

Matter of Selcuk v Yuran
2010 NY Slip Op 31126(U)
March 26, 2010
Sup Ct, NY County
Docket Number: 116405/09
Judge: Joan M. Kenney
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Sinan Pelcuk

INDEX NO. 116405/09

MOTION DATE 1

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

BURAK YURAM

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/26/10

Joan M. Kenney
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
In the Matter of the Application of

SINAN SELCUK, Holder of a 50%
Membership Interest,

Petitioner,

Index No. 116405/09

For the Dissolution of SALATA LLC, a
Domestic Limited Liability Company,
Pursuant to Section 702 of the Limited
Liability Company Law,

**DECISION JUDGMENT &
ORDER**

-against-

BURAK YURAN,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served issued hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
419).
Respondent
-----X

-----X
KENNEY, JOAN, M., J.S.C.

For Petitioner:
Rottenberg, Lipman Rich, P.C.
369 Lexington Aveue, 16th Fl.
New York, New York 10017
(212) 661-3080

For Respondent:
Law Office of Marc E. Verzani
500 Fifth Avenue, Suite 1610
New York, New York 10110
(212) 725-8900

Papers considered in review of this Order to Show Cause to dissolve a limited liability company:

Papers	Numbered
Order to Show Cause, Petition, Memorandum of Law, and Exhibits	1-13
Affirmation in Opposition with Exhibits	14-21

Petitioner Sinan Selcuk (Selcuk), the owner of a 50% membership interest in Salata LLC (Salata), a New York limited liability company, moves by order to show cause for an order: (1) pursuant to CPLR 6301, enjoining respondent Burak Yuran (Yuran), the owner of the other 50% membership interest in Salata and its day-to-day manager, from transacting any business or entering into any agreements outside the ordinary course of Salata's business during the pendency of this

action;¹ (2) pursuant to Section 702 of the Limited Liability Company Law (LLCL), for a judicial dissolution of Salata; (3) appointing a receiver to supervise the management and liquidation of Salata; (4) for an accounting of Salata; and (5) to the extent necessary, vacating the prior order of this court, dated June 18, 2009, in a related action entitled *Selcuk v Yuran*, Index No. 602506/08 (the Related Action).

BACKGROUND

Salata was formed by Selcuk and Yuran, business partners, on or about October 3, 2005, pursuant to an October 3, 2005 registration filed with the New York Secretary of State, for the purpose of operating a “bodega-style” restaurant. Since its inception, Selcuk and Yuran have been the sole members of Salata, each having a 50% “share ownership.” Presently, Salata operates two restaurants on the Upper East Side of Manhattan, to wit: one restaurant located at 1392 Madison Avenue, Suite 106, New York, New York (Salata I), and the second restaurant located at 1392 Madison Avenue, Suite 101, New York, New York (Salata II), pursuant to lease agreements.

The petition alleges that, pursuant to an agreement dated November 18, 2005 (the November 2005 Agreement), Selcuk loaned Yuran \$175,000 for Yuran to contribute his share of the capital contributions to Salata. Pursuant to an agreement dated August 17, 2006 Agreement (the August 2006 Agreement or Partnership Agreement), which replaced the November 2005 Agreement, Selcuk again loaned money to Yuran for his share of additional capital contributions made by the parties in 2006,

¹On November 20, 2009, this court granted Selcuk a temporary restraining order, pending the hearing of this motion, enjoining Yuran from transacting any unauthorized business, or entering into any transactions other than in the ordinary course of business, in the name of, or on behalf of Salata. Yuran was further directed to: preserve all of Salata’s books and records; not to use any of Salata’s funds to pay legal fees; and not to take any steps to alter or terminate Salata’s leases, without Selcuk’s written consent.

bringing the total amount loaned to Yuran to \$230,000. Under the 2006 Agreement, Selcuk was in charge of the daily financial arrangements of Salata, including payments of all rental obligations to the landlord, and other matters.

Under the terms of a later agreement, dated November 7, 2007 (the November 2007 Agreement), which replaced the August 2006 Agreement, Selcuk agreed to loan Yuran \$440,000 (the Loan) in exchange for Selcuk's 50% membership interest in Salata. In turn, Yuran agreed to repay the Loan by making weekly cash payments of \$4,000 to Selcuk. The agreement also provided that any failure by Yuran to pay a particular weekly payment would result in an additional \$4,000 added to the total amount owed, and that Selcuk would retain his Salata membership interest as security against Yuran's default. The agreement noted that, pursuant to the terms of the Partnership Agreement, Selcuk had loaned Yuran \$230,000, and that \$140,000 of this amount remained unpaid.

It is undisputed that Yuran made payments under the 2007 Agreement from on or around November 12, 2007 to May 22, 2008, for a total of \$79,000, but did not make any further payments. In August 2008, Selcuk commenced the Related Action seeking, inter alia, recovery of \$448,000, which he claimed was owed to him by Yuran under the 2007 Agreement, and conveyance of Yuran's membership interest in Salata to Selcuk .

Thereafter, Yuran moved, inter alia, for a declaratory judgment that the November 2007 Agreement was void as usurious. By decision and order dated June 18, 2009, this court denied Yuran's motion for a declaratory judgment; continued a previously granted temporary injunction "to stay enforcement of any activity by [Selcuk] or his agents based on a default of the 2007 Agreement, which was granted in this court's February 10, 2009 order" pending the completion of further discovery; and, continued "the prohibition of [Selcuk]... from interfering in any manner with the

possession, use occupancy and enjoyment of Salata I and II, which was ordered in this court's February 10, 2009 order" pending the completion of further discovery.

Each of the parties alleges that the other has refused to comply with any of the discovery requests in the Related Action.

THE INSTANT MOTION

In support of his motion, Selcuk argues that dissolution of Salata is necessary because, inter alia, Salata is heavily in debt, and there is a lack of trust between himself and Yuran, such that they cannot continue to remain in business together, leaving Salata in a management deadlock.

Selcuk claims that under Yuran's management, Salata failed to generate sufficient revenue to repay Selcuk his capital contributions or to distribute any monies to him for over a year. Specifically, Selcuk alleges that: (1) Yuran caused Salata to accrue aggregate rental arrears of nearly \$200,000 by failing to pay the rent for Salata's two locations for almost a year; (2) Salata has two judgments of eviction against it; (3) Salata has not paid its New York State taxes, causing tax liens to be filed against a Salata bank account; (4) Yuran arranged it so that Salata transferred one of its restaurants to an entity controlled by Yuran, without any consideration to Salata, as part of a scheme on Yuran's part to avoid tax liens filed by the State of New York on Salata, and to avoid paying any money to Selcuk.

Selcuk further argues that Yuran breached his fiduciary duty to Selcuk and Salata by wasting Salata's assets, usurping corporate opportunities, and failing to keep Selcuk fully informed concerning the state of Salata's business. It appears that Salata's landlord, 1392 Associates LLC (the Landlord), commenced two separate eviction proceedings against Salata to recover possession of the premises for both locations, which resulted in judgments of eviction being obtained on default.

In opposition to the motion, Yuran claims that he has spent four years and 18-hour days building up Salata's two stores, and expects that Salata will finally earn a profit in 2010. He concedes that, since its inception, Salata has always operated at a loss, but blames Selcuk's management style and over-extension of the business, in addition to the economic downturn, for Salata's failure to earn a profit until recently. Yuran avers that Salata's operating loss has decreased significantly with each passing year, and that in December 2009, he made payments to the landlord of over \$30,000, whereas the combined rent for the Salata stores totaled only \$17,232.

Yuran disputes Selcuk's claim that he did not keep him apprised of Salata's business condition, contending that Selcuk has openly accessed the Salata bank account online since November 2007. He claims that, notwithstanding Salata's debt and the status of its accounts payable to its creditors, "they have all come to agreement with Salata to see it survive in these hard economic times." Yuran also maintains that he never diverted assets of Salata, and that he has tried several times to sell the stores to third parties over the past two years, and received good offers from prospective buyers, but Selcuk refused to sell the business.

LLCL § 702, entitled "Judicial Dissolution" provides in relevant part:

On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

It is undisputed that an operating agreement was never signed, between the parties. Thus, the court must consider whether Salata's management is so dysfunctional, or continuing the company is financially unfeasible, that "it is not reasonably practicable" to carry on the business sought to be

dissolved (*see Schindler v Niche Media Holdings, LLC*, 1 Misc 3d 713, 716 [Sup Ct NY County 2003] [abrogated on other grounds by *Tzolis v Wolff*, 10 NY3d 100 [2008]; *Spires v Niche Media Holdings, LLC*, 4 Misc 3d 428 [Sup Ct, Monroe County 2004]; LLCL § 702). Further, pursuant to LLC § 703, in the event of a dissolution, the court may appoint a receiver or liquidating trustee to wind up the company's affairs. Finally, the appropriateness of an order for dissolution of a limited liability company is vested in the sound discretion of the court hearing the petition (*Matter of Extreme Wireless*, 299 AD2d 549, 559 [2d Dept 2002]).

Although Yuran claims that "all [creditors have] have come to agreement with Salata," he fails to provide this court with any specifics regarding these alleged representations, or to offer any admissible evidence regarding these alleged representations (*see e.g. Corcoran Group, Inc. v Morris*, 107 AD2d 622 [1st Dept], *affd* 64 NY2d 1034 [1985]). There is no dispute that the partners are deadlocked, cannot resolve their differences, and blame each other for Salata's problems. However, "where dissolution is sought, the underlying reason for the dissension is of no moment; nor is it at all relevant to attempt to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs" (*Matter of T.J. Ronan Paint Corp.*, 98 AD2d 413, 422 [1st Dept 1984]). Nor is the ability of Salata to operate at a profit a bar to dissolution (*Dahlberg v Clipper Holding Assoc., LLC*, Index No. 115592/04 [Sup Ct, NY County Jan 3, 2005]).

In applying the standard for dissolution without an operating agreement, upon a review of the facts and the evidence submitted, this court concludes that petitioner has met his burden of establishing that it is not reasonably practicable to carry on the business of Salata in that, inter alia, (1) Salata is approximately \$200,000.00 in debt; (2) Yuran is in default under the 2007 Agreement with Selcuk,

wherein Yuran was to purchase Selcuk's membership interest in Salata and never has; and (3) there is conflict and disagreement between the partners regarding the management and viability of Salata that makes it unfeasible for Salata to carry on its business (*see Matter of T.J. Ronan Paint Corp.*, 8 AD2d at 422).

This court finds that in light the circumstances here, dissolution of Salata is appropriate, and that Selcuk has shown good cause to have a receiver or liquidating trustee appointed. It appears that Yuran has been the sole person in control of Salata for the past two years. This court further finds that Selcuk, as a member of a limited liability company is entitled to an accounting from Yuran (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550 [1st Dept 2009]).

Accordingly, it is

ORDERED and ADJUDGED that the petition seeking to dissolve Salata LLC., is granted in its entirety, and it is further

ORDERED and ADJUDGED that the parties shall settle an Order effectuating the terms of this decision within thirty (60) days hereof.

Dated: March 26, 2010

ENTER:



HON. JOAN M. KENNEY
J.S.C.

UNFILED JUDGMENT
(This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).