

Rel: March 22, 2024

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0365

William Bento

v.

Brian Bento and Bento Construction, LLC

Appeal from St. Clair Circuit Court
(CV-21-900122)

SC-2023-0398

Bento Construction, LLC, and Brian Bento

v.

William Bento

**Appeal from St. Clair Circuit Court
(CV-21-900122)**

COOK, Justice.

These consolidated appeals involve the distribution of the assets and liabilities of a limited-liability company following its dissolution. Two brothers, Brian Bento and William "Bill" Bento, owned and operated Bento Construction, LLC. That company was later dissolved by the St. Clair Circuit Court. In these appeals, the parties challenge the order of the trial court purporting to distribute Bento Construction's assets and liabilities. Because we conclude that the order appealed from is not a final judgment, we dismiss the appeals.

Facts and Procedural History

Brian and Bill co-owned Bento Construction, a property-restoration company. Over time, the brothers began to quarrel about various disagreements in company management and finances, leading to this dispute.

On June 19, 2021, Brian, individually and on behalf of Bento Construction, filed a complaint in the St. Clair Circuit Court against

Bill,¹ seeking the judicial dissociation of Bill as a member of Bento Construction, judicial dissolution of Bento Construction, and a judgment declaring each party's rights and interests in Bento Construction pursuant to the Alabama Limited Liability Company Law, § 10A-5A-1.01 et seq, Ala. Code 1975. He also sought damages and an injunction preventing Bill from participating in the affairs of Bento Construction.

Bill answered and filed a counterclaim, individually and on behalf of Bento Construction, against Brian,² seeking damages and the judicial dissolution of Bento Construction. Bill later amended his counterclaim to add a request for the inspection of Bento Construction's records pursuant to § 10A-5A-4.09(b), Ala. Code 1975.

On December 6, 2021, the trial court, pursuant to an agreement of both parties, issued an order retroactively dissolving Bento Construction and dissociating Bill as a member of the company as of July 31, 2021. The

¹Brian also filed the complaint against several fictitiously named defendants. However, the record does not indicate that he ever amended the complaint to identify any such parties.

²Bill also filed a third-party complaint against various fictitiously named parties. However, the record does not reflect that Bill amended the third-party complaint to identify any such parties.

order also provided:

"... That all contracts for performance of work by Bento Construction, LLC[,] entered after July 31, 2021[,] are to be assigned by Bento Construction, LLC[,] to Brian Bento Construction, LLC[, Brian's new construction company]. ...

"....

"... That the parties are to begin the winding down of Bento Construction, LLC (as of July 31, 2021[])[,] with intent to complete winding down to the extent possible within 90 days. The parties expect and anticipate funds presently in and assets of Bento Construction, LLC[,] may be required to fund the expenses of the dissolution and winding down.

"... The Court will retain jurisdiction to accomplish the judicial dissolution, including the determination of the proper assets of the dissolved corporation."

(Emphasis added.)

After its dissolution, Bento Construction continued to operate for the limited purpose of winding up its affairs pursuant to § 10A-5A-7.02(a), Ala Code 1975.³ Bento Construction's equipment was valued and

³Under that Code section, the only "activities and affairs" that a limited-liability company may conduct during the winding-up process include:

"(1) collecting its assets;

"(2) disposing of its properties that will not be distributed in kind to persons owning transferable interests;

sold where possible, and the company attempted to complete its outstanding contracts.

The trial court later conducted a bench trial to determine the proper distribution of any of Bento Construction's remaining assets. At the time of trial, Bento Construction still had several unsettled obligations based on projects contracted before the July 31, 2021, dissolution date. Specifically, according to Bento Construction's bookkeeper, the company still had at least one incomplete project and two or three projects that were not "completely finalized."⁴ Bento Construction was also involved in several pending lawsuits regarding disputed invoices that remained unresolved at the time of the trial.

"(3) discharging or making provisions for discharging its liabilities;

"(4) distributing its remaining property...; and

"(5) doing every other act necessary to wind up and liquidate its activities and affairs."

§ 10A-5A-7.02(a), Ala. Code 1975.

⁴The bookkeeper testified that she had included the invoice amounts from the unfinished projects in her calculation of Bento Construction's total assets; however, she also acknowledged that the amounts of at least three of those invoices were disputed.

On January 6, 2023, the trial court issued an order in which it stated the following:

"Bento Construction having been previously dissolved, the only issues remaining are between ... Brian Bento and his brother, ... William Bento. The Court hereby awards all personal property and accounts in possession of Brian Bento to Brian Bento and all personal property and accounts in possession of William Bento are awarded to William Bento.

"Brian Bento is Ordered to be responsible for all debts and obligations of ... Bento Construction and hold William Bento harmless for such debts and obligations of Bento Construction. All funds [now] in the ... possession of Bento Construction are awarded to ... Brian Bento. All real property owned by Brian Bento is awarded to Brian Bento. Each party [is] awarded personal property and accounts in their possession."

That order made no mention of the incomplete projects or the pending lawsuits.

Bill filed a motion to alter, amend, or vacate the trial court's order, and Brian filed a motion to modify the trial court's order. The trial court denied Bill's motion to alter, amend, or vacate the order. The trial court did not rule on Brian's motion, and it was therefore denied by operation of law under Rule 59.1, Ala. R. Civ. P.

In appeal no. SC-2023-0365, Bill challenges the trial court's order insofar as it denied his request to receive over \$200,000 in repayment of

"loans" that, he says, he provided to the company. He also challenges the trial court's distribution of property in Brian's possession to Brian. In appeal no. SC-2023-0398, Brian and Bento Construction cross-appeal, challenging the trial court's denial of their request for reimbursement of approximately \$400,000 for "loan repayments" that, they say, were improperly paid to Bill and determined that Brian was personally liable for the debts of the company.

Discussion

Although the issue has not been raised by the parties, we must first address whether the trial court's order constitutes a final judgment supporting the appeals in this case. "This Court addresses ex mero motu the lack of appellate jurisdiction when an appeal is taken from a nonfinal judgment." Richey v. Morris, [Ms. SC-2023-0261, Aug. 11, 2023] ___ So. 3d ___, ___ (Ala. 2023) (quoting Ex parte Eustace, 291 So. 3d 33, 36 (Ala. 2019)). A final judgment is one "that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved." Richey, ___ So. 3d at ___ (quoting Bean v. Craig, 557 So. 2d 1249, 1253 (Ala. 1990)). Stated another way, the question whether an order is a final judgment may be phrased as whether the order leaves

"something more for the court to do.'" Wesley v. Brandon, 419 So. 2d 257, 258 (Ala. Civ. App. 1982) (quoting Sexton v. Sexton, 280 Ala. 479, 481, 195 So. 2d 531, 533 (1967)). "The question whether a judgment is final is a jurisdictional question, and the reviewing court, on a determination that the judgment is not final, has a duty to dismiss the [appeal]." Merrick v. Merrick, 321 So. 3d 1268, 1271 (Ala. Civ. App. 2020) (quoting Owens v. Owens, 739 So. 2d 511, 513 (Ala. Civ. App. 1999)).

In the present appeals, the parties present various arguments relating to the merits of the trial court's January 6, 2023, order. However, that order did not address Bento Construction's incomplete projects or the multiple lawsuits involving Bento Construction that were ongoing at the time of the bench trial.⁵ Bento Construction's unfinished projects constitute both outstanding liabilities and accounts receivable. Additionally, the pending lawsuits require the payment of attorney's fees to pursue and defend the actions, and some also present an opportunity for financial recovery.⁶

⁵The order also was not certified as final pursuant to Rule 54(b), Ala. R. Civ. P.

⁶Although a trial court's failure to assess attorney's fees generally does not render a judgment nonfinal, see Eagerton v. Vision Bank, 99 So.

The Alabama Limited Liability Company Law requires a limited-liability company to pay creditors before distributing assets to its members. § 10A-5A-7.06, Ala. Code 1975. Thus, the trial court must necessarily determine whether any revenue from those projects or lawsuits will be sufficient to pay off Bento Construction's total debts before it can determine a final distribution of the company's assets. See Polk v. Polk, 70 So. 3d 363, 376 (Ala. Civ. App. 2010) (opinion on return to remand) (concluding that a trial court could not distribute the assets of a dissolved limited-liability company when the record did "not conclusively establish that the [company] had no outstanding debts"). If any such revenue is sufficient, each brother may have an interest in any potential profits that may remain after all the company's debts are paid. See § 10A-5A-7.06. These issues must be addressed to "'conclusively determine[]" all of the matters presented regarding the distribution of

3d 299, 303 n.6 (Ala. 2012), the parties here are not waiting for a determination on attorney's fees in the present action. Instead, Bento Construction will need to pay attorney's fees to pursue and defend other actions, and the payment of those fees would be the responsibility of Bento Construction. See § 10A-5A-3.01, Ala. Code 1975 (providing that individual members of a limited-liability company are not liable for the debts of the company). Thus, those fees will offset any recovery in those actions or add to any expense of those other actions.

Bento Construction's assets. Richey, ____ So. 3d at ____ (quoting Bean, 557 So. 2d at 1253).

Although the trial court's order addresses the funds "in the ... possession of Bento Construction," it does not discuss or attempt to allocate any portion of the revenues that may arise from the incomplete projects or the lawsuits. The trial court's failure to address these issues leaves them unresolved and thus renders its January 6, 2023, order nonfinal. Compare Merrick, 321 So. 3d at 1271 (dismissing an appeal on the basis that the trial court's order was nonfinal when the trial court's order "never mentioned," and thus never resolved, a claim against a defendant), with Polk, 70 So. 3d at 376 (opinion on return to remand (reversing a distribution order that purported to allocate the assets of a limited-liability company because the order was "premature" due to a lack of "evidence as to the extent of the [company's] assets and liabilities"). Cf. Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 361-62 (Ala. 2004) ("That a judgment is not final when the amount of damages has not been fixed by it is unquestionable." (quoting "Automatic" Sprinkler Corp. of Am. v. B.F. Goodrich Co., 351 So. 2d 555, 557 (Ala. 1977))).

SC-2023-0365 and SC-2023-0398

Accordingly, these appeals -- which both arise out of the January 6, 2023, order -- "must be dismissed as arising from a nonfinal judgment." Richey, ____ So. 3d at _____. Because we dismiss the present appeals, "we do not consider the merits of the parties' substantive arguments, and we express no opinion concerning those issues." Deutsche Bank Nat'l Tr. Co. v. Karr, 306 So. 3d 882, 890 (Ala. 2020).

SC-2023-0365 -- APPEAL DISMISSED.

SC-2023-0398 -- CROSS-APPEAL DISMISSED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur.

Cook, J., concurs specially, with opinion.

COOK, Justice (concurring specially).

Although I am the author of the main opinion, I write specially to address the general process of dissolving a limited-liability company ("LLC") for the benefit of the bench and bar in future litigation.

This action is governed by the Alabama Limited Liability Company Law, § 10A-5A-1.01 et seq., Ala. Code 1975.⁷ See Sadler v. Players Recreation Grp., LLC, 374 So. 3d 683, 687 (Ala. 2022). Under Alabama law, an LLC is an artificial person -- that is, it has its own existence similar to a corporation. See § 10A-5A-1.04(a), Ala. Code 1975 ("A limited liability company is a separate legal entity."); Childs v. Pommer, 348 So. 3d 379, 391 (Ala. 2021) (noting that, in the context of an LLC, "[t]he concept that a corporation is a legal entity existing separate and apart from its shareholders is well settled in this state" (citation omitted)); Ex parte Alabama Power Co., 369 So. 3d 662, 672 (2022) (Mitchell, J., concurring in the result) (noting the corporate-formality similarities in LLCs and "corporations," a term which "traditionally encompassed any artificial separate legal personality, capable of continuous existence, that

⁷In 2014, the former Alabama Limited Liability Company Law, former § 10A-5-1.01 et seq., Ala. Code 1975, was repealed and replaced by the current Alabama Limited Liability Company Law.

is created and invested with its powers by positive law").

The members of an LLC do not own particular assets or even portions of particular assets of the company. See § 10A-5A-4.02, Ala. Code 1975 ("A member has no interest in any specific property of a limited liability company or a series thereof."). Instead, the members own only an interest in the LLC. See Bradley J. Sklar & W. Todd Carlisle, The Alabama Limited Liability Company Act, 45 Ala. L. Rev. 145, 205-06 (1993) ("'[A]ll property originally contributed to the limited liability company or subsequently acquired' becomes LLC property for which no member has any specific interest. Unlike partnership property under the [Uniform Partnership Act], LLC property is owned by the firm itself rather than nominally or otherwise by the members." (emphasis added; footnotes omitted)).^{8,9}

⁸I note that, although this excerpt from Sklar and Carlisle's article references a former version of § 10A-5A-4.02, the language in the former version of § 10A-5A-4.02 is identical to the current version of that statute that is cited at the end of the previous sentence.

⁹An LLC may acquire and hold property in its own name pursuant to Chapter 1 of the Alabama Business and Nonprofit Entity Code, § 10A-1-1.01 et seq., Ala. Code 1975. See Ala. Code 1975, § 10A-1-2.11(3) (providing domestic entities the authority to "acquire, receive, own, hold, improve, use, and deal in and with property or an interest in property"); § 10A-5A-1.04(b) ("A limited liability company shall possess and may

Additionally, "[a] member of a limited liability company is not liable, solely by reason of being a member, for a debt, obligation, or liability of the limited liability company or a series thereof, whether arising in contract, tort, or otherwise"¹⁰ § 10A-5A-3.01, Ala. Code 1975; Bonedaddy's of Lee Branch, LLC v. City of Birmingham, 192 So. 3d 1151, 1161 (Ala. 2015) ("Membership/ownership in an LLC ... is not a basis for liability for debts of the LLC." (quoting appellant's brief)); Sklar & Carlisle, supra, at 199 ("A member of an Alabama LLC is not liable for the debts and obligations of the LLC or for the conduct of any other

exercise all powers and privileges granted and enumerated by Chapter 1").

¹⁰Generally, a trial court may hold a member personally liable for the debts of an LLC based on his or her membership status only if the court "pierces the corporate veil," which "is not a power that is lightly exercised." Childs v. Pommer, 348 So. 3d 379, 394 (Ala. 2021) (quoting Simmons v. Clark Equip. Credit Corp., 554 So. 2d 398, 400 (Ala. 1989)). In order for a trial court to pierce the corporate veil, "a plaintiff must show fraud in asserting the corporate existence or must show that recognition of the corporate existence will result in injustice or inequitable consequences." Id. at 391 (quoting Simmons, 554 So. 2d at 400).

I note that, when considering piercing an LLC's veil, "corporate precedents may be appropriately analogous" because "[t]he members of an LLC, like shareholders in a corporation, are able to participate in the management of the company without sacrificing their limited liability." Sklar & Carlisle, supra, at 200-01.

member, manager, agent, or employee of the LLC."). In fact, "[l]imited liability has always been a cherished attribute of the corporate entity."

Sklar & Carlisle, supra, at 199.¹¹

As to dissolution of an LLC, the Alabama Limited Liability Company Law provides that an LLC may be dissolved by "the entry of an order dissolving the limited liability company" after an "application by a member."¹² § 10A-5A-7.01(d), Ala. Code 1975. After dissolution, the LLC

¹¹There may, of course, be other circumstances that might cause an individual member to be liable for the debts of an LLC. For instance, a member may have made a personal guarantee of certain debts of the LLC. See Comment to § 10A-5A-3.01, Ala. Code 1975 (noting that "a member may become liable in contract to a third-party creditor of the limited-liability company through a guarantee or similar arrangement").

Similarly, a manager of an LLC is generally not liable for obligations of the LLC, but can commit wrongs individually that might subject him or her to liability, just as a corporate officer might. Although the Alabama Limited Liability Company Law does not expressly address manager liability for the obligations of an LLC, "like a corporate officer, a manager serves only as an agent of the LLC. Therefore, as a general rule, there should be no grounds for imposing such liability on the manager." Sklar & Carlisle, supra, at 199.

¹²In most cases, the dissolution of an LLC occurs without judicial intervention. Moreover, the dissolution is often governed by the specific provisions previously agreed upon by the members in an LLC agreement, which operates as a contract between the members. Absent such an agreement, § 10A-5A-7.01, Ala. Code 1975 -- which describes the triggering events for the dissolution of an LLC -- applies. See 10A-5A-1.08(a)(2), Ala. Code 1975.

"continues its existence as a limited liability company but may not carry on any activities and affairs except as is appropriate to wind up and liquidate its activities and affairs." § 10A-5A-7.02(a), Ala. Code 1975 (emphasis added).

During the winding-up process, the only "activities and affairs" that an LLC may conduct include:

"(1) collecting its assets;

"(2) disposing of its properties that will not be distributed in kind to persons owning transferable interests;

"(3) discharging or making provisions for discharging its liabilities;

"(4) distributing its remaining property ...; and

"(5) doing every other act necessary to wind up and liquidate its activities and affairs."

§ 10A-5A-7.02(a), Ala. Code 1975. The LLC may also "prosecute, defend, or settle actions or proceedings." § 10A-5A-7.02(b)(3).

Even when an LLC agreement governs, the parties may nevertheless request judicial intervention when they dispute the distribution of the LLC's assets or seek the resolution of issues like, as in this case, deciding whether an investment in the LLC is a loan or a contribution, determining actual creditors from contingent creditors, or determining the value of the members' actual ownership interests.

Once the winding-up process is complete, any remaining assets of the LLC are distributed first to creditors and then, after the debts of the LLC are paid, to members in accordance with § 10A-5A-7.06(b) and (c), Ala. Code 1975. In other words, (1) everything should be liquidated,¹³ (2) all debts should be paid, and (3) then members should be paid -- generally in accordance with their agreed-upon percentages of ownership of the LLC.

To summarize:

"Once dissolved, a limited liability company continues to exist, but its existence is solely for the purpose of winding up and liquidating its business and affairs The company may continue to act as a going concern for a 'reasonable time,' sue and be sued in its name, [and] transfer assets

"....

"Upon the winding up of an LLC, the company's creditors (including members who are creditors) have the first priority

¹³The word "liquidate" means to convert nonmonetary assets (both tangible and intangible assets) into money. See Black's Law Dictionary 1072 (10th ed. 2014). Without limitation, this might mean (1) completing and being paid for a contract or (2) selling an asset (including physical assets, accounts payable, or an ongoing contract) or (3) even selling all the assets as a going concern. It might (or might not) be helpful to appoint a receiver to liquidate those assets. See § 10A-5A-7.03(b), Ala. Code 1975 (providing a circuit court authority to appoint "a person to wind up the limited-liability company's activities and affairs" when dissolving an LLC). See generally Rule 66, Ala. R. Civ. P.; §§ 6-6-620 through -628, Ala. Code 1975.

for payment from the company's assets. Only after creditors have been fully paid may there be any distributions to the company's members"

See Gregory A. Brockwell, Plop Plop, Fizz Fizz: Dissolving an Alabama Biz, 39 Ala. Ass'n Just. J. 53, 56 (2018) (footnotes omitted).

In dealing with the dissolution of a partnership rather than an LLC, our Court has previously recognized that a judgment dissolving a partnership should contain: A date of dissolution; a determination of the assets and indebtedness of the partnership; a marshaling of the assets or accounting; a determination of partnership property; and a distribution of the assets and liabilities and a determination of contribution. See Briley v. Briley, 51 Ala. App. 671, 288 So. 2d 733 (1974). Even when a trial court addresses outstanding obligations, a trial court's allocation of an LLC's assets may be "premature" if the record does not show a conclusive determination of the LLC's assets and liabilities. See Polk v. Polk, 70 So. 3d 363, 376 (Ala. Civ. App. 2010) (opinion on return to remand) (reversing a trial court's distribution order that allocated the assets of an LLC because "[t]he record ... [did] not conclusively establish that the LLC had no outstanding debts" and one member testified that another member "had possession and control of certain assets belonging

to the LLC"). "Without evidence as to the extent of the LLC's assets and liabilities," a trial court may not purport to distribute any assets of the LLC. Id.

I acknowledge that making these requisite determinations can be complicated. As noted earlier, courts sometimes find it beneficial to appoint a receiver to assist in some, or all, of the steps above. See note 13, *supra*. Further, the trial court's job is complicated here by ancillary arguments from the parties. I make no determination as to those arguments except to note that the trial court may need to determine those issues in order to enter a final judgment. Instead, I highlight the applicable law in hopes that it will aid the bench and bar in this and future cases.