2012 IL App (1st) 111408-U

FIRST DIVISION
March 19, 2012

No. 1-11-1408

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD SHROCK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 1455
	)	
ROBERT J. MEIER,	)	Honorable
	)	Ronald Bartkowitz,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

HELD: In this Rule 307(a)(1) appeal, we affirmed the order modifying an earlier injunctive order and allowing defendant to proceed with the dissolution of the limited liability company of which he and the plaintiff were the two members. We held that the trial court committed no abuse of discretion where the LLC's operating agreement allowed for its dissolution by defendant.

¶ 1 Plaintiff, Edward Shrock, and defendant, Robert J. Meier, are the two members of Baby Supermall, L.L.C. (hereinafter, BSM or, the Company). Defendant is the majority shareholder and managing member. Plaintiff brought suit contending various actions taken by defendant in his capacity as majority shareholder and managing member violated BSM's operating agreement and his

fiduciary duty to plaintiff. Following the filing of plaintiff's complaint, defendant indicated his intent to merge BSM with another company he planned to set up. On March 27, 2009, the trial court enjoined defendant from so merging the companies or dissolving BSM. On April 18, 2011, the trial court modified the March 27, 2009, injunctive order and allowed defendant to proceed with the dissolution of BSM. On May 13, 2011, the trial court denied plaintiff's emergency motion to modify the April 18, 2011, order, but stated: "dissolution shall not go forward until [the] ruling of [the] Appellate Court on Plaintiff's Rule 307(a)(1) appeal." In this interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010)), plaintiff appeals from the April 18, 2011, and May 13, 2011, orders. We affirm.

¶ 2 I. The Limited Liability Company Act

¶ 3 This case involves a limited liability company (hereinafter, LLC). An LLC is a hybrid form of doing business that combines the advantages of a corporation's limitation on personal liability with a partnership's pass-through tax treatment (*i.e.*, the LLC pays no entity level state or federal income tax, meaning that income, gains, losses, and deductions pass-through to investors.) See Spudis and Gravelle, *The Illinois Limited Liability Company Act*, 81 Ill. B.J. 352 (1993); Brigham, *Just How Limited is the Illinois Limited Liability Company*, 26 S. Ill. U.L.J. 53 (2001).

¶ 4 LLC's are regulated by the Limited Liability Company Act (hereinafter, the Act). 805 ILCS 180/1-1 *et seq*. (West 2010). The Act provides: an LLC "shall have one or more members" and "is a legal entity distinct from its members." 805 ILCS 180/5-1(b), (c) (West 2010). An LLC may "[e]lect managers and appoint agents ***, define their duties, and fix their compensation." 805 ILCS 180/1-30 (10) (West 2010). Section 15-1 provides for either member-managed companies or

manager-managed companies. 805 ILCS 180/15-1 (West 2010). A member owes a member-managed company and its other members fiduciary duties of loyalty and care. 805 ILCS 180/15-3(a), (b), (c) (West 2010). Similarly, a manager in a manager-managed company also owes fiduciary duties of loyalty and care. 805 ILCS 180/15-3 (g)(2) (West 2010). Section 15-5 provides, the members of an LLC may enter into an operating agreement "to regulate the affairs of the company and the conduct of its business and to govern relations among the members, managers, and company." 805 ILCS 180/15-5(a) (West 2010). The Act governs relations among the members, managers, and company only "[t]o the extent the operating agreement does not otherwise provide." 805 ILCS 180/15-5(a) (West 2010).

¶ 5 II. Procedural Background

¶ 6 Plaintiff and his brother, Richard, started the company that eventually became BSM, an internet retailer of baby products. BSM needed someone with accounting and management training. Richard hired defendant, an accountant, as a consultant. Defendant eventually purchased, substantially, all the assets of BSM. Defendant acquired 70% of BSM's "membership units," Richard acquired 20%, and plaintiff acquired the remaining 10%. Plaintiff, defendant, and Richard signed BSM's operating agreement, which appointed defendant as BSM's manager. In 2004 and 2005, BSM redeemed Richard's membership units. Following the redemption, defendant owned 87.5% of BSM's membership units, and plaintiff owned the remaining 12.5%.

¶ 7 In early 2005, defendant hired Silvia Suby and Alexander Nisman as employees of BSM. Plaintiff contends Ms. Suby is defendant's live-in girlfriend. In October 2005, defendant hired Ms. Suby's son, David, as BSM's vice-president of information technology. Silvia and David Suby

(hereinafter, the Suby's) were given incentive compensation agreements upon joining BSM. Plaintiff contends that between 2005 and 2008, BSM paid defendant and the Subys a total of approximately $4.1 million under these agreements, in addition to their salaries, while plaintiff's salary was reduced from $75,000 to $45,000. Plaintiff contends the payments to defendant and the Subys were excessive and in violation of the operating agreement. Defendant counters, the payments were necessary to attract top management talent for BSM, and with the "right management team in place [he] was able to increase [BSM's] annual sales from $2,142,738 in 2004 to $16,380,296 in 2008."

¶ 8 On February 9, 2009, plaintiff filed his 33-count complaint alleging various wrongdoings by defendant in his management of BSM. On July 1, 2009, plaintiff filed an amended complaint with 36 counts. Defendant moved to dismiss 16 of those counts, but before the trial court could rule on his motion to dismiss, plaintiff sought leave to file a 17-count second-amended complaint adding additional nominal defendants. The trial court granted defendant leave to file a second-amended complaint, but denied him leave to add the additional nominal defendants. On April 7, 2011, the trial court entered an order striking 13 of the 17 counts in the second-amended complaint. As currently pleaded, the lawsuit alleges claims for breach of contract (count III), unjust enrichment (count IV), breach of fiduciary duty (count VII), and violations of the Illinois Wage Payment and Collection Act (count XII). 820 ILCS 115/1 *et seq*. (West 2010).

¶ 9 Meanwhile, following the filing of the initial complaint, defendant sent plaintiff a letter outlining his plan to merge BSM with a newly-formed S corporation that would effectively change BSM from an LLC to an S corporation. Plaintiff moved for a preliminary injunction that would enjoin defendant from "taking any action to merge, dissolve, or dispose" of any of BSM's assets. On

March 27, 2009, the trial court granted plaintiff's motion for a preliminary injunction. The court expressly enjoined defendant from "taking any actions to change the legal form of [BSM] or to merge or dissolve it."

¶ 10 On May 12, 2009, the trial court entered an order stating: the "order for a preliminary injunction is entered and continued by the agreement of the parties" to conduct settlement negotiations. Settlement negotiations did not lead to the resolution of this matter.

¶ 11 Defendant filed a motion for partial summary judgment to terminate the preliminary injunction barring the merger of BSM with the S corporation. On May 18, 2010, the trial court denied defendant's motion, stating: "while dissolution is a permissive means of termination [based on the operating agreement]," the proposed merger was not. The trial court gave the parties 45 days to negotiate a resolution to their dispute, after which, the court would hold hearings to discuss the process of dissolution.

¶ 12 On November 9, 2010, defendant addressed a letter to the circuit court setting forth his preliminary plan for dissolving BSM:

> "The Company will employ standard bidding procedures to qualify bidders for the sale process of its assets and certain liabilities. These bidding procedures will ensure a fair and orderly process relating to bidder qualifications, due diligence, and the auction sale. The Company proposes that all members of the Company will be informed of all bids. Certain material decisions by the Company concerning qualifying bids, winning bids, and other matters in the sale process will be made in consultation with the Union Bank of Elgin ('The Bank'), the Company's secured creditor and to the extent that such decisions involve

> members of the Company or their affiliates, the Seller will take measures to ensure that such dealings are at arm's length and on commercially reasonable terms. Based on its business and the lack of historical interest in its assets, the Company does not expect that there will be any other bidders for its assets other than the Company's two members. [Plaintiff] may solicit such outside bidders at his own expense and time in accord with the bidding procedures, provided that he take all reasonable steps to assure that any such solicitations protect sensitive Company information."

¶ 13 The letter further explained the need to proceed expeditiously with the dissolution, citing, among other considerations, the fact that:

> "[M]embers of the Company's key management team have expressed their dissatisfaction that their hard work and long hours to build the Company have been denigrated by [plaintiff] in his allegations in the present lawsuit and that their agreements with the Company, which they bargained for before leaving long-term stable jobs at other companies, will not be honored." The letter also noted plaintiff had "stated on multiple occasions over the past year that he has ready access to capital sources and is prepared for an immediate sale."

The letter stated defendant would be prepared to discuss BSM's dissolution with the circuit court at the parties' upcoming status hearing.

¶ 14 On November 15, 2010, defendant filed a motion to clarify the status of the March 27, 2009, order enjoining him from taking any actions to change the legal form of BSM or to merge or dissolve it. In the motion, defendant stated that after initially indicating his readiness to participate in the dissolution sale, plaintiff has now taken the position that the dissolution is barred by the March 27,

2009, order. Defendant stated it was his understanding that the March 27, 2009, order has lapsed and been superceded by the court's May 18, 2010, order. Defendant asked the court to enter an order confirming the March 27, 2009, order has lapsed and/or has been vacated such that it does not prohibit BSM's dissolution.

¶ 15 On April 18, 2011, the trial court entered an order stating:

> "1. On March 27, 2009, an Order was entered stating in part that '[defendant] is enjoined from taking any actions to change the legal form of Baby Supermall, LLC or to merge or dissolve it.' The March 27, 2009 Order was entered and continued by a subsequent Court Order dated May 12, 2009 (the 'Two Orders').
>
> 2. On May 18, 2010, an Order was entered denying [defendant's] motion seeking partial summary judgment to terminate the injunction barring a merger of Baby Supermall, LLC (the 'May 2010 Merger Order').
>
> 3. The Two Orders and any Orders extending the Two Orders or restricting [defendant] from dissolving the Company are modified to allow [defendant] to start the dissolution process of the Company in accord with the Company's Operating Agreement and the LLC Act."

¶ 16 On April 20, 2011, in accordance with the trial court's April 18, 2011, order, defendant sent plaintiff a letter outlining the proposed dissolution process for BSM. Under the plan outlined in the letter, Bruce Richman, an employee of the Reznick Group, a national accounting firm, would be hired to prepare an independent valuation of BSM. The valuation report would be completed by June 15, 2011, and provided to both plaintiff and defendant, who would each have five business days

to review the report, including up to four hours each to meet with Mr. Richman at BSM's expense. If either plaintiff or defendant objected to the report, he could commission a second independent valuation at his own expense from an expert with qualifications similar to Mr. Richman's. If a difference existed between the alternate valuations, and plaintiff and defendant could not agree upon a value within five business days, the two valuation experts would agree on a third valuation expert, whose valuation would be used as the definitive valuation for BSM. Both plaintiff and defendant could assemble a group of investors to purchase BSM's assets as part of the dissolution process.

¶ 17 The letter explained that dissolution would "allow [plaintiff] to either immediately realize the value of [his] 12.5% interest or provide an opportunity for [him] to purchase [BSM's] assets outright through the dissolution process." It stated that dissolution would provide "an opportunity for [plaintiff and defendant] and any qualified investors [they] identify to purchase [BSM] via a private sale," noting plaintiff's counsel had "stated on several occasions over the past six months that [plaintiff] or an investor group including [plaintiff] is available and ready to purchase [BSM's] assets." The letter proposed a business meeting during the following week to allow plaintiff to comment on this proposal.

¶ 18 On April 21, 2011, plaintiff filed an emergency motion to modify the April 18, 2011, order, so as to prohibit defendant from proceeding with the dissolution of BSM. On May 13, 2011, the trial court denied plaintiff's emergency motion to modify the April 18, 2011, order, and denied plaintiff's request for Rule 308(a) certification. Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010).

¶ 19 On May 18, 2011, plaintiff filed a notice of interlocutory appeal from the April 18, 2011, and May 13, 2011, orders under Supreme Court Rule 307(a)(1). Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26,

2010). The notice of interlocutory appeal states plaintiff is seeking: (1) reversal of paragraph 3 of the April 18, 2011, order modifying the injunction and allowing defendant to begin dissolution of BSM; (2) entry of an order stating that defendant shall not take any action to change the legal form of BSM or its respective membership during the pendency of the trial court case; and (3) any further and equitable relief as may be just.

¶ 20 III. Analysis

¶ 21 Rule 307(a)(1) provides, a party can appeal an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010). Controverted facts or the merits of the case are not decided on an interlocutory appeal brought pursuant to Rule 307(a)(1). *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989, 993 (2008). The only question in such an appeal is whether there was a sufficient showing to affirm the order of the trial court granting, denying, or modifying the interlocutory relief. *In re Marriage of Ignatius*, 338 Ill. App. 3d 652, 657 (2003). The standard of review in a Rule 307(a)(1) interlocutory appeal is whether the trial court abused its discretion. *Woods*, 381 Ill. App. 3d at 993.

¶ 22 Plaintiff initially raises issues concerning the compensation of BSM employees and defendant's overall management of BSM. However, those issues are not properly before us as they do not relate to the April 18, 2011, and May 13, 2011, orders appealed from, which modified the injunction and allowed defendant to begin dissolution of BSM. See *Disciplined Inv. Advisors, Inc. v. Schweihs*, 272 Ill. App. 3d 681, 691 (1995) ("[O]ur jurisdiction on appeals under Rule 307 is limited to consideration of only the propriety of the order appealed from.")

¶ 23 The only issue properly before us is whether the trial court abused its discretion by modifying

the injunction to allow defendant to begin dissolution of BSM. We begin by considering the operating agreement, which, as discussed above, governs relations among the members, managers and company and which supercedes any contrary provisions in the Act. See 805 ILCS 180/15-5(a) (West 2010).

¶ 24 Section 8.1 of the operating agreement provides: "[BSM] shall be dissolved upon the agreement of Members who hold a majority of the Units, upon the receipt of the final installment from the sale of all of [BSM's] assets, or as required by the Act." Defendant is the majority member of BSM, holding 87.5% of its units; as the majority member, defendant has the right under section 8.1 to dissolve BSM.

¶ 25 Plaintiff counters that pursuant to section 8.1, the dissolution cannot go into effect until "the receipt of the final installment from the sale of all of [BSM's] assets." Plaintiff argues section 15-1(c)(11) of the Act requires unanimous consent of all the members for "the sale, lease, exchange, or other disposal of all, or substantially all, of the company's property." 805 ILCS 180/15-1(c)(11) (West 2010). Since plaintiff does not consent to the sale, he contends the dissolution cannot go forward.

¶ 26 Plaintiff's argument is without merit. Section 8.1 of the operating agreement provides three different ways BSM may be dissolved: (1) upon the agreement of members holding a majority of the units; (2) upon the receipt of the final installment from the sale of all of BSM's assets; or (3) as required by the Act. Defendant is the holder of the majority of the units, and his agreement to dissolve BSM is sufficient to begin the dissolution process, even in the absence of the receipt of the final installment from the sale of all of BSM's assets. Moreover, even if we were to agree with

plaintiff, that dissolution cannot go forward until the receipt of the final installment from the sale of all of BSM's assets, the result would be the same. As discussed, with regard to relations among the members, managers, and company, the operating agreement takes precedence over the Act. Section 6.2.2 of the operating agreement expressly provides: "[e]xcept as otherwise provided in this Agreement, the affirmative vote of Members holding a majority of the Units then held by the Members shall be required to approve any matter coming before the Members." Thus, under section 6.2.2 of the operating agreement, unanimous consent is not required for a "matter coming before the Members" such as, in this case, the sale of all of BSM's assets; rather, only the consent of the members who hold a majority of the units is required. As the majority member, defendant's vote in favor of the sale allows the dissolution to go forward.

¶ 27 Plaintiff next argues sections 7.4 and 10.6 of the operating agreement prevent defendant from dissolving BSM. We disagree. Section 7.4 provides: "[n]o Member shall have the right to terminate or dissolve the Company *except as set forth in this Agreement* or in Sections 35-1(3) and (4) of the Act." (Emphasis added.) Thus, under the plain language of section 7.4, a member may dissolve BSM as "set forth in" the operating agreement. As explained above, defendant's dissolution of BSM is as set forth in section 8.1 of the operating agreement and, thus, is in compliance with section 7.4.

¶ 28 Section 10.6 provides: "[w]ith respect to any Amendments proposed which would amend sections 1.6, 1.21, 6.1.3, 7.5, or 10.6, or directly or indirectly have the effect of altering the economic effects of those sections or any provisions in this Agreement regarding the allocations of Profits, Losses, or Distributions among Members, this Agreement may only be amended with the consent of the Manager and the unanimous consent of all of the Members." Plaintiff argues that as BSM's

dissolution would "directly or indirectly" alter the allocation of profits or losses to BSM's members, it may only be approved by unanimous consent under section 10.6. Plaintiff's argument is without merit. Section 10.6 only applies to amendments to the operating agreement. As discussed, the dissolution here is made pursuant to the already-existing section 8.1 of the operating agreement; there is nothing to amend in the operating agreement, and therefore section 10.6 does not apply.

¶ 29 Next, plaintiff argues defendant's dissolution process will result in his appropriating BSM's business while forcing out plaintiff, which will, in turn, constitute a violation of defendant's fiduciary duties of good faith and fair dealing. Plaintiff's argument is not well taken, as it anticipates a dissolution process that has not yet been approved by the trial court. Although defendant has *proposed* a dissolution process (see defendant's November 9, 2010, and April 20, 2011, letters), the trial court has not yet established the procedures for dissolution and, therefore, the issue of the propriety of the dissolution process is not properly before us.

¶ 30 Plaintiff also cites sections 35-3(a) and 35-4(c) of the Act. Section 35-3(a) states: "a limited liability company continues after dissolution only for the purpose of winding up its business." 805 ILCS 180/35-3(a) (West 2010). Section 35-4(c) states: "[a] person winding up a limited liability company's business may preserve the company's business or property as a going concern for a reasonable time." 805 ILCS 180/35-4 (West 2010). Plaintiff argues defendant will be in violation of sections 35-3(a) and 35-4(c) of the Act post-dissolution, because he has no intention of winding up BSM's business, but, rather, intends to purchase BSM's assets and then carry on BSM's business without plaintiff. This issue is not properly before us as plaintiff is, again, anticipating the result of a dissolution process that has not yet been approved by the trial court. Further, we have no

jurisdiction to consider defendant's post-dissolution conduct because it was not the subject of the orders appealed from, which addressed only whether defendant could begin dissolution, and did not address the parties' post-dissolution conduct. *Schweihs*, 272 Ill. App. 3d at 691.

¶ 31 Next, plaintiff argues the trial court exceeded its jurisdiction in *sua sponte* allowing defendant to proceed with the dissolution of BSM, in the absence of any pleadings requesting such a dissolution. Plaintiff's argument is without merit. As discussed above, defendant sought a partial summary judgment to terminate the preliminary injunction barring the merger of BSM with the S corporation. In denying defendant's motion, the trial court noted in its written order, dissolution, not merger, was a permissive means of termination under the operating agreement. Defendant, subsequently, sought to dissolve BSM, and he filed a motion for clarification that the March 27, 2009, order had lapsed or been vacated, and he could proceed with BSM's dissolution. The trial court granted defendant's motion for clarification and modified the March 27, 2009, injunctive order so as to allow for BSM's dissolution. Thus, the dissolution issue was properly before the trial court, pursuant to defendant's motion, and the court did not exceed its jurisdiction in granting the motion and allowing for the commencement of dissolution proceedings.

¶ 32 Next, plaintiff makes a three-sentence, cursory argument that the dissolution process will violate his demand for a jury trial on his underlying complaint. Plaintiff has waived review by failing to make a cohesive legal argument or an adequate analysis of case law. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1994) (quoting *Thrall Car Mfg. Co. v. Linquist*, 145 Ill. App. 3d 712, 719 (1986)) ("a reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument

presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.").

¶ 33 Next, plaintiff contends defendant should be judicially estopped on appeal from arguing for dissolution, because defendant, initially, argued against a judicial dissolution in the trial court. Plaintiff waived review of his judicial-estoppel argument by raising it, for the first time, in his reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 34 Finally, plaintiff argues the trial court erred when it entered the following order on August 4, 2011:

> "1. Although the Court does not have the power to make substantive changes to its April 18, 2011 injunction Order, pursuant to *City of Chicago v. Scandia Books*, 102 Ill. App. 3d 292 (1st Dist. 1981), this Court still retains jurisdiction to explain and provide specifics of the Order.
>
> 2. To this effect only, the Court clarifies its April 18, 2011 Order to also provide that [defendant] is not barred from bidding at a public sale for [BSM] even though [plaintiff] objects to such."

¶ 35 Plaintiff contends the trial court erred in allowing defendant to bid on the sale of BSM or its assets. However, before addressing the merits, we must consider our own jurisdiction to address plaintiff's argument. See *Washington Mut. Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427, 430 (2008) ("a reviewing court has a duty to consider *sua sponte* whether it has jurisdiction") .

¶ 36 In *Scandia Books*, we held that the trial court retains jurisdiction, post-appeal, to hear "purely collateral or supplemental matters" and to "determine matters arising independent of and unrelated

to that portion of the proceeding that pends on appeal." *Scandia Books*, 102 Ill. App. 3d at 298. The trial court also retains jurisdiction to "amend the record to correct matters of inadvertence or mistake, but it is denied the power to remedy defects of substance which would make it a new case." *Id*. With respect to *appellate jurisdiction*, we held: "the appellate court has jurisdiction to review only those questions which were present on the record as it existed on the date when the notice of appeal was filed." *Id*. at 297. See also *Cygnar v. Martin-Trigona*, 26 Ill. App. 3d 291, 293 (1975) ("The filing of the notice of appeal vested jurisdiction in the appellate court and the appellate court can consider only questions existing when the notice was filed. We have no jurisdiction to consider subsequent proceedings.").

¶ 37 Accordingly, in the present case, we can only consider questions existing when the Rule 307(a)(1) notice of interlocutory appeal was filed on May 18, 2011, and we have no jurisdiction to consider subsequent proceedings. The question of whether defendant can bid at the public sale of BSM's assets was not addressed by the orders appealed from on May 18, 2011; rather, this question was only addressed in the subsequent August 4, 2011, order for which no notice of appeal was filed. We lack jurisdiction to consider plaintiff's argument regarding the propriety of the August 4, 2011, order.

¶ 38 For all the foregoing reasons, on plaintiff's Rule 307(a)(1) appeal from the April 18 and May 13, 2011, orders, we affirm the April 18, 2011, order allowing defendant to begin dissolution of BSM and we affirm the May 13, 2011, order denying plaintiff's motion to modify the April 18 order.

¶ 39 Affirmed.