STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Park Regency, LLC, Landy Properties, LLC and Sowers Properites, individually and in a Derivative capacity on behalf of Crossroads Retail, LLC, Plaintiffs, v. R&D Development of the Carolinas, LLC, Hawkensen Construction, Inc. and Carl's Construction, Inc., Defendants.	)	**ORDER** FILED-RECEIVED 2010 DEC 17 AM 9:05 DAVID HAMILTON C.C.C.P. & G.S. YORK COUNTY, SC Case No. 2009-CP-46-5440

This case came before me on September 27 and 28, 2010, for a non-jury trial. Present and representing the parties were [redacted] for Plaintiffs, and [redacted] for Defendants. Based on the record and evidence presented by the parties, I make the following findings of fact and conclusions of law.

STATEMENT OF CASE

This action arises from a dispute between members of Crossroads Retail, LLC, a South Carolina limited liability company ("Crossroads Retail"). Crossroads Retail owns a parcel of real estate for commercial development ("Crossroads Property"), which was originally owned by these parties as tenants in common. That parcel, and an owner-financed note and second mortgage on a portion of the original parcel sold to a third party, are the assets of the LLC.

Plaintiffs commenced this action seeking a dissociation of R&D Development of the Carolinas, LLC, ("R&D") as a member of Crossroads Retail, and seeking damages against R&D, Hawkensen Construction Company, Inc. ("Hawkensen") and Carl's Construction, Inc. ("Carl's") for breach of contract, and for trespass against Hawkensen and Carl's only. R&D and Hawkensen have asserted counterclaims against Plaintiffs for breach of contract.

By way of background, Hawkensen and Carl's previously filed mechanic's liens against the Crossroads Property, claiming amounts due for site development work. Those mechanic's liens were dismissed by prior order of the court, and attorneys' fees in connection with obtaining that dismissal were assessed against Hawkensen and Carl's, and paid.

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FINDINGS OF FACT

The following are the findings of fact of the court, which are made based on all the evidence, and after consideration of any applicable burden of proof. I have also considered the credibility of the witnesses in reaching these findings.

Crossroads Retail was formed in 2008, and owns a partially developed tract of land in Fort Mill, South Carolina. Plaintiffs, Park Regency, LLC ("Park Regency"), Sowers Properties, LLC ("Sowers") and Landy Properties, LLC ("Landy"), as well as R&D, are the members of Crossroads Retail. Before forming Crossroads Retail, Park Regency, Sowers, Landy and R&D owned the Crossroads Property as tenants in common.

The parties' business relationship began in 2006. In May, 2006, Hawkensen entered into a contract to purchase the Crossroads Property from a third party for approximately $2.9 million. Subsequently, Hawkensen could not qualify for sufficient financing to complete the purchase. Mutual acquaintances introduced the parties to this action, and a series of discussions led to the formation of an ownership group, and plans to purchase and develop the Crossroads Property.

The parties executed a written contract in September, 2006, whereby they agreed that Park Regency and Landy would provide cash of approximately $950,000 in the form of no interest loans, with the remainder of the purchase price to be obtained through commercial financing. Park Regency's and Landy's contributions gave those entities 37.5% and 10 % interests in the project, respectively. Sowers agreed to provide professional services to the group, in exchange for a 5% interest in the project. In exchange for a 47.5% interest, Hawkensen agreed as follows: to provide grading and site development work on the project "at cost"; to place $80,000 in escrow with the group's commercial lender; and, to pay all "interest and other carrying charges" on the parties' loan.

So that Park Regency's cash contribution would qualify the transaction as an exchange of like-kind property under Internal Revenue Code § 1031, the parties agreed that Park Regency initially would hold title to the entire tract. Park Regency acquired title to the Crossroads Property on October 6, 2006.

In accordance with their contract, Hawkensen prepared a budget for the cost of its site work totaling $596,700. In June, 2007, Hawkensen began site work, and by November, 2007, had completed the majority of the work. Hawkensen submitted payment applications in September, 2007, December, 2007, and May, 2008, totaling $581,199.02. The group paid Hawkensen directly $424,481.32 against those applications. It also made interest payments on

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behalf of Hawkensen totaling another $76,717.70, and deposited $80,000 with the group's lender to satisfy Hawkensen's contractual obligation to escrow that amount. Thus, Hawkensen has received full payment or credit on its payment applications.

By November, 2007, Hawkensen formed R&D to receive Hawkensen's 47.5% ownership interest in the Crossroads Property. On November 9, 2007, Park Regency, Landy, Sowers and R&D (the "Tenants in Common") executed a written Agreement Among Tenants in Common (the "TIC Agreement"). On that same day, the Tenants in Common and Hawkensen executed a Horizontal Development Agreement (the "Development Agreement"), designating Hawkensen as "horizontal developer" for the project. Pursuant to the Development Agreement, Hawkensen agreed to ". . . provide oversight and management of the land clearing and site development of the Project at no cost to the Co-Tenants, but shall be reimbursed for its out-of –pocket expenses incurred from an outside source." Pursuant to the TIC Agreement, R&D agreed to ". . . pay without contribution from the other Co-Tenants and without affecting the proportionate ownership interest of the Co-Tenants all interest and other carrying charges on the Loan."

By deed dated November 16, 2007, and recorded November 20, 2007, Park Regency conveyed the Crossroads Property to the Tenants in Common, and each received an ownership interest in the Crossroads Property corresponding to their respective prior determined interests in the venture.

In an email to the Tenants in Common dated November 30, 2007, Hawkensen requested, for the first time, $216,540 for reimbursement of "Carl's equipment costs." After discussion, the Tenants in Common determined that the "equipment costs" were not reimbursable "expenses incurred from an outside source." Hawkensen seeks payment of those charges in this action. None of the written requests for reimbursement of expenses that Hawkensen submitted to Plaintiffs prior to November 30, 2007, included amounts for equipment charges. After Hawkensen's request for reimbursement of equipment charges was challenged, Hawkensen claimed that it had "rented" equipment from Carl's, and had incurred $216,540 in rental charges. This is not supported by Hawkensen's own accounting records. Thus, I find that the charges, which were essentially based on charges for employment of Hawkensen's own equipment, were not reimbursable under the agreement.

In May, 2008, the Tenants in Common sold a portion of the Crossroads Property to an unrelated entity. At that time, the Tenants in Common also formed Crossroads Retail with each Co-Tenant obtaining an ownership interest in the LLC equal to its ownership interest in the

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Crossroads Property as a tenant-in-common. On May 8, 2008, the Co-Tenants executed a deed conveying the remainder of the Crossroads Property to Crossroads Retail. While the parties did not create a new operating agreement for Crossroads Retail after its formation, I find that they all adopted the TIC Agreement as the *de facto* operating agreement for the LLC. Thus, all of the terms and conditions of the TIC Agreement define the rights and responsibilities of the parties to the LLC, and apply to the parties dealings that are the subject of this action.

For the purposes of dealing with the issues presented, particularly the determination of the "fair value" of R&D's interest, ¶ 11c. of the TIC Agreement provides a framework for a formula agreed to by the parties in the event of a default by a member/Co-Tenant. The agreed formula deals with payment to a defaulting member/Co-tenant for its interest in the LLC. The parties elected to base such a determination on the fair market value of the Crossroads Property, the "outstanding Obligations" of the LLC, and a percentage discount of the defaulting member's interest in the venture. It makes no reference to recognized accounting principles or practices, such as a value determination based on a balance sheet prepared in accordance with generally accepted accounting principles. I find that the parties' own agreed formula is the proper way under the circumstances to arrive at the "fair value" of R&D's interest.

After the formation of Crossroads Retail, R&D continued to make monthly interest payments on the LLC's commercial loan until July, 2009. In July, 2009, R&D ceased making interest payments on the loan, and informed the other members of the LLC that R&D would not make any future payments. From that point forward, the other members of the LLC made interest payments totaling $146,200 in order to keep the loan current.

At trial, the parties stipulated that they would commission a joint appraisal of the Crossroads Property, which appraisal would be submitted at a later date to assist the court in determining fair value of R&D's proportionate interest in Crossroads Retail. The appraisal is a collaborative effort of three duly licensed appraisers of the firm of Fred H. Beck & Associates, LLC, and submitted to the court on November 16, 2010. The appraisal is made a part of the record in this case.

The appraisal contains two value opinions, a "fair market value" opinion of $3,140,000, and a "120 liquidation value" opinion of $725,000. I have reviewed the appraisal report in detail and considered the raw data and the analysis thereof by the appraisers, including their commentary on market conditions. I have also taken into consideration their assumption concerning a reasonable time to market the property at fair market value.

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Based on the appraisal and my consideration of it, I find that the proper valuation to use is that of fair market value. To assume the necessity of a 120 day liquidation is not reasonable at this time. Thus, I find that the fair market value of the Crossroads Property is $3,140,000 as of October 29, 2010.

Crossroads Retail also holds a note and second mortgage on the parcel of property sold to Crossroads Commons, LLC. Payment on the first mortgage loan on that parcel is in default, and the second note and mortgage has no current value. Thus, that "asset" is not used in the calculation of the value of R&D's distributional interest.

In determining how payment of R&D's distributional interest in the LLC is to be made, I find that the ability of the LLC to pay is contingent upon a disposition or development of the Crossroads Property in a fair market transaction. It is clear that the parties contemplated that any monies to be received by the members would be dependent on the successful sale or development of the property.

Presently, the LLC's bank loan has matured and is in default. There are no serious prospects for sale of the property. Also, there is currently little or no market for undeveloped commercial land, and prospects for sale of the property are "speculative" at this time. In this case, the status of the LLC's loan and the poor prospects for sale of the Crossroads Property must be factored into any plan for payment to R&D for its distributional interest in the LLC. I find that payment to R&D should be structured to coincide with any *bona fide* sale or other *bona fide* transfer of the Crossroads Property.

As asserted by Plaintiffs, I have considered the conduct of R&D in light of the demise of the relationship between the parties. The conduct of Hawkensen and Carl's raises issues of the good faith of both in connection with Hawkensen's role as horizontal developer in seeking to collect payment for work in contravention of the Development Agreement, and the filing of mechanic's liens. However, under the framework of the parties' agreements, R&D is not legally responsible for that conduct. In any event, Plaintiffs have been compensated for the legal expenses incurred in connection with gaining the dismissal of the mechanic's liens. In summary, I find that the conduct of R&D, while creating problems for the LLC, was not vexatious or arbitrary to the extent of causing unnecessary payment or loss by Plaintiffs beyond that due to the financial inability of a member to perform under the parties' agreements.

Concerning Plaintiffs' claim for trespass against Hawkensen and Carl's, I find that the offending equipment remained upon the Crossroads Property after a demand that it be removed,

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and thus, constituted a trespass. However, there was no actual damage incurred or done.

I also find that advances made to Chad Whitmire were to him personally, and not R&D. It follows that R&D is not liable for those advances.

CONCLUSIONS OF LAW

A. Plaintiffs' Claims

1. Dissociation of R&D.

A court may order expulsion of a member of an LLC where the member has:

> (i) engaged in wrongful conduct that adversely and materially affected the company's business; (ii) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members; or (iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member. S.C. Code Ann. § 33-44-601(6)(1976 as amended).

The evidence presented at trial establishes that R&D willfully or persistently committed a material breach of its duty owed to Crossroads Retail, and to the other members, and supports the judicial expulsion and dissociation of R&D.

As stated in the findings above, the TIC Agreement is the *de facto* operating agreement of Crossroads Retail. The TIC Agreement states that R&D

> . . . shall pay without contribution from the other Co-Tenants and without affecting the proportionate ownership interest of the Co-Tenants all interest and other carrying charges on the Loan (or any replacement thereof) until leases on the Property generate cash flow sufficient to cover all Obligations, including interest on the Loan.

R&D's refusal to make interest payments on Crossroads Retail's loan since July, 2009, is a willful and persistent material breach of the operating agreement, and is grounds for dissociation.

2. Determination of Fair Value.

Since R&D will be dissociated from the LLC, the "fair value" of R&D's distributional interest must be determined. S.C. Code Ann. §§ 33-44-701 and 702 direct the court to determine such value, and give the court guidelines for such determination. The court is directed to

> determine the fair value of the [dissociated member's] interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of a distributional interest for any other purpose, the recommendation of an appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest. S.C. Code Ann. § 33-44-702(a)(1).

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The comment to § 702 indicates that the court has wide latitude in making the determination. "[A] court is free to determine the fair value of a distributional interest on a fair market, liquidation, or any other method deemed appropriate under the circumstances." S.C. Code Ann. § 33-44-702, comment.

I have considered all options set out in the statutory directive, the entire circumstances of the parties' relationship, the nature of the underlying real estate transaction involved, and the terms of the TIC Agreement at ¶ 11c.(ii)(C), regarding payment for a party's interest in the LLC. After such consideration, I conclude that the parties' agreed formula is the appropriate method, and is to be applied as follows:

Fair market value of property: $3,140,000 x .475 =		$1,491,500
Less: Outstanding obligations:		
Mortgage balance now due:	$1,900,000	
Property Maintenance	28,528	
Property taxes:	56,000	
Total	$1,984,528 x .475 =	942,650
Undiscounted Value		$ 548,850
		x 0.75
Discounted Value		$ 411,638
Less: Additional sums due by R&D:		
Interest on loan paid by others:	$146,200	
Total		$ 146,200
Purchase Price		$ 265,438

Applying the TIC Agreement's formula, I conclude that R&D's proportionate ownership interest has a value of $265,438.

I further conclude that an award of additional reimbursement to Plaintiffs for R&D's breach of the TIC Agreement based on vexatious or arbitrary actions is not warranted under the circumstances. Also, I conclude that Plaintiffs are not entitled to reduce R&D's distributional interest by any amount advanced to Chad Whitmire. Those advances are the personal obligation of Whitmire, not R&D.

3. **Payment to R&D.**

§ 33-44-702(a)(2) requires that the court

> . . . specify the terms of the purchase including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the company's other creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on a dissociated member; . . .

As indicated in the findings of fact, it is appropriate to structure payment to R&D to coincide with a *bona fide* transaction for the sale or other transfer of the Crossroads Property.

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All of the parties involved anticipated that they would receive any profit derived from the venture upon the sale of the property. They have, in fact, sold a portion of the original tract purchased. Thus, I conclude that R&D should be paid in full its interest determined herein upon the closing of a *bona fide* sale or other *bona fide* transfer of the property by the LLC. In the event the property is transferred for less than the fair market valuation upon which the calculation of R&D's distributional interest is calculated, then R&D's interest in any proceeds shall be proportionally reduced. This will be based on a calculation of the percentage that the actual transfer price bears to the fair market value used in calculating the amount due R&D in this action. If a transfer of the property yields more than the value established in this action, R&D will only be entitled to receive the distributional interest determined by this order.

I further conclude that R&D's interest should be secured by a mortgage on the Crossroads Property. Such mortgage shall be second in priority only to the current mortgage loan and refinancing or replacement thereof. In the event of any refinancing of the current mortgage loan, R&D's mortgage lien shall be subordinated to any such refinancing.

This special provision for payment shall not be construed to prohibit payment by the LLC to R&D at an earlier time if it chooses to do so.

I have also considered the provisions of the TIC Agreement regarding payment to a transferring member by the LLC. In accordance with the broad power granted by § 33-44-702, I conclude that application of such provisions to payment to R&D would be inequitable under the circumstances of this case. It could unduly burden the LLC, and could result in a windfall for R&D in the event the LLC failed prior to the sale of Crossroads Property, a risk assumed by all parties involved in the venture.

4. <u>Claim for Trespass</u>.

Trespass is ". . . any intentional invasion of the plaintiff's interest in the exclusive possession of his property." *West v. Newberry Electric Co-op.*, 357 S.C. 537, 544, 593 S.E.2d 500, 503 (Ct. App. 2004). "The mere entry [by the tortfeasor or his agent] entitles the party in possession to at least nominal damages." *Cedar Cove Homeowners Association, Inc. v. DiPietro*, 2006 S.C. (4092), 368 S.C. 254, 628 S.E. 2d 284 (Ct. App. 2006).

As I found no actual damages, and considering the circumstances of Hawkensen's and Carl's trespass, I conclude that only nominal damages are indicated in this case. Thus, I conclude that Plaintiffs shall have actual damages of $1.00, and no recovery of punitive damages for the trespass.

5. **Statutory fine for frivolous liens.**

S.C. Code Ann. § 29-5-15 (1976, as amended) provides: "A contractor who files a frivolous lien is subject to a fine of up to five thousand dollars, the loss of his registration or contractor license, or both." Plaintiffs contend that they are entitled to recover a statutory fine from Hawkensen and Carl's based upon the mechanics' liens of both companies filed in December, 2009.

While there are no cases interpreting § 29-5-15, I conclude that the fact that the statute authorizes a "fine" suggests that the statute does not create a private cause of action. Instead, the statute contemplates the imposition of fines to be paid to the state. Plaintiffs are not entitled to recover a fine under § 29-5-15.

5. **Attorneys' fees and costs.**

In an action to expel a member on an LLC, the court may award attorney's fees and reasonable expenses where a party to the proceeding has acted "arbitrarily, vexatiously, or not in good faith." S.C. Code Ann. § 33-44-702(2)(d). I conclude that such an award is authorized only where a member-party to the dissociation action has acted ". . . arbitrarily, vexatiously, or not in good faith."

Evidence was presented from which it may be concluded that Hawkensen and Carl's Construction acted in bad faith by filing groundless mechanic's liens, and by attempting to create the appearance that equipment charges claimed by Hawkensen were reimbursable under the Development Agreement. However, neither Hawkensen, nor Carl's Construction are members of Crossroads Retail. Under the facts presented, I do not believe that the actions of Hawkensen or Carl's may be imputed to R&D to support an award of attorney's fees under S.C. Code § 33-44-702(2)(d). Consequently, I conclude such an award must be denied.

7. **Hawkensen's counterclaim for breach of contract.**

Hawkensen contends that Plaintiffs owe it $216,540 for its "equipment charges" on the project. Based upon the evidence presented at trial and the preceding discussion in this order, I conclude that Hawkensen is not entitled to any recovery on its counterclaim.

From the commencement of the Crossroads project in 2006, Hawkensen contractually agreed to perform its work "at cost." While the parties offered conflicting testimony as to whether equipment charges were to be included as reimbursable costs, the most credible evidence was that Hawkensen's equipment charges were not "costs" to be reimbursed by the group. It was not until after Hawkensen's request for reimbursement of equipment charges was

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challenged by Plaintiffs that Hawkensen claimed that it had "rented" equipment from Carl's and incurred rental charges. Hawkensen's own accounting records belie that assertion.

8. R&D's counterclaim for breach of contract.

Defendants did not present any evidence that Plaintiffs breached any contractual duty owed to R&D. Therefore, R&D's breach of contract counterclaim fails as a matter of law.

ORDER

Based on the findings and conclusions herein, it is ordered as follows:

1. R&D of the Carolinas, LLC is hereby dissociated as a member of Crossroads Retail, LLC, effective as of the date of this order. Within ten days following receipt of this order, R&D shall deliver a duly executed assignment of its interest in Crossroads Retail, LLC, to Plaintiffs' Counsel.

2. R&D shall be paid the sum of $265,438.00 for its distributional interest in Crossroads Retail, LLC. Such amount shall be paid as set forth in the conclusions of law.

3. Crossroads Retail is granted judgment against Hawkensen and Carl's Construction in the amount of $1.00 actual damages.

4. The parties' remaining claims and counterclaims are dismissed with prejudice.

AND IT IS SO ORDERED.

December 8, 2010

S. Jackson Kimball
Special Circuit Judge
York County

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