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Legal News for Clients

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THE MAJORITY RULES: CONSIDER RETAINING A MAJORITY INTEREST IN YOUR BUSINESS

When a new business venture begins, everyone works hard to make the business successful. New business owners typically start out happy and satisfied. Once the business venture begins making money and acquiring customers, however, problems may arise. The individuals in the business start bickering about how the business should be operated. They can disagree about how much money should be distributed, how much salaries should be, and how much income ought to be reinvested. When this bickering begins, as it is likely to do, an understanding of the corporate structure of the business is key. Peter Kertesz (“Kertesz”) learned this lesson the hard way in *Kertesz v. The Spa Floral, LLC, et al.*, 994 So.2d 473 (Fla. 3d DCA 2008).

In 2006, Kertesz formed The Spa Floral, LLC (the “LLC”) and began operating under the name “Mourning Flowers.” His business specialized in the design, preparation, and sale of flowers and floral arrangements to funeral homes. When Kertesz originally formed the LLC, he was the only member and its manager. Ultimately, he granted ownership interests totaling 55% to six other individuals. They ended up being the defendants in the lawsuit he brought.

In mid-2007, the defendants and Kertesz had a fal-

ling out over the operations of the LLC. The defendants controlled 55% of the LLC, and were able to remove Kertesz as the managing member. After the LLC lost its largest client, Kertesz brought suit against the LLC and the defendants. The suit sought (1) a judicial dissolution of the LLC based on an alleged deadlock in management; (2) the appointment of a third party to act as a receiver to protect the assets and goodwill of the LLC; and (3) compensation for “a loss in value of his member interest in the LLC” based on defendants’ alleged breach of duty of care to Kertesz.

On defendants’ motion, the trial court dismissed all of Kertesz’s claims with prejudice. Kertesz filed an appeal with the Third District Court of Appeal. The Third District recognized that the issue was whether the removal of Kertesz as the managing member of the LLC and the alleged resultant loss of a major client of the LLC gave rise to any claims by Kertesz against the LLC or the defendants. The appellate court held that Kertesz had no viable legal claims against the defendants or the LLC.

The appeals court observed that there was no “deadlock” in the LLC which would justify dissolving it or appointing a third party to act as a receiver. A “deadlock” is defined as “a state of inaction

or of neutralization caused by the opposition of persons or of factions (as in a government or voting body).” In this case, there was no deadlock because defendants controlled the majority interest in the LLC. They had the absolute right to replace Kertesz as the managing member.

Moreover, the appeals court found that the defendants’ decision to replace Kertesz as managing member did not constitute misappropriation or waste of the LLC just because the LLC’s customers might not approve of the change in management. As such, defendants’ decision to replace Kertesz is not actionable on its own. The Court noted that the defendants’ business decision might possibly prove to be a sound one over a longer term. Even if not, “a change of management that ultimately proves to have been improvident does not of itself give rise to a cause of action against the majority who voted for it or the LLC.”

Despite Kertesz having originally formed and developed the business on his own, he subsequently gave away his majority interest in the LLC to others. As a result, he ended up losing control of the business. He had no legal remedies against defendants because they controlled the majority in the LLC. Before giving others a stake in a business that you have developed and created, you should consult legal counsel about possible ways to maintain some control in order to protect yourself.

READY, AIM, FIRE: ARM YOURSELF WITH KNOWLEDGE

Florida's Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008 (the "Arms Act") took effect this past July 1, 2008. The Arms Act imposes significant restrictions upon the ability of a public or private individual or entity to prohibit customers, employees, or invitees in the State of Florida from keeping a legally owned firearm inside or locked to a motor vehicle in a parking lot. The Arms Act provides aggrieved parties with a private right of action. Employers must therefore remain vigilant and stay abreast of the latest developments regarding this constitutionally controversial law. If not, they could find themselves facing a significant claim for civil damages.

The Arms Act is presently being challenged by several groups representing employer interests. No court, however, has yet overturned it. The contours of this relatively new statute are being rapidly manipulated, refined, and re-adjusted as each new judicial opinion is rendered on the subject. Consequently, a regular dialogue with your legal counsel is the only way to effectively protect against inadvertent violations of the Arms Act.

The Arms Act generally prohibits public and private employers from engaging in the following activities:

- Inquiring as to whether employees, customers or invitees have a firearm inside or locked to a vehicle in a parking lot;

- Conducting a search of a vehicle in the employer's parking lot to ascertain the presence of a firearm within the vehicle;

- Taking any action against a customer, employee, or invitee based upon verbal or written statements of some party concerning possession of a firearm inside or locked to a vehicle in a parking lot for lawful purposes;

- Prohibiting or attempting to prevent any employee, customer or invitee from entering the parking lot of the employer's place of business because a firearm is present within that person's vehicle and is being carried for lawful purposes out of sight within such person's motor vehicle;

- Conditioning employment on whether an employee or prospective employee holds or does not hold a license to carry a concealed firearm, pursuant to § 790.06, Fla. Stat.;

- Conditioning employment on an employee or prospective employee's entry into an agreement prohibiting the employee from keeping a legal firearm locked inside or locked to a vehicle in a parking lot when that firearm is kept for lawful purposes;

- Terminating employment or otherwise discriminating against an employee or expelling a customer or other invitee for possessing a firearm or for exercising the right of self-defense as long as the firearm is never exhibited on company property for other than lawful purposes.

The Florida Legislature has imposed some exceptions to the general rules laid down by the Arms Act. For example, the prohibitions set forth in the preceding paragraph do not apply to certain school property; certain correctional institutions; property where a nuclear-powered electricity generation facility is located; property used for national defense, aerospace, or homeland security; a motor vehicle owned, leased, or rented by a public or private employer; or certain property upon which possession of a firearm or other legal product by a customer, employee, or invitee is prohibited pursuant to any federal law, contract with a federal government entity, or general law of this state.

The private right of action given to employees, customers or invitees who may claim their rights have been violated under the law allows for recovery of costs and attorneys' fees by the prevailing party. Moreover, the Florida Attorney General is authorized to bring a civil or administrative action to enforce the rights of any person aggrieved by a violation of the Arms Act. In such a suit, the attorney general may seek damages, injunctive relief, and civil penalties of up to \$10,000 per violation.

The Arms Act is a brand new body of law. Some have said its intent is to recreate the Wild West in Florida. Careful consultation and consideration by an attorney is imperative in order to fully understand and appreciate the many intricacies and exceptions to the Arms Act.

"[A] regular dialogue with your legal counsel is the only way to effectively protect against inadvertent violations of the Arms Act."

THE DEVIL MADE ME DO IT!

Anyone who complains about frivolous lawsuits should realize that the practice has been going on for a very long time. A good example is the case of *United States ex rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971). Mayo came before the court when the plaintiff, Gerald Mayo, sought to proceed in forma pauperis, that is, without paying court costs. Mayo wished to bring a civil rights lawsuit against "Satan and his staff," because Satan "on numerous occasions, caused [Mayo] misery and unwarranted threats" and "placed deliberate obstacles in his path and . . . caused [Mayo's] downfall."

Judge Weber, sitting on the federal district court for the Western District of Pennsylvania, denied Mayo's motion, after giving the case careful consideration. Judge Weber held that even if Mayo's complaint stated a case against Satan and his staff, it was doubtful that the court had personal jurisdiction over the defendants. In state

and especially in federal court, personal jurisdiction is a procedural hurdle the plaintiff must overcome to insure the case is not being unfairly tried before the wrong tribunal. To obtain personal jurisdiction over a defendant, a plaintiff must show that the defendant purposefully engaged in some activity in the chosen forum state such that the defendant could reasonably expect to be hauled into court there.

After a thorough search of the case law, Judge Weber found no case where Satan or his staff had appeared as a party. No doubt referring to Stephen Vincent Benét's *The Devil and Daniel Webster*, the judge nevertheless said that he had seen "an unofficial account of a trial in New Hampshire where [Satan] filed a mortgage foreclosure as plaintiff." Satan's possible participation in that case was not sufficient, however, to satisfy personal jurisdiction requirements.

Judge Weber was also concerned that permitting the case to go forward would inevitably raise questions as to whether a class action would be appropriate. The judge worried that the potential class of persons who might have been vexed by Satan was "so numerous" that he could not determine "if [Mayo would] fairly protect the interests of the class."

Finally, Judge Weber expressed doubts that the defendants could even be served with the complaint. The judge noted that Mayo "failed to include with his complaint the required form of instructions for the United States Marshall for directions as to service of process." After all, even the Prince of Darkness is entitled to due process.

Judge Weber therefore denied Mayo's claim to proceed in forma pauperis. Subsequent case history does not reveal whether Mr. Mayo was able to provide the necessary court costs to proceed.

"After all, even the Prince of Darkness is entitled to due process."

**LITCHFORD &
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AND YOUR LOVED ONES A
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