# STATE OF MICHIGAN

# COURT OF APPEALS

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| 72-52 INVESTMENT GROUP, LLC, a Michigan limited liability company, | UNPUBLISHED October 29, 2009 |
| Plaintiff-Appellant, | |
| v | No. 287315 Oakland Circuit Court |
| MICHAEL LODISH, an individual, | LC No. 07-087713-CK |
| Defendant-Appellee. | |

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In this breach of contract claim, plaintiff 72-52 Investment Group, LLC (72-52) alleged that defendant Michael Lodish breached 72-52's operating agreement for failure to pay certain requested capital contributions. 72-52 moved for summary disposition. The trial court denied 72-52's motion and, pursuant to MCR 2.116(I)(2), granted summary disposition in favor of Lodish. We affirm.

## I. Summary of Facts and Proceedings

72-52 was formed on October 19, 1999 with two members, John Plowman and Capital Construction Co, LLC, each with a 50 percent interest. On May 30, 2001, under the First Amendment to 72-52's Operating Agreement, Capitol Equities, LLC replaced Capital Construction as a 50 percent member. On June 4, 2001, Lodish became a 30 percent member of 72-52 and invested $100,000. Plowman simultaneously withdrew as a member and Capitol Equities' membership interest increased from 50 percent to 70 percent. The Operating Agreement was further amended to require 75 percent of the members' interests to make decisions, since the existing percentage would have always been met by Capitol Equities' 70 percent interest. On February 19, 2004, the Operating Agreement was again amended, this time changing 72-52's manager from James Cherocci to Cherocci Companies, LLC. 72-52's sole asset was and remains approximately 22 acres of vacant land located in the City of Perry, Shiawassee County, Michigan (the Property), which was purchased for $455,000.

The instant dispute has its origins in the sale of approximately one acre of the Property in 2005 for the development of a Dollar General store. As a condition of the sale, 72-52 had to install sanitary sewer and water lines to the Dollar General site. To obtain permission to install the utility lines, 72-52 entered into a Municipal Utility Agreement with the City of Perry on

December 27, 2005 (the Utility Agreement). Cherocci executed the Utility Agreement for 72-52 as "Managing Member." Under the Utility Agreement, 72-52 had to install sanitary/sewer lines to both the Dollar General site and the remaining vacant acreage by December 2007. The utility lines were installed to the Dollar General site, but not to the vacant acreage before the deadline imposed by the Utility Agreement.

Counsel for the City of Perry indicated that it would "insist on completion of the facilities immediately" but was "willing to extend the completion date upon being provided a bond or irrevocable letter of credit in the amount of $120,000.00, to ensure the proper completion and compliance with the Agreement." In response, on December 17, 2007, Cherocci sent a letter to Lodish requesting a special meeting to permit the City of Perry to have a mortgage interest in 17.5 acres of the land and requesting $36,000 as Lodish's 30 percent share of the $120,000. The letter indicates that the request for payment is for "equity [] required for expenses at 72-52 Investment Group, LLC." Lodish declined to make the requested payment.

Cherocci had also sent correspondence to Lodish two months earlier, in October 2007, indicating a need for a "cash equity" payment of $7,297.42 as Lodish's 30 percent of $24,324.72—$8,534.03 of which was for 2007 property taxes, and $15,790.69 of which was a "72-52 payable due to Capitol Bldg Co." Lodish also declined to make this requested payment.[1]

72-52 filed suit against Lodish alleging a breach of contract and promissory estoppel, based on Lodish's failure to provide the requested "cash equity" payments.[2] 72-52 later amended to include a count for violation of the Michigan limited liability company act, MCL 450.4101 *et seq.* (LLCA). In July 2008, 72-52 moved for summary disposition, which Lodish opposed. The trial court dispensed with oral argument and issued its opinion on August 13, 2008.

The trial court found no support for the breach of contract claim because, although the Operating Agreement provided specific procedures for loans, it was silent as to procedures for "capital calls" and did not impose a duty on Lodish to pay the capital contributions at issue. The trial court concluded there was no support for 72-52's claim that Lodish violated the LLCA because a promise to contribute must be in writing and there was no requirement under the Operating Agreement to make the requested payments. As for the promissory estoppel claim, the trial court concluded that the integration clause of the Operating Agreement prevented such a claim. Finally, the trial court found that the Utility Agreement, the contract with Capitol Building, and the instant lawsuit were unenforceable against Lodish because the actions were taken by 72-52's manager without authority based on a failure to request and receive consent of

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[1] Lodish did subsequently indicate his willingness, but denied any obligation, to pay a portion of the 2007 property taxes.

[2] Interestingly, the lawsuit was filed on December 3, 2007, prior to 12/17/07 request for the $36,000. We presume that the initial suit was based on the failure to pay the $7,297.42 requested in October 2007 and that the $36,000 was subsequently added to the total amount claimed after Lodish declined to pay that amount as well.

75 percent of the membership sharing ratio. Having found no basis for any of 72-52's claims, the trial court granted summary disposition in Lodish's favor. 72-52 now appeals.

## II. Analysis

We review de novo a trial court's decision on summary disposition. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. We consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Hess v Cannon Twp*, 265 Mich App 582, 589; 696 NW2d 742 (2005). We also review de novo the construction and interpretation of a contract. *Bandit Industries, Inc v Hobbs Int'l, Inc* (*After Remand*), 463 Mich 504, 511; 620 NW2d 531 (2001).

The goal of contract construction is to determine and enforce the parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction." *Id.* quoting *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887 (1997).

We look first at 72-52's claim that Lodish breached the Operating Agreement by failing to provide the "cash equity" payments, which 72-52 claims were required capital contributions for payment of ongoing operating expenses. The trial court concluded that although the Operating Agreement provided specific procedures for loans, it was silent as to procedures for "capital calls" and did not impose a duty on Lodish to pay the capital contributions at issue. We agree.

72-52 initially argues that the trial court inappropriately focused on the fact that section 3.2 is titled "Loans to the Company" because section 10.2 provides that article headings "in no way . . . define, limit or describe the scope or intent of any provision of this Operating Agreement." However, in responding to Lodish's claims on appeal, 72-52 abandons this argument and claims that Lodish's argument that article 3.2 only applies to loans to the company ignores that Article III, which contains section 3.2, is titled "Capital Contributions and Member Share Ratios." 72-52 cannot have it both ways; either the titles carry meaning or they do not. We hold, consistent with article 10.2, that the titles are of no consequence and that we must rely on the language contained in the articles themselves.

72-52 next contends that "loan" and "Capital Contribution" are used interchangeably in the Operating Agreement. We disagree. The Operating Agreement is clear that "[n]o interest shall accrue on any Capital Contribution" but that "[a]ll loans made to the Company shall bear interest" and proceeds to provide the rate of interest. Because the Operating Agreement provides for different handling of interest with respect to loans and capital contributions, the terms cannot be synonymous or interchangeable. Accordingly, the loan provisions in section 3.2 cannot provide the basis for 72-52's breach of contract claim for Lodish's failure to pay capital contributions.

Additionally, Lodish's status as a member does not require that he make capital contributions. MCL 450.4501(2) provides that "[a] limited liability company may admit a person as a member who does not make a contribution or incur an obligation to make a

contribution to the limited liability company." Although Lodish made an initial capital contribution to 72-52 to obtain an ownership interest in the company, the Operating Agreement makes no provision for either additional capital contributions or the payment of operating expenses. 72-52 has provided no evidence that Lodish had any legal obligation under the Operating Agreement to make the requested payments.[3] The fact that Lodish voluntarily paid such expenses for the six previous years did not suddenly render him obligated to pay subsequent payments. See *Sprik v Regents of the Univ of Mich*, 43 Mich App 178, 191; 204 NW2d 62 (1972) (Holding that the university's voluntary payment did not create a legally enforceable obligation). Absent any indication that Lodish was legally obligated to make those payments, there is no breach of contract. Accordingly, the trial court properly granted summary disposition to Lodish on 72-52's breach of contract claim.

72-52 also argues that the trial court erroneously concluded that Cherocci, as representative of 72-52's manager, did not have the authority to enter into the Utility Agreement or enter into the construction contract with Capitol Building. 72-52 relies on section 7.2 of the Operating Agreement, which provides:

> Except as may otherwise be provided in this Operating Agreement, the ordinary and usual decisions concerning the business affairs of the Company shall be made by the Manager. The Manager, *with the consent of the Members*, has the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company, including the power to:
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> e. enter into any and all agreements and execute any and all contracts, documents and instruments;
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> k. cause the land to be improved through the construction and installation of roadways, utilities, and other improvements and performing or causing to be performed site work and other activities on or with respect to the development of the Land, and enter into and perform any and all agreements, execute any and all instruments and documents, and take any and all actions with respect thereto;
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> o. contract with any person, including any Member or any affiliate of any Member, to supply any goods and/or services for the Company in connection with

[3] We are not holding that 72-52 cannot make a loan request pursuant to section 3.2. Rather, we are holding that because the requests were for capital contributions, which are not provided for under the Operating Agreement, there was no breach of contract for Lodish's failure to pay pursuant to those requests.

> the Company business including, but not limited to, management and leasing services, and pay all costs, fees, commissions or other compensation thereof, or any basis determined to be appropriate by the Managing Member; [and]
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> p. perform any and all other acts the Managing Member deems necessary for or appropriate to the Company business[.] [Emphasis added.]

The disagreement here appears to be the meaning of the language "with the consent of the Members." Lodish argues this language implies the members must vote, while 72-52 argues it means that the consent has already been granted. Based on our review of the Operating Agreement, we agree with Lodish that the language implies that a vote must occur. Nothing in the language of the sentence suggests that the required consent has already occurred. Indeed, there would be no reason to include the language "with the consent of the Members" under 72-52's interpretation, because in either case, 72-52 reads the sentence to give the manager the authority to authorize the itemized decisions. Thus, 72-52's interpretation renders the language nugatory, in violation of our rules of contract construction. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) ("[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."). By giving meaning to each of the phrases, we conclude that the section provides that the manager is given the authority to make all "ordinary and usual decisions." That grant is then limited, such that the manager may make any of the decisions thereafter itemized, only when the members have given consent.

72-52 argues that section 7.3, titled "Limitations," which explicitly requires a vote for certain actions such as "the sale of all or substantially all of the assets and property of the Company" would be rendered nugatory under this interpretation. We disagree. As previously noted, the fact that section 7.3 is titled "Limitations" has no bearing. Our interpretation that the actions listed under section 7.2 require a vote in no way invalidates the requirement in section 7.3 that those actions also cannot be taken without a vote. We find the Operating Agreement inartfully written. However, we will not strike the language in section 7.2 that protects a minority member simply because additional provisions of the Operating Agreement also provide protections to minority members.

Because we find that the actions listed under section 7.2 require a vote, we agree with the trial court that 72-52 has failed to show that it had the authority to enter into the Utility Agreement, as one of the itemized decisions which required a vote was "cause the land to be improved through the construction and installation or [sic] roadways, utilities, and other improvements . . . ."[4]

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[4] We also note that it is unclear in what capacity Cherocci executed the Utility Agreement because the signature block reads "James D. Cherocci, Managing Member," while other signature blocks for documents he executed read "James Cherocci, Managing Member Cherocci Companies, LLC and as Manager of 72-52 Investment Group, LLC." Thus, it appears that Cherocci may have signed the Utility Agreement as an individual, even though at the time it was
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Similarly, subsection (o) requires a vote before contracting with any member or an affiliate of a member, such that a vote was required before 72-52 could contract with Capitol Building. Additionally, at the time the contract was made between 72-52 and Capitol Building, Cherocci was the sole owner of Capitol Building and Cherocci Companies was the manager for 72-52. Thus, Cherocci was on both sides of the contract. The Operating Agreement provides that "the Members *shall* have the right to vote on all of the following: . . . (c) a transaction involving an actual or potential conflict of interest between a manager and the Company (emphasis added)." Cherocci's position as the representative of the manager for 72-52 as well as the sole owner of the company with whom 72-52 was contracting constituted, at the very least, a potential conflict of interest, such that the contract required a vote that never occurred. Accordingly, a vote on this issue was required under no fewer than two sections of the Operating Agreement.

72-52 argues that the vote was unnecessary because the Operating Agreement specifically provided:

> The Members or any affiliate of the Members, namely Schmitz as Managing Member of Capital Construction Co L.L.C., shall construct or cause to be constructed any real estate projects on the land. In such event, [] Capital or any such affiliate shall be entitled to receive profit as a result of such construction activities . . . .

72-52 argues that because Capital Construction assigned its interest to Capitol Equities, Capitol Equities received the authority granted to Capital Construction and that Capitol Building, as an affiliate of Capitol Equities, was permitted to perform any work. However, 72-52 has completely ignored section 7.9, which states that "if Schmitz is not active in any affiliate acting as Construction Manager or Leasing Agent, the Members *other than Capital* shall determine if the Members shall be retained . . . . (emphasis added)." When Capitol Equities received its interest from Capital Construction, Schmitz was no longer active in any affiliate, thereby triggering section 7.9. And, because only members other than Capital Construction would determine whether members should be retained to do work, and Capitol Equities replaced Capital Construction, only members other than Capitol Equities, namely Lodish, were permitted to determine whether members or affiliates could be retained. Here, Lodish made no such decision. Accordingly, the trial court properly concluded that the decision to hire Capitol Building was made without authority.

Next we consider 72-52's claim that the trial court erred in concluding that 72-52 failed to show promissory estoppel. The trial court concluded that the promissory estoppel claim failed because of the integration clause contained in the Operating Agreement.

"The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of

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signed, Cherocci Companies, not Cherocci himself, was the manager. However, because we have concluded that the manager did not have the authority to enter into the Utility Agreement, the resolution of this question does not change the outcome.

the promise, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if justice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). The promise must be definite and clear to support a claim of estoppel. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993).

Here, 72-52 failed to present evidence of a clear and definite promise by Lodish. The Second Amendment to the Operating Agreement, which made Lodish a member, indicates only that Lodish would pay $100,000 for his 30 percent interest and would become a member of the company. There is no evidence that Lodish made any promises other than those contained in the Second Amendment. Further, the amendment explicitly states that "except as modified by this Agreement, the Operation Agreement shall continue in full force and affect [sic] as previously adopted." Section 10.4 of the Operating Agreement provides that "[t]his Operating Agreement supersedes any and all other agreements, either oral or written, between said parties with respect to the subject matter hereof." This cause renders 72-52's claim meritless, as "[r]eliance on pre-contractual representations is unreasonable as a matter of law when the contract contains an integration clause." *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859; 714 NW2d 287 (2006).

72-52 alleges that the integration clause does not apply because the Operating Agreement was executed prior to the amendment that made Lodish a member. This argument is true for any promise contained in the amendment that made Lodish a member. However, because that amendment explicitly reasserted the enforceability of the unmodified sections of the Operating Agreement, the integration clause became applicable to any alleged prior agreements with or promises by Lodish that were not memorialized within the amendment that made him a member. Accordingly, we conclude that the trial court properly granted summary disposition to Lodish on 72-52's promissory estoppel claim.

72-52 also contends that the trial court erred in concluding that there was no violation of MCL 450.4302. MCL 450.4302 provides, in relevant part:

> (1) A promise by a member to contribute to a limited liability company is not enforceable unless the promise is in writing and signed by the member.
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> (2) Unless otherwise provided in an operating agreement, a member is obligated to the limited liability company to perform any enforceable promise to contribute cash or property or to perform services . . . .

72-52 alleges that because the Second Amendment to the Operating Agreement acknowledges an existing mortgage note and "ongoing expenses relating to the ownership of the property," the Second Amendment is a written and signed promise by Lodish to make additional capital contributions. We disagree. The fact that the Second Amendment gives notice of these expenses is neither the functional nor legal equivalent of a promise to make contributions toward the payment of those expenses. There is nothing in the language of either the Operating Agreement or the amendment thereto that could be interpreted to be a promise by Lodish to make additional capital contributions or pay operating expenses. Given the lack of any written and signed promise, the trial court properly concluded that there was no violation of MCL 450.4302.

72-52's final claim of error is that the trial court erred in concluding that it did not have the authority to initiate legal action against Lodish. 72-52 relies on MCL 450.4210 and the Operating Agreement. MCL 450.4210 grants limited liability companies "all powers necessary or convenient to effect for any purpose which the company is formed" including the power to sue and be sued. This power, however, is the general power to sue and be sued "in the same manner as natural persons." MCL 450.1261(b). MCL 450.4210 does not grant 72-52 any more power to sue than that provided for in the Operating Agreement such that any provisions in the Operating Agreement that place limits on 72-52's ability to take legal action are binding. As noted above, section 7.2 provides a list of activities that require a vote of the members. Two such activities are, subsection (h): to "commence, prosecute or defend any proceeding in the Company's name" and subsection (m): to "sue on, defend, or compromise any and all claims or liabilities in favor of or against the Company, submit any and all such claims or liabilities to arbitration, and confess a judgment against the Company; . . . ." Thus, the ability to sue is one of the decisions that required a vote and, because no vote occurred, 72-52 did not have the authority to file suit.

Affirmed. Lodish is entitled to costs as the prevailing party. MCR 7.219.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro