Appellate Division Decision Shows How Difficult It is to Get Counsel Fees Awarded Under RULLCA

by Noel D. Humphreys

A recent unpublished New Jersey Appellate Division decision[1] contained two noteworthy statutory interpretations involving the New Jersey Revised Uniform Limited Liability Company Act (RULLCA), which became effective for all limited liability companies (LLCs) in 2014. One of these interpretations does not necessarily conform to the statutory language and, if followed, could make it difficult to get an award of counsel fees under RULLCA.

Summary

The first statutory provision the Appellate Division dealt with was the so-called 'savings clause,'[2] which is discussed in more detail below. How do facts that occurred prior to New Jersey's adoption of RULLCA affect claims in litigation decided after RULLCA's effectiveness?

In the *Marra* case, the Appellate Division panel maintained the plaintiff's claims that arose under the prior statute (the New Jersey Limited Liability Company Act, codified at N.J.S.A 42:2B-1 to -70 (the LLCA)), but also permitted the plaintiff to add RULLCA claims based on facts that arose before RULLCA's 2014 effective date.

Lawyers may find the court's second interpretation of RULLCA more surprising than the first. That interpretation involved the circumstances in which New Jersey's version of RULLCA permits a court to award counsel fees when a litigant acts "vexatiously or otherwise not in good faith"[3] in a dissolution action governed by RULLCA.

In an apparent departure from the statutory language, the Appellate Division panel appears to have held that a court is authorized to award legal fees under N.J.S.A. 42:2C-48(c) *only* if the court orders the LLC's dissolution. Such an interpretation is contrary to the statutory language, which appears to focus on whether the plaintiff sought the LLC's dissolution.

The Facts of the Case

After a 15-day trial between real estate developers, the superior court judge found that Marra was a member of the embattled LLC and ordered the Berlant defendants to buy Marra's interest.

Both Marra and the Berlants appealed. The Appellate Division largely affirmed the lower court decision. The court focused its efforts on sorting out the appropriate components of the calculation of the defendants' payment where the parties lacked reliable financial records.

Marra's particular facts are not what make the decision noteworthy.

The Decision

The lower court had found that Marra's claims accrued in 2011, and Marra brought the action a few months later in 2011. At the time that the claims arose, the LLCA was still in effect in New Jersey.

New Jersey's RULLCA first became effective in March 2013, applying to new limited liability companies and those that opted in to RULLCA. On March 1, 2014, RULLCA became the governing act regarding all LLCs formed in New Jersey.[4]

The lower court issued its ruling after RULLCA's 2014 effective date, though all the pertinent facts antedated that date.

RULLCA provides: "This act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect."[5] This provision is known as a 'savings clause.'

The parties argued over the savings clause's effect. The plaintiff argued that the clause affected the plaintiff's claims in two ways. First, the plaintiff argued that Marra's 2011-dated claims and 2011-initiated suit were preserved under the old statute.[6] Second, the plaintiff argued that, to the extent Marra can make valid claims based on pre-2013 facts, RULLCA allows those RULLCA-based claims. One lower court judge had allowed Marra to amend his complaint to include RULLCA-based claims, including a dissolution claim under RULLCA. Later, a different lower court judge concluded that RULLCA did not apply to the defendant's pre-2013 acts.

Citing a 1984 Appellate Division decision,[7] the Appellate Division panel agreed with both the plaintiff's arguments. The decision stated:

> We agree with plaintiff that the Savings clause in the RULLCA was intended to preserve rights that accrued under the former law, not extinguish rights that the party may have gained by the passage of the new law.

In the absence of a savings clause, pre-existing claims under the old statute would have been extinguished. The time of the decision, not the time of the predicate acts, determines which law applies in the absence of a savings clause.

Marra wanted RULLCA to apply for several reasons, including that RULLCA permits the court to award counsel fees from the Berlants. Specifically, N.J.S.A. 42:2C-48(c) provides:

> c. If the court determines that any party to a proceeding brought under paragraph (4) or (5) of subsection a. of this section has acted vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.

In this language, the claims alleged in the complaint, rather than the outcome of the proceeding, appear to control the court's power to award counsel fees.

What claims entitle a court to award counsel fees? N.J.S.A. 42:2C-48(a) provides that an LLC is dissolved upon the occurrence of itemized circumstances, including:

> (4) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that:
> (a) the conduct of all or substantially all of the company's activities is unlawful; or
> (b) it is not reasonably practicable to carry on the company's activities in conformity with one or both of the certificate of formation and the operating agreement; or
> (5) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that the managers or those members in control of the company:
> (a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or
> (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

The language in 42:2C-48(c) appears to condition the counsel fees award on "a proceeding brought under" those paragraphs (4) or (5), rather than on the court's ultimate order. In fact, Marra's amended complaint had sought as a remedy dissolution under N.J.S.A. 42:2C-48.

Contrary to the statutory language, the Appellate Division panel's opinion did not explicitly consider either whether the plaintiff's suit had been brought under those paragraphs (4) or (5) or whether the defendants had acted "vexatiously or otherwise not in good faith."

Instead, the Appellate Division found that the lower court opinion had not ordered the LLC's dissolution. The lower court had ordered the defendants to buy out the plaintiff. Therefore, the Appellate Division said, "by its plain terms," the provision allowing for award of legal fees does not apply in this case.

The plaintiff initiated a motion for reconsideration, but the matter settled. The Appellate Division opinion is the court system's last word on this issue in this case.

N.J.S.A 42:2C-48(c) does not originate with the current official version of the Uniform Limited Liability Company Act that was promulgated by the National Conference of Commissioners on Uniform State Laws and upon which New Jersey's RULLCA was based.[8] Encouragement for oppressed members to bring dissolution claims and for parties to act in good faith arises apparently only in New Jersey. The bill initially introduced in the state Legislature included the counsel fees provision cited above. That language appears to correlate with a comparable provision of the New Jersey Business Corporation Act.[9] The prior LLCA did not provide a comparable remedy.[10]

Conclusion

A handful of New Jersey decisions have dealt with the attorney's fees issue under N.J.S.A. 42:2C-48(c). For example, in the unpublished *Carfagna* decision,[11] a suit to enforce a mediation agreement in which the Bergen County chancery judge did not order dissolution, the court ruled that the plaintiff's behavior was not suffi-

ciently vexatious or lacking in good faith to order payment of counsel fees.

As parties seek legal fees in coming cases, courts will have a variety of precedents to parse to suggest how expansively to apply N.J.S.A. 42:2C-48(c). In other words, a party should not expect that an award of legal fees under N.J.S.A. 42:2C-48(c) is a foregone conclusion. ■

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Endnotes

1. *Marra v. Berlant*, 2017 N.J. Super. Unpub Lexis 2778, 2017 WL 5171863 (S. Ct. App. Div. 2017). [*Anthony Marra, Individually and as a Member of Martinsville Realty Associates, LLC, v. Mitchell T. Berlant, Robert D. Berlant, and Martinsville Realty Associates, LLC*, Superior Court of New Jersey, Appellate Division Docket No. A-0149-15T3, November 6, 2017].
2. N.J.S.A. 42:2C-90.
3. N.J.S.A. 42:2C-48(c).
4. N.J.S.A. 42:2C-91(b).
5. N.J.S.A. 42:2C-90.
6. This interpretation is consistent with the comment to the official version of the Uniform Limited Liability Company Act, Section 1103; http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ULLCA_Final_2014_2015aug19.pdf.
7. *Parsippany Hills Assocs. v. Rent Leveling Bd. of Parsippany-Troy Hills Twp.*, 194 N.J. Super. 34, 42-43, 476 A.2d 271 (App. Div.) (citations omitted), *certif. denied*, 97 N.J. 643, 483 A.2d 169 (1984).
8. http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ULLCA_Final_2014_2015aug19.pdf.
9. N.J.S.A. 14a:12-7(8)(d).
10. *Tutunikov v. Markov*, No. A-1827-10T3, 2013 BL 321740 (N.J. Super. Ct. App. Div. Aug. 01, 2013).
11. *Carfagna v. The Carfagna Family LLC*, No. BER-C-246-14 Civil Action, 2015 BL 382846 (N.J. Super. Ct. Ch. Div. Nov. 17, 2015), *IE Test, LLC v. Carroll*, 226 N.J. 166, 140 A.3d 1268 (2016) (*per curiam*) *reversing the judgment and remanding the case in IE Test LLC v. Carroll*, No. A-6159-12T4, 2015 BL 71284 (N.J. Super. Ct. App. Div. March 17, 2015) *IE Test, LLC v. Carroll*, 222 N.J. 15, 116 A.3d 1070 (2015) *petition granted IE Test LLC v. Carroll*, No. A-6159-12T4, 2015 BL 71284 (N.J. Super. Ct. App. Div. March 17, 2015), Court Opinion (03/17/2015) *Tutunikov v. Markov*, No. A-1827-10T3, 2013 BL 321740 (N.J. Super. Ct. App. Div. Aug. 01, 2013), Court Opinion (08/01/2013).