STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK H. LEVINE, MD,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

v

JAMES E. O'DORISIO, MD,

Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
July 24, 2007

No. 266166
Berrien Circuit Court
LC No. 2004-003060-CK

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

In this professional limited liability corporation (PLLC) dissolution case, defendant appeals the trial court's entry of judgment. The parties are vascular surgeons who were in practice together. During their association, they opened a vascular laboratory. After the PLLC dissolved, plaintiff sued defendant for specific performance of defendant's contractual obligation to resign and for an accounting and distribution of the PLLC's assets. The trial court awarded defendant one-half of the laboratory's 2004 annual profit, and one-half the value of partnership property remaining in his possession, which property was ordered sold. Plaintiff was permitted to keep the partnership property that he took with him when leaving the business. On appeal, defendant challenges the trial court's valuation method and the amount it awarded him. On cross-appeal, plaintiff argues that the trial court erred by awarding defendant the value of the vascular laboratory because the value of defendant's capital account was greater. We reverse and remand.

The parties essentially ask this Court to determine whether the trial court properly distributed the PLLC's assets upon dissolution. We find that it did not. In order to establish a PLLC, the members must write and sign an operating agreement "pertaining to the affairs of the limited liability company and the conduct of its business." MCL 450.4102(2)(q). As a contract between the members, the language of operating agreements should be given its ordinary and plain meaning. See *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 590; 683 NW2d 233 (2004). Here, the operating agreement provides that dissolution occurs "at any time that there are less than two remaining Members." Upon defendant's withdrawal from the PLLC, based on his loss of hospital privileges, the PLLC had only one remaining member, plaintiff. Therefore, in accordance with the operating agreement, the PLLC dissolved.

Article XII, § 12.3 of the operating agreement governs winding up, liquidation and distribution of assets post-dissolution. Upon dissolution, the operating agreement requires the company accountant to complete an "*accounting*" of the company's liabilities and assets from the date of the last accounting to the dissolution date. After the *accounting*, the company's assets are to be sold and the profits or losses allocated as mandated by Article IX, which governs allocations, income tax, distributions, elections and reports. The company's liabilities then should be discharged and the remaining assets distributed. In this case, however, plaintiff performed the accounting and then filed suit to have the trial court distribute the assets. Instead of enforcing the operating agreement as written, the trial court relied on the figures presented by the parties regarding the worth of the PLLC and awarded defendant six months of the 2004 annual profits, a distribution that is without basis in the operating agreement. The trial court later ordered that partnership property in defendant's possession would be sold and the profits divided between plaintiff and defendant, while plaintiff was permitted to keep partnership property in his possession. This action was also without basis in the operating agreement.

In support of its award, the trial court relied on *Christner v Anderson, Nietzke & Co*, 433 Mich 1; 444 NW2d 779 (1980), a case inapplicable to the facts presented here. In *Christner*, an employee of a professional corporation was fired and sued to enforce a buy-sell agreement between the parties. *Id.* at 4. The Michigan Supreme Court enforced the buy-sell agreement and awarded the plaintiff 50 percent of the previous year's fees, as the portion of goodwill that plaintiff was entitled to under the agreement. *Id.* at 11-12. The present case does not involve a partner withdrawal or a buy-sell agreement. This is a dissolution, and its terms are governed by the operating agreement. The operating agreement explicitly outlines the dissolution process and the division of assets. It was the trial court's duty to enforce the agreement as written. In its failure to do so, it erred as a matter of law, and remand is required.

On remand, the trial court must enforce the operating agreement. Therefore, the PLLC's accountant should prepare an accounting and the assets should be divided in accordance with the operating agreement.

In dividing the assets, the trial court must re-examine each party's entitlement to a share. In ruling, the trial court agreed with defendant that the operating agreement required the distribution of all of the PLLC's assets to the member with a positive account. Based on testimony from plaintiff and defendant that there had been unequal distributions in the past and, as a result, plaintiff had a negative capital account, the trial court indicated that it would award defendant 100 percent of the PLLC's assets. However, from the record, it does not appear that the trial court took into account "all Capital Account adjustments for the Company's taxable year during which the liquidation occurs." Arguably, if the adjustments were made, plaintiff's capital account could move from negative to positive and he would be entitled to a share of the liquidation assets. This result is likely because Section 12.3(b)(i)-(iv) of the operating agreement requires the sale of the company's assets and the allocation of the profits [or loss] to the member's capital accounts before any balance in a member's capital account is distributed. Therefore, on remand, the trial court should consider whether adjustments made during the liquidation year would make plaintiff's account positive and then allocate the liquidation distributions "in accordance with the positive Capital Account balances of the Members."

We note that, on remand, the trial court should not consider defendant's expert's testimony regarding the value of the PLLC. Defendant's expert valued the PLLC as an on-going concern, taking into account future earnings and goodwill. While this type of valuation would be appropriate in a divorce or condemnation, it is not an appropriate way to value a dissolved business because future earnings and goodwill are not tangible assets that can be distributed by the dissolved company. See e.g., *Kowalesky v Kowalesky*, 148 Mich App 151, 156-157; 384 NW2d 112 (1986); *Detroit v Hospital Drug Co*, 176 Mich App 634, 645-646; 440 NW2d 622 (1988). Also, the operating agreement does not provide for the distribution of goodwill or future earnings. Therefore, defendant's valuation of the business should not be considered on remand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto