



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 14, 2022

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OPINION LETTER

Re: AV Automotive, LLC, et. al. v. Donald B. Bavely.
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Re: *AV Automotive, LLC, et. al. v. Donald B. Bavely,*
Case No. CL-2019-2804¹

Dear Counsel:

The issue before the Court is whether members of a limited liability company (“LLC”) who granted their voting rights to another member through agreements silent as to revocability may unilaterally revoke their assignments. The Court holds no statutory or common law right exists for such a revocation. Alternatively, it holds that the assignee members in the present case assigned their voting rights coupled with an interest. Thus, if common law principal-agency principles applied in this context, the assignees may not unilaterally revoke their assignments.

Donald Bavely (“Bavely”) properly pled and offered sufficient evidence on his claims under the theory that the three relevant assignee members could not revoke their voting assignments. AV Automotive, LLC’s (“AV’s”) Motion to Strike Counts V-X and XII will be denied.

I. OVERVIEW.

Before the Court are seven cases, that have been consolidated for trial, relating to employment and ownership disputes between various individuals and entities within the Rosenthal Automotive dealership empire. The present matter concerns Bavely’s counterclaim to AV’s lawsuit. At the close of Bavely’s evidence AV moved to strike Counts V-X and XII of Bavely’s Second Amended Counterclaim.

¹ The Court consolidated this case for trial along with the following cases: *RBD of Virginia, et. al., v. Donald Bavely*, CL-2018-11424; *Donald Bavely v. Geneva Enterprises, Inc., et. al.*, CL-2018-13979; *Geneva Enterprises, Inc. et. al. v. Donald B. Bavely*, CL-2018-18124, *Donald Bavely v. Jaguar Land Rover of Chantilly, LLC, et. al.*, CL-2019-13200; *Donald Bavely v. DealerPPC, LLC*, CL-2020-7497; *Donald Bavely v. Fairfax Imports, Inc, et. al.*, CL-2020-18740.

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Counts V-X and XII consist of the following claims: Count 5: Breach of Contract (OA) – Injunction Restoring Bavely as a Member of AV’s Board of Managers; Count 6: Breach of Contract (OA) – Injunction Removing Geneva from AV’s Board of Managers; Count 7: Breach of Contract (OA) – Injunction Restoring Bavely as President of AV and its Subsidiaries; Count 8: Breach of Contract (OA) – Injunction Removing Liu as President and/or Secretary of AV and its Subsidiaries; Count 9: Breach of Contract (OA) – Injunction Restoring Bavely as Center Operator and Dealer-Principal of the AV Dealerships; Count 10: Breach of Contract (OA) – Injunction Removing Pugh as Center Operator and Dealer-Principal of the AV Dealerships; and Count 12: Breach of Contract – AV Salary.

All contested counts rely on the answer to a single question: did AV executives George Liu, Jerry Griffin, and Steve Ferouz (“the Executives”) have the power to revoke voting assignments they granted to Bavely at the time they acquired their memberships in AV? Bavely argues the assignments are irrevocable; AV argues they are revocable and were revoked.

II. ANALYSIS.

A. **There is No Statutory License for an LLC Member to Revoke a Voting Assignment at Will.**

No statutory authority directly addresses the revocability of an LLC member’s voting assignment as the law does for corporations. AV is a LLC, not a corporation. The laws governing LLCs and corporations are different. *Compare* VA. CODE ANN. §§ 13.1-601 *et seq.* (“Virginia Stock Corporation Act”) and 13.1-801 *et seq.* (Virginia Nonstock Corporation Act) *with* § 13.1-1000 *et seq.* (Virginia Limited Liability Company Act). The revocability of proxies in corporations is clear: a proxy is irrevocable only if coupled with an interest or given as security. VA. CODE ANN. § 13.1-663(D).

The General Assembly has defined “coupled with an interest,” under the Virginia Stock Corporation Act to include “[a] party to a voting agreement created under § 13.1-671.” VA. CODE ANN. § 13.1-663(D)(5).² The referenced statute unequivocally states:

“A. Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose.

...

B. A voting agreement created under this section is specifically enforceable.”

² Other jurisdictions define “coupled with an interest” variously. This variety of definitions belie AV’s position that that at common law LLC voting proxies are irrevocable only if coupled with an interest. With all these definitions the common law is not so “common.” *See* RESTATEMENT (THIRD) OF AGENCY § 3.12 (2006) (cataloguing in the reporter notes the wide variety of state definitions of interests supporting proxy irrevocability—distinguishing between states that have nonexclusive lists from those that have exclusive lists). None of this is surprising considering that LLCs are statutory creations.

VA. CODE ANN. § 13.1-671. As stated above, AV is an LLC and not a corporation, so this section is not directly applicable. However, when determining the meaning of “coupled with an interest,” the General Assembly’s definition is helpful. Thus, as the General Assembly has defined it for corporations, Bavely held a proxy coupled with an interest because he was the beneficiary of a voting agreement—the Shareholder Agreements.

The law concerning the revocability of proxies in LLCs is less clear. The Virginia Limited Liability Company Act has no analogue to § 13.1-663(D). AV excuses the absence of the Stock Corporation Act’s proxy provisions in the Limited Liability Company Act because, it asserts, the common law controls for LLCs. *Citing* VA. CODE ANN. § 13.1-1001.1(A) (“Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.”). From this, AV maintains that, at common law, a proxy is always revocable unless coupled with an interest.

The Court rejects the argument by AV that under common law a LLC member who assigns their vote may revoke this assignment, unless otherwise coupled with an interest. How could there be? Until 1991 there were no LLCs in Virginia. 1991 VA ACTS CH. 168. The only authority AV cites for its proposition is *Roscigno v. DeVille*, 28 Va. Cir. 96, 100 (Fairfax 1992). *Roscigno*, in turn, cites to what must be the wrong page of a legal treatise that does not support the cited principle. AV similarly cites *Spence v. N. Va. Doctors Hosp. Corp.*, 202 Va. 478, 483 (1961), for the same principle even though *Spence* involves a corporation and not an LLC. As stated, above, the Virginia Stock Corporation Act, which governed the corporation in *Spence*, is different from the Virginia Limited Liability Company Act, which governs AV. The former contains a statute stating that a proxy is irrevocable only if coupled with an interest (and on its face states it is irrevocable). VA. CODE ANN. § 13.1-663(D). The latter does not. Therefore, *Spence* is not on point. The parties offered no controlling authority supporting AV’s position and the Court found none.

In contrast, the Virginia Limited Liability Act clearly contemplates circumstances where voting rights and economic rights are severed. *See* VA. CODE ANN. § 13.1-1039. By default, the law permits assignment of membership interests. *Id.* A “membership interest” is defined to mean only a member’s economic interests—profits, losses, and distributions. The definition is silent as to voting or management rights. VA. CODE ANN. § 13.1-1002. However, Virginia Code § 13.1-1039 is not silent. It reads “an assignment does not entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights of a member.” VA. CODE ANN. § 13.1-1039. Stated differently, LLC members may assign their economic interests to a third party stripped of voting rights.

Considering this right of contract, there is no principled reason why an LLC member who voluntarily agrees to transfer voting rights to another member should retain the right to unilaterally revoke the grant. The law does not permit parties to exit other contracts at will, so what makes LLC voting assignments so special? The Court cannot fathom why adults should be barred from entering contracts where one’s economic interests are stripped from voting rights considering the Commonwealth’s policy of “giving maximum effect to the principle of [an LLC member’s] freedom of contract.” VA. CODE ANN. § 13.1-1001.1(C). Considering all this, one cannot fairly argue that the Executives’ assignment of voting rights to Bavely is repugnant to the

law. LLC members may agree to assign their voting rights to another member and no statutory license exists for the assignor to unilaterally revoke the assignment.

B. Even Under General Common Law Principles, the LLC Members in the Present Case Lacked the Right to Revoke their Voting Assignments at Will.

There is a common law principal-agent principle that a naked agency is revocable by the principal. So, for example, if a person gives a power of attorney to an agent, the agency is revocable. However, if the agency is coupled with an interest, the agency is irrevocable. *Hunt v. Rousmanier's Adm'rs*, 21 U.S. 174, 204-05 (1823) (Marshall, CJ). *Hunt* defined “coupled with an interest” as follows:

“An [agency] coupled with an interest is [an agency] which accompanies, or is connected with, an interest. The [agency] and the interest are united in the same person. *Id.* at 204. (Internal quotations omitted).

“But if the interest, or estate, passes with the [agency], and vests in the person by whom the [agency] is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate.” *Id.* at 205.

The Great Chief Justice in *Hunt* then provided an illustration contrasting a power of attorney without an interest, where the agent is acting for the principal, to one where the agent is really acting as the principal. *Id.* at 205-06. The former is revocable by the principal at will—even if the agent has an interest in exercising the power. The latter is irrevocable because the agent holds the power and an interest. *Id.*

Applying *Hunt* to the present case, the Court concludes that even if the common law maintains that an LLC member who assigns his or her vote to another member may unilaterally revoke the assignment, unless the assignment was coupled with an interest, the Executives’ voting assignments to Bavely were irrevocable. They were coupled with an interest. Bavely obtained voting rights from the Executives when AV granted each the opportunity to invest in AV via a Shareholder Agreement. (*See, e.g.*, B209.) Each assignment reads,

“Shareholder recognizes that the financial strength, marketing expertise and experience of Bavely made establishment and success of companies controlled by Bavely possible and that Bavely’s continued participation are instrumental in each company’s future success. **Shareholder agrees to vote his/her stock in each corporation controlled by Bavely as directed by Bavely (by this, Shareholder understands and agrees that he/she possesses no voting rights, such rights are vested exclusively with Bavely). Shareholder and Bavely agree that if at any time Bavely deems it appropriate to hold Shareholder’s stock in his name, stock may be issued to Bavely for the benefit of Shareholder.** Shareholder

retains full rights to said stock, including all rights to income and all other rights under law, except as set forth by this Agreement or any other agreement.” (*Id.*) (Emphasis supplied; underline in original).

By a plain reading of this contract, the Executives granted Bavely their voting rights coupled with an interest as defined in *Hunt*. Bavely was not a mere agent of the Executives for them or their convenience. He was a member himself and obtained a personal interest in the Executives’ votes. The contract states twice that each executive obtained membership interests without voting rights—first that each will vote “as directed by Bavely”; and second that each possesses “no” voting rights and that voting rights “are vested exclusively with Bavely.” (*Id.*) (Emphasis in original).

While counsel for the parties refer to the Shareholder Agreement as a “proxy,” the Shareholder Agreement really establishes a different arrangement. A proxy is generally defined as “a person who is substituted or deputed by another to represent him and act for him.” *Proxy*, BLACK’S LAW DICTIONARY (5th ed. 1979). In contrast to a proxy, the Shareholder Agreement granted Bavely (1) the right to direct the vote—implicitly as Bavely deemed fit and not “for” the Executives, and (2) the complete “vest[ing]” of the voting rights. In this sense Bavely is not the agent of the Executives. He is permitted to act for himself with the votes they would otherwise have. He does not vote based on the Executives’ interests as their agent; he was vested with the Executives’ votes. If there was any doubt, the Shareholder Agreement even granted Bavely the right to hold the Executives’ membership interests in Bavely’s own name.

All of this demonstrates that the voting assignments from the Executives to Bavely was coupled with an interest, even if AV was correct that the common law governs revocability of an LLC member’s voting assignment. The Executives lacked the unilateral right to revoke their voting assignments to Bavely.

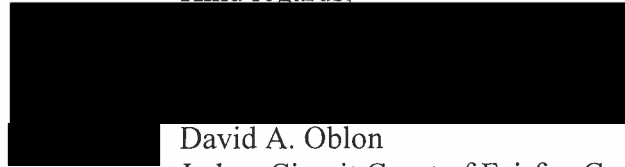
III. CONCLUSION.

The law permitted the Executives to assign their voting rights to Bavely. They did so through their Shareholder Agreements. They may not unilaterally revoke their grant to him of their voting rights. Without the Executives’ votes, and in the light most favorable to Bavely, the non-moving party, Bavely has offered sufficient evidence to support his claims that AV had the votes to take the various actions set forth in Counts V-X of the Second Amended Complaint and that he is entitled to his back salary as set forth in Count XII. AV’s Motion to Strike will be denied.

An appropriate Order is attached.

Re: AV Automotive, LLC, et. al. v. Donald B. Bavely.
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Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AV AUTOMOTIVE, L.L.C., *et al.*)

Plaintiffs,)

v.)

CL-2019-2804

DONALD B. BAVELY, *et al.*)

Defendants.)

ORDER

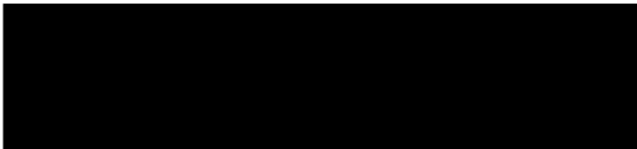
THIS MATTER came before the Court on AV Automotive, LLC’s (“AV’s”) Motion to Strike Counts V-X and XII of Donald Bavely’s (“Bavely’s”) Second Amended Counterclaim. And, for the reasons stated in the Opinion Letter of October 14, 2022, that is incorporated in this Order by reference, it is

ORDERED AV’s Motion to Strike Counts V-X and XII of Donald Bavely’s Second Amended Counterclaim is DENIED.

THIS CAUSE CONTINUES.

OCT 14 2022

Entered



Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. ANY DESIRED ENDORSEMENT OBJECTIONS MUST BE FILED WITHIN 10 DAYS.