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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002523-MR

BEN SPURLOCK — APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 07-CI-00063

TATE BEGLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Ben Spurlock appeals from a judgment entered upon a jury verdict adjudging him liable on a contract under which Tate Begley claimed that Spurlock purchased his 25% interest in Caribou Coal Processing, LLC. Spurlock alleges that Begley did not own an interest in the company, and the

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

contract accordingly was void for want of consideration. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Robert Griffin formed a limited liability company, Caribou Coal Processing, LLC, for the purpose of acquiring and operating a coal tipple in Leslie County, Kentucky. After forming Caribou, Griffin approached Begley about investing in the company. Rather than becoming an equity investor in the company, however, Begley borrowed $75,000.00 from a local bank and loaned the money to Caribou. In return, on November 10, 2004, Caribou executed a promissory note payable to Begley,[2] which provided that the loan amount was to be repaid in full by June 1, 2005. The due date passed without any repayment on the note, although Begley regularly contacted Griffin about repayment. Griffin continued to promise to begin making payments on the note.

At some point, Griffin exchanged a 25% interest in Caribou to Up The Creek Mining, LLC, a company in which Ben Spurlock had an ownership interest, for a 25% interest in the latter business. Spurlock had originally formed Up the Creek with two men, James Woods and Tony Hamilton. Thus, at the time of the events discussed herein, Griffin owned 75% and Up The Creek owned 25% of Caribou.[3]

[2] Begley's bank loan was for an interest rate of 8½ percent whereas the Caribou note paid an interest rate of 8 percent. How Begley was to profit from his loan to Caribou is unclear, although he apparently anticipated sharing in the profits of the company as a result of the loan. Nothing in the record explains this anomaly.

[3] Spurlock testified that while this agreement was indeed entered into, Griffin never formally transferred the interest on the records of Caribou.

Begley and Spurlock first met when Begley stopped by a new coal mine Spurlock's company, Up The Creek, was placing into operation. Begley, who understood that the coal from the mine was going to be processed through the Caribou tipple, believed that he might benefit indirectly from the arrangement if Caribou realized profits which could be used to repay his loan.

Begley next met with Spurlock when, at Spurlock's invitation, he attended a meeting at Caribou's offices in Manchester, Kentucky (the Manchester meeting). Griffin, Hamilton, and perhaps Woods also attended the meeting. According to Begley's testimony, Spurlock proposed at the meeting that Griffin give Begley a 25% interest in Caribou until such time as the company paid its $75,000 debt to him.[4] Griffin agreed to Spurlock's proposition, and he orally announced that he was giving Begley a 25% interest in Caribou. Evidently, no documentation was ever executed to formalize Begley's interest in Caribou. Begley, who testified that Griffin informed him that he would prepare the necessary paperwork but never did, could testify to no further actions taken by Griffin or Caribou to memorialize the transfer of the interest.

On February 22, 2006, Spurlock came to Begley's office and proposed to purchase Begley's 25% interest in Caribou, along with the associated $75,000 note. According to Begley's testimony, he and Spurlock came to the understanding that by purchasing the note, Spurlock would replace Begley as

[4] Spurlock testified that he did not make this suggestion and, in fact, did not know that the issue of Begley being given an interest in Caribou had even been discussed at the meeting.

owner of a 25% interest in Caribou. In other words, the understanding was that by purchasing the note, Spurlock would also purchase Begley's 25% interest in the company.[5] Spurlock rejected the detailed agreement which Begley prepared in anticipation of the transaction, suggesting instead that "let's just do a two or three liner." Begley then typed up a bare-bones note and agreement which provided as follows:

> 70000.00 will be paid by Ben Spurlock 200 Dawahare Dr. Hazard, KY 41701 by May 01, 2006. This transaction is for 25 percent ownership of Caribou Coal Processing LLC. If the note is not paid by the due date then an additional charge for what ever [sic] interest incurred by Tate Begley will be added to the balance. This is in reference of [sic] the promissory note signed by Caribou Coal November 10, 2004 copy [sic] of note will be included in the agreement.

The parties signed the note and agreement on February 22, and their signatures were notarized. Spurlock paid Begley $5,000 by check that day, with the balance to be paid pursuant to the note. Although Begley testified that he believed the check was drawn on a Caribou checking account, the physical evidence at trial showed it was actually drawn on an Up The Creek account.

After the due date passed without Spurlock making payment under the agreement, Begley contacted Spurlock. According to Begley, Spurlock stated that he was unable to pay because he had not been mining any coal, but he neither denied owing the debt, nor questioned the legitimacy of Begley's ownership interest in Caribou. By contrast, Spurlock testified that shortly after February 22,

[5] Spurlock testified that he was not purchasing the note but, rather, was purchasing only Begley's 25% interest in Caribou.

2006, he told Griffin about his purchase of the 25% interest in Caribou, and Griffin told him that Begley did not own an interest in the company, but, rather, merely held a promissory note. Spurlock stated that Griffin "made fun of him" for buying a nonexistent interest. He testified that once he learned this information, he no longer felt obligated under the February 2006 agreement.

At some later point, Caribou became insolvent and ceased operations. Hence, the original $75,000 Caribou promissory note in favor of Begley, which then was purchased by Spurlock in connection with his purchase of Begley's 25% interest in Caribou, lost all value.

In March 2007, Begley filed a complaint in the Leslie Circuit Court seeking a judgment on the February 2006 promissory note and agreement. Spurlock's answer denied liability, alleging failure of consideration based on averments that Begley's fraudulent misrepresentation that Begley owned a 25% interest in Caribou, when, in fact, Begley did not, and never has, owned an interest in the company. Spurlock also filed a counterclaim for the $5,000 down payment he made to Begley in February 2006.

A jury trial was conducted in August 2007. The case was submitted to the jury upon a single interrogatory, as follows:

> Do you believe from the evidence heard in this case that Robert Griffith [sic] transferred to Tate Begley at [sic] 25% ownership interest in the company, Carabou [sic] Coal Processing, LLC?

The jury replied affirmatively, and the trial court entered a judgment in favor of Begley. The court denied Spurlock's subsequent motion for judgment notwithstanding the verdict. This appeal followed.

ENTITLEMENT TO DIRECTED VERDICT

In his first and second arguments Spurlock contends that the judgment against him should be reversed because Begley was not an "owner" of Caribou Coal Processing, LLC, resulting in a failure of the consideration (the 25% interest in Caribou) he was to receive in return for his $5,000 down payment and $70,000 promissory note. We construe this argument as one that the trial court erred by failing to grant Spurlock's motion for a directed verdict.

A directed verdict is "appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict." *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998). The trial court is required to "consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991). In our review, we must "consider[ ] the evidence in the same light." *Id.*

Viewed in the light most favorable to Begley, the relevant facts pertaining to whether Begley received an ownership interest in Caribou as a result of Griffin's oral commitment are as follows: (1) Griffin voiced at the Manchester meeting that he was giving Begley a 25% interest in Caribou; (2) Spurlock was

aware of this; (3) Griffin owned a 75% interest and Up The Creek owned a 25% interest in Caribou at the time of the Manchester meeting; (4) Griffin and Up The Creek (through Spurlock, Griffin, Hamilton, and Woods as its agents) unanimously agreed that Begley would receive a 25% interest in Caribou; (5) no documentation or paperwork was ever completed to memorialize the transfer of the 25% Caribou interest to Begley; and (6) both Begley and Spurlock believed Begley had a 25% interest in Caribou.

Limited liability companies are creatures of statute, and their organizational and operating parameters are extensively codified in KRS Chapter 275. We begin by noting, however, that the chapter does not define LLC "owner(s)" or "ownership." Rather, the chapter speaks to "limited liability company interest" or the "interest in the limited liability company," which KRS 275.015(12) defines as "the interest that may be issued in accordance with KRS 275.195." Moreover, "[a] limited liability company interest [(LLC interest)] may be issued in exchange for consideration consisting of cash, property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services." KRS 275.195(1). Additionally, the chapter provides for LLC "members," who are defined by KRS 275.015(16) as including "a person or persons who have been admitted to membership in a limited liability company as provided in KRS 275.275 and who have not ceased to be members as provided in KRS 275.280[.]"

A careful reading of KRS Chapter 275 discloses that a member may assign his or her LLC interest to another unless an operating agreement provides otherwise. KRS 275.255(1)(a). Such an assignment permits the assignee to receive, to the extent provided, the distributions to which the assignor would be entitled. KRS 275.255(1)(b). This section also makes clear that an assignment does not dissolve the LLC or entitle the assignee to participate in the management of the LLC, and the assignor remains a member of the LLC unless and until the assignee is admitted to membership. KRS 275.255(1)(c), (d). Furthermore, an LLC interest, whether held by a member or by an assignee, may but is not required to be evidenced by a certificate. KRS 275.255(2). Most importantly, although the formal admission of any new member to an LLC generally must be made in writing, KRS 275.265(1), we have found no requirement that a mere assignment of an LLC interest must be made in writing. *See Frear v. P. T. A. Industries, Inc.,* 103 S.W.3d 99, 105 (Ky. 2003) (observing that "under contract law, an oral contract is ordinarily no less binding than one reduced to writing") (citing *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 445 (Ky. 1997)); *see also Skaggs v. Wood Mosaic Corp*., 428 S.W.2d 617, 619 (Ky. 1968) ("[i]n the absence of a statutory requirement [a contract] need not be in writing"). As the record contains no operating agreement for Caribou, we must presume that Caribou had no operating agreement that either restricted the transfer of its LLC interests, or required such transfers be in writing.

Spurlock argues, without citation, that "[t]he only method to have 'ownership' in a limited liability company is to be admitted as a member. Anything less than membership or ownership merely results in being entitled to a distribution and not to decision make or guiding the company." Spurlock quotes *Elrod v. Schroader*, 261 Ky. 491, 498, 88 S.W.2d 12, 15 (1935) for the proposition that

> [g]enerally speaking, "ownership" embodies the idea of exclusive right of possession, enjoyment, and disposal -the right by which property belongs to some one in particular to the exclusion of all others and claim of ownership is synonymous with claim of title. *Stryker v. Meagher*, 76 Neb. 610, 107 N.W. 792 [(1906)]; *Ducre v. Milner* (La. App.) 140 So. 158 [(1932)]; *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 [(1916)]. In *Ohio Valley F. & M. Ins. Co.'s Receiver v. Skaggs*, 216 Ky. 535, 287 S.W. 969, 970 [(1926)], it is said: "The essence of the ownership of a thing is that aid which organized society will through the courts, as its agents, give to one individual to the exclusion of all others, to take or keep possession of it."

Although we agree with the quoted passage, Spurlock's argument ignores the express provisions of KRS Chapter 275, which allow for the possibility of a division between management rights (membership) and economic rights (an LLC interest). *See* Thomas E. Rutledge and Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 Ky. L. J. 1, 33 (1995). Notwithstanding that an assignee of an LLC interest may have no say in the management of an LLC, the assignee still has "exclusive rights of possession, enjoyment, and disposal" *Elrod*, 261 Ky. at 498, 88 S.W.2d at 15, as

recognized and protected under KRS 275.255. Similar nonmanaging interests may exist in other business organizations, as in the case of non-voting common stock in corporations, see KRS 271B.2-020(2)(b) (articles of incorporation may limit powers of shareholders), or limited partners in limited liability partnerships. *See* KRS 362.2-302 (a limited partner cannot "act for or bind [a] limited partnership").

In this case, the trial court submitted a simple instruction to the jurors, asking whether they believed that Robert Griffin transferred 25% ownership in Caribou to Begley. We hold that such instruction was sufficient to cover the assignment of a 25% LLC interest in Caribou, and Begley was not required to prove that Griffin or Caribou formally admitted him as a member of the LLC.[6]

Spurlock next argues that no consideration passed since Caribou was administratively dissolved by the Kentucky Secretary of State in November 2007, soon after the trial in this matter, and that the note was practically worthless as being in default at the time of the transaction.

On this issue we note that "'the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court.'" *Frear*, 103 S.W.3d at 105 (quoting *First Commonwealth*

[6] We believe the dissent erroneously states that KRS 275.310 sets forth the ownership characteristics of an assigned LLC interest. Those characteristics are delineated in KRS 275.255. Furthermore, unlike the dissent, we do not view KRS 275.310 as manifesting legislative guidance that an assignee of an LLC interest either does not possess an equity interest an LLC or may not receive liquidation distributions. Such position ignores the express provisions of KRS 275.255(1)(b) that "[a]n assignment shall entitle the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled." The relative priority to entitlement to liquidation distributions between a member of an LLC and any assignee, however, is not an issue before this court.

Bank of Prestonsburg v. West, 555 S.W.2d 829, 835 (Ky.App. 2000)). If no ambiguity exists, "a written instrument is to be strictly enforced according to its terms which are to be interpreted 'by assigning language its ordinary meaning and without resort to extrinsic evidence.'" *Allen v. Lawyers Mut. Ins. Co. of Ky*., 216 S.W.3d 657, 659 (Ky.App. 2007) (quoting *Island Creek Coal Co. v. Wells*, 113 S.W.3d 100, 104 (Ky. 2003)). Contracts "must be supported by a consideration, but the adequacy of the consideration cannot be inquired into if there is something of detriment to one party or benefit to the other, however slight." *Posey v. Lambert-Grisham Hardware Co.*, 197 Ky. 373, 379, 247 S.W. 30, 33 (1923). Mutual promises form valid consideration for agreements. *Campbell v. Campbell*, 377 S.W.2d 93, 95 (Ky. 1964).[7]

Here, Begley and Spurlock agreed in February 2006 that Begley would transfer to Spurlock a 25% interest in Caribou, as well as the $75,000 note. In return, Spurlock agreed to pay Begley $5,000 upon the signing of the agreement, plus another $70,000 by May 1, 2006. We hold that the assignment of the 25% interest in Caribou took place upon the agreement's execution, based on not only its plain language, but also its lack of contingencies as to its effective date. Indeed, the only future date listed in the agreement was the May 2006 date for

[7] The benefit of the transaction to Begley is apparent: he gets paid for a note which is past due. The benefit of the transaction to Spurlock is not so clear in hindsight, but at the time of the transaction, Spurlock perhaps saw value in the business operations of Caribou, and in improving his position as regards the other owners of Caribou, both as a creditor and/or as an assignee of the LLC interest. However, as noted, our place is not to question the "adequacy of the consideration . . . if there is something of detriment to one party or benefit to the other, however slight." *Posey*, 197 Ky. at 379, 247 S.W. at 33.

Spurlock's final performance. We take judicial notice[8] that according to the records of the Kentucky Secretary of State, Caribou apparently was in good standing both at the time of the agreement and on May 1, 2006. In fact, an annual report was filed on behalf of Caribou with the Secretary of State in August 2006.[9]

Parties to a business transaction enter into their agreement and allocate various risks to the transaction according to the agreement's terms or contingency clauses. Frequently, parties will enter into an agreement in which the transaction's effective or closing date is postponed to some future time to enable the parties to conduct whatever investigation or due diligence they, or their counsel, deem necessary to ensure that the value bargained for is viable. In this instance Spurlock, according to Begley's testimony, apparently insisted upon and signed a fairly simple agreement without the benefit of counsel. In hindsight Spurlock made a poor decision, but that fact does not mean the transaction lacked consideration. Begley agreed to transfer to Spurlock a 25% interest in Caribou and the $75,000 Caribou note. In exchange, Spurlock agreed to pay Begley $5,000 upon signing, and $70,000 on May 1, 2006. If Spurlock had wished subsequent developments to impact his obligation to pay, he easily could have insisted on such provisions in his contract with Begley. As a court, we may not "change obligations of a contract which the parties have made," nor "add a condition which

[8] Kentucky Rules of Evidence (KRE) 201(f) provides that "[j]udicial notice may be taken at any stage of the proceeding."

[9] Kentucky Secretary of State, On-Line Business Database, Caribou Coal Processing, LLC (http://apps.sos.ky.gov/business/obdb/showentity.aspx?id=0572653&ct=06&cs=99999).

was not written into the contract." *White v. Winchester Land Dev. Corp*., 584 S.W.2d 56, 64 (Ky.App. 1979).

The cases cited by Spurlock, regarding impossibility of performance, do not compel a different result. In *Senters v. Elkhorn & Jellico Coal Co.*, 284 Ky. 667, 145 S.W.2d 848 (1940), the parties entered into a contract for the removal of rock and dirt so that the coal company could construct a tram road. The company defended against enforcement of its contractual obligation on the basis that the parties understood that the acquisition of another piece of property was a condition of the contract, that the land had not been acquired, and that by mutual mistake this provision had been omitted from the written contract. The court expressed the rule of law that "when the performance of a contract is based upon the continued existence of a given thing, the existence being assumed as a basis of the contract, performance is excused when the existence fails." 284 Ky. at 673, 145 S.W.2d at 851. *Swiss Oil Corp. v. Riggsby*, 252 Ky. 374, 67 S.W.2d 30 (1933), also cited by Spurlock, involved the termination of an oil and gas lease once the gas was exhausted. The court applied the rule that "the continuation of the subject-matter of the contract is the essential foundation of the obligation. And when that subject-matter is shown to have become non-existent, performance is excused and the contract terminates by operation of law." 252 Ky. at 383, 67 S.W.2d at 34.

By contrast, in the case *sub judice*, the contract's subject matter was Caribou Coal Processing, LLC, which was in existence at all times relevant to the parties' agreement. Indeed, Spurlock was in breach of the agreement in May 2006,

long before Caribou was administratively dissolved by the Kentucky Secretary of State. *See* 17A Am.Jur.2d, *Contracts* § 674 (2004) ("The parties are excused in case, **before breach** and without the fault of either party, performance becomes impossible by reason of a thing or condition ceasing to exist[.]" (Emphasis added.)) Caribou's subsequent dissolution has no bearing on Spurlock's unmet obligation to pay.

JURY INSTRUCTIONS

As previously noted, the case went to the jury on the following bare-bones interrogatory: Do you believe from the evidence heard in this case that Robert Griffith [sic] transferred to Tate Begley at [sic] 25% ownership interest in the company, Carabou [sic] Coal Processing, LLC?" The court rejected Spurlock's tendered instruction, which stated:

> 1. You are instructed that a member (owner) of a Kentucky limited liability company means a person who has been admitted to membership as set forth within the limited liability company's operating agreement or, if an operating agreement does not so provide in writing, upon the written consent of all members. (KRS 275.015(13) and KRS 275.275).
>
> INTERROGATORY NO. I: From the evidence at the trial of this action, on February 22, 2006, was Tate Begley the owner of a 25% interest in Caribou Coal, LLC?

As we have held that the ownership of a limited liability company interest is not synonymous with being a member in an LLC, the trial court did not err by failing to instruct on whether Begley had been admitted to membership in Caribou.

CONCLUSION

For the foregoing reasons the Leslie Circuit Court's judgment is affirmed.

ACREE, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: Because as a matter of law Robert Griffin did not transfer an ownership interest in Caribou Coal Processing, LLC, to Tate Begley, leaving Begley with no possessory interest in the LLC to transfer to Ben Spurlock, I respectfully dissent.

Following the presentation of the evidence, the case was submitted to the jury on a single Interrogatory asking as follows:

> Do you believe from the evidence heard in this case that Robert Griffith [sic] transferred to Tate Begley a 25% ownership interest in the company, Caribou Coal Processing, LLC.

Though the jury (without guidance concerning what was required to transfer an LLC interest) answered this technical question in the affirmative, as a matter of law Griffin did not transfer a 25% interest in Caribou Coal to Begley.

As noted by the majority, in the light most favorable to Begley, the relevant facts upon the issue of whether Begley received an ownership interest in Caribou upon the oral commitment of Griffin are as follows: (1) Griffin did orally state at the Manchester meeting that Begley was being given a 25 percent interest

in Caribou; (2) Spurlock was aware of this; (3) Griffin was a 75 percent owner and Up the Creek was a 25 percent owner in Caribou at the time of the Manchester meeting; (4) Griffin and Up the Creek (through Spurlock, Griffin, Hamilton, and Woods as its agents) unanimously agreed that Begley would receive a 25 percent interest in Caribou; (5) no documentation or paperwork was ever completed memorializing the transfer of a 25 percent interest in Caribou to Begley; (6) Begley believed he had a 25 percent interest in Caribou; and (7) Spurlock believed Begley had a 25 percent interest in Caribou

Caribou Coal Processing, LLC, was a limited liability company. Such companies are creatures of statute, and their organizational and operating parameters are extensively codified in Kentucky Revised Statutes (KRS) Chapter 275. Among the parameters codified are provisions relating to the ownership of an LLC.

KRS Chapter 275 does not refer to the "owners" of a limited liability company as "owners" (or by other possible terms such as "partners," "shareholders," or "associates"). Rather, the equity owners of a limited liability company are referred to as "members." KRS 275.015(16) defines a member as follows: "'Member' or 'members' means a person or persons who have been admitted to membership in a limited liability company as provided in KRS 275.275 and who have not ceased to be members as provided in KRS 275.280[.]"

KRS 275.275, which is titled "Admission to Membership in Company," provides as follows:

> (1) Subject to subsection (2) of this section, a person may become a member in a limited liability company:
>
> (a) In the case of the person acquiring a limited liability company interest directly from a limited liability company, upon compliance with an operating agreement or, if an operating agreement does not so provide in writing, upon the written consent of all members; and
> (b) In the case of an assignee of the limited liability company interest, as provided in KRS 275.255 and 275.265.
>
> (2) The effective time of admission of a member to a limited liability company shall be the later of:
>
> (a) The date the limited liability company is formed; or
>
> (b) The time provided in the operating agreement or, if no time is provided, when the person's admission is reflected in the records of the limited liability company.

No evidence was presented concerning Caribou's operating agreement or whether it even had one. Thus the terms of the operating agreement – if there was one – can be of no assistance to Begley, and Begley's admission as a member could only have been "upon the written consent of all members." KRS 275.275(1)(a). While I accept for purposes of review that the necessary oral approvals for the admission of Begley as a member were given, no evidence was presented at trial that there was "written consent" by Griffin and Up the Creek agreeing to the transaction, nor does Begley even now allege that there was such written consent. As such, there was a failure of proof that Begley was admitted as a member, that is, an owner, of Caribou under KRS 275.275(1)(a).

As an alternative to the foregoing, KRS 275.275(1)(b) provides a pathway to membership in a limited liability company by way of assignment. KRS 275.255 is titled "Assignment of Interest." This statute explains the effect of an assignment and makes clear that a mere assignee is not a member. The statute states, in part, as follows:

> (1) Unless otherwise provided in a written operating agreement:
>
> (a) A limited liability company interest shall be assignable in whole or in part;
>
> (b) An assignment shall entitle the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled;
>
> (c) An assignment of a limited liability company interest shall not dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or exercise any rights of a member other than the right to receive distributions pursuant to subsection (1)(b) of this section;
>
> (d) Until the assignee of a limited liability company interest becomes a member pursuant to KRS 275.265(1), the assignor shall continue to be a member and to have the power to exercise any rights of a member, subject to the members' right to remove the assignor pursuant to KRS 275.280(1)(c)2.;
>
> (e) Until an assignee of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment; and
>
> (f) The assignor of a limited liability company interest shall not be released from liability as a member solely as result of the assignment.

> (2) A written operating agreement may provide that a member's limited liability company interest may be evidenced by a certificate of limited liability company interest issued by the limited liability company and may also provide for the assignment or transfer of any interest represented by the certificate.
>
> . . . .

KRS 275.265 is captioned "Assignee of an Interest as a Member of the Company," and provides how an assignment interest may be converted into a member interest. The statute states, in part, as follows:

> (1) Unless otherwise provided in a written operating agreement, an assignee of a limited liability company interest shall become a member only if a majority-in-interest of the members consent. The consent of a member may be evidenced in any manner specified in writing in an operating agreement, but in the absence of specification, consent shall be evidenced by one (1) or more written instruments, dated and signed by the requisite members.
>
> . . . . . .

Even if what occurred at the Manchester meeting could be construed as first an assignment under KRS 275.255 (presumably out of Griffin's 75 percent interest) followed by an attempted conversion under KRS 275.265, because there is no operating agreement evidencing the contrary, consent to the conversion would have needed to be "evidenced by one (1) or more written instruments, dated and signed by the requisite members." No such written instruments were introduced at the trial, nor does Begley now allege that such written instruments were executed.

Thus there is a complete failure of proof upon the issue of whether Begley became a member of Caribou under this method of admission.

In addition, under either method (by the direct method contained in KRS 275.275(1)(a) or the assignment method described in KRS 275.275(1)(b)), in the absence of an operating agreement (as here), the new member's interest, pursuant to KRS 275.274(2)(b), would not be effective until "the person's admission is reflected in the records of the limited liability company." Again, no evidence was presented at trial that the records of Caribou were ever adjusted to reflect Begley's membership interest, nor does Begley now contend that they were. Indeed, at trial, Begley testified that Griffin was to have done the paperwork to reflect his membership into the company, but never did. Accordingly, Begley's admission as a member to Caribou was not perfected under KRS 275.275(2)(b).

In summary, upon application of the statutory prerequisites for admission as a member to a limited liability company contained in KRS Chapter 275, even upon viewing the evidence in the light most favorably to Begley, he did not obtain a membership interest in Caribou as a result of the events occurring at the Manchester meeting. While he may have been orally promised this membership, and though the other members of the company may have orally acquiesced to it, the terms of Chapter 275 were not complied with so as to consummate and finalize the interest.

A substantial failure of consideration ordinarily justifies rescission of a contract. *O. P. Link Handle Co. v. Wright*, 429 S.W.2d 842, 845 (Ky. 1968).

While Begley and Spurlock both were originally under the impression that Begley owned a 25 percent interest in Caribou, because of the statutory deficiencies in perfecting the interest as discussed above, there was a failure of the principal consideration Spurlock was to have received under the February 22, 2006, agreement. Because Begley did not have a perfected 25 percent interest to covey to Spurlock – which was an explicit term of the agreement – there was, as alleged by Spurlock, a failure of consideration. As such, he was entitled to a directed verdict upon his affirmatively pled defense of failure of consideration.

The majority errs in equating the assignment of an LLC interest to a membership interest. Unlike a membership interest, an assigned LLC interest is, simply put, not an equity interest in the company, and it is erroneous to treat the interest as though it were[10]. In my view it is inaccurate to compare assignees of an LLC membership interest to stockholders and limited partners, both of whom are equity owners under established law.

The issue presented to the jury was whether Griffin transferred an "ownership interest" in Caribou to Begley. As a matter of law, he did not. Accordingly, Spurlock was entitled to a directed verdict at the conclusion of the

[10] Legislative guidance regarding the ownership characteristics of an assignment interest may be found at KRS 275.310. That statute provides that the excess assets of the company are to be distributed to members and former members upon the winding up of its affairs. A quintessential characteristic of an equity owner is that he shares in the distribution of the assets upon the liquidation of a company. Assignees of a membership interest are not included in the statutory distribution scheme, which indicates that they were not intended to be equity owners.

presentation of the evidence. Accordingly I dissent from the majority's conclusion to the contrary.

I further believe that the trial court erred in rejecting Spurlock's tendered instruction to the jury which would have informed the venire concerning what is required to transfer an equity interest in a limited liability company.

As previously noted, the case went to the jury upon the bare-bones interrogatory "[d]o you believe from the evidence heard in this case that Robert Griffith [sic] transferred to Tate Begley a 25% ownership interest in the company, Caribou Coal Processing, LLC." Spurlock had tendered the following instruction to the trial court:

> 1. You are instructed that a member (owner) of a Kentucky limited liability company means a person who has been admitted to membership as set forth within the limited liability company's operating agreement or, if an operating agreement does not so provide in writing, upon the written consent of all members. (KRS 275.015(13) and KRS 275.275).
>
> INTERROGATORY NO. I: From the evidence at the trial of this action, on February 22, 2006, was Tate Begley the owner of a 25% interest in Caribou Coal, LLC?

Given the specialized meaning of the term "owner" in the context of a limited liability company, I believe the trial court erred by failing to instruct the jury concerning this specialized terminology. It makes little sense to ask a jury whether there has been a transfer of an ownership interest in a limited liability company without informing it about the requirements to transfer such an interest.

Properly instructed the jury would have, I believe, concluded that there had been no transfer of an ownership interest from Griffin to Begley.

In summary, the majority erroneously concludes that there had been a transfer of an ownership interest from Griffin to Begley and, moreover, errs in concluding that the jury was properly instructed upon the issue. For these reasons, I respectfully dissent.

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