

McCormack v Kuras
2022 NY Slip Op 35249(U)
January 11, 2022
Supreme Court, New York County
Docket Number: Index No. 656434/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X
DENNIS MCCORMACK,

Petitioner,

- V -

MICHAL KURAS, MIKE GHORAYEB, TRIBOSS
BROOKLYN, LLC

Respondents.
-----X

INDEX NO.	656434/2021
MOTION DATE	N/A, N/A
MOTION SEQ. NO.	001 002
DECISION + ORDER ON MOTION	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 27, 35

were read on this Petition for
DECLARATORY RELIEF AND MOTION FOR
INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34

were read on this motion for
DISMISSAL

Upon the foregoing documents, and for the reasons stated on the record following oral argument on January 10, 2022, it is

ORDERED that Petitioner's motion to award the declaratory relief sought in the Verified Petition is **granted in part**.

Petitioner has established that under the unambiguous terms of the Operating Agreement he is and remains the managing member of Respondent Triboss Brooklyn, LLC. The Operating Agreement appoints Petitioner to be the managing member and does not provide a basis for his removal by majority vote of the members. The only reference to a change in the identity of the managing member is in Paragraph 11 of the Operating Agreement, which provides that, "[i]f at

any time the Managing Members do not own, in the aggregate, at least 20 percent of the Members' Percentage Interests, all of the Members shall be Managing Members until such time as the Members duly elect Managing Members who do own at least 20 percent of the Members' Percentage Interests” (NYSCEF 2). The record indicates that Petitioner has remained above that 20 percent threshold since the Operating Agreement was finalized. As the Court observed in a related action, *TriBoss Brooklyn, LLC v. Kuras, et al.* (Index No. 654282/2021, Doc. Nos. 38, 40), the gap-filling provisions of the LLC law do not create a manager-removal right that the parties chose not to include in the Operating Agreement (*Goldstein v Pikus*, 2015 NY Slip Op 31483[U] [Sup Ct, NY County 2015]; *Friedman v Ridge Capital Corp.*, 2010 WL 5799429 [Sup Ct, NY County 2010]).

The attempt by Respondents Kuras and Ghorayeb to evade the terms of the Operating Agreement by seeking to amend the Articles of Organization – without Petitioner’s consent and in violation of the Operating Agreement to which all parties agreed – is similarly unavailing. As stated in *Nathanson v Nathanson*, 20 AD3d 403, 403–04 [2d Dept 2005], even if the articles of organization vest management of the company in its members generally, “such vesting of authority is ‘subject to any provisions in . . . the operating agreement . . .granting or withholding the management powers or responsibilities of one or more members’” (quoting LLCL § 401[a]).

Accordingly, it is

ORDERED, ADJUDGED, and DECLARED that Petitioner Dennis McCormack is, has been, continues to be, and remains the Managing Member of Respondent Triboss Brooklyn, LLC, and the terms of the Operating Agreement of Triboss Brooklyn LLC remain in full force and effect; it is further

ORDERED that the remaining portion of Petitioner's motion seeking additional relief and judicial dissolution under the Verified Petition is denied as premature, given that there are fact issues that must be resolved in order to determine the merits of those claims; it is further

ORDERED that Petitioner's motion for preliminary injunctive relief is **denied**; it is further

ORDERED that Respondent's motion to dismiss the Petition (Mot. Seq. 002) is **denied**; it is further

ORDERED that Defendants shall file an Answer to the Petition within 21 days of the date of this Order; it is further

ORDERED that the parties are to appear for a telephonic preliminary conference on February 8, 2022, at 10:00 am to discuss, among other things, consolidation with the pending action *TriBoss Brooklyn, LLC v. Kuras, et al.*, (Index No. 654282/2021), and the parties are to circulate dial-in information in advance to Chambers at SFC-Part3@nycourts.gov; and it is further

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.

1/11/2022

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

20220111140114MCOHEN401A60165BDB4E988C9E4D7C3B18D375

JOEL M. COHEN, J.S.C.