

**Thomas v Thomas LaBarbera Counselors at Law P.C.**

2023 NY Slip Op 31872(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 654804/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

-----X

KATHLEEN THOMAS,

Petitioner,

- v -

THOMAS LABARBERA COUNSELORS AT LAW  
PROFESSIONAL CORPORATION, and ANNE  
LABARBERA,

Respondents.

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**INDEX NO.** 654804/2021

**MOTION DATE** 11/05/2021,  
11/23/2022

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39

were read on this motion to STRIKE MATTER FROM THE PETITION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 69

were read on this motion for INJUNCTIVE RELIEF.

Upon the foregoing documents, respondent Anne LaBarbera’s motions to strike material from the petition and for other relief (Mot. Seq. No. 002) and for a preliminary injunction (Mot. Seq. No. 003) are consolidated for disposition in accordance with the following memorandum opinion.

In this special proceeding, petitioner Kathleen Thomas (“Thomas”) seeks the dissolution of respondent Thomas LaBarbera Counselors at Law Professional Corporation (the “firm”), of which Thomas and respondent Anne LaBarbera (“LaBarbera”) are each 50% owners. LaBarbera first moves, pursuant to CPLR 405, to correct certain alleged deficiencies in the petition. The statute provides that a party “may move to cure a defect or omission in the record, or to strike scandalous or prejudicial matter unnecessarily inserted in a pleading, or for a more definite statement of a pleading” (CPLR 405[a]). The first ground, relating to the cure of some defect or

omission, applies where the petition seeks review of the decision of a prior administrative proceeding (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 405 ["The first ground would appear to apply where the special proceeding involves review of some prior proceeding"]). The second ground relied on in the motion, that of striking "scandalous or prejudicial matter," is based on the same grounds as a motion made in an action pursuant to CPLR 3024(b). Such a motion "will be denied if the allegations are relevant to a cause of action" (*New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 [1st Dept 2005]). Here, the moving papers do not specifically list which allegations of the petition are scandalous and prejudicial, except to state generally that petitioner included what are claimed to be "selective and misleading material gleaned from settlement talks" (memorandum of law in opposition, NYSCEF Doc. No. 17 at 4). In reply in further support of the motion (NYSCEF Doc. No. 37), LaBarbera belatedly identifies the allegedly objectionable allegations; but Thomas' recounting of the history between the parties set forth in those allegations is germane to the relief sought in the petition. They are "relevant to [the] cause of action" (*New York City Health & Hosps. Corp., supra*). Therefore, such allegations may not be stricken from the petition.

LaBarbera also seeks the appointment of a referee to assist the parties in negotiating the dissolution of the firm pursuant to Business Corporations Law § 1108, which allows for the appointment of a referee to resolve the petition. The court notes the filing of a so-ordered stipulation dated January 20, 2022, and so-ordered on March 14, 2022, in which the parties consented to dissolution of the firm and set forth the process by which they would accomplish the same (NYSCEF Doc. No. 46). Accordingly, the court sees no need to appoint a referee at the

present time; but will conference this matter with the parties to determine how best to proceed with the remaining issues necessary to consummate the dissolution.

Turning now to the motion for a preliminary injunction: “[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual” (CPLR 6301). Preliminary injunctions “should be issued cautiously and in accordance with appropriate procedural safeguards” (*Uniformed Firefighters Assn. of Greater New York v City of New York*, 79 NY2d 236, 241 [1992]). “The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). “Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient” (*DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-37 [2d Dept 2009] [internal quotation marks and citation omitted]). “The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts (*Nobu Next Door, LLC*, 4 NY3d at 840).

Here, LaBarbera seeks an injunction requiring Thomas to turn over to LaBarbera a percentage of the attorneys’ fees obtained in actions that originated at the firm, but that Thomas took with her to her new firm and subsequently settled. The motion also seeks certain other reliefs related to the disposition of those funds. As the parties do not dispute, the firm is entitled to recover “the settlement value, less that amount attributable to the lawyer’s efforts after the firm’s dissolution” (*Murov v Ades*, 12 AD3d 654, 656 [2d Dept 2004]). “[A]bsent an agreement

to the contrary, pending contingency fee cases of a dissolved partnership are assets subject to distribution” (*McDonald v Fenzel*, 233 AD2d 219, 220 [1st Dept 1996]). This rule applies with equal force to professional corporations (*DelCasino v Koeppe*, 207 AD2d 374 [2d Dept 1994]). However, the amount due to the firm and, thus, to be distributed among the parties is an ascertainable sum of money damages, and therefore injunctive relief is not appropriate on the present record. In addition, LaBarbera’s motion for sanctions is also denied for the lack of any perceptibly sanctionable conduct.

Accordingly, it is hereby

ORDERED that the motion to correct the petition pursuant to CPLR 405 (Mot. Seq. No. 002) is denied; and it is further

ORDERED that respondents are to file an answer to the petition within 20 days of the date of filing hereof; and it is further

ORDERED that the motion for a preliminary injunction (Mot. Seq. No. 003) is denied; and it is further

ORDERED that the parties shall appear for a status conference in Room 1166, 111 Centre Street on June 28, 2023, at 10:00 AM.

This constitutes the decision and order of the court.



<u>5/25/2023</u> DATE	<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> SUBMIT ORDER	