

<b>Matter of WRD Sales, Inc. v Millennium Falcon Corp.</b>
2005 NY Slip Op 30598(U)
July 6, 2005
Supreme Court, Nassau County
Docket Number: 000875/2005
Judge: Ira B. Warshawsky
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

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**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 16**

In the Matter of the Application of WRD SALES,  
INC. as a Member of Worldwide Papers LLC, for  
a Judgment Dissolving Worldwide Papers LLC, a  
Limited Liability Company,

Petitioner,

INDEX NO.: 000875/2005  
MOTION DATE: 05/10/2005  
MOTION SEQUENCE: 001

-against-

MILLENNIUM FALCON CORP.,

Respondent.

The following papers read on this motion:

Order to Show Cause, Verified Petition & Exhibits Annexed.....	1
Affirmation in Support of Verified Petition.....	2
Verified Affirmation in Opposition, Verified Affidavit & Exhibit Annexed.....	3
Memorandum in Reply to Opposition of Respondent to Petition to Dissolve.....	4
Reply Affidavit of William R. Davis in Further Support & Exhibits Annexed.....	5

Petitioner, WRD Sales, Inc., moves to dissolve Worldwide Papers, LLC pursuant to § 18-802 of Delaware Limited Liability Company Law and/or § 702 of New York Limited Liability Company Law on the grounds that (a) it is no longer reasonably practical to carry on the business of the company in conformance with its operating agreement.

Respondent Millennium Falcon Corp. requests that petition for dissolution be denied on the grounds that (a) only petitioner's role is not in conformity with the operating agreement, (b) Worldwide Papers LLC continues to operate despite a fiduciary breach by William R. Davis, the sole principal of petitioner WRD Sales, Inc., and (c) Worldwide Papers, LLC's Operating Agreement does not provide for dissolution. Respondent also seeks to be awarded the costs and expenses that it has incurred in this action.

The matter is set down for an evidentiary hearing to determine whether Davis breached his fiduciary duty to Worldwide Papers, LLC. and for a decision as to whether WRD is entitled to dissolution in the discretion of the court even in the absence of bad faith on the part of Davis (see, *Schindler v. Niche Media Holdings, LLC*, 1 Misc.3d 713, 717 n.3 [Sup. Ct. New York County 2003]; BCL § 1104-a[b][1],[2]).

Petitioner, WRD Sales, Inc. (WRD) and Respondent, Millennium Falcon Corp. (Millennium) each have a 50 percent interest in Worldwide Papers, LLC ("the Company"). William R. Davis, sole principal of WRD, is the Operating Manager and Chief Executive Officer of the Company. Richard Leeds is the Vice President of respondent Millennium, as well as the Chairman and Chief Executive Officer of the sole shareholder of Millennium, Systemax, Inc. Pursuant to the Company's operating agreement, all significant action by the Company must be authorized by the holders of a majority of the membership interests, i.e., WRD and Millennium (Exhibit B).

WRD accuses Millennium of acting on behalf of the Company without the authority of Davis or WRD, an alleged violation of Article 3, Section 5 of the operating agreement (Exhibit B). According to WRD, Millennium initially agreed to sell the good will of the company but subsequently refused to consummate the sale on reasonable terms. Thereafter, Millennium retained counsel, on behalf of the Company, in order to threaten litigation against certain salesmen who terminated their employment with Worldwide and who became salesmen for the putative buyer of the Company's goodwill. Millennium retained counsel without the agreement or authorization of CEO Davis, as is

required by the operating agreement. Moreover, WRD contends that this threatened litigation materially lessened the value of Worldwide's goodwill.

According to WRD, Millennium violated the operating agreement on many more occasions. First, WRD maintains that Millennium bound the Company to material agreements without the knowledge or approval of the CEO Davis, or its managing member, WRD, that Millennium discharged an employee of the company against the wishes of Davis and WRD, and that Millennium filed two actions against Davis and WRD on behalf of the Company. WRD argues that the foregoing demonstrate that the Company is not functioning pursuant to the terms of its operating agreement. Finally, WRD stresses that Millennium's attempt to resolve the "deadlock" by operating the Company without WRD further violates the Company's operating agreement.

WRD contends that, as a result of Millennium's actions, Worldwide no longer engages in its business of purchasing and reselling paper. Consequently, it is no longer reasonably practical to carry the business in conformance with its operating agreement, and Worldwide should be dissolved pursuant to §18-802 of the Delaware Limited Liability Company Law and/or pursuant to §702 of the New York Limited Liability Company Law.

Millennium counters, explaining that only Davis' role as the once Operating Manager that is not in conformity with the operating agreement. Millennium claims that Davis breached his fiduciary duty to the Company by inducing two salesmen and one secretary to leave the company and by diverting business from the company to competitors. WRD also borrowed from and became indebted to the Company in the amount of \$186,273.00. Millennium stresses that despite Davis' misconduct, Worldwide continues to operate. The Company still places orders with mills, has a full time administrator, has active payables in the approximate amount of \$117,000.00 and has receivables in excess of \$133,000.00. Lastly, Millennium declares that the Company's operating agreement does not provide for dissolution as means of remedying non-

conformance. Rather, respondent contends that Article 14 of the operating agreement sets forth 'transfer' as the only remedy for non-conformance.

Both Delaware and New York law provide for dissolution where it is not reasonably practical to carry on the business of a limited liability company in conformity with its operating agreement (Del. CODE ANN. §18-1802; N.Y. [LTD. LIAB. CO.] Law §702 [2005]). The phrase "not reasonably practical" has been interpreted to mean that the business sought to be dissolved is "unable to function as intended, or else that it is failing financially" (*Schindler v. Niche Media Holdings, LLC*, 1 Misc.3d 713, 716 [Sup. Ct. New York County 2003]). Although Delaware and New York case law dealing with judicial dissolution of a limited liability company is thin, the court may analogize to limited liability partnership law and limited liability corporate law (*Haley v. Talcott*, 864 AD2d 86, 93 [Del. Ch. 2004]). Under Delaware law, a member of an LLC cannot be stripped of its ownership rights except as provided under the terms of the LLC itself. (*Walker v. Resource Development Company Limited*, 791 A.2d 799, 813 (Del. Ch. 2000)). Therefore, when two members of a limited liability company disagree about how to run said company, one member cannot operate the business as if the other does not exist. However, "[a]...shareholder " 'whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression' is not entitled to redress under the statute" (*Cassata v. Brewster-Allen-Wichert*, 248 AD2d 710, 711 (2<sup>nd</sup> Dept 1998)). Therefore, judicial dissolution, which is discretionary, will not be granted to a member who claims to have been cut out of the day-to-day operations of the Company when it is found he is responsible for his own "freeze out" and is the perpetrator rather than the victim of abuse (*see Matter of Pace Photographers, Ltd.*, 71 NY2d 737, 745 [1988]).

The operating agreement does not prohibit nor provide for dissolution. Millennium claims that the operating agreement provides transfer as the only means of remedying non-conformance. However, Article XIV's transferability clause prohibits transfer of membership interest for seven years from the date of the Company's

formation. Worldwide was formed in September 2001. Thus, only four years has passed since the Company's formation, and transfer pursuant to the operating agreement is not an available remedy.

A question of fact exists as to whether or not Davis breached his fiduciary duty to Worldwide and was therefore excluded from the Company's day-to-day business decisions, and thus whether or not the court will exercise its discretion to order dissolution. Accordingly, an evidentiary hearing shall be held on August 16, 2005, at 9:30 A.M., before Judicial Hearing Officer Daniel Palmieri, to hear and report, or hear and determine on consent of the parties, to determine whether Davis breached his fiduciary duty toward Worldwide. If Davis breached his fiduciary duty, then petitioner WRD is not entitled to judicial dissolution.

Dated: July 6, 2005

  
J.S.C.

**ENTERED**

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