

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0278

**MICHAEL N. PITTMAN, M.D.
AND THE FOUR M FAMILY TRUST**

VERSUS

FAIRWAY MEDICAL CENTER, L.L.C.

[Handwritten signatures and initials: J.P.B., J.M.M., J.D.H. by J.M.M.]

Judgment Rendered:

OCT - 6 2011

**Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2005-15076**

The Honorable Richard A. Swartz, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

A limited liability company operating an outpatient surgery center appeals a partial summary judgment ordering the membership interest of an ousted member reinstated, based upon a finding that it failed to timely exercise an option to purchase the member's interest, and also an incorporated judgment denying its cross-motion for summary judgment. For the following reasons, we reverse in part, affirm in part, and remand this matter for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The defendant-appellant, Fairway Medical Center, L.L.C. (Fairway) was initially formed as PHIG, L.L.C., on August 27, 1998. It owns and operates an outpatient medical center and specialty hospital on Industry Lane in St. Tammany Parish. The plaintiff-appellee, Michael N. Pittman, M.D., is a practicing urologist and was one of Fairway's initial members.

Fairway's articles of organization provide that each member's share of profits and losses and voting rights on items of business are proportionate to his or her ownership interest (membership interest) in the company. On April 27, 1999, its members entered into an operating agreement governing the duties and obligations of its managers and officers, the conditions and terms of membership, the sale or other transfer of membership interests, and other matters. In September 2000, PHIG, L.L.C. amended its articles of organization to change its name to Fairway.

Fairway's operating agreement provides that the occurrence of certain events affecting a member ("Triggering Events"), including death, divorce, interdiction, and loss of a medical license or staff privileges, obligate that member or his legal representatives to issue written notice to Fairway regarding the event, including its nature and the date upon which it occurred.

The affirmative vote of members owning 51% or more of Fairway's total membership interests to terminate a member's status is also defined as a "Triggering Event." Upon the occurrence of any "Triggering Event," the member whose interest is affected by the event is required to notify Fairway and to offer to sell that interest to Fairway first, and, if Fairway fails to exercise its purchase option, then to the other members, either acting in combination or individually. If Fairway exercises its purchase option, the closing of its purchase of the membership interest must take place no later than 30 days after its election to exercise the option.

In late 2003 and early 2004, competition developed between Dr. Pittman and Fairway over the acquisition of real estate located on Industry Lane, where both Fairway's facility and Dr. Pittman's urology office were located. On November 22, 2004, a majority of Fairway's managers met and voted to call a meeting of Fairway's members to be held on December 7, 2004, for the stated purpose of "voting to terminate the membership interests of Tristan R. Schultis, M.D. and Michael N. Pittman, M.D." Notice was sent to all members, including Dr. Pittman.

On December 3, 2004, Dr. Pittman and his wife, as joint settlors, established a revocable *inter vivos* trust, the Four M Family Trust (Four M), purporting to transfer to the trust all of their membership interest in Fairway, consisting of Dr. Pittman's "three membership units." Dr. Pittman was designated as trustee and the couple's four children were designated as beneficiaries.

On December 7, 2004, the scheduled meeting of Fairway's members was held. Votes were cast on behalf of 34 of Fairway's 35 members, either personally or by proxy. Dr. Pittman attended the meeting, purportedly as trustee of Four M. The result of the vote relating to termination of Dr.

Pittman's interest was 90.67% of the total membership interest voting in favor of termination and 9.33% against.

On December 17, 2004, Dr. Pittman executed a mediation agreement on behalf of Medical Center Diagnostic, a company he owned. Fairway's management chairman executed the agreement on its behalf on December 21, 2004. The stated purpose of the mediation was "[t]o help facilitate negotiations between both parties that would be mutually acceptable."

By notice dated December 21, 2004, Fairway's members were formally notified by its management chairman of the vote in favor of termination of Dr. Pittman's membership interest. The notice also informed the members that "[t]his vote constitutes a 'Triggering Event' under the [o]perating [a]greement," thereby, according to the notice, granting Fairway the first option to acquire Dr. Pittman's interest according to the terms of the operating agreement.

On December 22, 2004, a majority of Fairway's managers voted to exercise its purported option to redeem or acquire all of Dr. Pittman's membership interest in Fairway. Formal notice of that action, dated January 6, 2005, was sent to Dr. Pittman and the other members by Fairway's management chairman.

Fairway did not close the purchase of Dr. Pittman's membership interest within 30 days of giving notice of its election to exercise its purchase option. Its alleged reason for not doing so was the purported existence of a forbearance or "standstill" agreement between Fairway and Dr. Pittman, under the terms of which the parties supposedly agreed to suspend the consummation of Fairway's acquisition of Dr. Pittman's membership interest pending the outcome of negotiations on that issue and others.

In the meantime, Fairway and Dr. Pittman, on behalf of Medical Center Diagnostic, continued their ongoing negotiations and mediation of various items of dispute. On January 12, 2005, they executed a document expressing their understanding of the mediation objectives and issues. Among the issues in that "Stage 1" agreement proposed by the mediator for consideration by Fairway were that it "would stop all legal action against [Dr.] Pittman from [sic] past issues" and that it "would reinstate [Dr.] Pittman[']s membership interest in [Fairway]." The mediator also proposed that Dr. Pittman consider the proposal to "stop all legal action against [Fairway] and their [sic] representatives."

The mediation was unsuccessful in resolving the dispute between Fairway and Dr. Pittman relating to his ownership interest. On October 21, 2005, Fairway sent a letter by certified mail to Dr. Pittman, enclosing its check in the amount of \$69,243.26, purporting to represent the first installment, or 25% of the purchase price of Dr. Pittman's membership interest. Also enclosed was Fairway's promissory note for the balance of \$209,229.78, to be paid in five annual installments of \$41,845.96. The letter stated that "by mutual consent" the payments had been "held in suspense while efforts were made to negotiate an overall resolution of various issues" between Dr. Pittman and Fairway, and that the payments were being initiated because no agreement was reached between the parties. Dr. Pittman received the letter and enclosures on October 27, 2005.

On November 29, 2005, Dr. Pittman, through his attorney, returned Fairway's check and promissory note by certified mail. Also enclosed with the cover letter was a courtesy copy of the petition that instituted the present civil action. Fairway received the letter and enclosures on December 6, 2005.

On November 30, 2005, Dr. Pittman and Four M filed a petition, naming Fairway as defendant and alleging that the termination of his membership interest was without cause and in violation of Fairway's operating agreement and articles of organization. They also alleged that the termination should be voided, that Four M's membership interest should be recognized, that the membership should be reinstated, and that they were entitled to damages. Finally, they alleged in the alternative that the purchase or redemption price tendered by Fairway was inadequate.

Fairway answered the petition on March 13, 2006, denying that its termination of Dr. Pittman's membership interest was in violation of its operating agreement and articles and denying any liability for damages. In addition to certain affirmative defenses, Fairway alleged that the termination of Dr. Pittman's membership interest was in accordance with the express terms of its operating agreement, that the transfer of his interest to Four M did not comply with the operating agreement, and that the transfer was not effective prior to the vote to terminate Dr. Pittman's membership interest.

On July 6, 2007, Fairway filed a peremptory exception of no right of action, asserting the objection that Four M had no right of action to assert any claims for wrongful termination of any membership interest and for damages. Fairway alleged that Four M never acquired any membership interest in Fairway because of noncompliance with the terms of the operating agreement regarding such an assignment or transfer of interest, including the written approval of Fairway's managers and members holding 51% of the total membership interest.

Fairway then filed a motion for partial summary judgment on September 26, 2007, seeking dismissal of the claims of Dr. Pittman and Four

M for wrongful termination of his membership interest under the terms of Fairway's operating agreement and articles of organization.

Fairway's peremptory exception was heard on October 24, 2007. At the conclusion of the hearing, the trial court ruled in favor of Fairway, and its judgment sustaining the exception and dismissing Four M's claims with prejudice was signed on November 15, 2007.

Fairway's motion for partial summary judgment was heard on January 23, 2008, and the trial court denied the motion following the conclusion of argument. Its judgment denying the motion was signed on February 27, 2008. Fairway applied for supervisory writs, but its application was denied by this court on June 20, 2008, on the grounds that Fairway had an adequate remedy by appeal following rendition of final judgment.

On April 19, 2010, Dr. Pittman filed a motion for summary judgment, seeking his reinstatement as a member of Fairway retroactively as of December 21, 2004 and the sum of \$353,315.11 in profit distributions to which he would have been entitled since the latter date.¹ The motion was heard on July 14, 2010, and the trial court took the matter under advisement at the conclusion of the hearing.

The trial court issued its written reasons for judgment on August 2, 2010. It held that the mediation agreement did not operate to suspend the time for Fairway to pay the purchase price of Dr. Pittman's membership interest, as evidenced by the fact that Fairway sent notice of exercise of its purchase option on January 6, 2005, and that Fairway failed to exercise its purchase option by failing to timely pay the purchase price. The court accordingly granted partial summary judgment, ordering Fairway to reinstate

¹ The motion was also filed on behalf of Four M, although Four M had already been dismissed as a party plaintiff.

Dr. Pittman's membership, but also ruled that genuine issues of material fact existed as to the amount of damages claimed by Dr. Pittman, requiring denial of summary judgment in part. On August 16, 2010, the trial court issued separate, detailed written reasons supporting its designation of the partial summary judgment in favor of Dr. Pittman as a final judgment for purposes of appeal.

Fairway now appeals both the partial summary judgment and the prior interlocutory judgment denying its motion for summary judgment.²

ASSIGNMENTS OF ERROR

Fairway assigns the following described error on the part of the trial court:

I. The [trial] court erred when it ordered that Fairway reinstate [Dr. Pittman's] membership . . . as of December 21, 2004, as a remedy for Fairway's alleged late payment to [Dr. Pittman] for his interest . . ., when the only legal remedy for late payment of a monetary obligation is principal and interest from the due date.

II. The [trial] court erred when it ordered that Fairway reinstate [Dr. Pittman's] membership . . . as of December 21, 2004, because Fairway's payment to the plaintiff was not late [since] the parties had agreed to forbear from concluding the redemption while they attempted to amicably resolve their differences. [The appellate] [c]ourt not only should reverse the [trial] court's . . . summary judgment in favor of [Dr. Pittman], but also should render judgment in favor of Fairway.

III. In the alternative, the [trial] court erred when it ordered that Fairway reinstate [Dr. Pittman's] membership as of December 21, 2004, when a genuine issue of material fact exists concerning the existence and terms of the forbearance agreement between Fairway and [Dr. Pittman.]

² When an unrestricted appeal is taken of a final judgment determinative of the merits, the appellant is generally entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *See Judson v. Davis*, 04-1699, p. 8 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112, *writ denied*, 05-1998 (La. 2/10/06), 924 So.2d 167. In the case of an appeal of a partial judgment or partial summary judgment designated as final under La. C.C.P. art. 1915(B), an appellant may also appeal an interlocutory judgment involving the same or related issues, such as a judgment denying a cross-motion for summary judgment. *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of La.*, 10-0689, pp.7-8 n.6 (La. App. 1st Cir. 2/11/11), 56 So.3d 1236, *writ denied*, 11-0849 (La. 6/3/11), 63 So.3d 1023.

DISCUSSION

Standard of Review and General Principles of Summary Judgment

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. *Berard v. L-3 Communications Vertex Aerospace, LLC*, 09-1202, p. 5 (La. App. 1st Cir. 2/12/10), 35 So.3d 334, 339-40, *writ denied*, 10-0715 (La. 6/4/10), 38 So.3d 302. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Hines v. Garrett*, 04-0806, p. 7 (La. 6/25/04), 876 So.2d 764, 769.

The mover has the burden of proof that he is entitled to summary judgment. *See* La. C.C.P. art. 966(C)(2). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The proper interpretation of a contract is also a question of law subject to *de novo* review on appeal. *Solet v. Brooks*, 09-0568, p. 5 (La. App. 1st Cir. 12/16/09), 30 So.3d 96, 99. Accordingly, we need not accord deference to the trial court's legal conclusions as to the meaning and effect of the agreement's provisions, but must independently review its language to determine the parties' mutual intent. *See Toomy v. La. State Employees' Ret. Sys.*, 10-1072, p. 5 (La. App. 1st Cir. 3/25/11), 63 So.3d 198, 201-2.

General Principles of Contractual Interpretation

Contracts have the effect of law for the parties. La. C.C. art. 1983. Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. This is an objective inquiry; thus, “a party’s declaration of will becomes an integral part of his will.” La. C.C. art. 2045, Revision Comments – 1984, (b). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent. La. C.C. art. 2046.

The words of a contract must be given their generally prevailing meaning. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. C.C. art. 2048. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050.

The Language of the Operating Agreement

The operating agreement of a limited liability company is contractual in nature; thus, it binds the members of the limited liability company as written and is interpreted pursuant to contract law. *Risk Mgmt. Services, L.L.C. v. Moss*, 09-632, p. 5 (La. App. 5th Cir. 4/13/10), 40 So.3d 176, 181, writ denied, 10-1103 (La. 9/3/10), 44 So.3d 683.

Louisiana Revised Statutes 12:1325(B) provides that “[a] member of a limited liability company not entered into for a term may withdraw or resign from a limited liability company at the time or *upon the happening of an event specified in a written operating agreement and in accordance with the written operating agreement.*” (Emphasis added.) Article X of the operating agreement is entitled “Sales, Assignments or Transfers of

Interests.” Section 10.3, entitled “Option to Purchase Membership Interests,” provides, in pertinent part:

(a) Upon the occurrence of any of the following events (a “Triggering Event”), the Member with respect to which the Triggering Event has occurred . . . shall provide prompt written notice (the “Triggering Event Notice”) to the Company [Fairway] describing the Triggering Event and the date thereof, the interest or interests in the Company that have become subject to the options described in Section 10.3(b) (the “Subject Interest”), and the name or names of the persons who may at any time have rights to that interest (collectively, the “Selling Party”):

. . .

(vii) If those Members holding fifty-one percent (51%) of the outstanding Membership Interests vote to terminate a Member’s status as such, then all of such Member’s interests in the Company (and any community property interest of such Member’s spouse) . . . shall be the Subject Interest under this Article X and such member together with such Member’s spouse . . . shall be the Selling Party.

It is clear that Section 10.3(a)(vii) allows for the involuntary termination or expulsion of a member; in fact, Section 3.8(b), relating to the required percentages of membership interests for votes on various issues, expressly states that “the *expulsion* of a Member . . . is provided for in Section 10.3(a)(vii).” (Emphasis added.) Thus, the termination of Dr. Pittman’s membership interest by affirmative vote of Fairway’s members was clearly contemplated by the terms of the operating agreement. *See Risk Mgmt. Services*, 09-632 at pp. 6-7, 40 So.3d at 181-82, and 9 Susan Kalinka, *Louisiana Civil Law Treatise* § 1.42 (2001).

The first paragraph of Section 10.3(b) provides that the Triggering Event Notice required to be sent by the involved member (the Selling Party) to Fairway “shall constitute an offer by the Selling Party to sell the Subject Interest to the Company and to the Members who are not members of the Selling Party [the “Other Members”] in accordance with the terms of this

Article X and for the Redemption Price.”³ Thus, the occurrence of a Triggering Event is a suspensive condition that operates to activate an offer to sell the involved member’s membership interest.⁴

The second paragraph of Section 10.3(b) provides:

Within five (5) days after the date the Company receives the Triggering Event Notice, the Company shall send a copy of the Triggering Event Notice to each of the Other Members. The last date that the Triggering Event Notice is received by the Other Members shall constitute the “Triggering Event Notice Date.” The Company shall be obligated to promptly determine the Triggering Event Notice Date following its delivery of the Triggering Event Notice to the Other Members, and such date shall be promptly communicated in writing by the Company to all the Members within five (5) days of the determination of such date.

The fourth paragraph of Section 10.3(b) provides, in pertinent part:

The Company shall have the sole and exclusive option to acquire all or any portion of the Subject Interest . . . in accordance with the provisions of this Article X, (i) for a period of twenty (20) Business Days commencing on the Business Day immediately following the Triggering Event Notice Date The Company may exercise such option by giving written notice of exercise to the Selling Party and to all Other Members prior to the termination of the Company’s exclusive option period. Such notice of exercise shall refer to the Triggering Event Notice and shall set forth the portion of the Subject Interest to be acquired by the Company.

An option to buy is a contract whereby a party gives to another the right to accept an offer to sell a thing within a stipulated time. La. C.C. art. 2620. Under the above contractual provisions, following receipt of a Triggering Event Notice, Fairway would be given an optional right of first refusal, or primary purchase option, to buy the involved member’s

³ Section 15.3 of the operating agreement addresses the form of notices required under its provisions. It provides that “[a]ll notices, consents and other communications under this Agreement shall be in writing” and may be delivered by hand, by facsimile telecopier followed by first class mail, or by “a nationally recognized overnight delivery service,” if received by the addressee.

⁴ A “buy-sell agreement” is “an arrangement between owners of a business by which the surviving owners agree to purchase the interest of a withdrawing or deceased owner.” *Black’s Law Dictionary* 213 (8th ed. 2004).

membership interest. *See* La. C.C. art. 2625. Upon acceptance of an offer to sell contained in an option, the parties are then bound by a contract to sell. La. C.C. art. 2621. An agreement whereby one party promises to sell and the other party promises to buy a thing at a later time is a contract to sell. La. C.C. art. 2623. A contract to sell gives either party the right to demand specific performance. *Id.* As in the case of a sale, a contract to sell must set forth the thing and the price, but a contract to sell does not effect a transfer of ownership. *Id.*, Revision Comments – 1993, (c).

The actual amount of the purchase price or “Redemption Price” of a membership interest is determined according to a detailed accounting formula set forth in Section 10.3(d) of the operating agreement. Section 10.3(c) provides for three alternate methods of payment of the Redemption Price: (1) payment of the full amount in cash; (2) payment of 25% in cash and the balance by promissory note payable in five equal annual installments, plus interest; or (3) “in such manner as the purchaser and the Selling Party may agree.”

Section 10.3(e) of the operating agreement addresses the timing of the actual payment of the Redemption Price or “closing” of the sale of a membership interest after the exercise of a purchase option and the corresponding creation of a contract to sell the membership interest:

The closing of the purchase of an interest in the Company that is being purchased pursuant to this Article X shall take place no later than thirty (30) days after all of the elections, if any, that may be made under this Article X have been made; provided, however, that such closing shall be delayed so long as is reasonably necessary to allow the representative, executor, or administrator of any person whose interest is to be sold to qualify properly as such in order that such representative, executor, or administrator shall have all necessary authority to convey such interest. At the closing, the parties shall take all action necessary to convey the interest in the Company to be transferred in accordance with this Article

X, free of all liens and encumbrances, all as reasonably determined by the purchasers) [*sic*] thereof.

The Effect of Dr. Pittman's Failure to Send the Triggering Event Notice

It is undisputed that Dr. Pittman never sent the Triggering Event Notice required of him under Section 10.3(a). Fairway's time-sensitive obligations under Section 10.3(b) to send copies of that notice, to determine the Triggering Event Notice Date, and to send notice of that date were dependent upon its receipt of Dr. Pittman's notice. Thus, according to the operating agreement's definition of the term, there was no Triggering Event Notice. It is likewise undisputed that Fairway did not actually determine and notify its members of the Triggering Event Notice Date; however, as there was never any actual Triggering Event Notice, by definition no Triggering Event Notice Date could have been determined.

The operating agreement does not address the effect of the failure of the member involved in a Triggering Event to send the notice required of him under Section 10.3(a), nor does it expressly contemplate the situation where Fairway would send notice of a Triggering Event to its members in lieu of notice being sent to it by the selling member. Similarly, it does not address the applicability of Section 10.3(b)'s requirement that Fairway determine the Triggering Event Notice Date in such event, nor does it address the consequences of Fairway's failure to do so. In that regard, La. C.C. art. 2054 provides some initial guidance:

When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to *whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.*

(Emphasis added.)⁵

The purpose of La. C.C. art. 2054 is not to resolve ambiguity or doubt in contractual language, but to resolve a situation where the contract “simply fails to address a particular question.” La. C.C. art. 2054, Revision Comments – 1984, (b). This article stands for the proposition that a contract includes not only what the parties said, or express obligations, but also what is necessarily implied from what was said, or implied obligations. *See Certain Underwriters at Lloyd’s, London v. Sea-Lar Mgmt., Inc.*, 00-1512, p. 8 (La. App. 4th Cir. 5/9/01), 787 So.2d 1069, 1075-76.⁶ Under La. C.C. art. 2054, the court is, in effect, given discretion to determine the law between the parties in the context of contractual interpretation, since no situation may be regarded as unregulated by the legal order. *See* La. C.C. art. 2054, Revision Comments – 1984, (d) and La. C.C. art. 4.

The language of Article X evinces the clear intent of Fairway’s members to effect an orderly transfer of the company’s ownership corresponding to any change in membership interest by the addition of new members or substitution of existing members, or the termination of a member due to his death, termination of membership by vote of expulsion, divorce, or other Triggering Event. The overall language of Fairway’s articles of organization and its operating agreement, particularly the “buy-

⁵ As used in La. C.C. art. 2054, “equity” is “based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.” La. C.C. art. 2055. A “usage” is “a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.” *Id.*

⁶ The court in the cited case pointedly observed that “[i]n fact, more contractual promises are probably implicit than explicit because of the impracticality, if not impossibility, of describing every variable the parties will encounter in the course of a contractual relationship.” *Id.*, 00-1512 at p. 8, 787 So.2d at 1076. A leading commentator has similarly noted that “it seems quite clear that the civil law would regard as a remarkable exception a writing that actually embodied the whole agreement of the parties.” 5 Saül Litvinoff, *Louisiana Civil Law Treatise: The Law of Obligations* § 12.93 (2nd ed. 2001).

sell” provisions of Article X, also demonstrate the intent that Fairway’s membership was to be restricted, and that Fairway itself and its members were granted preference in the acquisition of the membership interest of a departing member. That general intent should therefore guide our determination of the legal issues presented by the circumstances not expressly contemplated by the parties’ agreement.

Additionally, La. C.C. art. 1772, relating to conditional obligations, provides that “[a] condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment.” The case of *Schwarz v. Bourgeois*, 459 So.2d 650 (La. App. 4th Cir. 1984), involved the application of the former version of that codal provision to the dissolution and liquidation of a medical partnership. The four physicians executed a detailed written agreement to separate their medical practices, contingent upon three of the physicians leasing new medical offices, with one agreeing to assume responsibility for the partnership’s existing lease of office space. The agreement provided that once the departing partners acquired their new leases, the partnership would “be dissolved the following day, when a consent to dissolve shall be signed by all the partners.” After the three departing partners acquired their new leases, one partner refused to sign the “consent to dissolve” unless the remaining partner agreed to a new indemnity provision for liquidated damages. The trial court held that the objecting partner’s refusal to sign the “consent to dissolve” was “obviously arbitrary and capricious,” in light of the fulfillment of the suspensive condition regarding the new leases, and that he “cannot impede the further execution of the [a]greement by arbitrarily refusing to comply with the formality of executing [the consent to dissolve] which he is now obligated to execute.” *Id.* at 652-53.

On appeal, the reviewing court agreed with the trial court's reasoning, and rejected the objecting partner's argument "that the partnership remains undissolved because of his failure to sign the 'consent to dissolve'" *Id.* at 653. The court concluded that "the real purpose of the 'consent to dissolve' is to fix a benchmark or specific date of record for the convenience of the liquidator in disbursing partnership assets." *Id.* Invoking the predecessor of La. C.C. art. 2054, the court further held:

Moreover, assuming *arguendo* that the "consent to dissolve" is a suspensive condition, it is self-activating because the other conditions to dissolution have been satisfied. [The objecting partner's] unilateral refusal to sign constitutes a willful prevention of the fulfillment of the condition. Under such circumstances, the condition is considered fulfilled, despite his failure to sign. [Citations omitted.]

Id. at 654.

Applying the foregoing rationale to the present facts, we conclude that La. C.C. art. 1772 operates to fulfill the suspensive condition of the Triggering Event Notice and to validate Fairway's independent notice of the occurrence of the Triggering Event.⁷ If Dr. Pittman had sent Fairway notice of the Triggering Event, Fairway would then in turn have been obligated to forward copies of his notice to its members and to then determine the Triggering Event Notice Date (the latest date upon which a member received that notice). Fairway would then have been certain of the commencement of the 20-day period for exercise of its purchase option as of the day following the Triggering Event Notice Date. In turn, the obvious purpose of the notice

⁷ It could be argued that La. C.C. art. 1772 might also apply in the case of Fairway's failure to meet the conditions of determining and sending notice of the Triggering Event Notice Date, and should consequently operate to invalidate the exercise of its initial option to purchase Dr. Pittman's membership interest. However, the Triggering Event Notice Date determination and the corresponding commencement of the time period for exercise of its option were certainly not contrary to Fairway's interest in acquiring Dr. Pittman's membership interest, but rather would be in accord with and advance such interest. Thus, Fairway was not "a party with an interest contrary to the fulfillment" of the determination of the Triggering Event Notice Date, and La. C.C. art. 1772 cannot apply by its own terms.

of the Triggering Event Notice Date was to alert Fairway's members of the onset of the limited time period for Fairway's exercise of its purchase option, and, in default of such exercise, the corresponding onset of the individual members' contingent purchase option. As did the "consent to dissolve" in the *Schwarz* case, the Triggering Event Notice Date simply served as a formality to set a benchmark or specific date of record for the onset of the purchase option periods of Section 10.3. Because Dr. Pittman did not send the Triggering Event Notice required of him, equity would dictate that he should not be heard to complain of Fairway's technical omission to determine and send notice of the Triggering Event Notice Date.

Dr. Pittman cites this court's prior decision in *Bezou v. Fairway Med. Ctr., LLC*, 09-1275 (La. App. 1st Cir. 2/12/10) (unpublished opinion), as authority for his position that the trial court was correct in reinstating his membership in Fairway, based upon its failure to timely exercise its option to purchase his interest in compliance with the provisions of Section 10.3. We disagree. *Bezou* is not on point. Although the *Bezou* case did require the interpretation of the same operating agreement, its result is based upon markedly different facts, based upon Fairway's initial noncompliance with the specified procedure for purchase of a membership interest. There, Dr. Bezou resigned from Fairway's medical staff due to disability, and the loss of his staff privileges was defined as a Triggering Event. His letter of resignation constituted a proper Triggering Event Notice, but Fairway's management took no action with regard to that letter until over seven months later, when it attempted to exercise its purported purchase option. Because Fairway did not comply with its obligations to forward Dr. Bezou's Triggering Event Notice, to determine the Triggering Event Notice Date, and to then timely exercise its option, we properly concluded that Dr. Bezou

was entitled to retain ownership of his membership interest. In the present case, the inapplicability of the specified procedure of Section 10.3 was attributable to Dr. Pittman's failure to comply with his contractual obligation, and not to Fairway's failure to timely exercise its purchase option.

Other codal articles provide some guidance for resolution of the legal issues presented by the unique fact situation. Louisiana Civil Code article 1773 provides that "[i]f no time has been fixed for the occurrence of the event, the condition may be fulfilled within a reasonable time." Similarly, La. C.C. art. 1928 provides that "[w]hen the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time." Here, Dr. Pittman's (the offeror's) intent to extend a delay for Fairway's acceptance is clear from the overall language of Section X and implicit in the fact that the other members of Fairway have a secondary, subordinate purchase option triggered by Fairway's failure to exercise its primary option. As Dr. Pittman failed to send his Triggering Event Notice as required, the sequence of subsequent actions dependent upon the Triggering Event Notice could not take place according to the operating agreement's terms, and the agreement's terms consequently failed to set a time for Fairway's acceptance of his offer.

However, as previously noted, Dr. Pittman's obligation to send notice was considered fulfilled upon Fairway's independent sending of notice and Dr. Pittman's implicit acquiescence in that notice by his continuing inaction in sending his own notice. Upon the fulfillment of that first condition by operation of law, the offer to sell Dr. Pittman's interest was made, according to Section 10.3(b).

Exercising our considered discretion under the authority of La. C.C. art. 2054, we conclude that, as a matter of law, the notice sent by Fairway (in lieu of the Triggering Event Notice that Dr. Pittman was obligated to send) served the implicit purposes of both the Triggering Event Notice and the second notice of the Triggering Event Notice Date. Consideration of the purpose and effect of the determination of that date and the related notice demonstrates that such a result is appropriate under the circumstances. Fairway's independent notice of the Triggering Event reasonably informed all members of the existence of Fairway's option as of the date of the notice, and confirmed Fairway's knowledge of its existence. Accordingly, Fairway's option period should be deemed to have commenced, at the earliest, as of the date of its independent notice (December 21, 2004) and to have existed for a prompt and reasonable time from the sending of its notice.

Fairway in fact exercised its option on the ninth business day from the business day immediately following the date of its independent notice of the Triggering Event. The notice of its exercise of its option thus fell well within the period of "twenty (20) days following the date that the last Member receive[d]" its notice of the Triggering Event, the time period that would ordinarily have applied had Dr. Pittman sent his Triggering Event Notice. We conclude that this time period was reasonable for the exercise of Fairway's purchase option. As between Dr. Pittman and Fairway, the parties to this action, Fairway's notice of the exercise of its option was unquestionably valid, and a contract to sell Dr. Pittman's membership interest was created.

The operating agreement does not address the effect of the parties' failure to close the sale of a membership interest within 30 days of the purchaser giving notice of his election to exercise a purchase option. In its

written reasons for judgment on Dr. Pittman's motion, the trial court observed that Fairway's check and promissory note were not sent to Dr. Pittman until October 21, 2005, "well beyond twenty business days from the 'Triggering Event Notice Date.'" The trial court found that Fairway "failed to timely exercise its option to purchase Dr. Pittman's interest in [Fairway]," and ordered that "Dr. Pittman's membership in [Fairway]" be reinstated as of December 21, 2004. In doing so, the court confused the deadline for Fairway's exercise of its purchase option under Section 10.3(b) with the deadline for closing of the sale of the membership interest under Section 10.3(e). The trial court also seemed to confuse Dr. Pittman's status as a member of the limited liability company with the status of the transfer of ownership of his membership interest by payment of the Redemption Price. Nothing in the operating agreement or the Louisiana Limited Liability Company Law suggests that the mere ownership of the unsold membership interest of a terminated or expelled member somehow voids the vote to terminate membership status and entitles him to continued status as a managing or voting member. See La. R.S. 12:1329-33 and 8 Glenn G. Morris & Wendell H. Holmes, *Louisiana Civil Law Treatise: Business Organizations* § 44.20 (1999).

We conclude that Fairway's first assignment of error has merit, and reverse the trial court's summary judgment ordering the reinstatement of Dr. Pittman's "membership" in Fairway retroactive to December 21, 2004.

The Effect of the Delay in Payment of the Redemption Price

Louisiana Revised Statutes 12:1325(C) provides that upon the "withdrawal" of a member from a limited liability company, that member "is entitled to receive . . ., if not otherwise provided in a written operating agreement, within a reasonable time after withdrawal . . ., the fair market

value of the member's interest as of the date of the member's withdrawal . . .
.”

Damages for delay in performance of an obligation are owed from the time the obligor is put in default. La. C.C. art. 1989. When the term for performance is either fixed, or is clearly determinable by the circumstances, the obligor is put in default by the mere arrival of that term. La. C.C. art. 1990. Here, Fairway's term for performance of payment of the sale price was due at the time of the sale, no later than 30 days after the exercise of its purchase option.

When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on the sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest. La. C.C. art. 2000. Payment of the sale price is due at the time stipulated in the contract, or, in the absence of such a stipulation, at the time of delivery of the thing sold. La. C.C. art. 2550. The buyer owes interest on the price from the time it is due. La. C.C. art. 2553.

However, Fairway contends that the time specified for the closing of its purchase of Dr. Pittman's membership interest and the payment of the Redemption Price was suspended by voluntary agreement of the parties, and that even if its payment was untimely, Dr. Pittman's sole recourse is recovery of legal interest for the delay in payment, pursuant to La. C.C. art. 2000. In support of its contention that the contractual deadline for the sale and payment of the Redemption Price was suspended, Fairway presented evidence of the subject matter of the mediation, including documents prepared by the mediator. In doing so, it emphasizes that the mediation agreement itself was not the forbearance or "standstill" agreement that it

contends existed, but rather only evidence of the separate forbearance agreement.

The “Stage #1” mediation goals listed by the mediator in one document included the recommended goals that Fairway “stop all legal action against [Dr.] Pittman from [*sic*] past issues” and “reinstate [Dr.] Pittman[’s] membership interest in [Fairway]” and that Dr. Pittman “stop all legal action against [Fairway] and their [*sic*] representatives.” A later e-mail from the mediator to Fairway’s mediation attorney, dated March 24, 2005, confirmed that Dr. Pittman had again raised the issue of his reinstatement as a member of Fairway as part of the mediation.⁸

Fairway also filed the affidavit of its mediation attorney, attesting to the existence of the forbearance or “standstill” agreement, suspending the time for payment of the Redemption Price, and the fact that payment was tendered upon the failure of the mediation and negotiations. Similar affidavits of Fairway’s chief executive officer and its management chairman were also filed. The cover letter of October 21, 2005, enclosing the first installment of the Redemption Price and the promissory note for the balance, was also filed with the management chairman’s affidavit. That letter specifically referred to the purported suspension of payment “[b]y mutual consent.” The record also contains excerpts from the depositions of Fairway’s management chairman and its chief executive officer. However, none of the supporting documents submitted by Fairway in support of its

⁸ The pertinent part of the e-mail reads: “There is another issue that [Dr. Pittman] presented to me. He is requesting to be reinstated as a member of [Fairway] even if he sells his business [Medical Center Diagnostic]. I disagree with his wishes and will be doing everything I can to discourage him. He needs to let go of all ties to [Fairway].”

motion describe the time, circumstances, and precise terms of the purported forbearance agreement.⁹

There is no evidence that Dr. Pittman demanded payment of Fairway for its failure to pay him the Redemption Price of his membership interest in the time between the expiration of the 30-day deadline following its exercise of its option and its eventual tender of the initial 25% of the Redemption Price and its promissory note for the balance. Fairway contends that this factual circumstance is relevant and significant, and indirectly supports the existence of the purported forbearance agreement. We agree. Because the agreement between the parties was a contract to sell, and not a sale, it may have been necessary for Dr. Pittman to have demanded payment prior to Fairway's tender in order to preserve his right to seek judicial dissolution of the contract to sell, as opposed to specific performance. *See* La. C.C. arts. 2015 and 2438; *Cf.* La. C.C. art. 2561. As he did not do so, Dr. Pittman might only be entitled to specific performance and recovery of the Redemption Price and legal interest from the date of expiration of the 30-day deadline, assuming that there was no binding forbearance or "standstill" agreement suspending the time period for Fairway's payment. We need not determine these legal issues at this time, however, for the following reasons.

Despite Dr. Pittman's insistence that strict adherence to the written operating agreement and the separate mediation agreement is required by the "parol evidence" rule, the existence of a separate written or unwritten agreement to amend or suspend the operating agreement's time limit for the closing or final purchase of Dr. Pittman's membership interest is a disputed

⁹ For example, in his deposition, Fairway's chief executive officer testified that he believed the forbearance agreement was in writing. On appeal, Fairway contends the agreement was oral. Additionally, there are disputed material facts as to whether the purported agreement provided for the payment of interest on the Redemption Price in the event of unsuccessful negotiations to reinstate Dr. Pittman's membership.

material fact. In the case of a multi-member limited liability company, the “operating agreement” is defined as “*any agreement, written or oral, of the members as to . . . the affairs of a limited liability company and the conduct of its business.*” La. R.S. 12:1301(A)(16).

Fairway would bear the burden of proof at trial on this issue, as the proponent of the existence of the purported agreement in its favor. Based upon our review of the pleadings and the entire record, reasonable minds could differ as to whether the alleged forbearance agreement existed and, if so, its form, scope, and mutual intent in relation to the terms of the operating agreement. Thus, there is genuine dispute as to the existence of those material facts, upon which the important issue of the timeliness of Fairway’s tender of payment depends, and summary judgment as to those factual issues is inappropriate. We accordingly affirm the trial court’s interlocutory judgment denying Fairway’s motion for summary judgment. For the same reason, the trial court’s conclusion that Fairway’s tender of payment was untimely, ineffective, and warranted dissolution of the contract to sell Dr. Pittman’s membership interest was erroneous. There is also the unresolved legal issue regarding the status of the subordinate purchase option in favor of Fairway’s other members, which is dependent upon the resolution of the factual issues relating to the existence of the forbearance agreement and the viability of the contract to sell between Dr. Pittman and Fairway. Accordingly, the trial court’s partial summary judgment ordering the reinstatement of Dr. Pittman’s membership was improper and is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.