Matter of Mangan v Second to None, LLC
2016 NY Slip Op 32378(U)
March 21, 2016
Supreme Court, Richmond County
Docket Number: 85073/14
Judge: Kim Dollard
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---x

In the Matter of the Application of PATRICIA A. MANGAN, a Member of Second to None, LLC,

Petitioner,

For the Judicial Dissolution of Second to None, LLC, a New York limited liability company,

-against-

SECOND TO NONE, LLC and ANN MARIE KERN,

Respondents.

---x

DCM Part 4
Present:
Hon. Kim Dollard

DECISION AND ORDER

Index No. 85073/14
Motion Seq No. 3732-001
1460-002

The following papers numbered 1 to 4 were fully submitted on the 22nd day of January, 2016:

	Pages Numbered
Order to Show Cause and Verified Petition for Dissolution with Supporting Papers and Exhibits (dated November 6, 2014)	1
Notice of Motion for Pendent Lite Monthly Accounting and Monthly Distributions by Petitioner, with Supporting Papers and Exhibits (dated April 10, 2015)	2
Affirmation in Opposition to Petitioner's Motions for Dissolution, Monthly Accounting and Payment of LLC Profits, by Respondents, with Supporting Papers and Exhibits (dated July 22, 2015)	3
Affirmation in Further Support of Petitioner's Motions for Dissolution, Monthly Accounting and Payment of LLC Profits, by Petitioner, with Supporting Papers and Exhibits (dated December 2, 2015)	4

Upon the foregoing papers, petitioner's applications are decided as follows.

To the extent relevant, on December 17, 2002, petitioner Patricia A. Mangan (hereinafter "petitioner") and her brother, Joseph Kern, entered into an Operating Agreement to form "Second

to None LLC" (hereinafter, the "LLC"), for the purpose of owning and operating two parcels of real property on Staten Island (*see* Respondents' Exhibit "O").[1] Joseph Kern had a 75% membership interest in the LLC, while petitioner owned 25% (id.). The two parcels of the property are leased and operated by third parties doing business as an auto repair shop and a car wash.

According to the Agreement, the company "shall be dissolved and its affairs wound up upon the first to occur of the following: the.. death... of any member or the occurrence of any other event that terminates the continued membership of any member, unless within six months after such event, this company is continued either by vote or written consent of a majority in interest of all the remaining members" (id. at Article IV[1][c]). It is alleged that after Joseph Kern's passing on December 22, 2010, respondent Ann Marie Kern (hereinafter "Respondent"), Kern's widow, acceded to his interest and took control of the management of the LLC, which continued in operation (*see* Affidavit of Patricia A. Mangan, paras 11-12).

According to petitioner, she did not vote for the continuation of the business nor had she provided her written consent to same (id. at 28). Moreover, it is alleged that respondent has failed to make any distributions to petitioner, despite paying herself $6,000 per month, (id. at 19), and that based on the financial statements prepared by the LLC's accountant, the rents collected from the two properties had decreased from $185,000 in 2010 and 2011 to approximately $138,000 in 2012 and 2013 (id. at 15). Petitioner alleges that the decrease in rental income is a result of respondent's mismanagement of the property.

On the basis of these facts, petitioner commenced the instant proceeding seeking the dissolution of the LLC and the appointment of a receiver. Petitioner also moves for an accounting

---

[1]According to the Operating Agreement, the LLC's principal place of business is located at 4463/4467 Amboy Road, Staten Island, New York.

and the monthly distributions of her share of the profits pendente lite.

In their Amended Answer, respondents deny the material allegations of the complaint and assert counterclaims alleging that petitioner has already received distributions from the LLC in the sum of $75,000, more that she would have been entitled to under the Operating Agreement.

In opposition to the motions, respondent Kern (hereinafter "Kern") attests that petitioner has commenced the instant proceeding "solely to shield herself from the claims against her in a prior action commenced [by respondent] as Executor of ... [her] mother-in-law['s]... [e]state based upon [petitioner's purported] misappropriation of $533,189.39 from an account in [the decedent's] name" (*see* Affidavit of Ann Marie Kern, para 2).[2] Respondent further attests that "[p]rior to [petitioner's] commencement of this action [for dissolution of the LLC;] she never made any complaint whatsoever concerning [respondent's] management of the LLC or the distributions she received as a 25% minority member" (id).[3] In addition, respondent maintains that notwithstanding her husband's contribution of the full amount of the LLC's initial capital investment, "he gratuitously gave [his sister] a 25% membership interest and retained 75% for himself" (id. at 4). She further maintains that after her husband passed away on December 22, 2010, and "with [petitioner's] consent, [she] became the owner of his LLC membership interest and [status as] managing member" (id. at 6).

---

[2]*Matter of Kern, as executor of Estate of Carmela Kern v. Mangan*, Index No. 101601/2014 is presently pending in Surrogates Court *(see* Respondent's Exhibit "E"). Carmela Kern passed away on December 23, 2011.

[3]In addition, respondent contends that the petition is barred by the doctrine of laches based on petitioner's inaction for four years following her brother's death in 2010. The Court disagrees. For these purposes, the happenstance that both actions were commenced in the same year is irrelevant. The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party. The mere lapse of time without a showing of prejudice will not sustain a defense of laches. In this context, prejudice may be established by a showing of injury, a detrimental change of position, the loss of evidence, or some other disadvantage resulting from the delay, none of which has been demonstrated herein (*see Markell v. Markell*, 91 AD3d 832, 834 [2nd Dept 2012]).

According to respondent, during the time that she was attempting to recover the funds purportedly misappropriated from her mother-in-law's estate, she deposited petitioner's share of the LLC's distributions, the sum of $18,000, to be held in escrow (id. at 13). She also attests that petitioner "has... received copies of the LLC tax returns and K-1 schedules for each and every tax year since [she has] been [the] Managing Member" (id. at 16). Finally, in response to petitioner's allegations pertaining to the decrease in rental income, respondent attests that "[t]he giving of rent abatements and reductions [to the LLC's tenants] were... approved by [her husband prior to his death] and implemented by [her] after [his] pass[ing]" (id. at 17).

Section 702 of the law regulating limited liability companies provides, as relevant, that "[o]n 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" (*see Matter of 1545 Ocean Ave, LLC*, 72 AD3d 121, 126). However, absent a definitive analysis of what makes the carrying on of a business "not reasonably practicable," the standard for dissolution under Limited Liability Company Law §702 is somewhat unsettled in New York (id. at 128). Nevertheless, section 702 makes it clear that unlike the judicial dissolution standards in the Business Corporation Law and the Partnership Law, the court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether or not it is reasonably practicable for the limited liability company to continue to carry on its business "in conformity with... the operating agreement" (id.). Thus, the dissolution of a limited liability company under §702 of the Limited Liability Company Law begins with an analysis of the operating agreement (id.).

Pursuant to the above section, it has been held that the member petitioning for judicial 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. at 131). Thus, judicial dissolution is reserved for those situations in which, e.g., the LLC's management has become dysfunctional (such as a case of a voting deadlock) or its business has diminished to the point that it is no longer profitable, or where the defined purpose of the entity has become impossible to fulfill (id.).

Here, petitioner's allegation that she has been excluded from the operation and affairs of the company are insufficient to establish that it is no longer reasonably practicable for the company to carry on its business, as required under Limited Liability Company Law §702 (*see Doyle v. Icon, LLC*, 103 AD3d 440). The allegations presently before the Court fail to show that the management of the entity has become dysfunctional or is otherwise unable or unwilling to reasonably promote the purpose intended to be realized or achieved, or that continuing the entity is financially unfeasible (id. at 440). To the contrary, the allegation that respondent has failed to pay petitioner her share of the profits and award her distributions tends to demonstrate that the company is still profitable (id.). Accordingly, petitioner has failed to meet the standard for dissolution under the Limited Liability Company Law.

The operating agreement of this LLC further provides that "[t]he failure of a member to make any required contribution shall be subject to any or all of the following consequences at the option of a majority in interest of the remaining members[:]... (a) Reduction or elimination of the defaulting member's interest; and/or (b) Subordination of the defaulting member's interest to that of the non-defaulting members; and/or (c) Forced sale of the defaulting member's interest and/or (d)

Forfeiture of the defaulting member's interest" (*see* Respondent's Exhibit "O", Article V[1]). It is further provided that "[s]uch contribution[s] may be in cash, property or services rendered" (id. at Article IV[1][c]).

Here, it is undisputed that petitioner did not make any capital contribution to the LLC (*see generally Matter of Eight Swords, LLC*, 96 AD3d 839, 840), or take any role in its management or day-to-day operations.

Similarly important to a just resolution is section 102(o) of the Limited Liability Company Law, which defines a "majority in interest of the members" means, "unless otherwise provided in the operating agreement, the members whose aggregate share of the current profits of the limited liability company constitutes more than one-half of the aggregate of such shares of all members".[4] It not being "otherwise provided in the operating agreement", petitioner's consent was not required to continue the business after the death of her brother, whose widow became vested with his 75% share of the profits (*see* Article V[1] of the Operating Agreement, Respondent's Exhibit "O").[5]

In brief, petitioner has failed to carry her burden of demonstrating that dissolution of the LLC in question is warranted under the circumstances presented.

---

[4]The subject operating agreement also states, in relevant part, that the "words and phrases set forth [herein]... shall be defined as... [provided] in Section 102 of the New York Limited Liability Company Law" (*see* Respondents' Exhibit "O", Article 1).

[5]Where an operating agreement does not address, e.g., the topic of dissolution, a limited liability company is bound by the default requirements set forth in section 417(a) of the Limited Liability Company Law (*cf. Matter of 1545 Ocean Ave, LLC*, 72 AD3d at 128-129). However, in the case at hand, the operating agreement contains a provision that expressly addresses dissolution. As therein provided, it states that the LLC is dissolved upon the death of any member "unless within six months after such event, [the] company is continued either by vote or written consent of a majority in interest of all the remaining members" (*see* Respondent's Exhibit "O", Article IV[1][c]). In view of Ann Marie Kern's 75% interest, petitioner's failure to vote or consent in writing to the continuation of the business is largely irrelevant.

Petitioner's motion, inter alia, for the appointment of a temporary receiver is denied. A party moving for the appointment of a temporary receiver must submit clear and convincing evidence of an irreparable loss or waste to the subject property such that a temporary receiver is needed to protect his or her interest (*see* CPLR 6401[a]; *Magee v. Magee*, 120 AD3d 637). Here, petitioner's unsupported allegations and conclusions fall far short of the required clear and convincing evidence that the property of the LLC is in danger of being removed from the state, lost, materially injured or destroyed (*see Vadaris Tech, Inc v. Paleros, Inc.*, 49 AD3d 631, 632). Moreover, the funds being deposited into escrow are not susceptible to dissipation, and their distribution to petitioner is a matter best addressed in Surrogate's Court, where the bona fides of respondent's claims will ultimately be determined.

Accordingly, it is

ORDERED that petitioner's application, inter alia, for the appointment of a temporary receiver and related relief is denied; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed; and it is further

ORDERED that the Clerk mark his records accordingly.

ENTER,

Dated: March 21, 2016

Kim Dollard, A.J.S.C.