SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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ADVANCED 23, LLC, DAVID SHUSTERMAN,

Petitioner,

- v -

CHAMBERS HOUSE PARTNERS, LLC, ANITA MARGRILL, HERBERT MARGRILL

Respondent.

INDEX NO. 650025/2016

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number were read on this application to/for Dissolution

HON. SALIANN SCARPULLA:

Petitioners Advanced 23, LLC ("Advanced") and David Shusterman ("Shusterman") (collectively, "Petitioners") commenced this special proceeding by verified petition and order to show cause (motion seq. no. 001), seeking, *inter alia*, a judicial decree dissolving Chambers House Partners, LLC pursuant to NY Limited Liability Company Law ("LLCL") § 702 and directing that its real property be sold and that CHP be liquidated.

Background

Respondent Herbert Margrill ("Herbert") and Respondent Anita Margrill ("Anita") (collectively, "Respondents") and Ephraim Resnick and Hisako Resnick (collectively, "the Resnicks") purchased the land and building located at 154 Chambers Street, New

York, New York 10013 (hereinafter, "the Building") on January 18, 1982. The Building contains four residential units and one commercial unit. On that same date, Respondents and the Resnicks conveyed the Building by deed to Chambers House Partners, a general partnership. Respondents each held a 25% membership share in the Building and the Resnicks collectively held 50% of the membership shares. On November 8, 2007, the Chambers House Partners general partnership conveyed the Building by deed to Chambers House Partners, LLC ("CHP"); Respondents and the Resnicks maintained their membership shares. CHP is the current owner of the Building.

On February 1, 2013, Advanced[1] purchased the Resnicks' 50% membership share in CHP. Respondents and Advanced executed CHP's Amended and Restated Operating Agreement ("Operating Agreement"); Shusterman executed a personal guarantee which stated, in part, that he would be responsible for Advanced's obligations under the Operating Agreement as a Member of CHP. The parties also executed separate guarantees, each in favor of half of the $547,760.30 HSBC Bank mortgage on the Building, which was to become due and payable on December 1, 2015.

CHP's business purpose is "to own and operate the building known and located at 154 Chambers Street, New York, NY 10013 . . . ; to provide a residence for its Members; and to conduct any lawful business as the Members may from time to time determine." Operating Agreement ¶ 2.3. The Operating Agreement provides that the only method for

[1] Shusterman owns 100% of Advanced.

CHP's dissolution is by unanimous consent of CHP's Members. Operating Agreement ¶ 10.1.

Operating Agreement ¶ 3.10 provides a list of actions that require the Members' unanimous consent. Relevant actions requiring unanimous consent include "(a) amending or waiving any provision of [the Operating Agreement]" and "(h) any . . . refinance or extension of any existing mortgage." If the Members are unable to reach a unanimous agreement, Operating Agreement ¶ 3.11(a) provides that Members are to first hold a series of informal meetings to try to come to an agreement on the matters that require unanimous consent. If after these meetings, Members still have not come to a resolution on something that will "materially hinder the conduct of [CHP's] business," that the matter shall be resolved by the arbitration clause. Operating Agreement ¶ 3.11(b). The arbitration clause states, in part, that "[a]ny controversy or claim arising out of or relating to this Agreement, in excess of Twenty-Five Thousand ($25,000) Dollars, shall be finally resolved by arbitration . . . ." Operating Agreement ¶ 13.11. If a claim or controversy does not exceed $25,000, the Operating Agreement does not provide any alternate procedures to resolve these disagreements.

Under the terms of Article 4 of the Operating Agreement, the parties agreed that Shusterman and Herbert each have a material obligation to actively manage CHP as equal Co-Managers with equal voting rights. The Operating Agreement defines "actively managed" to

> mean that each Manager is available for management responsibilities in New York, at the Building, and shall meet with the other Manager no less than once per month to review management and operation matters or as may be

needed to address and emergency impacting the physical or financial condition of the Building or any imminent danger to person or property.

Operating Agreement ¶ 4.1(d).

Operating Agreement ¶ 4.2(b) provides a non-exhaustive list of the Co-Managers' duties, which are to be performed "in good faith and with that decree that an ordinarily prudent person in a like position would use under similar circumstances." Operating Agreement ¶ 4.2(a). As Co-Managers, Shusterman and Herbert established a bank account at Capital One Bank, N.A. ("Capital One Account") in accordance with the Operating Agreement – they were both signatories, rent checks from the Building's tenants were to be deposited into this account, and payments of expenses were to be withdrawn from it. Operating Agreement ¶ 8.1.

If either Co-Manager refuses to serve as a manager or fails to fulfill their managerial duties in a manner "reasonably necessary to conduct [CHP's] business, then the ***remaining*** Manager" is entitled to receive a three percent fee of CHP's gross annual rental income for managing CHP's business. Operating Agreement ¶ 4.1(d) (emphasis added). This provision provides for the removal of a Manager in another context than provided in Operating Agreement ¶ 4.3.[2] If this were to occur, the Manager who was removed would "have the right to appoint a Manager to replace . . . himself, subject to the

[2] "A Manager may be removed only for intentional misconduct hereunder or a knowing violation of law which causes material damage to the assets of the Company (and by which such Manager personally gained a financial profit to which he or she was not legally entitled). Any vacancy occurring as a result of such removal from office shall be filled as set forth in Section 4.1(b)." Operating Agreement ¶ 4.3.

unanimous approval of the remaining Managers, which shall not be unreasonably withheld . . . ." Operating Agreement ¶ 4.1(b).

Since Advanced purchased its interest in CHP in 2013, various disputes have arisen between the parties. Petitioners allege that in July 2015, Anita began to harass Shusterman's companion and entered his apartment without permission. Respondents submit a police report for harassment, which Anita filed against Shusterman on July 15, 2017 after an alleged physical altercation. Because of these disputes, Herbert appointed an attorney, Maurice A. Reichman, Esq. ("Mr. Reichman"), on September 17, 2015 to negotiate on his behalf with Shusterman regarding the mortgage[3] and Shusterman's obligations in the Operating Agreement.

On October 16, 2015, the parties and Mr. Reichman attended a meeting to discuss CHP business and the refinancing of the mortgage. Respondents allege that the meeting constituted a formal meeting of the Managers, that a quorum was present, and that Shusterman left the meeting without notice or explanation, which Petitioners deny. After Shusterman left the meeting, Respondents contend that Herbert held a vote to create a separate single-signature bank account for CHP, which he was allegedly entitled to do because a quorum was still present.

On October 19, 2015, Respondents created the separate bank account entitled "Anita & Herbert Margrill Trustees in Trust for Chambers House Partners LLC" at TD

[3] The parties were ultimately unable to agree to an extension or refinancing of the mortgage, and Respondents and Shusterman each paid half of the outstanding mortgage balance by the December 1, 2015 due date.

Bank ("TD Bank Account") and deposited the November rent checks from CHP without Shusterman's knowledge or consent. Respondents informed Shusterman that they created the TD Bank Account by letter dated November 24, 2015, justifying their actions as necessary "in order to ensure the timely and full payment of all [CHP] obligations" because his "conduct has seriously interfered with the operation of [CHP]." On December 3, 2015, Respondents transferred $75,000 from the Capital One Account into the TD Bank Account without Shusterman's authorization. On December 21, 2015, the TD Bank Account was frozen after Shusterman, acting through counsel, notified TD Bank that the account contained diverted rents and misappropriated funds.

In mid-December 2015, one of CHP's tenants wrote an email to the parties, requesting that they use a portion of her security deposit to pay for that month's rent. Respondents allegedly unilaterally consented to this request without consulting Shusterman, who later objected.

Petitioners commenced this special proceeding by verified petition and order to show cause seeking: (1) a judicial decree dissolving CHP pursuant to New York's Limited Liability Company Law ("LLCL") § 702, directing that its real property be sold, and that CHP be liquidated; (2) an accounting of all transactions from the TD Bank Account and any other transactions Respondents unilaterally entered into with CHP funds without Shusterman's authorization or consent; and (3) injunctive relief to maintain the status quo and to prevent irreparable harm to CHP's business during the pendency of this proceeding.

Respondents, by their verified amended answer, oppose the petition for dissolution. Respondents argue that any of Petitioners' allegations that it is no longer reasonably practicable to carry on CHP's business is a direct result of Shusterman's conduct. They argue that since Shusterman became Co-Manager of CHP, he has failed to fulfill his managerial duties, and Herbert has been the only one actively managing the Building such that he is entitled to the three percent manager's fee pursuant to Operating Agreement ¶ 4.1(d). They contend that Shusterman's sole actions as Manager were to negotiate a lease, propose house rules which were ultimately not adopted, and co-sign checks that Herbert provided to him; even though Shusterman's responsibilities were minimal, he would either refuse or significantly delay signing the checks to pay for CHP's expenses and operating costs and would routinely ignore Herbert's requests for managerial meetings. Therefore, Respondents allege, the creation of the TD Bank Account was not a breach of the Operating Agreement and their actions were necessary and justified because Shusterman's conduct was interfering in CHP's operation. Respondents submit evidence of all transactions made under the TD Bank Account, which they maintain were to pay for CHP expenses and monthly distributions.

Since the commencement of this proceeding, CHP has been functioning pursuant to a February 10, 2016 court stipulation – any noncompliance of which would subject the parties to a motion for contempt – which includes the following provisions: all funds in the TD Bank Account are to be deposited into the Capital One Account and all future rent deposits are to be deposited into the Capital One Account; monthly distributions and the Building's operation will continue during the pendency of this litigation; and all future

checks for ordinary and necessary payments for CHP's obligations will be submitted by Herbert to Shusterman by presenting Shusterman with an invoice and a check with Herbert's signature, which Shusterman will countersign and return within seven days.

Discussion

The standard of review in a special proceeding is the same as that of a motion for summary judgment, *In re Bank of New York Mellon*, 42 Misc 3d 1237(A) (Sup Ct, NY County 2014), *affd as mod sub nom. In re Bank of New York Mellon*, 127 AD3d 120 (1st Dept 2015), and I must "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." CPLR § 409(b).

A court may order the 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." LLCL § 702 (McKinney 2017). "Judicial dissolution of a limited liability company is considered a drastic remedy," the appropriateness of which "is vested in the sound discretion of the court hearing the petition." *Goldstein v. Pikus*, 2015 WL 4627747 (Sup Ct, NY County 2015) (quoting *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 131 & 133 (2d Dept 2010)) (internal quotation marks omitted).

In determining whether a limited liability company should be dissolved pursuant to LLCL § 702, "the court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether it is or is not 'reasonably practicable' for the limited liability company to continue to carry on its business in conformity with the operating agreement." *In re 1545 Ocean Ave., LLC*, 72

AD3d at 128 (internal citations omitted). The petitioner seeking judicial dissolution must either "show that 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 [that] continuing the entity is financially unfeasible." *Doyle v Icon, LLC*, 103 AD3d 440, 440 (1st Dept 2013) (quoting *In re 1545 Ocean Ave., LLC*, 72 A.D.3d at 131) (internal citations and quotation marks omitted).

Here, Petitioners have made a *prima facie* showing that it is no longer reasonably practicable for CHP to continue functioning in accordance with its Operating Agreement to achieve its stated business purpose. The Operating Agreement provides that virtually any material business decision requires the unanimous consent or the majority vote of either its Members or Co-Managers, however the relationship between the parties has degraded to such an extent that they are no longer on speaking terms (Respondents retained an attorney to deal with Shusterman directly) and they have been unable to cooperate to make business decisions regarding a tenant's inability to pay rent or refinancing their mortgage. *See Matter of 47th Rd. LLC*, 54 Misc 3d 1217[A], 2017 NY Slip Op 50196[U], *3 (Sup Ct, Queens County 2017); *Fakiris v Gusmar Enters., LLC*, 53 Misc 3d 1215[A], 2016 NY Slip Op 51665[U], *3 (Sup Ct, Queens County 2016).

Additionally, Petitioners maintain that CHP can no longer operate in accordance with the Operating Agreement – which requires that CHP be co-managed by Shusterman and Herbert – because Respondents have breached the Operating Agreement numerous times and undermined Shusterman's rights as a Co-Manager; the most significant example of this was when Herbert acted unilaterally to create the TD Bank Account,

deposit rents into that account, and transfer funds into it from the Capital One Account, all of which "are contrary to the contemplated functioning and purpose of [CHP]." *Goldstein*, 2015 WL 4627747, 16 (citing *In re 1545 Ocean Ave., LLC*, 72 AD3d at 132). Regardless of whether there was a quorum at the October 16, 2015 meeting and whether that quorum continued after Shusterman left, as Respondents claim, these actions taken by Herbert would not be in accordance with the Operating Agreement because any amendment to the Operating Agreement, such as changing the banking requirements of Operating Agreement ¶ 8.1, would require the unanimous consent of the Members. Operating Agreement ¶¶ 3.10(a) & 13.1.

Based on the above disputes, Petitioners contend that Respondents' actions have rendered it impossible to cooperate with Herbert equally in managing CHP, as required by the Operating Agreement. While deadlock between managers is not an independent basis for judicial dissolution under LLCL§702, "the court must consider the managers' disagreement in light of the operating agreement and the continued ability of [CHP] to function in that context." *In re 1545 Ocean Ave., LLC*, 72 AD3d at 129. However, courts will not order dissolution despite disagreements between managers when the limited liability company can continue to operate in furtherance of achieving its stated business purpose. *See, e.g., Belardi-Ostroy, Ltd. v. American List Counsel, Inc.*, 2016 WL 1558850 (Sup Ct, NY County 2016), 6 ("the Operating Agreement provides a straightforward means of avoiding deadlock - having a tie-breaking fifth member on the Board."); *Goldstein*, 2015 WL 4627747 (Sup Ct, NY County 2015), 17 (finding that dissolution was not warranted despite the parties being deadlocked over whether to sell or

convert the property because the property was being managed and operated by an independent managing agent); *In re 1545 Ocean Ave., LLC*, 72 AD3d at 129 (finding that deadlock is not possible because "the operating agreement permit[s] each managing member to operate unilaterally in furtherance of [the limited liability company's] purpose").

Here, there is evidence showing that CHP cannot continue to function because of the disagreements and inability of the parties to cooperate. Even though Operating Agreement ¶ 13.11 authorizes and requires that any dispute arising out of the Operating Agreement and exceeding $25,000 to be resolved through arbitration, neither party has availed themselves of this provision to resolve any of their disputes. Further, the Operating Agreement does not provide any means to resolve disputes that do not meet the amount in controversy requirement of the arbitration clause.

However, Respondents have raised issues of fact to preclude a summary determination on the issue of judicial dissolution. Respondents allege that any ineffectiveness in CHP's management and operation is due to the intentional acts of Shusterman in his attempt to force dissolution and gain control of the Building. Respondents argue that Shusterman breached his material obligation to manage CHP and that he was significantly interfering with CHP's operation by either refusing or causing a significant delay signing the checks to pay for CHP's expenses and operating costs and routinely ignoring Herbert's requests for managerial meetings.

The Respondents' allegations regarding Shusterman's conduct raise triable issues of fact, and if the trier of fact credits Respondents' allegations, judicial dissolution may

not be warranted. *Ward Sales, Inc. v. Millennium Falcon Corp.*, 2005 WL 6313474 (Sup Ct, Nassau County 2005) ("[J]udicial 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.").

Based on the parties' submissions, I find that a material issue of fact exists as to whether Shusterman breached his duties and obligations under the Operating Agreement to force dissolution. Accordingly, I order an evidentiary hearing to resolve this material issue of fact. CPLR § 410.

In accordance with the foregoing, it is

ORDERED that an evidentiary hearing is directed to be conducted before a Special Referee to determine whether Shusterman breached his duties and obligations under the Operating Agreement to force dissolution. The Special Referee is to report to this Court with all convenient and deliberate speed, 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 issue; and it is further

ORDERED that Petitioners' petition for judicial dissolution and for a court order directing that CHP's real property be sold and that CHP be liquidated (motion seq. no. 001) is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the Petitioners shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that upon receipt of the Special Referee's report, Petitioners petition for judicial dissolution and for a court order directing that CHP's real property be sold and that CHP be liquidated shall be disposed of in accordance with the results of the Special Referee's report as to service and this decision.

This constitutes the decision and order of the Court.

12/15/17
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[ ]	DENIED	[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED			[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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