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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :

HON. DANIEL PALMIERI
Justice Supreme Court

----------X TRIAL TERM PART 22

COREY GELMAN, individually and as Managing Member of behalf of CHARLES COURT BELLMORE, LLC.,

INDEX NO.012664/10

Plaintiff,

Motion Seq. 011
Motion Date: 11-28-12
Submit Date: 3-18-13

-against-

GARY GELMAN,

Defendant.

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The following papers have been considered:

Notice of Motion, dated 11-16-12.....1
Affidavit of Paul Wieseneck, dated 11-12-12.....2
Affidavit of Gary Gelman, dated 11-14-12.....3
Affidavit in Opposition, dated 1-18-13.....4
Reply Affidavit, dated 1-31-13.....5
Reply Affirmation, dated 2-1-13.....6

The motion by the defendant pursuant to CPLR 6401 and Business Corporation Law §§ 1202 and 1203 for an order distributing the liquid assets of Charles Court Bellmore LLC, and appointing a receiver therefor, is granted to the extent set forth in this order.

All requests for relief not specifically addressed are denied.

This is a dispute between the two members of Charles Court Bellmore, a Delaware Limited Liability Company. The members are brother and sister. It is not disputed that plaintiff Corey Gelman (Corey) owns a 50.5% interest, and defendant Gary Gelman (Gary) owns a 49.5% interest. Corey is the managing member. It is further not disputed

that the sole asset of the LLC, a piece of commercial real estate, was sold for approximately $4.4 million, and that with the exception of a partial distribution of some $625,000 to the members, control of the funds remains in the hands of Corey.

The parties also own another LLC, Newbridge Road, LLC, in which Gary holds the controlling interest, and which is the subject of two other related litigations. [1] This Court had directed during a conference held on the record on March 18, 2013 that counsel stipulate to have these three matters joined for trial and discovery, to have all pleadings submitted, and to consolidate all discovery in these proceedings to avoid needless duplication and confusion. To the date of this present Decision and Order, there has been no contact with the Court to assure it that there has been compliance with these directions. On the present motion the Court initially must resolve a threshold issue, not directly briefed by counsel nor mentioned at the conference held on the record on March 18, concerning which State's law controls this dispute. Gary cites both Delaware law and New York law regarding the appointment of a receiver, and Corey cites New York law only. The entity was originally formed in New York, in which the parties were members with minority holdings, the majority belonging to the estate of Jack Farber. It later merged into the Delaware company (*see* Business Corporation Law § 907), and as indicated above now has only the present parties as members.

The only Operating Agreement submitted by the parties is from the New York company, dated April, 1997. It contains a choice of law provision which obligates the members to apply New York law, "all rights and remedies being governed by said laws." The New York company was never dissolved but as noted merged into the new company, and in the absence of a contrary

[1] A receiver was previously appointed by Justice Winslow to sell the Newbridge Road property. Corey contends that she is managing Newbridge Road, as Gary "previously relinquished control of Newbridge Road to me after he was caught stealing."

operating agreement stating that Delaware law shall control, the Court finds that pursuant to the one Operating Agreement submitted New York law should be applied. This is especially true given the claims of tortious conduct made by both parties. *See L.K. Station Group, LLC v Quantek Media, LLC,* 62 AD3d 487, 493 (1st Dept. 2009).

Choice of law is of some significance as Gary argues for what he implies is a more relaxed standard for appointment of a receiver under Delaware law. *See In re Krafft-Murphy Co., Inc.,* Del Ch 2013 WL 1092598. ["a receiver may be appointed *at any time* for the distribution of undistributed assets" (emphasis in original)]. However, the conflict is essentially minimal, if it exists at all, as indicated by one of the cases he cites, *Jagodzinski v Silicon Valley Innovation Company,* Del Ch 2012 WL 593613. The court noted that Delaware law is silent with respect to appointment of a receiver for an LLC, but then made what appears to be a general statement of the law regarding receivers in that State. The court did state, as Gary quotes, that it had "inherent equitable power to appoint a receiver" and that it should do so when "a real beneficial purpose will be served. " Nevertheless, it also stated that such an appointment is an "extraordinary remedy" that should be granted "cautiously and only as necessitated by the exigencies of the case before it."

This is consistent with New York law. A court may appoint a receiver for an LLC in connection with winding up the company's affairs (Limited Liability Company Law § 703), but in the context of a dispute such as the one at bar CPLR 6401 applies, as there has been no application for dissolution of Charles Court pursuant to Limited Liability Company Law § 702. *See Doyle v Icon, LLC,* 103 AD3d 440 (1st Dept. 2013). In order to satisfy CPLR 6401(a), the moving party must make a clear evidentiary showing of the need to conserve the property at issue, and the need to protect the moving party's interests. *Lee v 183 Richmond Ave. Realty,* 303 AD2d 379 (2d Dept. 2003); *see also Secured Capital Corp. of N.Y. v Dansker,* 263 AD2d 503 (2d Dept. 1999) .

Turning to the merits of the present motion, Gary makes certain accusations regarding the alleged wrongful behavior of Corey that might justify the appointment of a receiver. He accuses her of filing false tax returns, specifically, one that showed on schedule K-1for the tax year 2011 a distribution to him of approximately $2.25 million, when he actually received, by agreement, a distribution of approximately $309,000. He claims that this, and withholding the distribution of the balance, was and is being done to hurt him, as she is aware of his need for the funds, and was involved in litigation with his ex-wife in Florida regarding financial support.

In support of this contention, he states that Corey has been in touch with his ex-wife and had threatened to provide her with the inaccurate return. He also contends that the return made it impossible for him to demonstrate his actual income for purposes of a support order in that State. He further states that Corey had fired Charles Court's accountant and replaced him with, to this point, an undisclosed new accountant. Gary's own tax preparer, a CPA practicing in Florida, has submitted an affidavit in which he claims that he needs the name of the person who prepared the 2011 return to be assured that the proper returns ultimately were filed. Gary's attorney also refers to allegations made by his client in a previously submitted affidavit that the assets of Charles Court and Newbridge Road have been commingled.

Corey admits that the K-1 Gary describes was wrong and yet was filed, but claims it was an accounting error that was corrected and an amended return filed without the complained-of K-1. She argues that the error was harmless in any event, in that the capital gain on the sale is taxable in the year in which it is realized, whether or not there is a distribution. She also accuses Gary of wrongdoing, including the sending of notices to tenants of both the Newbridge Road and Charles Court properties that the managing agent of the properties had been terminated, causing confusion in the tenants as to the proper party to whom rents should be paid. She claims he had

tenants of Charles Court pay rent to Newbridge Road, in which he has the majority interest, and that Gary has converted "hundreds of thousands of dollars" in rents due Charles Court.

While vehemently denying all of Gary's allegations of wrongdoing, Corey acknowledges that she has decided not to make a distribution until the lawsuit is settled or tried to a conclusion, and the accounts "correctly adjusted." In view of the foregoing, she argues that Gary has not made a sufficient showing to justify the appointment of a receiver, nor for a distribution at the present time.

The Court finds Corey's position on the distribution, and thus appointment of a receiver, to be untenable. She refuses to make any distribution until the litigation is resolved by trial or settlement, yet as a litigant she has a certain control over how long that process will take – certainly, she has control over whether she will settle. Her present opposition to any distribution beforehand is contrary to the Limited Liability Company Law and the Operating Agreement because Gary is not seeking dissolution, liquidation of assets and a final winding up of the company's affairs. As such, his application is in effect a motion for an interim distribution, and will be so treated, notwithstanding the fact that he clearly wants this Court to direct distribution of his full 49.5% of Charles Court's assets. That relief cannot be granted in view of the fact that the underlying litigation cannot be fully resolved on this motion, as neither party has sought such ultimate relief and indeed Gary has asked for and has received permission to amend his answer to add additional counterclaims. However, the Court can take up the issue of how much can be released to the parties prior to a final judgment or settlement.

In that regard, the statute provides that a member is entitled to an interim distribution "upon the happening of events specified in the operating agreement." Limited Liability Company Law § 507. The Operating Agreement does not specify when an interim distribution

is to be made, stating only that "Distributions shall be made to the Members at the times and in the aggregate amounts determined by the Members." It should be noted that neither this provision, nor any other provision in the Operating Agreement, precludes a distribution after sale before a final winding up of the company's affairs.

Although the foregoing provision on interim distributions refers to a determination by all the members, Corey is the managing member and holds the majority interest, and can effectively decide, on her own, when the time for an interim distribution has arrived and how much should be distributed. She here steadfastly refuses any such distribution, even though 1) she has never argued that Gary ultimately will be owed nothing, 2) has provided no concrete evidence of debts he owes the company (other than sweeping accusations that he misappropriated hundreds of thousands of dollars), and 3) has stated in her opposing affidavit at paragraph 47 that the company's final taxes and other debts have been paid, which if true serves to eliminate the possibility of violating Limited Liability Company Law § 508 (Limitations on distributions). Under these circumstances, the Court is presented with a majority member who will not make any interim distribution based solely on her belief that the pending cases should be resolved first (albeit they have been been pending since 2010 and show no signs of resolution) , an Operating Agreement that contemplates interim distributions and available distributable funds.

Under these circumstances, an interim distribution will be directed. That task, however, should not be left to plaintiff Corey as the majority member. Her management and decision making on behalf of the company have been called into question by her issuance of the erroneous K-1 and her adamant refusal to make any further distribution. Even if unintentional (which she claims), and ultimately harmless (which she further claims), she permitted a return to be filed with the Internal Revenue Service stating that a $2.25 million distribution had been made when it

had not. At minimum, this is a level of inattention that, as it indicated at the March 18 conference, gives the Court pause. Moreover, and perhaps more important, the present multi-faceted litigation between these parties, Corey's refusal to release any further funds voluntarily, and her statement that Gary has misappropriated hundreds of thousands of dollars belonging to the company, combined with an obvious animus toward her brother, renders her continued control of the assets a danger to the minority holder's interest in the funds, and places her in an untenable position to oversee such a distribution.

Accordingly, the funds and distribution will be placed in the hands of a receiver, who is appointed by separate order issued simultaneously herewith. The receiver's task will be to ascertain the location and amount of the assets, to take control thereof, to determine how the fund came to be generated, what financial liability to third parties exists, if any, the debts owed to the company, if any, by third parties or the members themselves, to collect and to pay sums due and owing, and to recommend to the Court a proposed interim distribution in accord with his findings, the Operating Agreement, this Decision and Order, and the Limited Liability Company Law. His appointment shall continue until further order of the Court.

A stay of any further transactions by the parties concerning any of Charles Court LLC's assets is hereby issued to abide the event, commencing with the date of this Decision and Order.

Order appointing receiver issued simultaneously herewith.

This shall constitute the Decision and Order of this Court.

DATED: April 3, 2013

ENTER

HON. DANIEL PALMIERI
Supreme Court Justice

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