SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0149-15T3

ANTHONY MARRA, individually and as a member of MARTINSVILLE REALTY ASSOCIATES, LLC,

Plaintiff-Respondent/ Cross-Appellant,

v.

MITCHELL T. BERLANT, ROBERT D. BERLANT, and MARTINSVILLE REALTY ASSOCIATES, LLC,

Defendants-Appellants/ Cross-Respondents.

Argued October 24, 2017 – Decided November 6, 2017

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. C-012067-11.

David P. Wadyka argued the cause for appellants/cross-respondents (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, PC, attorneys; Mr. Wadyka, of counsel and on the briefs; Allison L. Segal, on the briefs).

Matthew J. Lodge argued the cause for respondent/cross-appellant (Carroll McNulty & Kull LLC, attorneys; Mr. Lodge, of counsel and

on the briefs; Nicholas A. Vytell, on the briefs).

PER CURIAM

These appeals reach us after a Chancery Division judge (the judge) conducted a fifteen-day bench trial. Mitchell T. Berlant (Mitchell), Robert D. Berlant (Robert), and Martinsville Realty Associates, LLC (MRA) (collectively defendants) appeal from a September 3, 2015 final judgment in favor of plaintiff Anthony Marra, individually and as a member of MRA. Plaintiff cross-appeals from the same judgment. We remand for recalculation of the award after subtracting plaintiff's $10,000 capital distribution plus related interest. We affirm in all other respects.

Plaintiff pled the following causes of action: declaratory judgment (Count One); removal of the Berlants from MRA (Count Two); dissolution of MRA (Counts Three and Four); breach of fiduciary duty (Count Five); breach of contract (Operating Agreement) (Count Six); breach of contract (Loan Repayment Agreement) (Count Seven); breach of the duty of good faith and fair dealing (Count Eight); conversion (Count Nine); conspiracy to commit conversion (Count Ten); fraudulent and negligent misrepresentation (Count Eleven); conspiracy to commit fraud (Count Twelve); promissory estoppel (Count Thirteen); unjust

enrichment (Count Fourteen); and intentional infliction of emotional distress (Count Fifteen). Defendants pled several affirmative defenses, including laches and statute of limitations (SOL).

Before the trial, defendants moved for summary judgment on all counts except Count Seven. The motion judge granted their motion solely as to Count Six holding plaintiff knew or should have known, at the latest in 2004, that defendants had breached the Operating Agreement, and therefore, plaintiff's claim was filed outside of the six-year SOL. The motion judge issued a lengthy written opinion further explaining the basis for his ruling.

After the trial, the judge found that plaintiff owned fifty-percent of MRA, which the judge did not dissolve. He also vacated the grant of summary judgment entered by the motion judge on Count Six. The judge found no evidence that plaintiff had reason to believe that defendants had repudiated his interest in MRA. The judge found that Mitchell had affirmed plaintiff's position as an owner by executing two option agreements to purchase plaintiff's interest and plaintiff continued to receive distributions. The judge found defendants only repudiated plaintiff's ownership interest in 2011 and plaintiff's claim was not barred by the SOL.

The judge entered a $794,673 judgment against Mitchell and

Robert, which the judge reached by totaling $372,778 in capital, $223,790 for fifty-percent of the equity, $35,500 for half of the litigation costs paid by MRA, and $162,605 interest "on the differential between Marra's capital account and the Berlants' [capital] account over the years." The judge reconsidered his interest calculation, but did not change the amount.

On the appeal, defendants argue the judge erred by finding plaintiff was a fifty-percent owner of MRA; failing to apply the appropriate SOL or doctrine of laches; and calculating plaintiff's award. On the cross-appeal, plaintiff contends the judge erroneously concluded the Revised Uniform Limited Liability Company Act (RULLCA), N.J.S.A. 42:2C-1 to -94, was inapplicable, and as a result, plaintiff seeks a remand for the judge to award him fees.

Our standard of review requires deference to a judge's findings "unless they are so wholly unsupportable as to result in a denial of justice." Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div.), aff'd o.b., 33 N.J. 78 (1960); see also Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). We review questions of law de novo. Greenfield, supra, 60 N.J. at 444.

I.

We begin by addressing defendants' contention that the judge erred by failing to apply the SOL or doctrine of laches. Although not expressly stated in his written opinions, it appears the judge found for plaintiff on Counts One, Two, Three, Four, Six and Seven. Some of the Counts sought equitable relief and some sought money damages.

We agree with the judge that the doctrine of laches does not bar plaintiff's complaint. "Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-18 (2012) (quoting Cty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)). Our Supreme Court has found laches to be "an equitable defense that may be interposed in the absence of the [SOL]." Lavin v. Hackensack Bd. of Educ., 90 N.J. 145, 151 (1982).

The Court has explained that laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. 169, 180-81 (2003). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum

and the prejudiced party acted in good faith believing that the right had been abandoned." Id. at 181. "Our courts have long recognized that laches is not governed by fixed time limits, but instead relies on analysis of time constraints that 'are characteristically flexible.'" Fox, supra, 210 N.J. at 418 (citation omitted) (quoting Lavin, supra, 90 N.J. at 151). Whether laches applies "depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 248 (1988)).

In determining whether to apply laches, the court should consider the length of the delay, the reasons for the delay, and any changing circumstances of the parties during the delay. Fauver, supra, 153 N.J. at 105. As to the delay, the court should look to an analogous SOL, and laches applies where "a claim derived from a statutory right had been lost through failure to make a timely demand therefor." Fox, supra, 210 N.J. at 420 (citing Lavin, supra, 90 N.J. at 152).

"The [SOL], by its express terms, applies only to actions at law and may not be invoked as a defense against a claim exclusively equitable." Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 197 F. Supp. 627, 629 (D.N.J. 1961), aff'd, 307 F.2d 210 (3d Cir.

1962), cert. denied, 372 U.S. 929, 83 S. Ct. 872, 9 L. Ed. 2d 733 (1963). Contract claims have a six-year SOL. N.J.S.A. 2A:14-1. The "discovery" doctrine "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973). "Whether a particular cause of action is barred by a [SOL] is determined by a judge" and is a determination of legal consequence. Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 325 (App. Div.), certif. denied, 188 N.J. 577 (2006). We therefore owe no deference to the judge's decision and review de novo. Ibid.

Defendants contend that the causes of action "appeared to accrue in August 2001 when [p]laintiff signed documents indicating he was not a member of MRA." Defendants argue that plaintiff knew about his causes of action in September 2002, when he obtained counsel and asked Mitchell to sign an amended operating agreement. Defendants argue further that when Mitchell refused to sign, plaintiff should have known that Mitchell did not believe plaintiff was a member of MRA. According to defendants, plaintiff did not receive a K-1 or distributions from MRA, which they maintain "strongly suggest to a reasonable person that he was not considered

by the Berlants to be a member of MRA."

The judge disagreed with defendants' position, finding:

> The Berlants[] did not . . . manifest their position that Marra was not an owner until 2011 when they stopped making monthly payments to him . . . and Marra had no reason to believe before then that the Berlants took the position that he was merely a creditor. Even at trial Mitchell was equivocal stating that Marra could have become an owner if he fulfilled certain obligations. This action was timely filed within a few months after MRA stopped paying Marra.
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> . . . .
>
> There is no evidence that defendants repudiated Marra's interest in MRA until 2011. Moreover, during the six years beginning on January 1, 2003, Mitchell affirmed Marra's ownership interest when he executed . . . the option[] agreements to acquire Marra's interest. Similarly, J-41, undoubtedly drafted by a Berlant or a Berlant employee, affirms Marra's status as an owner . . . and pursuant to that letter, dated December 15, 2005, MRA began disbursing $4[]000 a month to Marra, all within the six-year period commencing January 1, 2003. The court finds that during 2003 and 2004 Mitchell assured Marra that all was well with the project and that the Berlants were not receiving distributions either. Thus, the full trial record establishes that during the '03-'04 period Marra had no reason to believe that defendants were repudiating his interests in MRA.

We conclude that there is sufficient evidence in the record to support the judge's findings. Although plaintiff signed both the August 31, 2001 letter and operating agreement removing him

from ownership, he believed that it was a formality only to satisfy the bank to obtain a loan, and Mitchell hand-wrote on the letter that plaintiff was still a fifty-percent owner of MRA.

The record demonstrates plaintiff's first objectively reasonable indication that he was not considered a member of MRA occurred in the spring of 2011, when he stopped receiving his monthly loan repayment checks, and when he received a series of correspondence from Mitchell. He filed suit in August 2011, within months of learning of the Berlants' position. Whether considering his actions under the SOL or laches, plaintiff's actions were reasonable.

II.

We reject defendants' contention that the judge erred by finding plaintiff was a fifty-percent owner of MRA. Here, there exists substantial credible evidence in the record to support the judge's findings.

The judge referenced a December 2002 letter that Mitchell sent to plaintiff with financial information regarding a MRA project, finding "[i]t is the type of information that would be provided to an owner." The judge also pointed to the June 2005 proposed option agreements, noting that "[o]ne does not enter into an option to buy an owner's interest if the seller is not an owner; these documents constitute Mitchell's acknowledgment in June 2005

that Marra is an owner." The judge further noted plaintiff's December 2005 letter, in which he recognized that plaintiff granting the Berlants rights to manage the project would not have made sense unless plaintiff had a stake in the company.

The judge continued:

> The Berlants' position is that Marra is not an owner because he failed to make required contributions of dollars and effort to MRA. The court rejects this position. There is no letter, e-mail or other document or corroborative evidence to establish that the Berlants ever made a demand or even a polite request of Marra to do anything regarding MRA that he had not done. Mitchell was the managing member and the court finds that he preferred to control, without interference, the construction, financing and operation of MRA. The court notes, in this regard, that money went into and out of MRA to and from other Berlant entitles without adequate explanation of the purpose of those transactions. Indeed, there is not an invoice or other objective record to establish the actual cost of the office buildings constructed by MRA under Berlant supervision. The court finds that on some occasions the Berlants used MRA as a bank for their other entities, and on other occasions used other entities as banks for MRA. Thus it suited them to keep Marra uninvolved and at a distance.
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> The Berlants also contend that they eliminated Marra's ownership interest because with Marra as a debtor they would be unable to limit their debtor liability to several guarantees instead of joint and several guarantees. The court rejects this contention. The Berlants were required to

> provide joint and several guarantees even without Marra's participation as a debtor.

Furthermore, the New Jersey Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70, was in effect.[1] The act addressed how an LLC should address members who fail to comply with an operating agreement:

> An operating agreement may provide that a member who fails to perform in accordance with, or to comply with the terms and conditions of, the operating agreement shall be subject to specified penalties or specified consequences, and at the time or upon the happening of events specified in the operating agreement, a member shall be subject to specified penalties or specified consequences.
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> [N.J.S.A. 42:2B-26.]

Similarly, N.J.S.A. 42:2B-33(c) stated:

> An operating agreement may provide that the limited liability company interest of any member who fails to make any contribution that he is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating his limited liability company interest to that of nondefaulting members, a forced sale of his limited liability company interest, forfeiture of his limited liability company interest, the lending by other members of the amount necessary to meet his commitment, a fixing of

[1] This section was repealed and replaced effective March 18, 2013, with the RULLCA, N.J.S.A. 42:2C-1 to -94.

> the value of his limited liability company interest by appraisal or by formula and redemption or sale of his limited liability company interest at such value, or other penalty or consequence.

None of the operating agreements here provided for any consequences to members who did not perform as expected. Defendants did not take any action against plaintiff, not even so much as a letter asking for compliance, when plaintiff allegedly failed to perform as they had expected. The lack of formal appropriate documents further supports the judge's finding that the Berlants liked having little oversight and no formal rules so that they could operate MRA in concert with their other businesses as it suited them.

III.

Defendants argue that the judge erred when he failed to credit loans to MRA from Berlant-owned companies against plaintiff's interest in MRA.

Defendants argue the judge failed to consider C-1, a document marked after the trial concluded, which was a balance sheet for MRA as of July 1, 2015, reflecting a balance due to other Berlant entities totaling $454,265.

The judge rejected, as being credible, defendant's contention that the Berlant entities loaned MRA $454,265 for expenses, including the cost of litigation. He found:

> These loans are not credible. The court addressed in its . . . opinion the manner in which the Berlants moved money into and out of their various entities in a process the court now characterizes as a financial shell game. The court also found that "[d]efendants also mismanaged MRA's books and ignored accounting standards, as catalogued by Chodor." . . . The Berlants have no credibility regarding the integrity and reliability of their bookkeeping. Moreover, defendants['] loan claims are an attempt to supplement the trial record. For example, J-56 is a collection of MR[A] balance sheets for the period through December 31, 2012. C-1, marked on July 15, 2015, adds a balance sheet "as of July 1, 2015."
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> [(first alteration in original).]

The judge correctly rejected what C-1 purported to say.

Alternatively, defendants argue that even if the judge properly excluded C-1 from admission into evidence, a balance sheet dated November 5, 2014, which the judge considered, reflected a balance due to Berlant entities totaling $195,765. Defendants contend "there is no evidence to establish that the loans made to MRA by other Berlant-owned entities were fictitious," and thus the judge erred by failing to include the alleged loan amounts due other entities.

There is sufficient evidence in the record to support the judge's findings to the contrary. There is no indication that the amounts on the balance sheets were actually "loans." Defendants could have produced records showing a loan or invoice to

corroborate the "loan." The Berlants testified on the subject, but the judge found their testimony incredible, finding that defendants were involved in a "financial shell game." Applying our standard of review, we have no reason to disturb those findings.

IV.

Defendants argue that the judge erred when he included plaintiff's $10,000 capital contribution as part of the judgment against them. We agree.

It is undisputed that plaintiff was required to make a $10,000 capital contribution. Plaintiff testified that he made this contribution by issuing a check in the amount of $50,000 made payable to Monogram, a Berlant-owned business. He claimed that he sat with Mitchell, who showed him "various costs that were due," and Mitchell told him the contribution he needed to make to cover the costs. Plaintiff wrote the check to Monogram, but he supplied no backup information because plaintiff "trusted" Mitchell. Mitchell and Robert both testified that plaintiff did not make the capital contribution.

In his July 2, 2015 opinion, the judge stated:

> Plaintiff's initial capital contribution consisted of the Conroy property and another $10,000 contribution for a total of $442,648. The court rejects plaintiff's contention that the capital contribution was $513,000 because

> there is insufficient evidence to support it. Plaintiff relies on his unilateral calculations and a check drawn to Monogram, a Berlant entity not related to MRA.

Plaintiff claimed that the capital contribution was included in the check to Monogram. The judge found plaintiff's testimony unsupported, but concluded that plaintiff made the $10,000 capital contribution. We therefore conclude that this limited finding as to the contribution is unsupported by the record and remand for a recalculation of the judgment minus the $10,000 alleged capital contribution.

V.

Defendants argue that the judge's purported award of $162,605 in prejudgment interest was "grossly excessive and constituted an abuse of discretion." We conclude that the judge's award of "interest" did not constitute "prejudgment interest."

The judge awarded "interest on the differential between Marra's capital account and the Berlants' [capital] account over the years." Plaintiff's expert, Lawrence Chodor (Chodor), provided a report and explanation of how the court should calculate the "interest" owed to plaintiff. A review of Chodor's testimony shows that this amount constituted a measure of plaintiff's damages, not an award on top of the damages to compensate plaintiff for the loss of the use of his money. The judge did not refer to

prejudgment interest.

Chodor calculated the interest from the date the Berlants refinanced MRA's mortgage in December 2005 and paid themselves $843,570, but did not pay plaintiff. He compared the capital accounts of plaintiff and the defendants each year, then "calculated the interest based on the rate of . . . the mortgage at 5.875 that they had just refinanced." He further explained:

> Well, part of my process . . . in doing forensics is to determine the appropriate interest rate. So, there's a lot of variables that go into account. . . . [W]hat I could do with that is I could look at the risks associated with an unsecured loan to a highly leveraged property, and I could utilize various databases to come up with the risk adjusted rate. And that would probably be much higher than 5.875. I had a recent refinancing here, so I just went with that. I thought that was a conservative approach.
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> But, the difference is the bank at 5.875 is secured and has the property as collateral. Mr. Marra doesn't have any collateral, so his risk is higher. It would justify a higher rate, but I went conservative, and I just used the bank rate.

Chodor again explained that he only applied interest to the spread between plaintiff's capital account and defendants' capital account; had he applied interest to the entire balance, the total interest would have been much higher.

In his July 2, 2015 opinion, the judge found:

> Chodor calculated interest based on the excess of Marra's capital over Berlant[s'] capital. . . . But, Chodor's calculation of Marra's capital included the loan balance of $123,898. The parties' property contributions were booked as loans to be interest free. Interest will have to be recalculated based on the differential capital excluding the loan balance. Plaintiff's expert shall prepare an amended interest calculation; defendant[s'] expert may respond to that calculation.

In his August 5, 2015 opinion, the judge noted Chodor's interest calculation of $242,728, but found it was "flawed by the inclusion of the balance of Marra's original contribution which was to be without interest." The judge adjusted "Chodor's interest amount by backing out of the interest calculation $123,898, the balance of Marra's original capital contribution" and awarded "interest on the differential between Marra's capital account and the Berlants' [capital] account over the years." The judge did this by calculating

> the annual average of excess Marra capital for the [ten]-year period shown on Chodor's [calculation]. That average is: $375,339. The court then divided $123,898 by the average, which resulted in a ratio of 33%. The court then reduced Chodor's interest amount by 33%, leaving interest due to Marra of $162,605. The court recognizes that its interest adjustment is unsophisticated, perhaps even naïve. It is, however, rationally based on the evidence in the trial record. Nevertheless, either party may submit a recalculation of interest that excludes the $123,898 interest-free capital. . . . In the absence of a recalculation, judgment shall be

> entered in the amount of $632,068 + $162,605 = $794,673.

In his final opinion, dated August 18, 2015, the judge noted that both parties submitted recalculations; plaintiff was "limited to my instructions" but "defendants have exceeded them." He rejected plaintiff's new calculations as "excessive." He kept the interest at $162,605.

There was no indication in Chodor's testimony that this "interest" was intended to be a "prejudgment interest" award. He made no mention of prejudgment interest; nor would it have been appropriate for an expert to testify to that, as the application and rate of prejudgment interest is solely within the discretion of the trial court. Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div.), certif. denied, 165 N.J. 607 (2000). Moreover, defendants' argument that the judge never gave any reason for awarding prejudgment interest supports that conclusion: the judge never gave any reason because he was not awarding prejudgment interest.

VI.

On the cross-appeal, plaintiff argues the judge erred by concluding that the RULLCA was inapplicable. Plaintiff maintains that the consequence of that conclusion deprived him of a counsel fees award. We conclude that the judge erred in his conclusion, but such error was harmless because plaintiff was not entitled to

counsel fees under the RULLCA.

In 2011, LLCs were governed by the New Jersey Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70. The RULLCA became effective March 18, 2013. L. 2012 c. 50 § 96. Before March 1, 2014, the RULLCA governed only an LLC formed on or after the effective date of the act and LLCs choosing to amend their operating agreements. N.J.S.A. 42:2C-91(a). However, "[o]n and after March 1, 2014, this act governs all limited liability companies." N.J.S.A. 42:2C-91(b). Pursuant to N.J.S.A. 42:2C-90, "[t]his act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect." The judge interpreted the statute, which is entitled "Savings clause," to mean that the RULLCA "does not govern the issues in this litigation."

Plaintiff argues on appeal that the judge misinterpreted the Savings clause in that savings clauses are "designed to preserve a party's rights to pursue claims under a statute being repealed, not to prevent them from asserting rights under the new statute". Plaintiff relies on Parsippany Hills Assocs. v. Rent Leveling Bd. of Parsippany-Troy Hills Twp., 194 N.J. Super. 34, 42-43 (App. Div.) (citations omitted), certif. denied, 97 N.J. 643 (1984), which states:

> In this State it is the general rule that where a statute is repealed and there is no saving clause or a general statute limiting the effect of the repeal, the repealed statute, in regard to its operative effect, is considered as though it had never existed, except as to matters and transactions passed and closed. Furthermore, it is settled law in this State that, unless vested rights are involved, the law in effect at the time of the disposition of the cause by an appellate court governs, rather than the law in effect at the time the cause was decided by the trial court.

If a statute has no savings clause, a person who brought an action under the previous law would lose those rights, even though an action had already been commenced. Ibid. We agree with plaintiff that the Savings clause in the RULLCA was intended to preserve rights that accrued under the former law, not extinguish rights that the party may have gained by the passage of the new law. The judge allowed plaintiff to amend his complaint without objection to include a claim for relief under the RULLCA. The RULLCA was in effect before the decision in this action. Thus, the judge was obliged to apply the law in effect at the time of the decision and consequently erred in finding that the RULLCA did not apply.

Plaintiff believes, however, that he is entitled to counsel fees under the RULLCA. Plaintiff makes that assertion relying on N.J.S.A. 42:2C-48(c), which states:

> If the court determines that any party to a proceeding brought under paragraph (4) or (5) of subsection a. of this section has acted vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.

Defendants, on the other hand, contend that N.J.S.A. 42:2C-48(c) is only applicable in cases of dissolution, which did not happen here. We agree with defendants.

Article 7 of the RULLCA is entitled "Dissolution and Winding up." The first part of Article 7, N.J.S.A. 42:2C-48, is entitled, "Events causing dissolution." It states:

> a. A limited liability company is dissolved, and its activities shall be wound up, upon the occurrence of any of the following:
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> . . . .
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> (4) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that:
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> (a) the conduct of all or substantially all of the company's activities is unlawful; or
>
> (b) it is not reasonably practicable to carry on the company's activities in conformity with one or both of the certificate of formation and the operating agreement; or
>
> (5) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that the managers or those members in control of the company:

> (a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or
>
> (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.
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> [N.J.S.A. 42:2C-48(a).]

The judge did not dissolve the company, but rather, ordered defendants to buy-out plaintiff's share. Thus, by its plain terms, N.J.S.A. 42:2C-48(c) is inapplicable.

We conclude that the parties' remaining arguments are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(1)(E).

We remand for recalculation of the final award after subtracting plaintiff's alleged $10,000 capital distribution plus its related interest. We affirm in all other respects. We do not retain jurisdiction.