

Matter of Cannon v FT 176 Seventh, LLC
2005 NY Slip Op 30599(U)
August 19, 2005
Supreme Court, New York County
Docket Number: 102022/05
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 6

Cannon

INDEX NO. 102022/05

MOTION DATE 7/12/05

- v -

MOTION SEQ. NO. 01

FT 176

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for dissolution

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2,3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
AUG 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-19-05

Eileen Branstén
EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X

In the Matter of the Application of

CHRISTOPHER CANNON, Individually, and as a
Member of the FT 176 Seventh, LLC and
FT Cleveland, LLC on behalf of himself and of
all the Other Members of the LLCs,
except FREDERICK TWOMEY,

Petitioner,

Index No.: 102022/05
Motion Date: 7/12/05
Motion Seq. No.: 001

For the dissolution of
FT 176 Seventh, LLC and FT Cleveland, LLC
and FREDERICK TWOMEY, Individually,
and as a Member of the LLC, d/b/a
BAR VELOCE and/or BAR TONNO,

Respondents.

-----X

PRESENT: EILEEN BRANSTEN, J.

Pursuant to Limited Liability Company Law of the State of New York ("LLCL") § 702, petitioner Christopher Cannon ("Mr. Cannon"), moves Individually, and as a Member of the FT 176 Seventh, LLC ("FT 176") and FT Cleveland, LLC ("Cleveland") on behalf of all the Other Members of the companies, except Frederick Twomey ("Mr. Twomey"), for dissolution of FT 176 and Cleveland. Additionally, Mr. Cannon moves for an order: appointing a receiver; enjoining Mr. Twomey from transferring or diminishing the assets of the companies; requiring Mr. Twomey to produce the records and books of the companies; and, demanding an accounting of all income, expenses and assets of the companies.

Mr. Twomey opposes this motion and cross-moves for an order removing Mr. Cannon as a director under BCL § 706 and dismissing the petition under CPLR 3211 and/or BCL §§ 626, 1001 and 1103.

Background

In 2002, Mr. Cannon, Mr. Twomey and other investors created Cleveland as a New York limited liability company for the purpose of owning and operating taverns and restaurants. Affirmation in Support of Petition (“Aff.”), at ¶¶ 5-6. Upon formation, the investors agreed to receive compensation, salaries and profits in accordance with their percentage interest in the company. Aff., at ¶ 13. Specifically, the founders agreed that Mr. Twomey would own 58 percent of company, Mr. Cannon would own 21 percent of the company, Jacob Vergara (“Mr. Vergara”) would own 7 percent of the company, James Stuart would own 5 percent of the company, Scott Conant and Jane Epstein (“Ms. Epstein”) would each own 4 percent of the company, and 1 percent of the interest in the company would remain unallocated. Aff., at ¶ 14.

Thereafter, in 2004, Mr. Cannon, Mr. Twomey and other investors created FT 176 to own and operate additional bars and restaurants. Aff., at ¶¶ 4,6. Again, the investors agreed to receive compensation, salaries and profits in accordance with their percentage interest in the company. Aff., at ¶ 13. Mr. Twomey owned 51 percent, Mr. Cannon owned 18 percent,

Mr. Vergara owned 11 percent, Ms. Epstein owned 10 percent, Barry Biggar owned 3.34 percent, and Howard Blaustein and Joseph Voyticky each owned 3.33 percent of the company. Aff., at ¶ 14.

Cleveland and FT 176 then hired Mr. Twomey to be in charge of handling the books, records, accounts, expenses and budgets. Aff., at ¶ 19.

In late 2004, Mr. Cannon alleges that he discovered that Mr. Twomey was paying his personal expenses from the companies' accounts and failing to allocate distributions in accordance with each member's percent ownership. Aff., at ¶¶ 22-23. He estimates that as of the date of this petition, Mr. Twomey misappropriated over \$300,000 of the companies' assets. Aff., at ¶ 26. Mr. Cannon also claims that when he confronted Mr. Twomey about the distributions, Mr. Twomey fired Mr. Vergara and cut off the other members' access to the companies' books, records and accounts. Aff., at ¶ 24. Moreover, Mr. Cannon argues that Mr. Twomey unilaterally made critical financial, contractual and personnel decisions contrary to the operating agreements of the companies. Aff., at ¶ 40.

Mr. Twomey maintains, however, that Mr. Cannon has full access to the companies' accounts and that all the members may inspect the books. Opp., at ¶ 92. Mr. Twomey also alleges that Mr. Vergara resigned in January 2005 after realizing that he could not dedicate enough time to managing Cleveland's books. Opp., at ¶¶ 76-78. Furthermore, Mr. Twomey

claims that Mr. Cannon removed financial documents and \$30,000 worth of inventory from the companies' properties without the other members' approval. Opp., at ¶¶ 63,69.

Mr. Cannon now moves for dissolution of FT 176 and Cleveland under LLCL § 702 and appointment of a receiver or liquidating trustee to wind up the companies' affairs pursuant to LLCL § 703. Aff., at ¶ 52. Mr. Cannon further requests the Court to order Mr. Twomey to produce the companies' records and books and to stop looting its assets. Aff., at ¶ 60. Finally, Mr. Cannon demands that Mr. Twomey pay \$1,000,000 in actual damages and \$3,000,000 in punitive damages for diminishing the value of his and the other members' interests in the companies. Aff., at ¶ 68. Mr. Cannon submits the unsigned operating agreements of FT 176 and Cleveland in support of his petition. See, Aff., Exs. A,B.

In response, Mr. Twomey cross-moves for removal of Mr. Cannon as a director pursuant to BCL § 706 and dismissal of the petition pursuant to CPLR 3211 and BCL §§ 626, 1001 and 1103. Opp., at ¶ 3. Mr. Twomey claims that dissolution of the companies is not proper because no meeting of the directors or shareholders has taken place and the shareholders have not voted for dissolution at a formal meeting. Opp., at ¶¶ 93-99. He also argues that dismissal is warranted under CPLR 3211(a)(7) because the petition fails to state of cause action. Opp., at ¶¶ 119-22.

Analysis

LLCL § 702

LLCL § 702 provides that a court “may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles or organization or operating agreement.” Courts have interpreted this to mean that dissolution is only warranted when the complaining member can demonstrate that the company sought to be dissolved is “unable to function as intended” or “failing financially.” *Schindler v. Niche Media Holdings, LLC*, 1 Misc. 3d 713, 716 (Sup. Ct., New York Cty., Sept. 25, 2003); *see also, Matter of Extreme Wireless*, 299 A.D.2d 549 (2d Dep’t 2002).

Although Mr. Cannon submits the operating agreements of both companies, he does not argue that Mr. Twomey has violated any specific article of either operating agreement nor does he allege that either company is failing financially. The submitted operating agreements, moreover, are both unsigned and it is unclear from the parties’ submissions whether those agreements were ever formally adopted by the companies’ members. In sum, Mr. Cannon alleges that he believes that Mt. Twomey is guilty of illegal, fraudulent and oppressive action toward the complaining members, but cites no provisions of the operating agreements alleged to have been violated. Reply, at ¶ 7.

Mr. Twomey, of course, denies all petitioners’ allegations.

Based on the parties' submissions, the Court does not have enough information to determine whether FT 176 and Cleveland can practicably carry on business in conformity with their operating agreements, and a hearing on this issue is necessary. *See, Ksi Rockville, LLC v. Eichengrun*, 305 A.D.2d 681, 682 (2d Dep't 2003) (Special Referee ordered to hear and report on dissolution of limited liability company).

The matter is hereby referred to a referee to hear and report on whether FT 176 and Cleveland can practicably carry on business in conformity with their operating agreements. Mr. Twomey is directed to produce the records, books and original operating agreements of FT 176 and Cleveland at the hearing for review by the referee. Additionally, Mr. Cannon's request for an accounting and appointment of a receiver or liquidating trustee is stayed pending the referee's review of this matter.

Damages

Mr. Cannon also alleges that Mr. Twomey must pay \$1,000,000 in actual damages and \$3,000,000 in punitive damages to the Members of FT 176 and Cleveland for diminishing the value of their interests. An action for breach of fiduciary duty and recovery of damages is not a special proceeding, however, and cannot be addressed by this Court pursuant to the petition that is presently pending before this Court. As such, the portion of

the petition that seeks damages for breach of fiduciary duties is hereby severed and transferred to a general IAS part.

CPLR 3211

Under CPLR 3211(a)(7), a party may move to dismiss a claim for failure to state a cause of action. In examining the merits of a claim, the court must liberally construe the complaint and take all factual allegations as true. *Sheila C. v. Povich*, 11 A.D.3d 120 (1st Dep't 2004). It cannot grant the CPLR 3211 motion to dismiss unless the complaint fails to allege facts that fit within "any discernible legal theory." *Sheila C. v. Povich*, 11 A.D.3d, at 120.

Here, Mr. Cannon has alleged facts sufficient to assert a claim for dissolution of FT 176 and Cleveland pursuant to LLCL § 702. Specifically, Mr. Cannon alleges that Mr. Twomey is looting money and preventing members from accessing the companies' books. These allegations, if true, might warrant dissolution. Therefore, Mr. Twomey's motion to dismiss the petition is denied.

BCL Provisions

Mr. Twomey's motion to remove Mr. Cannon as a director and to dismiss the petition under BCL §§ 626, 1001 and 1103 are also denied. The BCL clearly provides that its provisions only apply to domestic *corporations* and foreign *corporations* authorized to do or doing business in the State. BCL § 103(a) (emphasis added). FT 176 and Cleveland – both limited liability companies – are not governed by the BCL; thus, BCL §§ 626, 706, 1001 and 1003 are wholly inapplicable.

Accordingly, it is

ORDERED that the issue of whether FT 176 and Cleveland can practicably carry on business in conformity with their operating agreements such that Mr. Cannon has a cause of action for dissolution under LLCL § 702 is referred for assignment to a Special Referee to hear and report with recommendations except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that Mr. Cannon's petition for dissolution pursuant to LLCL § 702 is held in abeyance pending the hearing and report of the Special Referee to whom this matter is assigned; and it is further

ORDERED that counsel shall serve and file a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) for the purposes of arranging a calendar date for hearing and assignment to a referee to hear and report; and it is further

ORDERED that Mr. Cannon's motion for an accounting and appointment of a receiver or liquidating trustee is stayed pending review by the referee; and it is further

ORDERED that the portion of the Mr. Cannon's action that seeks recovery of damages for breach of fiduciary duties is severed; and it is further


ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the payment of proper fees, if any, to transfer the severed portion of this action to the appropriate IAS part; and it is further

ORDERED that Mr. Twomey's motion to dismiss the petition and remove Mr. Cannon as a director is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
August 19, 2005

ENTER


Hon. Eileen Bransten

FILED
AUG 29 2005
NEW YORK
COUNTY CLERK'S OFFICE

