SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK **ORIGINAL**

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of the Application of:
NILS YOUNGWALL, a Member of
Youngwall Realty, LLC,

Petitioner,

-against-

YOUNGWALL REALTY, LLC and
PERRY YOUNGWALL, a Member of
Youngwall Realty, LLC,

Respondents,

For the Dissolution of YOUNGWALL
REALTY, LLC, pursuant to LLCL §§ 701(a)(5)
and 702, and for related relief.

INDEX No. 22266/07

MOTION DATE: June 24, 2008
Motion Sequence # 002

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Affirmation in Support..... X
Reply Affidavit..... X
Memorandum of Law..... X
Reply Memorandum of Law..... X

This motion, by respondent Perry Youngwall, for an order: (1) pursuant to CPLR 5015(a)(3), vacating this Court's Short Form Order, dated March 14, 2008 (the "Order"), on

the grounds of fraud or misrepresentation committed by petitioner; (2) pursuant to CPLR 2221(e), for leave to renew the Order based upon facts not offered previously, namely a signed management agreement between the parties; (3) pursuant to CPLR 2221(d), for leave to re-argue the Order, based upon matters of law or fact misapprehended or overlooked by the Court, specifically, a provision in the operating agreement between the parties which bars the members of Youngwall Realty, LLC from seeking judicial dissolution; and (4) for such other and further relief as the Court deems just and proper, is determined as hereinafter set forth.

The facts of the instant matter have previously been set forth in this Court's order of March 14, 2008, and will not be repeated herein.

Procedurally, as a result of that order, in which George Esernio, Esq. was appointed as temporary receiver, the receiver has requested, and received, monies from the parties as a reserve from which to pay the ongoing expenses of the subject property and building. He has also marketed the property, through a broker, to sell it.

The respondent Perry Youngwall asserts that the petitioner defrauded the Court by his assertion that he did ". . .not recall this document [a 2nd agreement]" (Perry Youngwall affidavit ¶ 2); that this fraud precipitated this Court to incorrectly rule that the LLC was not ". . .fully prepared to deal with the re-letting of the commercial building which is its sole asset. . ." (Perry Youngwall affidavit ¶ 6); and that vacatur is warranted. He notes that the petitioner, in letters from his attorney, has acknowledged the existence and relevance of that 2nd agreement, which is further proof that the petitioner knew of that agreement and deceived the Court. He also asserts that, alternatively, his discovery of a fully-executed copy of that 2nd agreement warrants renewal because that agreement shows that the LLC can fulfill the business purpose of the LLC, i.e., to lease the subject premises. The respondent contends that reargument is also appropriate because the Operating Agreement expressly provides that any member who seeks judicial dissolution of the LLC is deemed to have forfeited all his rights in the LLC. The respondent elaborates his assertion that the 2nd agreement is relevant because it demonstrates that the LLC has procedures in place to go forward with re-letting the subject premises. With respect to renewal, the respondent contends that with the new exhibit of the 2nd agreement, such constitutes grounds for renewal, based upon his assertion that less than two weeks had passed, without a tenant (Transaero) paying rent, until the petition was made. He argues that he did not submit the letters which referred to the 2nd agreement because the petitioner's failure to recall that document was not enunciated until

the reply. In support of the renewal of that motion, he submits assertions that retaining the property for rental will probably provide the members of the LLC with a substantial annual profit.

In opposition, the petitioner's attorney asserts that the instant motion seeks only to augment the respondent's record on appeal filed by the respondent, but not yet perfected. Counsel points out that the underlying motion, submitted on February 1, 2008, was decided on facts set forth in affidavits and documents submitted in mid-January, and the underlying decision properly considered the facts as they existed at that time, concluding that the vacant building would be nothing more than a drain on the members' resources for maintenance and taxes. He further asserts that, although the manager and the respondent (who was and is the president of Transaero) knew, for more than four months, of the pending vacancy, took no steps to market or rent the property, and there was no proof that anyone did so. He contends that the respondent's belated attempts to evaluate and propose to rent the property is irrelevant and improper on this application. With respect to the 2nd agreement, counsel notes that on the original submission, that neither party had possession of a fully executed final copy of it and the petitioner could not recall whether he had or had not signed it. He also notes that such agreement expired by its own terms on September 30, 2007 and renewed automatically on a month-to-month basis terminable on 45 days written notice, and the effect on the future operation of the LLC is irrelevant. As to the use of some language of the agreement in the correspondence with Megale, the petitioner's attorney avers that he used one part of the agreement that he deemed sufficient, because six years after the agreement, neither the petitioner nor his attorney had a fully-executed copy. Counsel further avers that the issue of the use of the 2nd agreement is immaterial because the Court found that the present circumstances and proof did not substantiate that it was reasonably practicable to properly carry on the business of the LLC. Counsel disputes the applicability of the case law cited by the respondent's attorney, and, he contends, no fraud, deception or misrepresentation was intended or practiced herein by the petitioner. Counsel argues that renewal is improper herein because the respondent did not practice due diligence in presenting all the facts to the Court upon the initial motion, and did not seek to assert a sur-reply, and those new additional facts include the respondent's real estate broker's affidavit with the rental market data that could have been available upon the original submission. With respect to the reargument, the respondent improperly presents arguments that were not previously asserted, i.e., the impact of the operating agreement upon this petition for dissolution and the purported forfeiture. On the merits, counsel also contends that such provision is void as a violation of public policy, and notes that, with respect to dissolution, the document is internally inconsistent, and the motion to reargue is late.

In reply, the respondent asserts that he has a chronological explanation of the lack of a rental or lessee, and avers that such rationale was based upon the parties' negotiation of a possible global resolution of all litigation between them.

DECISION

The respondent herein seeks several forms of relief from this Court's order of March 14, 2008, seriatim: vacatur due to the petitioner's alleged fraud or misrepresentation; leave to renew on the basis of the signed management agreement that was not previously disclosed to the Court; and leave to re-argue the overlooked fact that the operating agreement bars judicial dissolution.

Initially, with respect to the request for vacatur of the March 14, 2008 Short Form Order, it is a thinly-veiled request for renewal. The respondent's argument, that the petitioner deceived the court into believing that the management agreement did not exist, is flawed, i.e., that the management agreement forms no basis for a reversal of this Court's finding that "[n]or is there any admissible documentary proof that either the manager or the members are actively pursuing a future/current replacement for Transaero, notwithstanding the self-serving statements of the respondent and manager". While this court disregarded the submission of the management agreement, the actual content of that agreement and evidentiary submission did not take the form of any contract with a real estate agent or broker to rent or lease the subject property. Taking note that the respondent had given notice prior to September 2007 that Transaero would not be renewing its lease, the respondent and the manager had not demonstrated any desire to rent or lease the subject premises for a period in excess of three months. That is the lack of demonstrable proof that formed the basis of this Court's ruling that the historical profit stream of the LLC was and had been effectively severed. Accordingly, the elements of "vacatur" have not been met (**New York & Presbyterian Hospital A/A/O Huang v American Home Assurance Co.**, 28 AD3d 442, 813 NYS2d 186, 2nd Dept., 2006).

Similarly, the respondent has not demonstrated his entitlement to renewal. The respondent, only now, after this Court's order granting the petitioner's application, has produced an affidavit from a real estate broker and an exhibit purporting to show that the subject premises has a substantial value as a rental property. The respondent herein has not shown that these are new or additional facts which, if known at the time of the original application, would have been brought to the Court's attention.

> ""[l]eave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application" (**Matter of Shapiro v New York**, **supra**, at 754)".

(**Hatchard v Grand Union**, 270 AD2d 447, 705 NYS2d 605, 2nd Dept., 2000). The respondent has not proffered a reasonable excuse why "additional facts" were not originally submitted, only that he "did not make an effort to locate and obtain all of the signed counterparts. . .". Moreover, on the merits, as previously stated, the management agreement does not prove that the LLC was an ongoing viable entity, only that the LLC was "prepared to deal with the re-letting of the- [subject premises]. . .", not that it had done so. In fact, as provided in Section II, "The principal objective of the Managing Agent will be to operate the Property in such a manner as will maximize the financial return to the Company, with an emphasis on current income". (emphasis supplied). That mandate was not fulfilled. Nor is there any evidence that the manager had complied with Section IV of the management agreement, i.e., "Managing Agent shall advertise vacancies by all reasonable and proper means; provided, Managing Agent shall not incur expenses for advertising in excess of $500.00 during any calendar quarter without the prior written consent of the Company".

With respect to the respondent's final assertion, that reargument is warranted because this Court overlooked Article III, Paragraph 11, which states, in pertinent part,

> "Neither member may seek judicial dissolution of this Company, and any withdrawal shall not be deemed an act causing dissolution of the Company. Any member who seeks judicial dissolution of the Company will be deemed to have withdrawn as a member of the Company, thereby forfeiting all rights, interests

and entitlements to the Company
and its assets".

This argument, as well, is flawed. The courts of this state have held that to absolutely prohibit judicial dissolution is void and unenforceable as against public policy (**Matter of Dissolution of Validation Review Associates [Berkun]**, 223 AD2d 134, 646 NYS2d 149, 2nd Dept., 1996). Additionally, on a motion to reargue, a movant is not permitted "an opportunity to argue a new theory of law not previously advanced by it" (**Frisenda v X Large Enterprises, Inc.**, 280 AD2d 514, 720 NYS2d 187, 2nd Dept., 2001).

Therefore, the respondent's motion is **denied** in its entirety.

Dated JUL 28 2008

Stephen A. Bucaria
J.S.C.

ENTERED

JUL 30 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

07-- 022266
NASSAU INDEX # 20
FILED
JUL 30 2007
COUNTY CLERK OF
NASSAU COUNTY