confirmed that Remus DE remained forfeited, but argued that the formation of Remus MD revived Remus DE’s capacity to prosecute its claims. Alternatively, counsel for Remus DE argued that Remus DE had assigned its claims to Remus MD. There was no evidence or any proffer of facts to support those assertions.

On the basis of this discussion, counsel for Freedom moved to dismiss Remus DE’s claims with prejudice for lack of capacity to sue. For the reasons we shall discuss, the trial court granted Freedom’s motion to dismiss Remus DE’s amended complaint, with prejudice. Freedom withdrew its counter-complaint and the jury was discharged.

On December 8, 2014, the court entered its judgment. Remus DE filed a timely motion to alter or amend the judgment, reiterating its position that the formation of Remus MD revived Remus DE’s standing as an LLC. The circuit court denied the

motion in an order entered on December 16, 2014. Remus DE filed a notice of appeal. Its status as an LLC in Delaware and Maryland remained forfeited.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

At the outset of the trial, the following discussion took place between the court and counsel for Freedom regarding the existence and status of Remus DE and Remus MD:

[COUNSEL FOR FREEDOM]: [Remus DE] is the only one that's here. That's the whole point, your Honor. . . . [I]t is still an entity. It cannot do business in Maryland and cannot use its name. Even if we were to ignore the case that I gave you, you could look at the . . . Maryland Rules and what you would see is that all cases are required to be brought by the party in interest. 2-201. The real party in interest is [Remus DE] that was formed in 2007 and forfeited in November of 2013. And this is exactly why I filed the Motion *in Limine* because what they tried to do is cure the problem by just creating another entity. They're different entities. The law accords them different entities.

THE COURT: Okay.

[COUNSEL FOR FREEDOM]: The State accords them different entities.

THE COURT: So, the entity Remus Enterprises, LLC, the Delaware LLC, exists as an entity but doesn't have the capacity to prosecute a law suit.

[COUNSEL FOR FREEDOM]: Correct.

THE COURT: Because of the holdings. Yeah. I think really that it could have and should have been cured before now. And [Remus MD] that's a Maryland entity is not the party in interest because they're not the party that lawfully filed this suit when they had the ability to.

Again, this emphasizes the importance if you operate as an entity to[,] you know, at the LLC status or the corporate status so that you can obtain the protections of the law that are delegated or designated for corporations and LLC's. You have to keep the corporate veil intact. And

failing to have the meetings of the Board of Directors, or failing to follow the by-laws, or failure to pay the personal property taxes and file the forms results in the loss of that corporate ability to act.

And therefore [Freedom’s] verbal motion to dismiss [Remus DE’s] Amended Complaint is granted with prejudice subject to appeal.

It is undisputed that, one month after filing suit, Remus DE forfeited its status as an LLC in both Delaware and Maryland, and that its status remains forfeited. Remus DE contends that the formation of Remus MD revived Remus DE’s status as an LLC and therefore the trial court erred in dismissing its suit for lack of capacity. Remus DE also argues that the court erred in dismissing its claims with prejudice, as opposed to without prejudice.

Freedom counters that Remus MD is an LLC that is separate and distinct from Remus DE and that because Remus DE remains forfeited “it would be improper to allow [Remus DE] to maintain the action.” Freedom argues that because it was ready to proceed on its counter-claim, which would have required the jurors to resolve the same operative facts as those involved in Remus DE’s claims, *res judicata* would have prevented Remus DE from refiling its suit and dismissal with prejudice was appropriate.

A

Under Rule 2-202(a), “[a]pplicable substantive law governs the capacity to sue or be sued of an individual, a corporation, a person acting in a representative capacity, an association, or any other entity.” Rule 2-201 requires that, with exceptions that do not apply here, “[e]very action shall be prosecuted in the name of the real party in interest[.]”

This rule advances “[t]he principle that the person entitled by law to enforce a substantive right should be the one under whose name the action is prosecuted.” *Real-Party-in-Interest Rule*, *Black’s Law Dictionary* (10th ed. 2014).

In *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695 (2010), this Court considered whether a forfeited LLC has the capacity to sue and to maintain a suit. In *Price*, a group of physicians and a corporation, Upper Chesapeake Health Ventures, Inc. (“UCH”), formed an LLC to operate an ambulatory surgical center. The LLC’s operating agreement created a management committee to control the LLC’s business affairs. Certain physicians and UCH, through individual representatives, were appointed to the committee. Four years later, a majority of the committee members agreed to sell the LLC’s assets to UCH in exchange for clearing the LLC’s debts. After the assets were sold, the LLC forfeited its status for failure to file a tangible personal property tax report, under Maryland Code (1975, 2007 Repl. Vol.), section 4A-911(d) of the Corporations and Associations (“CA”) Article. The minority committee members who voted against the sale filed a derivative action on behalf of the defunct LLC claiming that the assets had been sold “below fair value” and that neither the majority committee members nor UCH had provided them adequate information about the sale. *Id.* at 699. The trial court dismissed the suit, ruling that the LLC “did not legally exist.” *Id.* at 702. The minority members appealed.

This Court determined that “tax-failure forfeiture by an LLC, while resulting in the loss of important rights, does not make the LLC a legal non-entity.” *Id.* at 704.

Indeed, an “LLC does not become non-existent after it forfeits” its status. *Id.* at 705. We held, however, that when an LLC’s rights have been forfeited it “may not *file or maintain* a lawsuit[.]” *Id.* at 708 (emphasis in original). We emphasized the language of CA section 4A-920, which states that “the forfeiture of the right to do business in Maryland and the right to use the name of the [LLC] . . . does not . . . prevent the [LLC] from *defending* any action, suit, or proceeding in a court of this State.” *Id.* at 705 (emphasis added). We concluded that because the General Assembly used the word *defending*, as opposed to *prosecuting* or maintaining, a defunct LLC cannot *maintain* a suit. *Id.* at 708.

The *Price* case is dispositive. It is undisputed that Remus DE was an LLC in good standing in Delaware and in Maryland when the original complaint was filed, but soon thereafter it forfeited its status in Delaware and Maryland for failure to file personal property tax returns. Thereafter, it filed an amended complaint, adding the Land Installment Contract Act claim. *Price* makes clear that, even though Remus DE had the capacity to file suit when it filed the original complaint, it lost the capacity to “*maintain* a lawsuit after its rights [were] forfeited.” *Id.* (emphasis in original). “Maintaining” includes prosecuting the already filed claims and amending the complaint to add a new claim.

Delaware, like Maryland, requires an LLC to pay an annual personal property tax. *See* Del. Code. Ann. tit. 6 § 18-1107 (2014). And, in Delaware, as in Maryland, an LLC does not become a non-entity upon failure to make this payment; however, it forfeits its right to “maintain any action, suit or proceeding . . . until such domestic limited liability

company . . . has been restored to and has the status of a domestic limited liability company . . . in good standing. . . .” *Id.* at (l).

On the day of trial, Remus DE’s status as a domestic LLC in Delaware and as a foreign LLC registered to do business in Maryland was forfeited. As a matter of law it did not have the capacity to maintain its suit against Freedom. The parties were present in court for trial, a jury had been selected, but Remus DE could not go forward to prosecute its claims. Under the circumstances, the trial court did not err in dismissing Remus DE’s claims, and did not abuse its discretion in dismissing the claims with prejudice.

As noted, Remus DE took the position below that, because it had formed a new LLC in Maryland (“Remus MD”), it had the capacity to maintain its suit against Freedom. This is incorrect. As evidenced by the SDAT IDs, Remus DE and Remus MD are separate entities. The former is a foreign LLC; the latter a domestic LLC. Remus DE’s claims cannot survive simply because an entity with the same name was formed.³ Indeed, only Remus DE, not Remus MD, is the real party in interest.

B

Because Remus DE’s LLC status remains forfeited in both Maryland and Delaware, it lacks the requisite capacity to maintain this appeal. In *Price* we held “that

³ As noted, Remus DE made the alternative argument below that it had assigned its claims to Remus MD. In its brief on appeal, Remus DE does not advance this argument.

an LLC whose rights have been forfeited for tax failures still exists as an entity, but may only defend an action in court, not prosecute one” and that the “taking of an appeal is comparable to the act of filing suit[.]” 192 Md. App. at 709. Accordingly, as an LLC that was in forfeited status, Remus DE lacked the capacity to file a notice of appeal. For that reason, the notice of appeal was ineffective and this appeal must be dismissed.

APPEAL DISMISSED. COSTS TO BE PAID BY THE APPELLANT.