

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

TODD B. SCOBEEY, CYNTHIA KING, )  
and JACKSON SCOBEEY, by his next )  
friend TODD B. SCOBEEY, and )  
STRONG WATERPROOFING, LLC, )  
 )  
Plaintiffs, )  
 )  
VS. ) NO. 17-691-BC  
 )  
JOE STRONG, )  
 )  
Defendant. )

**MEMORANDUM AND ORDER GRANTING PARTIAL SUMMARY  
JUDGMENT FOR NONMOVING PARTY THAT CORPORATE DOCUMENTS  
PROVIDE FOR PERCENTAGE-BASED VOTING**

On July 6, 2018, oral argument was conducted on the *Plaintiffs' Partial Motion for Summary Judgment*. The *Motion* seeks a ruling that the voting rights of Strong Waterproofing, LLC (the "LLC") are per capita. In support the Plaintiffs assert, "the company governance documents are silent as to the issue of voting rights and, therefore, the Tennessee Revised Limited Liability Company Act at Tenn. Code Ann. §48-249-101, *et seq.* establishes the voting rights of Strong Waterproofing, LLC to be per capita. There are no material facts in dispute on this issue and the Plaintiffs are entitled to a judgment to this effect as a matter of law." *Motion*, filed May 30, 2018, at 1.

In opposition the Defendant asserts the following.

1. The voting rights issue is not pending and susceptible to a ruling as there is no claim or cause of action on the issue in the pleadings.

2. The intent expressed in the corporate documents, Operating Agreement and April 2017 Articles of Amendment, is percentage-based voting, not per capita voting.
3. Also demonstrating that the parties' intent was percentage-based voting is the parties' course of conduct, admissible under the contract interpretation rule of practical construction, *see, e.g., Hamblen County v. City of Morristown*, 656 S.W.2d 331 (Tenn. 1983), and which is distinguishable from and not precluded by the parol evidence rule.
4. If an ambiguity is found to exist, parol evidence of the Declaration of Joe Strong establishes percentage-based voting was intended.
5. Alternatively, there are in dispute genuine issues of material fact.

In their July 5, 2018 *Reply*, the Plaintiffs provide their rebuttal to each point of the Defendant's opposition.

In a preliminary memorandum entered August 15, 2017, in the context of Defendant Strong seeking to disqualify Attorney Klein Preston as Counsel for the Plaintiffs, the Court stated that there was no explicit section of the Operating Agreement entitled "Voting Rights," and that at that preliminary stage of the proceedings it appeared the Operating Agreement was ambiguous as to voting rights. Since then Counsel have developed arguments of the construction of the Operating Agreement and have located references to voting in the Agreement not found by the Court in its preliminary analysis. From that, and after considering the summary judgment record, the law and argument of Counsel, the Court concludes that the corporate documents are not ambiguous and that under Tennessee law those documents establish that percentage-based voting is the voting method for the LLC, not per capita voting. In making this determination, the Court relies upon only the

content of the corporate documents: the Operating Agreement and the April 2017 Articles of Amendment and the law. Neither the rule of practical construction nor the declaration of Todd Scobey nor the declaration of Joe Strong is the basis of the Court's determination that percentage-based voting applies.

Thus, item 2 of the matters asserted by the Defendant listed above, is the sole basis for the ruling. The Court denies item 1 of Defendant's objections listed above. The Court concludes that the issue of voting rights is a pending matter particularly as a subissue of the breach of fiduciary duty claims. Items 3-5 of Defendant's opposition, listed above, are rendered moot by the Court's ruling that the content of the corporate documents establish percentage-based voting.

The undisputed facts, law and reasoning on which this ruling is based are as follows.

### **Summary Judgment Standard**

As provided at pages 3-4 of Plaintiffs' May 30, 2018 *Memorandum*, summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 (Tenn. 2011); *Hannan v. Allied Publishing Co.*, 270 S.W.3d 1, 5 (Tenn. 2008). "[S]ummary judgment is not a disfavored procedural short cut, but rather an important vehicle for concluding cases that can and should be resolved on legal issues alone." *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). When a contract is not ambiguous, its interpretation is a question of law that is appropriate for summary judgment. *Battery Alliance Inc. v. T&L Sales Inc.*, 2015 Tenn. App. LEXIS 897,

\*14 (Tenn. Ct. App. Nov. 9, 2015). “Questions of contract interpretation are generally considered to be questions of law, and thus are especially well-suited for resolution by summary judgment.” *Bourland, Heflin, Alvarez, Minor & Matthews, PLC v. Heaton*, 393 S.W.3d 671, 674 (Tenn. Ct. App. 2012).

### **Rules of Contract Construction**

As provided in Plaintiffs’ May 30, 2018 *Memorandum* at page 5, in interpreting a contract, the court’s “role is to ascertain the intention of the parties” which “is based on the ordinary meaning of the language contained within the four corners of the contract.” *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011). “The parties’ intent is presumed to be that specifically expressed in the body of the contract.” *Ruth v. Home Health Care of Middle Tenn., LLC*, 2012 Tenn. App. LEXIS 693, at \*12 (Tenn. Ct. App. Oct. 10, 2012). “If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. A contract is ambiguous only when its meaning is uncertain and may fairly be understood in more than one way.” *Id.* at \*13 citing *Planters Gin Co. 17. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 88-90 (Tenn. 2002)). However “silence creates no ambiguity.” *McMillin v. Great Southern Corp*, 480 S.W.2d 152, 155 (Tenn. 1972).

### **Construction of Corporate Documents**

Not discerned by the Court in its August 15, 2017 memorandum is that the corporate documents are not silent with respect to voting. As shown by the Defendant in his June

29, 2018 *Response*, sections 1.6(c), 3.1(d), 7.8 and 4.2 of the Operating Agreement pertain to decisions to be made by the LLC members and provide for unanimous or majority consent. The term “consent” is a kind of voting and is synonymous with voting under the Revised LLC Act. *See, e.g.*, TENN. CODE ANN. § 48-249-405(b). The Operating Agreement, thus, does contain provisions on voting and is not silent in that regard.

Also not discerned by the Court in its August 15, 2017 memorandum but provided by Defendant Strong in opposition to Plaintiffs’ partial motion for summary judgment is that unless the Operating Agreement is construed to provide for percentage-based voting, one of its provisions is rendered superfluous which is contrary to Tennessee law. *See Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008) (“The interpretation should be one that gives reasonable meaning to all of the provisions of the agreement, without rendering portions of it neutralized or without effect.”). This issue relates to section 4.2.

The provision of section 4.2 is that it requires, when a member seeks to sell or otherwise transfer his interest, that such a transaction must be approved by the majority of Active Members. Section 1.6(b) identifies the two “Active Members” as:

Members Equity Interest	
Joe Strong	54% Active Member
Todd Scobey	39% Active Member
Cynthia King	5% Limited Member
Jackson Scobey	2% Limited Member

As asserted by the Defendant, because there are only two Active Members (Joe Strong with 54% and Todd Scobey with 39%), unless percentage-based voting is used, a majority of Active Members is the same thing as the unanimous consent of the Active Members, and

paragraph 4.2 of the Operating Agreement is superfluous and meaningless which is contrary to Tennessee rules of contract interpretation.

In addition, the Court now discerns that another indication of percentage-based voting derives from the section 1.5 definition of “Interest” in the Operating Agreement. This section provides that “‘Interest’ means the entire ownership interest of the Member in the Company, including the rights and obligations of the Member under this Agreement and the Act [emphasis added].” Turning then to the Act to see the constituents of a member’s rights, the Court sees that under the Act, a member’s rights are specified in section 48-249-102(11) and (13) as consisting of two kinds of rights: financial and governance. Next, the constituents of “governance” are defined in the Act as pertaining to and including voting. “‘Governance rights’ means a member’s right to vote on one (1) or more matters, all of a member’s other rights as a member in the LLC under the LLC documents or this chapter, other than financial rights, and the right to transfer the voting and other rights described in this subdivision (13).” Thus, when the provision of the Act that a member’s rights include governance rights, and those rights, as per the Act, are synonymous with voting, that means, when the term “Interest” is used in the Operating Agreement, that “Interest” pertains not only to financial rights but governance rights, i.e. voting. Next, taking this construction, the Court sees that at section 1.6(b) of the Operating Agreement, under the term “Interest,” percentages are provided. Accordingly, because “Interest” pertains to governance, i.e. voting, as well as financial rights, section 1.6(b) provides for a 54% governance/voting right of Joe Strong, a 39% governance/voting

right of Todd Scobey, and 5% and 2% governance/voting rights, respectively, of Cynthia King and Jackson Scobey.

The Defendants also argue in their response to the partial summary judgment motion that the Articles of Organization, as well, establish that LLC governance/voting is percentage based. Paragraph 4 is entitled “Management.” It provides that the LLC shall be Member Managed and sets out the same percentages as section 1.6(b) of the Operating Agreement. The Defendant’s argument is that “Clearly, the percentages refer to each member’s “management” of the Company, not their financial interest in the Company, as Plaintiffs contend.” This argument is supported by the Revised LLC Act. Part 4 “Management” of the Act refers throughout to voting in the “Management” Part 4 of the Act. Voting is included in the statutory scheme in “Management.” Thus, that the Articles of Organization in this case list percentages under management establishes percentage-based voting.

From all of the foregoing provisions and terms of the corporate documents, the Court finds there is no ambiguity, and as a matter of law, the voting in this case under the terms of the LLC documents is percentage-based voting.

Lastly, although the Plaintiffs filed the motion for partial summary judgment and are correct that there are no disputed facts and the Court can rule as a matter of law, the ruling issued is contrary to the decision sought in the Plaintiffs’ *Motion* and is a decision in favor of the nonmoving party. That, however, does not require that the *Motion* be denied, and the matter be left unresolved and undetermined.

Although this Court has not previously spoken on the subject, we are of the opinion that a trial judge may grant a motion for summary judgment in favor of a nonmoving party, or parties, as was done here. See 6 Moore's Federal Practice, s 56.12. We are of the opinion, however, that such action on the part of the trial judge should be taken only in rare cases and with meticulous care.

*Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976).

Summary judgment may be granted in favor of a nonmovant. *Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn.1976). Such action should be taken only in rare cases and with meticulous care. *Id.* Further, the party against whom summary judgment is to be rendered must have had notice and a reasonable opportunity to respond to all the issues to be considered. *See id.*; *March Group, Inc. v. Bellar*, 908 S.W.2d 956, 959 (Tenn.Ct.App.1995).

*Griffis v. Davidson Cty. Metro. Gov't*, 164 S.W.3d 267, 284 (Tenn. 2005).

While our Supreme Court has ruled that a trial judge may grant summary judgment to a non-moving party, the power must be exercised only in rare cases and with meticulous care. *Thomas v. Transport Insurance Co.*, 532 S.W.2d 263 (Tenn.1976). *See also* 6 Moore's Federal Practice § 56.12; 10A Wright & Miller, Federal Practice and Procedure § 2770. Such *sua sponte* action should be taken only when the party opposing summary judgment has been given notice and a reasonable opportunity to respond to all issues to be considered by the court. *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970 (6th Cir.1989) (In the Sixth Circuit the adverse party must be extended at least ten days notice before summary judgment may be entered.) *See also Yashon v. Gregory*, 737 F.2d 547 (6th Cir.1984).

*March Grp., Inc. v. Bellar*, 908 S.W.2d 956, 958–59 (Tenn. Ct. App. 1995)

The above analysis shows that this is one of those cases appropriate for summary judgment in favor of the nonmoving party. The ruling has been explained meticulously above, and there has been ample and reasonable opportunity to respond to all issues to be considered as these were covered by all parties in the summary judgment briefing.

It is therefore ORDERED that partial summary judgment is issued in this case that voting for the members on LLC matters is percentage-based, not per capita.

*s/ Ellen Hobbs Lyle*  
\_\_\_\_\_  
ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

G. Kline Preston

Emma R. Wolfe

Attorney for Plaintiffs Todd B. Scobey, Jackson Scobey and Strong  
Waterproofing, LLC

Jack R. Dodson III

Emma R. Wolfe

Attorney for Plaintiff Cynthia King

James D. Kay, Jr.

Benjamin E. Goldammer

Michael A. Johnson

Attorneys for Defendant Joe Strong

Brandt McMillan

Attorney for Defendant Entity Strong Waterproofing, LLC