

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

In the Matter of the Application for Judicial Dissolution of
BEVERWYCK ABSTRACT, LLC by Douglas Engels and
Peter C. Staniels, Members, as

Petitioners,

DECISION
AND
ORDER

-against-

GATEWAY TITLE AGENCY, LLC,

Respondent.

Index No. 8019-03
(RJI No. 01-05-084314)

(Judge Richard M. Platkin, Presiding)

APPEARANCES: Ganz Wolkenbreit & Friedman, LLP
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Hon. Richard M. Platkin, A.J.S.C.

This is a motion *in limine* seeking determination of the date of dissolution of Beverwyck Abstract, LLC (“Beverwyck”). While formal judicial dissolution of the company occurred by Order of this Court (Spargo, J.) dated May 26, 2005, a dispute exists regarding the point at which the fiduciary duty of petitioners to the LLC ended. Such determination is necessary in

order to calculate the value of the interest formerly held by respondent Gateway Title Agency, LLC (“Gateway”), once a member of Beverwyck.

The following facts were established based upon the credible testimony adduced at a prior proceeding held before Justice Spargo in connection with petitioner’s application for judicial dissolution of the company:¹

Douglas Engels and Peter Staniels own a real estate brokerage firm (“Weichert Northeast”) as well as a mortgage brokerage firm (“Alumni Funding”). Seeking to expand their real-estate related interests, Engels and Staniels teamed up with attorney Peter Herkenham to form Beverwyck as a means of benefitting from the title insurance work ancillary to their residential real estate transactions. When Herkenham left the company to join a law firm, he signed over his interest in Beverwyck to Engels and Staniels. Since these two lacked the necessary expertise to run a title company on their own, they sought out a professional to replace Herkenham.

Engels and Staniels approached attorney Elizabeth Wade, who was a principal of Gateway. They first suggested that Wade could “kick back” to them a portion of the profits generated on title work sent by them to Gateway, but Wade rejected such an arrangement as improper. Instead, she proposed that Gateway become a member of Beverwyck and that Beverwyck could then function as the conduit through which Engels and Staniels could share in the profits of the title work. This arrangement was agreeable to all parties. Gateway was thus made a member of Beverwyck without the need for any investment of capital or purchase of this interest, as Beverwyck had no assets at that time, and would exist solely as a “single source”

¹ As noted *infra*, the parties have stipulated that the undersigned may make factual determinations and credibility assessments on the basis of the transcript of the trial record.

entity whose clients would be limited to the mortgage brokerage customers of Alumni Funding who chose to use Beverwyck to obtain title insurance.

In practice what occurred was that Engels and Staniels urged their employees at Alumni Funding to encourage customers who applied for purchase money mortgages or refinancing of mortgages to use Beverwyck as their title company. Wade would then arrange to do the title search work and purchase title insurance from an underwriter through Gateway and deposit the fees thus earned into a Beverwyck account. Meanwhile, Engels and Staniels arranged for Wade to act as the bank closing attorney for Alumni Funding. Wade's law firm would retain all fees acquired through Wade's role as bank attorney, and Wade would periodically distribute to Engels and Staniels one-half of the profits earned on the title insurance work through Beverwyck.²

This arrangement worked for nearly two years. It became apparent, however, that the flood of mortgage refinancing transactions that Engels and Staniels steered through Beverwyck

² The ethical implications of this arrangement have not escaped the Court's notice. Several conflicts of interest here are apparent: as attorney for the lending institution, Wade was obliged to protect the bank in its real estate transactions. Wade also stood to gain a profit, however, through the sale of title insurance through Beverwyck, and this profit would only be realized if the real estate transaction was consummated. Thus, she had a personal stake in the outcome of the closing. Moreover, her business partners Engels and Staniels stood to gain additional profits from the fees earned by Alumni Funding, which again would only be realized if the transaction closed. Further conflicts would arise if the real estate transaction involved the purchase or sale of a home through Weichert Northeast, as Wade's partners' commissions as real estate brokers would be contingent on a successful closing. Compounding the dilemma is the fiduciary duty that Wade, as a principal in both Beverwyck and Gateway, owed to those companies. One could easily envision a scenario in which the interests of a mortgagee bank, a title insurance carrier *and* a home owner could all be compromised due to the divided loyalties of an attorney who might be tempted to overlook a cloud on the title to the subject property in a given transaction because she and her business partners had a substantial personal interest in the deal. A failure to appropriately disclosure these various relationships to all interested parties would raise serious issues of professional responsibility (*see e.g. Matter of Drysdale*, 27 AD3d 196 [2d Dept 2006]).

exceeded Gateway's capacity. While the group had prided itself on its rapid processing of applications, Gateway was taking far longer than the informal goal of two weeks to perform title work on many transactions.

As a result of these delays in processing title work, as well as friction that had developed between Wade and the CEO of Alumni Funding, the mortgage company ceased assigning bank closing work to Wade. She complained of this to Engels and Staniels. Wade also informed them that, since she was no longer being sent the bank closings, she would begin deducting the costs of title searches and related expenses from the Beverwyck profits prior to their monthly distributions to the members of the LLC.³ This only led to greater tensions between Wade and the other Beverwyck members.

On February 17, 2003 Engels, Staniels and Wade met to discuss their options. The result of this meeting was an oral understanding that Wade and Gateway would no longer accept title work from Beverwyck. Engels and Staniels then sent Wade draft forms for her to execute assigning Gateway's interest in Beverwyck back to Engels and Staniels effective April 1, 2003. Wade did not sign these documents.

Meanwhile Engels and Staniels approached their former partner Herkenham and persuaded him to join them in a new LLC that would follow up with title insurance work from the point where Beverwyck had left off. This new venture rented space in the Alumni Funding

³ Wade's testimony establishing a linkage between the charging back of title search expenses against Beverwyck profits and the termination of the bank closing referrals suggests a *de facto* splitting of counsel fees on the closings with non-lawyers Engels and Staniels (*see* DR3-102; 22 NYCRR § 1200.17).

offices and proceeded to do title work “in house.” When the parties were ultimately unable to come to terms regarding the winding up of Beverwyck’s business, this litigation followed.⁴

A trial was held before Justice Spargo on March 23 and 28, 2005. At the close of the trial, the Court determined that the LLC was dissolved but reserved on other issues. This matter was subsequently transferred to the undersigned pursuant to CPLR 9002. Following the filing of the papers on the present motion and a conference with the Court, counsel for both parties stipulated on April 24, 2007 that the stenographic record of the trial proceedings before Justice Spargo could be used for the factual findings necessary on this application, without the need for further testimony.

ANALYSIS:

The parties conducted Beverwyck’s business under the terms of a written operating agreement. That document lays out, in clear language, the circumstances under which the LLC will be dissolved. Those circumstances include, *inter alia*, a decree of judicial dissolution as was issued by this Court, and the vote or written agreement of a majority of the members of the company.

Petitioners contend, however, that a *de facto* dissolution occurred at or shortly after the meeting of February 17, 2003. They argue that the result of that meeting – that is, the understanding that Gateway would no longer be providing title work for Beverwyck – evidenced the termination of the business life of the LLC. In support of this position petitioners cite to

⁴ Indeed, it appears from the record that the discord between Wade and petitioners was exacerbated by Herkenham’s having told Wade he would be joining her firm to handle Beverwyck work while he had clandestinely arranged with Engels and Staniels to work directly for them. Wade testified that she had gone as far as having rented additional office space and purchased computer equipment for Herkenham. It was not until the very day that Herkenham was to have begun working for Wade that she learned of this change of plan.

numerous cases applicable to partnerships at law, where courts have found from circumstantial proof of the ending of a business relationship the termination of a partnership and, concurrently, the cessation of the partners' fiduciary obligations (*see e.g. Morris v Crawford*, 304 AD2d 1018 [3d Dept 2003]). Petitioners' reliance on such cases is, however, misplaced.

The Limited Liability Company is a creature of statute (L 1994 ch 576 § 1). Of relatively recent origin, the LLC shares many of the traits of a partnership while also sharing many of the traits of a corporation.⁵ While the case law surrounding the operation and dissolution of LLC's may be newly evolving, it is clear that, as with partnerships, the members have great latitude to chart their own course with their operating agreements (*cf. Silverman v Caplin*, 150 AD2d 673, 674 [2d Dept 1989], citing *Corr v Hoffman*, 256 NY 254, 272 [1931]). In the present case, Beverwyck's operating agreement spells out unequivocally the circumstances under which the LLC will be dissolved. There was no vote taken to dissolve the company, nor was there a written agreement of the members to do so. Up to the point of its judicial dissolution, Beverwyck remained in existence. Since the members had bound themselves by the terms of their operating agreement, the mere cessation of referrals from Alumni Funding to Beverwyck or the bare assertion by petitioners that the company was no longer in existence was insufficient to dissolve the LLC or to relieve petitioners of their fiduciary duties to the organization, since such eventualities were not listed as terminating events in the parties' operating agreement.

⁵ An in-depth discussion of the nature of the LLC which includes its creation, operation, dissolution and tax status can be found in "What Buy-Out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company?" (38 Harvard Journal on Legislation 413 [Sandra K. Miller]).

Petitioners would have it that the LLC ended as of the February 17, 2003 meeting among Engels, Staniels and Wade. At best, however, that meeting resulted in the understanding among the parties that their existing relationship was at an end. The very fact that Engels and Staniels later sent Wade the forms which would have transferred Gateway's interest back to the two remaining members is proof in itself that Beverwyck still existed as an entity and that it was the intent of Engels and Staniels that this be the case. Had Wade executed the documents on behalf of Gateway, Beverwyck would have continued its existence with two members instead of three. That the third member did not voluntarily dissociate from the company could not somehow have caused that company to dissolve in the absence of any other act or occurrence from among those listed in the operating agreement as terminating events. The one and only occurrence that marked the dissolution of Beverwyck was Justice Spargo's Order of Dissolution issued in May of 2005.

Accordingly, it is

ORDERED that the motion *in limine* is granted to the extent that the date of the dissolution of Beverwyck Abstract, LLC is determined as May 26, 2005.

This constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to counsel for respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
July 11, 2007



RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

1. Notice of Motion dated November 13, 2006; Affidavit of Robert E. Ganz, Esq. dated November 9, 2006, with annexed exhibits 1-11;
2. Memorandum of Law (undated);
3. Affidavit in Opposition of Kevin A. Luibrand, Esq. dated November 27, 2006, with annexed exhibits A-D;
4. Memorandum of Law dated November 27, 2006;
5. Stipulation dated April 24, 2007.