

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY  
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA PART 17

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In the Matter of the Application of Number 4577/ 2013  
JOSEPH NUNZIATA, a Member of Dinunzlu  
Group, LLC,

Petitioner, Motion  
Date May 1, 2013

For the Dissolution of DINUNZLU GROUP,  
LLC, a New York Limited Liability Motion Seq. No. 1  
Company, pursuant to Section 702 of the  
Limited Liability Company Law,

-against-

JOHN DIMARIO and GEORGE H. LUHRING,

Respondents.

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The following papers numbered 1 to 14 read on this proceeding by petitioner Joseph Nunziata for the judicial dissolution of Dinunzlu Group LLC (Dinunzlu), pursuant to Limited Liability Company Law § 702 and directing payment of its liabilities and the distribution of its assets; appointing a temporary receiver pursuant to Liability Company Law § 703; declaring the rights and responsibilities of petitioner and respondents upon dissolution and compelling respondents John DiMario and George H. Luhring to take such action and execute such documents as are necessary as to effectuate payment of the company's liabilities and distribution of its assets; compelling respondents to account to the company for funds they expended for their sole and personal benefit; compelling respondents to account to the company for all sums received and expended since they excluded petitioner from the business of the company; granting petitioner immediate access to the premises where the company's business is conducted and have involvement in the running and operation of the business; awarding petitioner costs and attorney's fees; and granting a preliminary injunction pursuant to CPLR 6301, (a) enjoining and restraining respondents from hypothecating, secreting, wasting, transferring, withdrawing or otherwise using or depleting funds held in the name of or in any

and all bank accounts in the name of Dinunzlu, except as reasonably necessary in order for Dinunzlu to conduct its ordinary and normal course of business; (b) enjoining and restraining respondents from utilizing any and all credit cards, charge cards and/or lines of credit held in the name of Dinunzlu, except as reasonably necessary for Dinunzlu to conduct its ordinary and normal course of business; © enjoining and restraining respondents from raising their salaries if any, and (d) enjoining and restraining respondents from utilizing any assets of Dinunzlu or Village Chapels Inc., whether in cash, credit card, charge card, line of credit or otherwise, to pay their legal fees in connection with this proceeding. Respondents cross move for an order dismissing the petition on the grounds that it fails to state a cause of action, pursuant to CPLR 3211(a)(7), or alternatively granting summary judgment pursuant to CPLR 3212, and vacating the temporary restraining order.

	<u>Papers Numbered</u>
Order to Show Cause-Verified Petition-Exhibits...	1-3
Notice of Cross Motion-Affidavits-Exhibits.....	4-9
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Upon the foregoing papers the motion and cross motion are determined as follows:

Petitioner Joseph Nunziata and respondents John DiMario and George Lurhing are the members of Dinunzlu, which, pursuant to the terms of its Operating Agreement, was formed in order to "acquire, improve, own, develop, manage, finance, lease and otherwise operate" the real property known as 67-67 Eliot Avenue, Maspeth, New York, as well as any other real property it may acquire.

Joseph Nunziata, John DiMario and George Lurhing are also the shareholders of Village Chapels, Inc., which operates a funeral home at the improved real property owned by Dinunzlu. Mr. Nunziata has commenced a proceeding in this court for judicial dissolution of Village Chapels Inc., pursuant to BCL § 1104-a (Index No. 4205/2013).

In the within proceeding for judicial dissolution of Dinunzlu, Mr. Nunziata alleges that Village Chapels, Inc. has failed to pay rent to Dinunzlu pursuant to a lease agreement; that he has not received any notices of meetings of the members of Dinunzlu or been permitted to vote on any matters; and that he has been excluded from all aspects and control of the business, to his

financial detriment. He further alleges that DiMario and Lurhing have engaged in oppressive conduct towards him in their operation of Village Chapels, and accuses them of corporate waste and mismanagement with respect to Village Chapels, and intertwines these claims with his application for judicial dissolution of Dinunzlu. Petitioner alleges that it is not reasonably practicable for Dinunzlu to carry on its business in conformity with the Operating Agreement, especially if the court directs the dissolution of Village Chapels, Inc.

Respondents cross move to dismiss the petition on the grounds that it fails to state a cause of action. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (see *Simkin v Blank*, 19 NY3d 46 [2012]; *Khan v MMCA Lease, Ltd.*, 100 AD3d 833 [2d Dept 2012]; *U.S. Fire Ins. Co. v Raia*, 94 AD3d 749 [2d Dept 2012]). Where evidentiary materials are submitted and considered by the court, the issue becomes whether the plaintiff has a cause of action, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rosin v Weinberg*, 107 AD3d 682 [2d Dept 2013]; *Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860 [2d Dept 2013]). Where, however, the plaintiff cannot establish a cause of action, a motion to dismiss should be granted (see *Parekh v Cain*, 96 AD3d 812 [2d Dept 2012]; *Morales v Copy Right, Inc.*, 28 AD3d 440, 441[2d Dept 2006]).

In determining an application for a judicial dissolution of a limited liability company, the court must first look to such company's operating agreement to determine "whether it is or is not reasonably practicable for the limited liability company to continue to carry on its business in conformity with the operating agreement" (*Matter of 1545 Ocean Avenue, LLC v Crown Royal Ventures, LLC*, 72 AD3d 121 [2d Dept 2010]; *Man Choi Chiu v Chiu*, 71 AD3d 646 [2d Dept 2010]).

Dinunzlu's operating agreement provides that John DiMario and George Lurhing are the managing members of the company. Article 13.1 of the Operating Agreement provides that "[t]he Company shall be dissolved without further action by the Members and its affairs wound up upon the first to occur of any of the following events

(each of which shall constitute a Dissolution Event): (a) The expiration of the term of the Company Agreement, unless the Company is continued with the consent of all of the Members; (b) The written consent of the Members holding at least two-thirds of the Membership Interests; and (c) At any time when there is but one Member."

Petitioner's allegations that he has been systematically excluded from the operation and affairs of the company by respondents are insufficient to establish that it is no longer "reasonably practicable" for the company to carry on its business, as required for judicial dissolution under Limited Liability Company Law § 702. The allegations do not show that "the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (see *Doyle v Icon, LLC*, 103 AD3d 440, 440-441 [1st Dept 2013]; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121,131 [2d Dept 2010]; *Schindler v Niche Media Holdings*, 1 Misc 3d 713, 716 [Sup Ct, New York County 2003]; see also *Matter of Eight of Swords, LLC*, 96 AD3d 839, 840 [2d Dept 2012]).

In view of the foregoing, respondents' cross motion to dismiss the petition in its entirety, is granted.

Dated: July 25, 2013

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J.S.C.