

DOCKET NO: FST CV 19-6041464

SUPERIOR COURT
JUDICIAL DISTRICT

J & G REALTY, LLC, ET AL

V.

BRIDJAY CAPONE

2024 MAY -1 A 11: 04

: J. D. of STAMFORD/NORWALK

: AT STAMFORD

: MAY 1, 2024

MEMORANDUM OF DECISION

The evidence before this court at trial discloses three separate economic crises that affected the four children of George and Maria Bongiorno.

The first occurred upon the death of their uncle, John Bongiorno, brother of George Bongiorno and co-owner of Bongiorno's Supermarket and related real property located in Stamford Connecticut. Financial obligations arose that required the settlement of John Bongiorno's estate. The family of George Bongiorno with the assistance of a bank and the guarantees of certain Bongiorno family members, resolved this economic crisis.

The second occurred when two large regional supermarkets opened in the immediate neighborhood. George and John Bongiorno started the family business as a small neighborhood market. It expanded to become Bongiorno's Supermarket that served the entire City of Stamford. Together the Bongiorno brothers acquired adjacent and neighboring real property on which they constructed businesses that were a companion to the Bongiorno Supermarket such as a liquor store, car wash and gas station. The opening of the two regional supermarkets caused Bongiorno's Supermarket to close. The family then converted that supermarket property to commercial rental property. Thereafter, the focus of the Bongiorno business was no longer

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providing food and related services. It became a commercial landlord with multiple high-quality tenants. For the second time the Bongiorno family weathered an economic crisis.

The third economic crisis concerned the effect of the federal tax code on the continued operation of the Bongiorno commercial real estate. The commercial properties were subject to mortgage amortization obligations. The mortgage payments were made from rents, the taxable income received from the tenants of those commercial properties. In the early years of the mortgage payments most of the funds paid to the lenders was deductible as interest under the federal tax code. As the years went by the deductible interest decreased and that portion of the rent received was devoted to an increased reduction of mortgage principal. The mortgage principal reduction was no longer a deduction under the federal tax code but the rents that supported those mortgage payments were all taxable. This resulted in “phantom income.” IRS Form K-1s were issued by the three plaintiff LLCs to each of the four children/partners, each in the same amount, requiring the children/partners to pay income taxes on money that was spent for the reduction of the mortgage principal.

This economic crisis caused the current litigation as well as the 18-day trial conducted before this court in 2018: *Bongiorno v J & G Realty, LLC, et al*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 12-6014465 S (March 12, 2019, Tierney, JTR) (211 Conn. App. 311). Other than that, long since terminated litigation no other claims of mismanagement have been litigated by Bridjay Capone.

Many real estate investors face “phantom income” and find its provisions economically difficult wherein they are obligated to pay income taxes on rental income that itself is used to reduce the mortgage principal. The owners then have an income tax obligation but have not received liquid cash with which to pay those income taxes.

There are four common solutions employed to reduce the effect of “phantom income”, none of which were applied by the four Bongiorno children doing business as the three plaintiff LLCs. The first is to refinance the existing mortgages thereby increasing the amount of deductible interest allocated to each mortgage payment. The second is to sell a portion of the real property paying off the existing mortgage on that sold parcel of real property and using the balance to pay down or pay off other mortgages. This reduces the amount of “phantom income.” The third is to have the partnership calculate the amount of income taxes due on the “phantom income” and make an annual cash distribution in the form of a cash dividend in amount equal to the income taxes to be paid. The fourth method is to rely on the substantial assets of the four partners in the three LLCs in order to pay individually each year the income taxes due by reason of the “phantom income.” According to the evidence George Bongiorno, who established his four children’s equal partnership in the three LLCs as the cornerstone of his estate plan paid the income taxes for Bridjay Capone for one year since she did not have the independent funds with which to pay the income taxes on that “phantom income.”

The evidence established to this court’s satisfaction that neither the four children as equal partners of the three plaintiff LLCs nor George Bongiorno understood the tax effects of the pay down of a commercial mortgage in which the payments were made by taxable commercial rents thus generating “phantom income” for the later years of the amortized commercial mortgage at a time when a majority of the payments would be allocated to the reduction of principal and not to the tax deductible payment of interest on the mortgages.

“George Bongiorno was born on January 18, 1930 and remained a lifelong resident of Stamford, Connecticut. He was self-employed in the food sales business. Along with his brother, John Bongiorno, they opened the highly successful west side neighborhood supermarket called Bongiorno’s Supermarket in 1957. They later created and built a retail gasoline sales business, a car wash and Bongiorno’s Maxi Discount Liquor near the

supermarket. Together the two brothers made many successful real estate purchases in Stamford, Connecticut. George purchased real estate elsewhere in the United States. George Bongiorno was survived by his wife, a co-plaintiff, Marie Palmer Bongiorno, one of the two plaintiffs in this litigation and four children, daughters, co-plaintiff, Bridjay Capone, and Michelle B. Nizzardo, and sons, John Bongiorno, Jr. aka John Bongiorno and individual defendant, Frank R. Bongiorno. On his death on March 13, 2016, he was survived by his wife, his above four children, his nine grandchildren, and eight great grandchildren.”

George Bongiorno v J & G Realty, LLC, et al, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 12-6014465-S (March 12, 2019, Tierney, JTR); Affirmed 211 Conn. App. 311 (2022).

George Bongiorno withdrew from that 2012 litigation in 2013. At trial the two plaintiffs were Bridjay Capone, daughter and Marie Palmer Bongiorno, wife of George and mother. At trial were two individual defendants, both co-managers of the three defendant LLCs, Frank R. Bongiorno and Maurice Nizzardo, husband of the daughter, Michelle B. Nizzardo, and the three LLCs that owned the Bongiorno real estate investments in Stamford, Connecticut and are the party plaintiffs in this current litigation.

That 2012 litigation ended after eighteen days of trial on March 12, 2019. This court was the trial judge. It issued a 107-page Memorandum of Decision on all seventy-two counts of that 2012 litigation. This court found in favor of all of the defendants on each of the seventy-two counts as against the claims made by the plaintiffs, Marie Bongiorno and Bridjay Capone. A lengthy appeal ensued, and the trial court’s decision was affirmed on March 22, 2022. This court concluded its March 12, 2019 Memorandum of Decision by citing four Connecticut appellate cases: “It is the sound public policy of Connecticut to encourage parties to settle their disputes and to avoid protracted litigation.” In this court’s own words: “It is this court's hope to avoid perpetual litigation among the Bongiorno family.” (#455.00, page 106). Despite that admonition, this current litigation commenced with service on May 8, 2019.

There are three events that the current plaintiff LLCs cite in support of this litigation to have the court enter an order of dissociation as to the three LLCs for the twenty-five percent interest of the now defendant, Bridjay Capone. The three numbered events are contained in the December 11, 2013 Plaintiff's Post-Trial Memorandum of Law, Re: Dissociation From and by a Limited Liability Company in Connecticut. (#147.00, pages 1-2). "The result of a disassociation event is that the disassociated member (or legal successor) retains an economic interest in the LLC, but possesses only limited rights, rather than the full complement of rights possessed by a 'member.'" *Faienza, Executrix of the Estate of Telmaco Faienza v T-N-B-Marble-N-Granite, LLC*, Superior Court, judicial district of Hartford at Hartford (March 26, 2018, Sheridan, J.)

- (1) Seeking appointment of a receiver and/or dissolution of a limited liability company is an act upon which a member is dissociated from that limited liability company. C. G. S. sec. 34-180, repealed, as saved by C.G.S. sec. 34-243w.
- (2) Defendant engaged in the fraudulent creation of a lease acting for J & G Realty, LLC, which adversely affected J & G Realty, LLC, thereby committing an act of dissociation pursuant to C.G.S. sec. 34-263a (5) (A), (B), (C).
- (3) Defendant failed to declare income distributions from each of the three plaintiffs as reported on the K-1 forms, thereby committing acts of dissociation pursuant to C.G.S. sec. 34- 263a (5) (B).

The court will discuss each of these three claims in succession.

Seeking appointment of a receiver and/or dissolution of a limited liability company is an act upon which a member is dissociated from that limited liability company. C. G. S. sec. 34-180, repealed, as saved by C.G.S. sec. 34-243w.

The three plaintiff LLCs were created for the purpose of owning and managing real property. Each is a manager managed LLC. Each LLC has an operating agreement. Each LLC is owned equally by John Bongiorno, Michelle B. Nizzardo, Frank R. Bongiorno, and Bridjay Capone. The current co-managers of each of the three LLCs are Frank R. Bongiorno and his brother-in-law, Maurice A. Nizzardo, husband of Michelle B. Nizzardo. The respective dates for the Operating Agreements of these LLC's are: J & G Realty, LLC on March 31, 2004, Ex. 3: 305 West Avenue, LLC on November 1, 2004, Ex. 1: and 24 Ardmore Street, LLC on November 1, 2004, Ex. 2.

The plaintiffs cite Gen. Stat. § 34-180 for the support of this first claim of dissociation of Bridjay Capone. The court understands that any reference to the word “disassociation” is intended to mean “dissociation.” Effective July 1, 2017, Gen. Stat. § 34-180 was repealed and in its place the General Assembly adopted the Uniform Limited Liability Act. (2016, P.A. 16-97, § 110, eff. July 1, 2017). At that same session the legislature adopted a Saving Statute, Gen. Stat. § 34-243w, that states. “The repeal of sections ... 34-180, ... by sections 110 and 111 of public act do not affect: (1) The operation of the statute or any action taken under it before its repeal; (2) any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal; (3) any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal; or (4) any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not

been repealed.” Gen. Stat. § 34-243w (P. A. 16-97, S. 24). The underlying litigation in which Bridjay Capone sought dissolution, winding up and distribution of all assets of the three plaintiff LLCs was commenced by a June 15, 2012 complaint and was in litigation until this court’s March 12, 2019 Memorandum of Decision. As stated by the plaintiffs in their December 11, 2013 Post-Trial Memorandum of Law (#147.00), this first claim of dissociation of Bridjay Capone is controlled by Gen. Stat. § 34-180 due to the effect of the savings statute, Gen Stat. § 34-243w.

“(a) ... a person ceases to be a member of a limited liability company upon the occurrence of one or more of the following events: . . . (4) ... the member ... (D) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, . . . ”

Gen. Stat. § 34-180 Events of dissociation.

The crucial language is the insertion of the phrase “seeking for himself.” This phrase must be read together with the other language and cannot be considered surplus meaningless language.

“It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions.... [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous.... Because [e]very word and phrase [of a statute] is presumed to have meaning ... [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant.” (Citations omitted; internal quotation marks omitted.) *American Promotional Events, Inc. v. Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008). Correspondingly, “[w]hen a court interprets [a statute], it cannot change the inherent meaning of words or supply additional terms to change the meaning of the provision at issue. See *Testa v. Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008) ([t]he process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case ...); *Lucarelli v. State*, 16 Conn.App. 65, 70, 546 A.2d 940 (1988) ([c]ourts must interpret statutes as they are written ... and cannot, by judicial construction, read into them provisions which are not clearly stated ...).” (Internal quotation marks omitted.) *139 *State v. DeJesus*, 288 Conn. 418, 501, 953 A.2d 45 (2008) (*Katz, J.*, dissenting).

PJM and Associates, LC vs City of Bridgeport, 292 Conn. 125, 138 (2009)

The court researched the phrases "seeking for himself" and "for himself" and was not able to find any court decision offering enlightenment beyond the plain language rule outlined above. A number of courts have used the phrase in merely citing Gen. Stat. § 34-180 for other purposes.

The underlying litigation and its Claims for Relief clearly demonstrate that Bridjay Capone intended by that underlying litigation to terminate all three LLCs and distribute the proceeds to each member according to their respective shares. She did not seek the dissolution relief solely "for herself." The original complaint so states. The Claims for Relief in the later filed operative complaint in the underlying litigation speak to that request.

"7. Counts 70 – 72 (Dissolution, Winding Up, & Accounting):

- a) Dissolution, winding up and distribution of the assets of all the entities to the rightful members, shareholders, transferees and/or distributees, as the Court deems appropriate;
- b) A temporary and permanent injunction against all Defendants, removing them from the operation, management or control of any of the entities;
- c) Appointment of a Receiver and/or Custodian of the various entities;
- d) Accounting and Audit of all entities and all financial transactions; and
- e) Any and all other relief in law or equity, the Court deems just and proper."

George Bongiorno v J & G Realty, LLC, et al, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 12-6014465-S (March 12, 2019, Tierney, JTR); Affirmed 211 Conn. App. 311 (2022). Second Amended Complaint dated July 5, 2018, (#440.00, page 108).

The passage of the Uniform Limited Liability Act effective July 1, 2017 removed any mention of a Member filing for the LLC's dissolution being a reason to dissociate that member. This court is applying the former statute because of the savings provision enacted by the July 1, 2017 legislature.

The plain language Gen. Stat. § 34-180, although repealed in 2017, is currently in effect by the savings statute, addresses the first of the three claims made by the plaintiff in this litigation. The court finds that there was no evidence before this court that the then plaintiff, Bridjay Capone, in the underlying litigation sought the dissolution, winding up and/or accounting of any of the three plaintiff LLC's solely for herself. The issue on the first claim is found for the current defendant, Bridjay Capone.

Defendant engaged in the fraudulent creation of a lease acting for J & G Realty, LLC, which adversely affected J & G Realty, LLC, thereby committing an act of dissociation pursuant to C.G.S. sec. 34-263a (5) (A), (B), (C).

The only evidence offered in support of this claim is a copy of the lease for Bongiorno's Maxi Discount Liquor store then being operated by Marie Palmer Bongiorno. She needed a lease executed by the landlord, J & G Realty, LLC, to be able to obtain a retail liquor sales permit from the State of Connecticut. Because of the family disputes it was extremely doubtful that she would obtain that lease in the usual business manner. Marie Bongiorno had a power of attorney executed by her husband, George Bongiorno, who had some limited authority as one of the three managers to execute that lease on behalf of J & G Realty, LLC. See Section 8.04 (c) of the Second Amended Operating Agreement. Ex. 3. Marie Bongiorno executed the lease utilizing that power of attorney on behalf of George Bongiorno as a Member of the landlord, J & G Realty, LLC. According to the Operating Agreement of J & G Realty, LLC no member could bind the LLC. Only a manager could bind the LLC. At that time /George Bongiorno was a co-manager of J & G Realty, LLC but only signed the lease as a Member of J & G Realty, LLC. Marie Bongiorno signed this lease on behalf of her corporation, Marie's Liquors, LLC as the tenant. There were two witnesses: Marie Bongiorno who signed as a Member of an unstated

entity and Bridjay Bongiorno Capone who signed as a Member of an unstated entity. The lease does not mention Bridjay Capone or Bridjay Bongiorno Capone, as she is otherwise known, anywhere else on the three-page lease.

Bridjay Capone's signature was that of a witness to a lease of real property for more than one year. She did not sign on behalf of J & G Realty, LLC. As only a member of J & G Realty, LLC she had no authority to bind the LLC to a contract or a lease. George Bongiorno, as one of the co-managers of J & G Realty, LLC, had a certain authority to bind the LLC. He signed that lease by the use of the power of attorney he had furnished to Marie Bongiorno. The fact that Marie Palmer Bongiorno took over the operation of the liquor store and refused to pay rent at the normal market rate is a matter between the management of J & G Realty, LLC and either Marie Palmer Bongiorno individually or in her corporate capacity. That financial responsibility does not and cannot fall on Bridjay Capone for executing the lease as a witness in which she described herself as a Member of an unstated entity.

For these reasons the court finds the issues on the second claim in favor of the defendant,
Bridjay Capone

Defendant failed to declare income distributions from each of the three plaintiffs as reported on the K-1 forms, thereby committing acts of dissociation pursuant to C.G.S. sec. 34-263a (5) (B).

IRS K-1 forms were offered in evidence for each of these three LLC's in both the underlying litigation and the current litigation for the tax years of 2012 through and including 2018. Exs. 8, 9 and 10. They outline the 25% ownership interest by each of the four partners/siblings/children. According to the K-1s, taxable income was to be declared by the

individual partners on their personal income tax returns, whether filed individually, married filing separately or jointly with their spouse, There is no language in any of the LLC operating agreements of a financial or dissociation penalty authorized for the failure to pay personal income taxes by reason of an issued K-1 by any of the LLCs.

“Section 6.04 Other Allocation Rules

(c) The Members are aware of the income tax consequences of the allocations made by this article VI and hereby agree to be bound by the provisions of this article VI in reporting their shares of Company income and loss for income tax purposes.”

The last K-1 offered was for the year 2018. The evidence is silent concerning the status of the K-1s for the LLC years 2019, 2020, 2021, 2022 and 2023. The evidence is equally silent as to whether or not Bridjay Capone filed any of those K-1s and paid income taxes thereon for those stated five years from 2019 through 2023.

Bridjay Capone’s federal income tax returns for the years 2015 through 2019 were not offered in evidence by either party. Portions of Bridjay Capone’s claimed federal income tax returns for the years 2015 through 2019 were offered in evidence together with Form 8275 detailed explanation in accounting terms. The plaintiff’s objections on numerous grounds to those exhibits were sustained and those documents remained exhibits for identification only. Ex. A, ID: Ex. B, ID: Ex. C, ID: Ex. D, ID: Ex. E, ID. No IRS response to any of Bridjay Capone’s IRS tax filings for the years 2015 through and including 2019 and thereafter to 2023 was offered in evidence before this court. Bridjay Capone testified that her husband, Joseph Capone, takes care of the income tax filings of the family. In his former trial testimony in July 2018 Joseph Capone acknowledged receipt of the K-1s for the years in question for the three

LLCs. The following dialogue occurred at underlying previous July 2018 trial in an examination of Joseph Capone by the plaintiff's counsel: "Q. Have you paid taxes on the money associated with those K-1s? A. No, we haven't. Q: And why have you not? A. I talked to my accountant and we elected not to submit the K-1s as part of our income tax because we didn't receive anything in we're in litigation about the amount, and I couldn't afford to pay taxes on phantom income." Ex. 14, page 100, lines 19-26

In the concluding section of this court's March 12, 2019 Memorandum of Decision in the underlying litigation, this court encouraged the payment of a small dividend to each of the partners/siblings to assist in defraying the cost of personal income taxes pursuant to the income tax effect of the K-1s to be issued in the future. An inference is drawn by this court from the 2023 trial cross-examination of Maurice Nizzardo, a co-manager of the three LLCs, that cash distributions have been made to all four LLC Members for the years 2019 through 2023 with a further request pending by Bridjay Capone to make those distributions quarterly instead of annually. The plaintiff's counsel confirms this fact by stating in his January 10, 2024 Plaintiff's Rebuttal to Defendant's Post-Trial Reply Brief at page 10: "As testified to by Maurice Nizzardo at trial, one of the Defendant's most recent requests was for quarterly distributions instead of the annual distributions that were given in 2019, 2020, 2021 and 2022." (#150,00, page 10).

"Period of limitations for assessment of tax:

3 years - For assessment of tax you owe, this period is generally 3 years from the date you filed the return. Returns filed before the due date are treated as filed on the due date."

Internal Revenue Service Topic No 305.

Bridjay Capone's complete federal income tax returns were not offered into evidence.

The Bridjay Capone K-1s for the years 2012 through 2018 were in evidence for all three LLCs.


There was no evidence of any audit by the IRS, or any collection action commenced against the Capones for failure to pay income taxes on tax returns that contained K-1 income. There was no evidence that the IRS has contacted any of the three LLCs or their managers, attorney or tax advisors concerning the Capone's failure to pay personal income taxes due to the K-1 status of the three LLCs.

The court finds the issues on the third claim in favor of the defendant, Bridjay Capone.

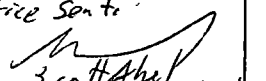
The court therefore having found all three issues for the defendant, Bridjay Capone, hereby enters an order finding all issues in the underlying litigation in favor of Bridjay Capone as against the three plaintiffs, J & G Realty, LLC, 305 West Avenue, LLC and 24 Ardmore Street, LLC.

The Court Clerk shall tax costs.

BY THE COURT


Kevin Tierney, JTR

*Decision enters in accordance with
The foregoing. All counsel and self
represented parties received notice
5-1-24, JDMO Notice sent.*


Scott Habel
Assistant Clerk