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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0271**

FR Holding, LLC,
Respondent,

vs.

BA Halper, LLC, et al.,
defendants and third party plaintiffs,
Appellants,

vs.

FactRight, LLC, et al.,
third party defendants,
Respondents.

**Filed December 11, 2017
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-16-13605

Christopher P. Parrington, Andrew R. Shedlock, Kutak Rock, LLP, Minneapolis,
Minnesota (for appellants)

F. Chet Taylor, Taylor Law Office, PLC, Minneapolis, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant is a limited liability company with one individual member, who is also an appellant. Appellants have a membership interest in respondent, which is also a limited liability company. The district court granted respondent's motion for summary judgment and respondents' motion to dismiss appellants' counterclaim and third-party complaint. Appellants argue that the district court erred by concluding that (1) respondent did not breach the Operating Agreement nor did it default on its obligation to purchase appellants' membership interests, (2) the purchase price of appellants' membership interests is appellants' capital account balance, and (3) appellants are not entitled to the fair market value of their membership interest plus the proceeds from liquidation of their capital account. We affirm.

FACTS

Background

Respondent FR Holding LLC (FR Holding) is an Illinois limited liability company with its principal place of business in Minnesota. FR Holding's primary business is investment activities, although it also conducts other business. Appellant Barbara Halper is the sole member and manager of appellant BA Halper LLC. Halper LLC had a 29.25% membership interest in FR Holding. And Barbara Halper was one of three managers of FR Holding. We will refer to appellants collectively as Halper.

In April 2011, FR Holding's members, including appellant Halper LLC, entered into an Operating Agreement (Agreement), which sets out the company's membership and

management structure and provides that the Agreement is exclusively governed by Illinois law.

The Agreement

The Agreement contains several provisions that are relevant to the issues on appeal. As discussed in more detail below, the first issue concerns whether Halper withdrew or dissociated from the company. Section 7.9 provides that a member may withdraw from FR Holding as the result of a “[w]ithdrawal [e]vent,” nine of which are identified in the Agreement. For example, a member may withdraw by “[w]ritten notice by the Member to the other Members or to the Manager of the Member’s dissociation.”

The Agreement also provides that a “[w]ithdrawal [e]vent” triggers a “[d]issociation [e]vent,” in which FR Holding or its remaining members may purchase the dissociating member’s membership units. Section 11.6(a) provides that, “With respect to a ‘Dissociating Member’, the Company shall have the primary right and option to purchase all or any portion of the Dissociating Member’s Interests (the “Subject Interests”), said option being exercised by notice to the Dissociating Member given within twenty (20) calendar days following the Dissociation Date.” Section 11.6(a) also states that:

If the Company and/or any one or more or all of the Members elect to exercise their respective options to acquire all or any portion of the Subject Interests, the Dissociating Member shall sell and assign the Subject Interests to the Company and/or the Members, in the proportions described above. . . . The failure of the Company or any of the remaining Members to exercise their respective options shall constitute a waiver of such options.

The purchase price of Halper's membership units is another issue in this appeal. In section 11(b), the Agreement specifies:

If the Dissociation Event is a divorce, separation decree, property settlement or other form of judicially approved marital arrangement, then the purchase price of the Subject Interests sold pursuant to this section shall equal the Fair Market Value thereof. If the Dissociation Event arises for any other reason, including by reason of the Dissociating Member's withdrawal from the Company . . . then purchase price for the Subject Interests shall be the lesser of (x) the Dissociating Member's aggregate Capital Account (as defined in the section 9.3 above) and (y) the Fair Market Value of the Subject Interests.

A "[d]issociation [e]vent" also invokes certain closing and purchasing procedures enumerated in section 11.6(c), (d), and (e) of the Agreement. Section 11.6(c) provides that, "The closing of the purchase and sale of Subject Interests pursuant to this section shall occur at the principal office of the Company within one hundred twenty (120) calendar days after the Dissociation Event." Section 11.6(d) states that at least 20% of the purchase price must be paid at closing with the balance to be paid by certified or cashier's check, by wire transfer, or by delivery of a promissory note. And section 11.6(e) provides that, "Upon delivery to the Dissociating Member of the purchase price as provided herein, the Subject Interests of the Dissociating Member shall be transferred to the Company and the purchasing Members."

Events Preceding Litigation

The parties agree that the following material facts are not in dispute but disagree about the legal significance of these facts. In January 2016, Halper began expressing her displeasure with FR Holding's decision to implement a new operating system. On

February 8, she met with two other members, respondents Stephen Fischer and Jeffrey Montgomery, to discuss her “transition” out of the company as a member and manager. The following day, Halper emailed Fischer and Montgomery stating, “You are both incredibly fine gentlemen. I look forward to working with you through this transition.” Montgomery responded the same day with an informal proposal, including a consulting agreement and a non-compete agreement. His email also indicated it was preferable for FR Holding to purchase all of Halper’s membership units and for Halper to remain a member until at least September 30, 2016.

Discussions continued for several months regarding the purchase of Halper’s membership units. In April 2016, Fischer emailed Halper a “term sheet” that proposed purchasing all of her units for \$287,300. The term sheet also calculated the value of each unit. Halper responded in May expressing some disagreement with the April proposal. In July, FR Holding sent Halper a draft of its proposed Membership Unit Purchase Agreement (MUPA). The MUPA stated a total purchase price of \$150,000 for Halper’s membership units. Fischer also notified Halper that her capital account with the company had a balance of \$121,641.11.

Halper’s July 26 letter rejected the MUPA, demanded that FR Holding purchase her membership units, and stated that she had given notice of her intent to dissociate on February 9, 2016. Halper claimed that FR Holding had failed to purchase her units within the timeframe mandated by the Agreement, and, therefore, was in default. FR Holding’s August 8 letter rejected Halper’s demand and notified her that it intended to exercise its option to purchase her membership units. Halper replied four days later, again asserting

that she had dissociated from FR Holding in February and that the company was in default. She also claimed the Agreement provides that FR Holding must pay the purchase price of her membership units plus the proceeds from liquidating her capital account.

Procedural History

On August 23, 2016, FR Holding served Halper with a complaint, seeking an order for specific performance that would direct Halper to sell her membership units to FR Holding. FR Holding also sought a declaratory judgment that (1) FR Holding did not default in its obligations to Halper under the Agreement, (2) FR Holding did not breach any contractual obligations, and (3) Halper is not entitled to any compensation other than the purchase price of her membership units. Halper filed a counterclaim against FR Holding and a third-party complaint against other entities and individuals associated with the company, alleging breach of contract, violations of Illinois law, and equitable, quasi-contract claims.¹

Halper filed a motion in September 2016, asking the district court to direct FR Holding to purchase her membership units for \$363,482.69, provide a complete accounting of her capital account, and liquidate her capital account. FR Holding filed a motion for summary judgment on its claims for specific performance and declaratory judgment. FR Holding and its affiliates also moved to dismiss Halper's counterclaim and third-party complaint.

¹ Halper filed her third-party complaint against respondents FactRight, LLC, FR Consulting Services, LLC, FR Risk Management, LLC, Investaire, LLC, Pretorien Management Company, LLC, Fischer, Montgomery, and Scott Smith.

In October, FR Holding sent a letter to Halper extending an offer to close on its purchase of her membership units. Halper did not respond.

In January 2017, the district court granted FR Holding's motion to dismiss Halper's counterclaim and her third-party complaint against FR Holding's affiliates. And the district court granted FR Holding's summary judgment motion for specific performance and instructed Halper to sell her membership units in exchange for the balance of her capital account. The district court initially denied FR Holding's request for a declaratory judgment and later amended its order to dismiss the claim.² The district court also denied Halper's buyout motion and directed entry of judgment.

Halper submitted a request to file a motion for reconsideration, asking the district court to reconsider the purchase price of Halper's membership interests and whether she is entitled to both the purchase price of her membership units and the proceeds from liquidating her capital account. The district court denied Halper's request. This appeal follows.

D E C I S I O N

Summary judgment is appropriate if the record reflects “no genuine issue as to any material fact” and the moving party “is entitled to [] judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal, we review “a district court’s decision to grant summary judgment de novo to determine whether any genuine issue of material fact exists and whether the district court correctly applied the law.” *Citizens State Bank Norwood Young*

² The district court concluded that FR Holding's declaratory-judgment claim was moot, based on the court's resolution of the other claims.

Am. v. Brown, 849 N.W.2d 55, 61 (Minn. 2014). Appellate courts “view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). “[Appellate courts] may affirm a grant of summary judgment if it can be sustained on any grounds.” *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

The district court may grant a motion to dismiss any pleading, in this case a counterclaim and third-party complaint, if it “fail[s] to state a claim upon which relief can be granted.” Minn. R. Civ. P. 12.02(e). Generally, the district court does not consider extrinsic evidence on a motion to dismiss, but the district court may consider documents referenced in the pleadings, such as a contract, when the referenced document is central to the dispute. *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). We consider a district court’s ruling on a motion to dismiss by reviewing de novo the legal sufficiency of the claim. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). This requires accepting the facts alleged in the pleadings as true and “constru[ing] all reasonable inferences in favor of the nonmoving party.” *Id.* (quotation omitted).

Halper argues that the district court erred in entering summary judgment in favor of FR Holding and granting the motion to dismiss her counterclaim and third-party complaint. She raised seven different claims in her counterclaim and third-party complaint, alleging breach of contract, three claims for violations of Illinois’s Limited Liability Company Act (the Act), and three equitable, quasi-contract claims. Because the parties do not dispute that the Agreement is a valid and enforceable contract under Illinois law, we need not address Halper’s quasi-contract claims. For reasons explained below, we begin by addressing

Halper's breach-of-contract claim. The interpretation of a contract, such as an operating agreement, presents a question of law that we review de novo. *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 329 (Ill. 2011).

I. The district court did not err in granting summary judgment in favor of FR Holding on Halper's breach-of-contract claim.

Halper argues that the district erred by failing to apply Illinois law and concluding that FR Holding did not breach the Agreement. The parties agree that the Agreement should be read in accordance with Illinois law. The Act sets forth organizational requirements and the obligations of a company's members and managers. 805 Ill. Comp. Stat. § 180/1-1 to 35-60 (2016). But the Act explicitly permits members to modify statutory provisions by entering into an operating agreement:

All members of a limited liability company may enter into an operating agreement to regulate the affairs of the company and the conduct of its business and to govern relations among the members, managers, and company. . . . To the extent the operating agreement does not otherwise provide, this Act governs relations among the members, managers, and company. Except as provided in subsections (b), (c), (d), and (e) of this Section, *an operating agreement may modify any provision or provisions of this Act governing relations among the members, managers, and company.*

805 Ill. Comp. Stat. § 180/15–5(a) (emphasis added).

A. Halper did not provide written notice of dissociation in February 2016.

First, Halper contends that the district court erred when it determined that Halper did not give notice of dissociation to FR Holding on February 9, 2016. Because notice of dissociation is a “[w]ithdrawal [e]vent” under the Agreement, Halper asserts that the Agreement and Illinois law require that FR Holding purchase her membership units within

120 days of the notice of dissociation. As mentioned previously, the Agreement provides that notice of dissociation must be in writing.

The district court determined that Halper's February email was vague and, therefore, was not written notice of dissociation under the Agreement. The record supports the district court's conclusion. In January 2016, Halper expressed dissatisfaction and indicated to Fischer that she was considering separation. Halper met with Fischer and Montgomery on February 8, and told them she would "transition" out of the company as a member and manager. She emailed Fischer and Montgomery on February 9 stating, "You are both incredibly fine gentlemen. I look forward to working with you through this transition." The district court concluded that, when viewed in the light most favorable to Halper, the February 9 email notified FR Holding that Halper intended to dissociate, but was not written notice of dissociation.

Halper argues that, because she was in "the act or process of dissociating," she dissociated from the company in February. The Agreement does not expressly define the term "dissociation." Contracts, like statutes, are construed according to their common meaning and courts may resort to dictionaries in ascertaining that meaning. *See People v. Taylor*, 561 N.E.2d 667, 671 (Ill. 1990). Halper relies on a particular dictionary definition. *See Merriam-Webster's Collegiate Dictionary* 363 (11th ed. 2014) (defining "dissociation" as "the act or process of dissociating: the state of being dissociated"). In contrast to Halper's definition, the common meaning of "dissociate" is "[t]o remove from association; separate." *The American Heritage Dictionary of the English Language* 523 (5th ed. 2011); *see also Oxford Dictionary of English* 508 (3d ed. 2010) (defining

“dissociate” as to “disconnect or separate”); *The Random House Dictionary of the English Language* 570 (2d ed. 1987) (defining “dissociate” as “to sever the association of (oneself); separate”). We conclude that the Agreement requires a written notice of dissociation to state that a member is severing or disconnecting from membership.

In her February 9 email to Fischer and Montgomery, Halper referred to a “transition.” Halper’s use of the word “transition” notified FR Holding that she was in “the process or a period of changing from one state or condition to another.” See *Oxford Dictionary of English* at 1889 (defining “transition”). Viewed favorably to Halper, her February 9 email notified FR Holding that she intended to separate from the company at some time, but the email does not discuss how or when separation would occur. We conclude that the district court did not err by determining that Halper’s February 9 email was vague and therefore not sufficient written notice of dissociation under the Agreement.³

Halper also contends that the Act mandates that FR Holding purchase her membership units. See 805 Ill. Comp. Stat. § 180/35-60(a) (“A limited liability company shall purchase a distributional interest of a member for its fair value determined as of the date of the member’s dissociation”), *repealed by* 2016 Ill. Legis. Serv. P.A. 99-637, § 10 (West); 805 Ill. Comp. Stat. § 180/35-55(a) (“Upon a member’s dissociation the

³ Because the Agreement governs when it modifies statutory provisions, we need not look to the Act to decide whether Halper’s email qualifies as notice of dissociation under Illinois law. Therefore, we do not consider Halper’s claims regarding notice under the Act.

company must cause the dissociated member's distributional interest to be purchased under Section 35-60."), *amended by* 2016 Ill. Legis. Serv. P.A. 99-637, § 5 (West).⁴

Halper's statutory argument fails because the Agreement and not the Act governs buyout of a member's units. The Agreement explicitly states that buyout is an option: "The failure of the Company or any of the remaining Members to exercise their respective options shall constitute a waiver of such options."⁵ Because the Agreement may modify any statutory provision governing an LLC and its members, and the Agreement provides that buyout is permissive, the Act's mandatory buyout provisions do not apply. The district court correctly concluded that the Agreement makes buyout an option, not an obligation.

B. FR Holding did not breach the Agreement by not closing on its purchase of Halper's membership units within 120 days of July 26, 2016.

Alternatively, Halper claims that she provided notice of her dissociation in her July 26 letter and that FR Holding breached the Agreement by failing to purchase her membership units within 120 days of that date. The parties do not dispute that Halper's July 26 letter was notice of dissociation under the Agreement. The district court determined

⁴ The Illinois legislature recently repealed section 35-60 in its entirety and removed the language on which Halper relies from section 35-55. 2016 Ill. Legis. Serv. P.A. 99-637, §§ 5, 10 (West). These changes to the Act took effect on July 1, 2017. Because retrospective application of the new law would affect the parties' rights and impose different duties from when they signed the Agreement, we presume that the legislature did not intend to apply the new law retroactively. *See People ex rel. Madigan v. J.T. Einoder, Inc.*, 28 N.E.3d 758, 765 (Ill. 2015).

⁵ We note that the Agreement contains a mandatory buyout obligation in section 11.7, which states that "[u]pon a Member's death, the Company *shall be obligated* to purchase such Member's Interests" (Emphasis added). Because similar mandatory language is missing from the provisions relating to dissociating members, we conclude that the Agreement reflects the parties' intention that buyout is optional.

that FR Holding chose to exercise its purchase option on August 8, which complied with the Agreement's provision that FR Holding may purchase all or any portion of a dissociating member's units by notice given within 20 days of notice of dissociation.

The Agreement also provides that the closing of the purchase and sale of a member's interests shall occur at the company's office within 120 days of the notice of dissociation. The Agreement requires that the company pay 20% of the purchase price and deliver a promissory note on the date of closing. Because FR Holding did not complete the purchase of Halper's units within 120 days of her July 26 letter, Halper claims that FR Holding is in default under the Agreement.

FR Holding counters that Halper waived this particular claim of default because she did not present it to the district court. *See Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.") (quotation omitted). In her counterclaim, third-party complaint, and motion for buyout, Halper contended that she gave written notice of dissociation on February 9. And she claimed that FR Holding breached the Agreement based on her dissociation on that date. Halper's motion for reconsideration, however, stated that FR Holding breached the Agreement by failing to timely close after exercising its option on August 8. Halper's theory has been consistent throughout: FR Holding breached the Agreement because it failed to timely close on the purchase of her membership units. *See generally id.* (explaining that a party may not "obtain review by raising the same general issue litigated below but under a different theory"); *Annis v. Annis*, 250 Minn. 256, 262-63, 84

N.W.2d 256, 261 (1957) (stating that litigants are bound to their theories of the case on appeal). Moreover, Halper’s argument challenges the district court’s determination that FR Holding properly exercised its option to purchase her membership units under the Agreement. Because Halper has consistently argued that FR Holding failed to fulfill its closing obligations under the Agreement, we will consider this issue.

The record reflects that FR Holding made several attempts to purchase Halper’s membership units. In its August 8 letter to Halper, FR Holding offered to purchase her membership units in accordance with the Agreement. Halper rejected that offer by making a counteroffer four days later. On August 25, FR Holding renewed its offer by filing an offer of judgment pursuant to Minnesota Rule of Civil Procedure 68.01. Halper did not respond. By rule, the offer was withdrawn ten days later. *See* Minn. R. Civ. P. 68.02(a). On October 24, FR Holding sent a letter extending yet another offer to purchase Halper’s units. The letter expressed the company’s readiness to close immediately. Halper did not respond.

Halper nevertheless urges this court to hold that the Agreement required that FR Holding close the sale before she transferred her units. We are not persuaded. The Agreement imposes duties on FR Holding and on Halper; specifically, “[i]f the Company . . . elect[s] to exercise their respective options to acquire all or any portion of the Subject Interests, the Dissociating Member *shall* sell and assign the Subject Interests to the Company.” (Emphasis added.) Moreover, the duty of good faith and fair dealing is implied in every contract. *See Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 903 (Ill. 1996). Accordingly, Halper cannot compel FR Holding to breach the contract by not responding

to the company's offers to close. Halper's contrary view conflicts with her duty of good faith and fair dealing. *See id.* ("This principle ensures that parties do not try to take advantage of each other in a way that could not be contemplated at the time the contract was drafted or to do anything that will destroy the other party's right to receive the benefit of the contract.").

Based on the pertinent provisions in the Agreement, the undisputed evidence, and relevant caselaw, the district court did not err by concluding that FR Holding did not breach the Agreement by failing to close the purchase within 120 days of the July 26 notice of dissociation. Because FR Holding repeatedly offered to close and Halper breached her obligation to sell and stymied a timely closing by failing to respond, we conclude that the district court did not err by granting FR Holding's motion to dismiss Halper's claims.

II. The district court correctly determined that the Agreement provides that Halper's capital account balance is the purchase price.

Halper next argues that the district court erred by concluding that the purchase price is the value of her capital account; Halper claims that she is entitled to the fair market value of her membership units. As noted above, the Agreement provides, in relevant part, that "[the] purchase price for the [Dissociating Member's] Subject Interests shall be the lesser of (x) the Dissociating Member's aggregate Capital Account . . . and (y) the Fair Market Value of the Subject Interests."

The parties apparently agree that the fair market value of Halper's membership units is greater than the balance of the capital account. Here, the district court ordered Halper to sell her membership units in exchange for the balance of her capital account, concluding

that “[t]he plain terms of the governing Agreement demonstrate that Halper is not entitled to the fair market value of her membership units.” We agree with the district court that the Agreement is not ambiguous and the purchase price of Halper’s membership units is the value of her capital account. Halper’s argument to the contrary relies on the Act, which does not govern this dispute.

Halper also claims that the district court erred by not permitting her to conduct further discovery about the value of her capital account. The Minnesota Rules of Civil Procedure permit a party to move for summary judgment “at any time after the expiration of 20 days from the service of the summons.” Minn. R. Civ. P. 56.01. “But Minn. R. Civ. P. 56.06 allows a party to move for a continuance [from summary judgment] to permit affidavits to be obtained or depositions to be taken or discovery to be had[.]” *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass’n*, 778 N.W.2d 393, 400 (Minn. App. 2010) (quotation omitted). In evaluating a party’s continuance request, the district court should consider the party’s diligence in seeking discovery and the materiality of the facts that the party seeks. *Id.*

A party opposing summary judgment may file an affidavit requesting the district court to continue the motion on the basis that the party be permitted to perform additional discovery. Minn. R. Civ. P. 56.06; *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010). “An affidavit filed pursuant to rule 56.06 must be specific about the evidence expected, the source of the discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Id.* (quotation omitted). However, “failure to

submit such an affidavit, by itself, justifies the district court's decision to rule on the motion without granting relief under 56.06." *Id.*

Here, Halper asserted in legal memoranda and argued at the summary judgment hearing that if the district court rejected her proposed purchase price, then limited discovery would be necessary to determine the value of her capital account balance. But she did not file any affidavit articulating her request for discovery, and therefore, she failed to comply with rule 56.06. Moreover, Halper did not diligently pursue discovery because she did not serve any interrogatories or document requests. We conclude that the district court did not abuse its discretion by granting FR Holding's summary-judgment motion without granting Halper's request for additional discovery. *See id.* (applying an abuse of discretion standard where the district court rules on a motion for summary judgment without allowing additional discovery).

Finally, Halper contends that the district court erred by not concluding that Halper is entitled to the proceeds from liquidating her capital account, in addition to the purchase price of her membership units. Section 9.3(a) of the Agreement states that the company maintains a separate capital account for each member. Halper relies on section 9.3(d) which provides, "Upon liquidation of . . . any Member's Membership Interest . . . liquidating distributions will be made." Halper also refers to the definition of "liquidation." *See Black's Law Dictionary* 1072 (10th ed. 2014) (defining "liquidation" as "[t]he act or process of converting assets into cash"). From this, Halper urges this court to conclude that the sale

of her membership units to the company liquidated her interest and triggered a distribution to her.

But Halper ignores the relevant provision of the Agreement, which states,

In the event of a permitted sale or exchange of a Membership Interest or an Economic Interest in the Company, the Capital Account of the transferor shall become the Capital Account of the transferee to the extent it relates to the transferred membership Interest or Economic Interest in accordance with Section 1.704-1(b)(2)(iv) of the Treasury Regulations.

The Agreement expressly provides that upon the sale of a member's interests, that member's capital account becomes the capital account of the transferee; in this case, the company is the transferee. Because the sale of Halper's membership interests results in a transfer of the capital account, the Agreement's provision regarding liquidation of a capital account is not invoked. In other words, Halper's capital account was not liquidated, it was transferred. We conclude that the district court did not err by deciding that the Agreement does not entitle Halper to the proceeds from liquidating her capital account. Accordingly, the district court did not err by denying Halper's request for relief.

Affirmed.