

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

In the Matter of MARY KOUTELOS x  
as the Holder of a Two-Sevenths  
Membership Interest,

Petitioner,

Index  
Number 5799 2008

Motion  
Date June 4, 2008

For the Dissolution of  
MOUHLAS REALTY, LLC,  
A New York Limited Liability  
Company,

Respondent.

Motion  
Cal. Number 21

Motion Seq. No. 1

x

The following papers numbered 1 to 18 read on this application by petitioner for the judicial dissolution of respondent Mouhlas Realty, LLC (LLC), and for other related relief, and a cross motion by respondent to dismiss the petition.

	<u>Papers Numbered</u>
Order to Show Cause - Petition - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits..	5-9
Answering Affidavits - Exhibits.....	10-13
Reply Affidavits.....	14-18

Upon the foregoing papers it is ordered that the petition and cross motion are determined as follows:

Judicial dissolution of a limited liability company is available under Limited Liability Company Law § 702 only when "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." The appropriateness of an order of dissolution is vested in the sound discretion of the court. (See, Matter of Extreme Wireless, LLC [Molina], 299 AD2d 549, 550 [2002].) In this case, the allegations in the petition of overreaching and breach of fiduciary duty by two of the other three members of respondent LLC

do not plead the requisite grounds for dissolution of a limited liability company. (Limited Liability Company Law § 702; see, Widewaters Herkimer Co., LLC v Aiello, 28 AD3d 1107 [2006]; Artigas v Renewal Arts Realty Corp., 22 AD3d 327 [2005]; Schindler v Niche Media Holdings, LLC, 1 Misc 3d 713, 716-717 [2003].) Petitioner has failed to state any facts showing that LLC is unable to function in accordance with its articles of organization or operating agreement, or that the business is failing financially. (See, Klein v 599 Eleventh Ave. Co. LLC, 14 Misc 3d 1211[A], 2006 NY Slip Op 52486U [2006]; Schindler, 1 Misc 3d at 716 [2003].)

The articles of organization for LLC, not included in petitioner's papers but provided by respondent, contain no provision relating to the operation of the business other than the paragraph stating that the limited liability company is to be managed by 1 or more members. Contrary to petitioner's assertion, this management scheme is permissible under the governing statute. (Limited Liability Company Law § 401.) The members of respondent LLC did not enter into a written operating agreement. Certain sections in the Limited Liability Company Law set forth default provisions that are applicable in the event a company does not have an operating agreement. None of the assertions made by petitioner demonstrate that respondent LLC cannot be operated in conformity with those provisions. Pursuant to Limited Liability Company Law § 411, the managers have authority to fix the compensation of managers for services in any capacity, and under section 402(c)(2) a majority of the members may approve incurring indebtedness other than in the ordinary course of business. While there is no specific statutory basis to compel additional capital contributions from members, neither is there a statutory prohibition against the practice, and the payment of an additional capital contribution properly voted for by the members has been approved judicially. (See, e.g., Van Der Lande v Stout, 13 AD3d 261 [2004].)

Moreover, even assuming that petitioner had articulated facts in the petition that would support a judicial dissolution, her failure to submit evidence in admissible form would defeat her application. Although both petitioner's order to show cause and the introductory paragraph of the petition herein make reference to the verified petition of Mary Koutelos, the petition is not verified by petitioner Mary Koutelos but by her attorney. In addition, the petition is not accompanied by a supporting affidavit from Mary Koutelos or anyone with personal knowledge of the facts alleged. (CPLR 403[a].) Nor does the documentary evidence annexed to the petition substantiate the allegations of wrongdoing in the petition. In fact, the letters submitted with the petition defeat petitioner's claim regarding the other members' refusal to adjourn a meeting, demonstrating that the request for an adjournment was

not made until the date of the meeting. Thus, petitioner has not provided an evidentiary basis to make a prima facie showing of entitlement to the relief she seeks in this special proceeding or to show the existence of a triable issue of fact warranting a trial with regard thereto. (CPLR 409[b]; 410; see, Matter of Horning v Horning Constr., LLC, 12 Misc 3d 402, 411-412 [2006]; see generally, Matter of Trustco Bank, N.A. v Strong, 261 AD2d 25, 27-28 [1999]; Friends World College v Nicklin, 249 AD2d 393 [1998].) Thus, the petition must be dismissed.

The parties have fully addressed the counterclaim interposed by respondent in its answer for an equitable buyout as an alternative to dissolution. As such, the parties have charted their own procedural course (see generally, Myers v BMR Bldg. Inspections, Inc., 29 AD3d 546 [2006]; Backer v Bouza Falco Co., 28 AD3d 503 [2006]), and the court will rule on the legal issue raised by this counterclaim. The counterclaim alleges that respondent has an equitable right to buy out petitioner's interest in the company in lieu of dissolution but asserts that respondent seeks to exercise this right only if it is granted an unmarketability discount of 30%.

Respondent's counterclaim for an equitable buyout is likewise dismissed. To the extent the counterclaim was asserted only as an alternative to dissolution, it has been rendered moot by dismissal of the petition. Furthermore, contrary to respondent's contention, a right to an equitable buyout was not recognized by the Appellate Division, First Department in Lyons v Salamone, (32 AD3d 757 [2006]). Rather, in a proceeding in which an application for dissolution was granted and a receiver was appointed to value the business and sell it in aid of dissolution, the First Department held that the absence of a provision in the Limited Liability Company Law expressly authorizing a buyout in a dissolution proceeding did not render the court "without authority to grant the parties mutual buyout rights" and found that "it is an equitable method of liquidation to allow either party to bid the fair market value of the other party's interest in the business, with the receiver directed to accept the highest legitimate bid." (Lyons, 32 AD3d at 758.) The Appellate Division merely approved a liquidation method fashioned by the IAS court in connection with the dissolution and sale of a business. Respondent has not identified any other common-law basis for the buyout counterclaim.

Moreover, even if respondent did have a right to buy out petitioner's interest, it would not be entitled to condition such buyout on a perceived right to a 30% unmarketability discount in the valuation of the interest. Fair market value is a question of fact, depending on the circumstances of each case, and there is no

single formula for mechanical application in ascertaining the value. (Matter of Seagroatt Floral Co., Inc. [Riccardi], 78 NY2d 439, 445 [1991].) Similarly, there is no single method to use to take into account the lack of a public market for an interest in a company. (Matter of Seagroatt Floral Co., 78 NY2d at 446.) A judicial determination of fair value, including the amount of any discount for unmarketability, is dependent upon the application of legal principles to the expert evidence adduced. (See, e.g., Matter of Friedman v Beway Realty Corp., 87 NY2d 161 [1995].)

Accordingly, the petition is dismissed without prejudice to any claims petitioner may have against the majority members of respondent. (CPLR 5013.) Respondent's third counterclaim is dismissed. The remaining counterclaims are severed and as to these counterclaims this proceeding shall continue as an action. (CPLR 407.) Respondent shall serve a complaint asserting the counterclaims as causes of action within 20 days of service of a copy of this order with notice of entry.

Dated: August 4, 2008

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J.S.C.