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Business Associations

by Crystal J. Clark*

I. INTRODUCTION

This Article surveys notable cases in the areas of corporate, limited liability company, partnership, agency, and joint venture law decided between June 1, 2014 and May 31, 2015 by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia.[1]

II. ISSUES OF FIRST IMPRESSION

A. *Confirmed Application of the Business Judgment Rule*

During the previous survey period, the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit submitted certified questions to the Georgia Supreme Court regarding whether the business judgment rule precludes ordinary negligence claims against bank officers and directors.[2] The Georgia Supreme Court affirmed and clarified the protections of the business judgment rule in Georgia.

In *Federal Deposit Insurance Corp. v. Loudermilk*,[3] the Georgia Supreme Court held that the law protects decisions by officers and

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1. For an analysis of Georgia business associations law during the prior survey period, see Crystal J. Clark & Kristi K. North, *Business Associations, Annual Survey of Georgia Law*, 66 MERCER L. REV. 15 (2014).

2. Last year's article discussed the holdings and analyses of the appellate courts for these cases. *See id.* at 15.

3. 295 Ga. 579, 761 S.E.2d 332 (2014).

directors against ordinary negligence claims by the business judgment rule, provided they make decisions with due care and deliberation.[4] In making its determination, the court first acknowledged the application of the business judgment rule in Georgia common law.[5] Next, the court compared the common law doctrine of the business judgment rule with the statutory duties of officers and directors under section 7-1-490 of the Official Code of Georgia Annotated (O.C.G.A.)[6] and determined that the former "is consistent with, and has not been superseded by, O.C.G.A. § 7-1-490(a)."[7]

The court overruled two cases that provided an absolute bar against claims of ordinary negligence by the business judgment rule because they were inconsistent with the rule at common law.[8] It clarified that "officers and directors may be liable for a failure to exercise ordinary care with respect to the way in which business decisions are made."[9]

The court explained that the standard of care for officers and directors of banks is less demanding than the "ordinary diligence" standard.[10] "[B]ank officers and directors are only expected to exercise the same diligence and care as would be exercised by 'ordinarily prudent' officers and directors of a similarly situated bank,"[11] not the "care which every prudent man takes of his own property of a similar nature."[12] Bank officers and directors may rely on certain information, when doing so in good faith.[13] This holding increases Georgia's bank officers' and directors' potential liability and provides insight into the liability implications for other officers and directors as well.

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4. *Id.* at 585-86, 761 S.E.2d at 338.
5. *Id.* at 581, 761 S.E.2d at 335.
6. O.C.G.A. § 7-1-490 (2015).
7. *Loudermilk*, 295 Ga. at 588-89, 593, 761 S.E.2d at 340, 342; O.C.G.A. § 7-1-490(a).
8. *Loudermilk*, 295 Ga. at 594, 761 S.E.2d at 343 (overruling Flexible Products Co. v. Ervast, 284 Ga. App. 178, 643 S.E.2d 560 (2007) and Brock Built, LLC v. Blake, 300 Ga. App. 816, 686 S.E.2d 425 (2009)).
9. *Id.* at 593, 761 S.E.2d at 342.
10. *Id.* at 595, 761 S.E.2d at 344. Ordinary diligence is "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances," and, with respect to the preservation of property, ordinary diligence is "that care which every prudent man takes of his own property of a similar nature." *Id.* at 594-95, 761 S.E.2d at 344.
11. *Id.* at 595, 761 S.E.2d at 344.
12. *Id.* (quoting O.C.G.A. § 51-1-2 (2000)).
13. O.C.G.A. § 7-1-490(a).

B. Jurisdiction for Charging Orders Against Limited Liability Company Interests

In *Mahalo Investments III, LLC v. First Citizens Bank & Trust Co.*,[14] the Georgia Court of Appeals held, as a matter of first impression, that under Georgia's Limited Liability Company Act (LLC Act),[15] a court only needs jurisdiction over the judgment debtor to enter a charging order against that judgment debtor's membership interest.[16] In *Mahalo Investments III, LLC*, First Citizens Bank & Trust Company (FCB) obtained a judgment against Mahalo Investments III, LLC (Mahalo), Mark Epstein, and Andrew Kelly. FCB then sought an order, by the same court and under the same case file, to change Epstein's and Kelly's interests in the limited liability company (LLC) with payment of the unsatisfied judgment.[17] The trial court issued the charging order pursuant to O.C.G.A. § 14-11-504(a),[18] and Epstein and Kelly appealed the order.[19]

The appellants argued that proper venue and jurisdiction over the interests in the LLC had to be established before a charging order could be entered against their interests in the LLC.[20] The court looked to statutory interpretation and determined that the plain language of O.C.G.A. § 14-11-504(a) allows any court of competent jurisdiction to issue a charging order.[21] While the statute is silent on whether the LLC needs to be a party to the proceeding for the charging order, the court determined that the LLC need not be added because the charging order affects no right or direct interest of the LLC.[22] As a result, courts may, under the LLC Act, enter a charging order against a judgment debtor's interest if the court has jurisdiction over the judgment debtor.[23]

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14. 330 Ga. App. 737, 769 S.E.2d 154 (2015).
15. O.C.G.A. §§ 14-11-100 to -1109 (2003).
16. *Mahalo*, 330 Ga. App. at 743, 769 S.E.2d at 158-59.
17. *Id.* at 737, 769 S.E.2d at 154-55.
18. O.C.G.A. § 14-11-504(a) (2003 & Supp. 2015).
19. *Mahalo*, 330 Ga. App. at 737-38, 769 S.E.2d at 155.
20. *Id.* at 738, 769 S.E.2d at 155.
21. *Id.* at 738-39, 769 S.E.2d at 155-56. The court dismissed the appellants' argument that the charging order under the Georgia Uniform Partnership Act, O.C.G.A. §§ 14-8-1 to -64 (2003), must be read *in pari materia* with O.C.G.A. § 14-11-504(a) because the plain language of the statute is unambiguous. *Mahalo*, 330 Ga. App. at 739, 769 S.E.2d at 156.
22. *Mahalo*, 330 Ga. App. at 742-43, 769 S.E.2d at 158.
23. *Id.* at 743, 769 S.E.2d at 158-59.

III. NOTEWORTHY CASES

A. *Charging Orders and Accounting of LLC Assets*

In *Gaslowitz v. Stabilis Fund I, LP*,[24] the Georgia Court of Appeals held that granting a charging order does not entitle one to an accounting of company assets.[25] In *Gaslowitz*, Stabilis Fund I, LP (Stabilis) obtained a judgment against Adam Gaslowitz. Stabilis also obtained a charging order against Gaslowitz's interest in G&A, LLC, an entity wholly owned by Gaslowitz. The trial court held that Stabilis was entitled, as a judgment creditor of Gaslowitz, to a charging order against Gaslowitz's membership interest and to an accounting of its assets.[26]

The court of appeals affirmed the order issuing the charging order.[27] The court determined that O.C.G.A. § 14-11-504(a) does not require the judgment creditor to establish a specific amount of the unpaid remaining judgment on the date that the charging order is issued.[28] Additionally, the charge can only be against the amount of judgment that remains unsatisfied; thus, the charging order need not give further direction regarding the specific amount.[29]

The court of appeals reversed the order for the accounting of the assets of G&A, LLC.[30] The court determined that an accounting of a company's assets does not indicate the likelihood that a judgment creditor will recover its claim.[31] Therefore, unlike the Uniform Partnership Act,[32] the LLC Act does not specifically provide a judgment creditor with a right to an accounting of a company's assets but, instead, provides other remedies.[33]

Lastly, the court of appeals held that the trial court did not abuse its discretion when it ordered Gaslowitz to post a supersedeas bond to secure the charging order.[34] On the other hand, the court determined that it was an abuse of the trial court's discretion to order G&A, LLC to jointly and severally post a supersedeas bond with Gaslowitz because the

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24. 331 Ga. App. 152, 770 S.E.2d 245 (2015).
25. *Id.* at 152, 156, 770 S.E.2d at 247, 250.
26. *Id.* at 152-53, 770 S.E.2d at 247-48.
27. *Id.* at 152, 770 S.E.2d at 247.
28. *Id.* at 155, 770 S.E.2d at 249.
29. *Id.*
30. *Id.* at 152, 770 S.E.2d at 247.
31. *Id.* at 155-56, 770 S.E.2d at 249-50.
32. O.C.G.A. §§ 14-8-1 to -64 (2003).
33. *Gaslowitz*, 331 Ga. App. at 156-57, 770 S.E.2d at 250-51.
34. *Id.* at 158, 770 S.E.2d at 251.

charging order did not affect a disposition of its property and it was not a necessary party to the charging order proceeding.[35]

B. Acronym as a Misnomer Rather Than a Fictitious Name

In *Courtland Hotel, LLC v. Salzer*,[36] the Georgia Court of Appeals held that the agent of a corporation could not be individually liable under a contract where the parties did not intend for the agent to be individually liable.[37] In *Courtland*, the principals of Convention Organizing and Leadership Team, Inc. referred to the corporation by the acronym "C.O.L.T., Inc." The principals used this acronym among themselves and with Joshua Salzer—an event coordinator hired to book rooms at a hotel for a convention to be held by the corporation. The corporation authorized Salzer to represent himself as the "Chairman" of the convention, and leading up to the convention, Salzer signed a contract with the hotel in the capacity of "Meeting Coordinator/Acting Chairman" on behalf of C.O.L.T., Inc.[38]

Thereafter, the principals cancelled the convention, and the hotel filed a complaint against Salzer individually. The hotel argued that Salzer was individually liable as a signatory to the contract on behalf of a nonexistent entity. Salzer responded that he was not a party to the contract and only executed it as an agent for the corporation.[39] The trial court granted summary judgment to Salzer, and the appellate court affirmed.[40]

In making its determination, the court acknowledged that Salzer "both disclosed to the hotel that he was acting as an agent and sufficiently identified his principal."[41] In accordance with past precedent, "[W]here the individual in question purported to act on behalf of a corporation which did in fact exist, the fact that the corporation's name was incorrectly set forth on the contract will not necessarily result in the imposition of personal liability against him."[42] Further, a "mere misnomer of a corporation in a written instrument is not material or vital in its consequences, if the identity of the corporation intended is

35. *Id.* at 152, 158-59, 770 S.E.2d at 247, 251-52.

36. 330 Ga. App. 264, 767 S.E.2d 750 (2014), *cert. denied*, 2015 Ga. LEXIS 259 (2015).

37. *Id.* at 264, 767 S.E.2d at 751.

38. *Id.* at 264-65, 767 S.E.2d at 751. Salzer was not an officer, director, or shareholder of the corporation. *Id.* at 265, 767 S.E.2d at 751.

39. *Id.* at 265, 767 S.E.2d at 751.

40. *Id.*

41. *Id.*

42. *Id.* at 266, 767 S.E.2d at 752 (quoting Pinson v. Hartsfield Int'l Comm. Ctr., 191 Ga. App. 459, 461, 382 S.E.2d 136, 138 (1989)).

clear or can be ascertained by proof."[43] As such, the court determined that the acronym of the corporation's full name was a misnomer and not sufficiently different to be a fictitious name rather than an abbreviation, and it held that Salzer was not individually liable under the contract.[44]

C. Substitute Service of Process

In *Hooks v. McCondichie Properties 1, LP*,[45] the court of appeals held that the law entitles a claimant to use substitute service of process where the registered office of a limited partnership is not being "continuously maintained."[46] In *Hooks*, Michael Hooks filed a personal injury action against McCondichie Properties 1, LP (McCondichie). When his process server attempted to serve the complaint on McCondichie's registered agent, he found the registered office address listed was a "virtual" office without anyone authorized to accept service of process on the registered agent's or on McCondichie's behalf. Subsequently, Hooks used substituted service through the Secretary of State and couriered a copy of the complaint to the registered agent at the registered office, which again went unclaimed. When the trial court entered default judgment for Hooks, McCondichie argued that Hooks failed to properly perfect service of process.[47]

Pursuant to O.C.G.A. § 14-9-104(a),[48] a limited partnership must "continuously maintain" a "registered office" and a "registered agent for service of process on the limited partnership."[49] In affirming the trial court's decision regarding Hooks' use of substitute service, the appellate court explained that "continuously maintained" means neither that the registered agent must be present in the office at all times nor that the office must be kept open outside of normal business hours.[50] If the registered office, however, is only a virtual or remote office that is generally unattended or if the registered agent works out of an office other than the registered office, then the registered office is not "continuously maintained" as required by statute.[51]

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43. *Id.* (quoting CML-GA Smyrna, LLC v. Atlanta Real Estate Invs., LLC, 294 Ga. 787, 789, 756 S.E.2d 504, 506 (2014)).

44. *Id.* at 266-67, 767 S.E.2d at 752.

45. 330 Ga. App. 583, 767 S.E.2d 517 (2015), *cert. denied*, 2015 Ga. LEXIS 523 (2015).

46. *Id.* at 587, 767 S.E.2d at 521.

47. *Id.* at 583, 585-86, 767 S.E.2d at 519, 520.

48. O.C.G.A. § 14-9-104(a) (2003).

49. *Id.*

50. *Hooks*, 330 Ga. App. at 587, 767 S.E.2d at 521.

51. *Id.*

D. LLC Members with Delegated Duties May Owe a Fiduciary Duty

In *Inland Atlantic Old National Phase I, LLC v. 6425 Old National, LLC*,[52] the court of appeals held that an LLC member's delegated duties raised a question of fact regarding whether the member owed a fiduciary duty to the other member, and it reversed the trial court's grant of summary judgment.[53] In this case, a joint venture was formed pursuant to an LLC agreement to develop a shopping center on a piece of property.[54] The LLC agreement provided that business and affairs of the venture would be managed by the managing-member (Manager) and that the Manager could delegate "specific management powers and duties to the members."[55] The Manager and a member entered into a Site Development Agreement, which provided that the member would supervise and manage the construction of the site improvements. Issues arose on the construction quality, and the Manager brought a claim against the member for breach of fiduciary duty.[56]

The general rule states that "where a member is not a manager in a company in which management is vested in one or more managers . . . that member shall have no duties to the limited liability company or to the other members solely by reason of acting in his or her capacity as a member[.]"[57] Here, because the Manager expressly delegated duties for the site development to the member, the appellate court determined that this arrangement created a question of fact about whether the member owed a fiduciary obligation to the Manager.[58]

LLC agreements are a great tool for limiting members' liability. Nevertheless, members need to be aware that accepting delegated duties could create a fiduciary duty that might not otherwise exist.

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52. 329 Ga. App. 671, 766 S.E.2d 86 (2014).

53. *Id.* at 675, 766 S.E.2d at 91.

54. *Id.* at 672, 766 S.E.2d at 89.

55. *Id.* at 675, 766 S.E.2d at 91.

56. *Id.* at 671, 672, 673, 766 S.E.2d at 88, 90.

57. *Id.* at 674, 766 S.E.2d at 91 (second alteration in original) (quoting ULQ, LLC v. Meder, 293 Ga. App. 176, 184, 666 S.E.2d 713, 720-21 (2008)). However, a company may provide otherwise in its operating agreement or articles of organization. *Id.*

58. *Id.* at 675, 766 S.E.2d at 91.