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| <b>JPS Partners v Binn</b>   |
| 2014 NY Slip Op 31204(U)   |
| May 6, 2014  |
| Supreme Court, NY County   |
| Docket Number: 6504301/12  |
| Judge: Melvin L. Schweitzer  |
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Transfer of substantially all of the assets of the Company.” On February 23, 2012, as part of the overall transaction underlying this dispute, Binn’s assets were contributed to XpresSpa Holdings, LLC (Holdings), a newly formed company. (See Affidavit of Moreton Binn, ¶10.) Binn received a 55% interest in Holdings. Moreton Binn holds 3%, and Mistral Equity Partners holds 42%. Without JPS’ consent, the Operating Agreement was amended by Moreton Binn prior to the transaction, to require that Binn remain in existence even if substantially all of its assets were to be transferred. (Operating Agreement, §9.07.)

### Discussion

The legal principles restated by the Court of Appeals in *Zuckerman v City of New York*, 49 NY2d 557 (1980) require that in order to obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985), *Matter of Redemption Church of Christ v Williams*, 84 AD2d 648 (3d Dept 1981).

JPS asserts that: Pursuant to section 8.01 of the Operating Agreement, Binn “shall . . . be dissolved upon . . . (b) The Transfer of substantially all of the assets of the Company”; and that the February 23, 2012 transfer of substantially all of Binn’s assets and liabilities to another entity was just such an event of dissolution under the Operating Agreement.

The Binn defendants assert that: the transfer did not constitute a dissolution under the Operating Agreement; and the amendment to the Operating Agreement ensured the continued existence of Binn. JPS disagrees, arguing that: the amendment is invalid; it violates Section 9.07

of the Operating Agreement; it adversely affected its right to dissolution; and JPS' written consent was not obtained.

The Court finds for JPS. Substantially all of the assets of Binn were transferred to XpresSpa Holdings, LLC. Moreton Binn attests that, "under the Operating Agreement, dissolution of Binn and Partners will only occur when it divests itself of the spa business." (*Id.*, ¶7.) However, Binn does not cite to any language, and there is none in the Operating Agreement to support this assertion. Section 8.01 is clear and unambiguous.

Defendants argue that the Operating Agreement was amended prior to the transaction on February 1, 2012, and that in spite of Section 8.01, the amendment contemplated the continued existence of Binn after the February 23, 2012 transaction. Although Moreton Binn is authorized by the Operating Agreement to make amendments to it at his sole discretion, this authority is limited in certain cases, such as when a member is adversely affected by an amendment varying terms of, *inter alia*, dissolution. (Operating Agreement, §9.07.) In that case, written consent of the affected member is required.

JPS alleges that the amendment to the Operating Agreement adversely affected its rights to dissolution in the event of a transfer of substantially all of the assets of Binn, and that its written consent was not obtained in connection with adopting this amendment. Defendants counter that at the time of the amendment, consent was not required because the amendment did not adversely affect JPS, and JPS had no right to dissolution. This argument is wrong, as well as beside the point. Under Section 9.07, consent is required if the amendment would vary the terms of dissolution, which there is no question it does here; prior to the amendment a transfer of substantially all of Binn's assets would have triggered dissolution, but after the amendment Binn would not be dissolved if it retained any illiquid assets, such as membership interests in a non-

public company. The evidence shows that the amendment was crafted to cover the transaction at issue, which resulted in Binn holding a 55% membership interest in Holdings. But there is no getting around the fact that substantially all of Binn's assets were transferred to accomplish this result. The fact that the Binn defendants are relying on the amendment to shield Binn from dissolution is evidence alone of its adverse impact on JPS.

The proponent of a summary judgment motion must make a prima facie showing to entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr., supra*. JPS has presented sufficient admissible evidence to the court by submitting the amendment and incontrovertible evidence that its consent was not obtained.

JPS has shown the amendment constitutes a material adverse limitation on its right to dissolution. The amendment is invalid and JPS has a clear right to dissolution in the circumstances here. Accordingly, it is

ORDERED that plaintiff JPS Partners' Motion for Partial Summary Judgment on its First Cause of Action for Dissolution under the Operating Agreement is granted, the First Cause of Action is severed, and the remaining Causes of Action shall continue; and it is further

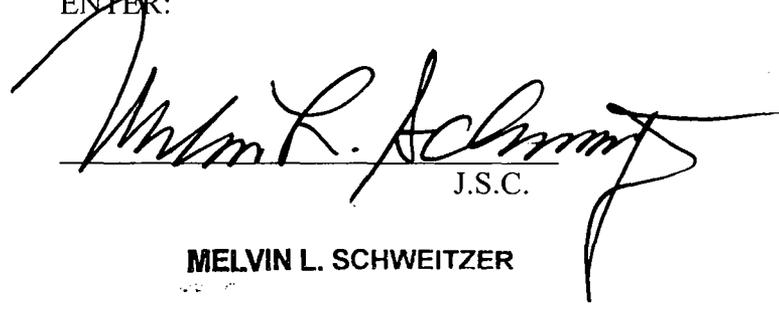
ORDERED that defendants' Motion for Partial Summary Judgment dismissing the First Cause of Action is denied; and it is further

ORDERED that pursuant to Part 36 of the Rules of the Chief Judge, the Court appoints as Receiver John H. Carley, Esq., Law Offices of John H. Carley, 88 Central Park West, New York, N.Y. 10023, (212) 874-2979, for the purpose of unwinding the business of Binn and Partners, LLC, liquidation, and recovery of assets; and it is further

ORDERED that the Receiver shall have the power to hire an attorney and an accountant, and any other professional as the need arises, to meet the obligations, and perform the duties of the Receivership.

DATED: May 6, 2014

ENTER:

  
J.S.C.  
**MELVIN L. SCHWEITZER**