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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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DANIEL KOCH and DEREK KOCH,

Petitioners,

Index No. 650519/14

-against-

HC HOSPITALITY PARTNERS, LLC, PCG DGHP, LLC, and DUAL GROUPE HOSPITALITY, LLC (nominally),

Respondents.

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Ellen Coin, J.:

Motions bearing sequence numbers 001 and 002 are consolidated for disposition.

This is a special proceeding by petitioners Daniel Koch and Derek Koch for judicial dissolution and appointment of a receiver (sequence 001) concerning the winding up of nominal respondent Dual Groupe Hospitality, LLC (DGH). Respondents HC Hospitality Partners, LLC (HC Hospitality), PCG DGHP, LLC (PCG), and DGH move (sequence 002), pursuant to CPLR § 404 (a) and § 3211 (a) (7), for an order dismissing the petition (Petition). For the reasons stated below, respondents' motion to dismiss is denied and respondents are directed to answer the petition.

Background

According to the Petition, DGH is a limited liability company

which was formed on October 10, 2012 for the purpose of owning and operating certain restaurants, bars, and other venues, including a brunch series named "Day and Night at Highline Ballroom." Derek Koch and Daniel Koch each owned 25% of the company. PCG DGHP owned 30% and HC Hospitality owned 20%.

DGH's Operating Agreement was executed on October 12, 2012 by HC Hospitality, PCG DGHP, Daniel Koch and Derek Koch. Section 1.1 identifies non parties Michael Wainstein and Andreas Huber as the Managers of DGH.

Section 4.4 of the Operating Agreement provided that management and control of the business and affairs of the company were vested exclusively in the Managers, with the exception of certain "major decisions," which required the approval of all of the members of the company. Section 4.5 defined "major decisions" as including, among other things, any decisions to renew, terminate or modify certain consulting agreements entered into by the company, as described below.

On October 12, 2012 Daniel Koch and Derek Koch each entered into a Consulting Agreement with DGH.[1] Among other things, they were responsible for "overseeing, managing, and conducting" the negotiation of contracts on DGH's behalf. Consulting Agreement, §

[1] The company also executed consulting agreements with Huber and non-party Worth Capital, LLC.

1.2. They were also responsible for overseeing certain of DGH's operations and employees at the request of DGH, and providing information and feedback to DGH in connection with marketing opportunities, growth opportunities, product quality, customer service, and team development. *Id.*

Section 1.2(ii) of the Consulting Agreements provided that DGH's Managers were the sole arbiters as to the satisfactory performance of the consultants' duties.

According to respondents, Daniel and Derek Koch engaged in a series of acts which violated their obligations under the DGH Operating Agreement and the Consulting Agreements. Specifically, among other things, in October 2013, they allegedly formed a competing company named "Day & Night Entertainment LLC" for the purpose of engaging in direct competition with DGH.

On October 22, 2013, HC Hospitality, PCG DGHP and DGH brought an action in this court against, among others, Derek Koch and Daniel Koch, asserting causes of action for: a) breach of the Operating Agreement, b) breach of the Consulting Agreements, and c) permanent injunctive relief.

In February 2014, Daniel Koch and Derek Koch filed the instant Petition, seeking judicial dissolution of DGH and appointment of a receiver. The Petition alleges that respondents: 1) are operating DGH without the involvement or participation of petitioners; 2)

have used the income of the company to pay personal obligations; and 3) have intentionally failed to pay approximately $182,000 of debts owed by the company on the pretext that the company has no readily available cash. This includes debts to former employees, consultants and vendors of the company.

Discussion

Limited Liability Company Law § 702 provides that:

> 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.

"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 1545 Ocean Ave., LLC*, 72 AD3d 121, 133 (2d Dept 2010) (internal quotation marks and citations omitted). It is well established that dissolution of a limited liability company is a drastic remedy. *Id.* at 131.

A party seeking dissolution "must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the

entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." *Id.*; *see Doyle v Icon, LLC*, 103 AD3d 440, 440 (1st Dept 2013).

As set forth above, petitioners contend that dissolution is required because, among other things, respondents are operating DGH without their involvement, have used the income of the company to pay personal obligations and have intentionally failed to pay debts owed by the company.

Respondents contend that the petition should be dismissed because petitioners have failed to submit evidence to substantiate their allegations. In opposition to the motion to dismiss, petitioners submit an affidavit from Derek Koch, stating that the Managers have, among other things, failed to pay the company's debts, and stating that it is not financially feasible to continue operating the company. He asserts that DGH is not profitable and will not be in the future. He also states that the Managers are in possession of the company's financial records and have refused to share them with petitioners.

Respondents contend that even assuming the truth of petitioners' allegations, such allegations do not demonstrate that the continued operation of the company is not financially feasible.

As set forth above, dissolution of a limited liability company is a drastic remedy. At this point, neither side has adequately

demonstrated whether the management of DGH is unable or unwilling to reasonably permit its stated purpose to be realized or whether continuing to operate DGH is financially unfeasible.

The parties sharply dispute whether the company is being operated according to the terms of the Operating Agreement. They also dispute the financial viability of the company including, among other things, the amount of its debts and whether such debts are being paid.

In light of such factors, and as there has been no discovery as yet in the proceeding, the court finds it premature to determine whether dissolution is appropriate. Accordingly, it is

ORDERED that the motion to dismiss the petition by respondents Dual Groupe Hospitality, LLC, HC Hospitality Partners, LLC and PCG DGHP, LLC (sequence 002) is denied; and it is further

ORDERED that respondents are directed to answer the Petition within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the above-captioned petition (sequence 001) is stayed pending the completion of discovery in a related plenary proceeding pending before this Court, entitled *Dual Groupe Hospitality, LLC v Daniel Koch*, Index No. 653653/2013.

DATED: May 18, 2015

ENTER:

Ellen M. Coin, A.J.S.C.