SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Application of JEFFREY PIKUS, owner of 50% of all the outstanding Class A membership interest in TEN SHERIDAN ASSOCIATES, LLC,

Petitioner,

for the dissolution of TEN SHERIDAN ASSOCIATES, LLC, a New York Limited Liability Company, pursuant to Section 702 of the Limited Liability Company Law,

v.

STUART D. GOLDSTEIN, the other 50% owner of all the outstanding Class A membership interests in TEN SHERIDAN ASSOCIATES, LLC, and EDWARD M. FOX, DARIN GOLDSTEIN, SUSAN GOLDSTEIN, DARIN GOLDSTEIN TRUST, DANIELLE GOLDSTEIN TRUST, HANS P. UTSCH, MICHAEL ROSENBERG, DAVID FASTENBERG, PETER SCHWARTZ, GERI SCHWARTZ, JEFF SCHAKIN, ERIC SCHAKIN, DENIS CASLON, ROBERT MINESS, ALAN HOFFMAN, FREDERICK WEINER, MICHAEL WEINSTEIN, CHARLES ROSENBERG, MYRNA ROSENBERG, AARON JUNGREIS, ROBERT WILLIAMS, SUSAN PIKUS, STEVEN GELLES, RICK ASALS, JUAN CARLOS PARKER, LUIS ANDREOTTI, ERWIN GRONER, GERALD GERMAIN, MARTOM ASSOCIATES INC., LYNN BOOTH, ANDREA ANSON, JACQUELINE MARKS NON-EXEMPT TRUST, JACQUELINE MARKS EXEMPT TRUST, ARLENE REISMAN, and ANDREW L. FREY, the owners of all the outstanding Class B membership interests in TEN SHERIDAN ASSOCIATES, LLC,

Respondents.

Index No. 653201/14

MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR DISSOLUTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS PETITION

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PRELIMINARY STATEMENT

Respondents Arlene Reisman, Alan Hoffman, Charles Rosenberg, Denis Caslon, David Fastenberg, Eric Shakin (s/h/a "Schaikin"), Erwin Groner, Frederick Weiner, Jeffrey Shakin (s/h/a "Schaikin"), Juan Carlos Parker, Larry Weinstein, Luis Andreotti, Michael Weinstein, Peter and Geri Schwartz, Frederick Asals, Robert Miness, Steven Gelles, Lynn Booth and Susan Goldstein (collectively, the "Class B Members"), by their attorneys Reed Smith LLP[1], submit this Memorandum of Law, along with the accompanying Affidavit of Respondent Luis Andreotti ("Andreotti Aff."), in opposition to the Petition of Jeffrey A. Pikus ("Pikus") for, *inter alia*, dissolution of Ten Sheridan Associates, LLC (the "LLC"), pursuant to New York's Limited Liability Company Law ("LLCL") §§ 701 and 702, and in support of the Class B Members' Cross-Motion to Dismiss the Petition, pursuant to CPLR 404(a) and 3211(a)(1) and (a)(7), for failure to state a cause of action and based on the documentary evidence, including the LLC's Operating Agreement.

Pikus, a holder of 25% of the total interests in the LLC (and 50% of the Class A shares), has brought this action, purportedly based upon ongoing disputes he has with another Class A Member (respondent Stuart Goldstein) that are already the subject of another, related, action. *Regardless of the merits of those disputes*, no basis exists for dissolution herein, under either the Operating Agreement for the LLC or New York's LLC Law on the facts alleged and dismissal is therefore required. As detailed below, the LLC is presently operating under the day-to-day management of its management company *as it has for the last seventeen years*, and without any involvement of any kind by Pikus for the last nine (9) months, at his own admission. The LLC continues to operate

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1 There are several others who hold additional Class B. shares in Ten Sheridan Associates, LLC (Aaron Jungreis, Andrew Frey, Hans P. Utsch, Gerald Germain, Robert Williams, Susan Pikus, David Goldstein, the Darin Goldstein Trust, The Daniel Goldstein Trust, Jacqueline Marks Exempt Trust, Jacqueline Marks Non-Exempt Trust, and Andrea Anson) that are separately represented or, upon information and belief, not appearing.

profitably, with a 90% occupancy rate in the residential building that is its sole asset, and makes regular distributions to its members.

More specifically, the LLC's Operating Agreement provides for dissolution of the LCC only under limited specific circumstances, with the LLC to otherwise continue until December 31, *2079*. None of those specified circumstances, including the death of a Class A Member or the joint decision by the Class A Members to terminate the LLC, has occurred, or is even alleged to have occurred. Instead, Pikus apparently relies on New York's LLCL and the standard therein for judicially ordered dissolution where it is no longer "reasonably practicable" for a limited liability company to continue. Pikus argues that because of disputes among the Class A Members and purported "self-dealing" with respect to several apartment units occupied by Stuart Goldstein's children at allegedly below-market rates, it is no longer "reasonably practicable" for the LLC to continue.

Pikus' position is meritless. The disputes between the Class A Members are *irrelevant* to the issue of dissolution, as the business of the highly successful LLC continues unimpeded, without any involvement by Pikus and with the management of the LLC's real property in the hands of the LLC's managing agent, pursuant to the LLC's Operating Agreement. Pikus' claims of self-dealing are also irrelevant to a claim for dissolution. Rather, they are simply the basis for a purported breach of fiduciary duty claim, a claim Pikus has already asserted in a separate proceeding.

The Class B Members, who collectively own a greater share of the LLC than Pikus and one roughly equivalent to that held by Goldstein, therefore vigorously oppose dissolution of the LLC, a dissolution that would have severe negative economic and tax consequences for them, in addition to being inconsistent with the parties' agreement and New York law. Because dissolution is both inappropriate as a matter of law, even accepting Pikus's allegations regarding the ongoing disputes between Pikus and Goldstein as true and because those allegations are, in any event, refuted by the documentary evidence, including the Operating Agreement, dismissal of the Petition is required.

STATEMENT OF FACTS

Petitioner's Allegations

Petitioner Pikus seeks dissolution of the LLC, the appointment of a Receiver to wind up the LCC's affairs and injunctive relief based upon the following allegations:

- Four apartments have been rented by Class A Member Goldstein to his children ("Goldstein Units") at amounts purportedly below market rent. Petition ¶ 4.
- The Goldstein Units have purportedly been "covertly" re-registered as rent-stabilized, thereby allegedly diminishing their value. Petitioner ¶ 5.
- The use of the Goldstein Units in this matter amounts to "stockpiling" units in anticipation of a future condominium conversion at some later date. Petition ¶ 6.
- Although Pikus was paid a fee for management services for many years that fee has been recently terminated by Goldstein, who has purportedly denied Pikus unspecified access to that Property and the LLC's books and records and commenced an action against Pikus. Petition ¶ 8.

Based on these factual allegations, Pikus seeks dissolution of the LLC, arguing that: (a) management is contravening the LLC's "stated purpose" by its conduct with respect to the Goldstein Units and (b) the purported deadlock between Pikus and Goldstein "precludes the Company's viability." Petition ¶ 7.

The LLC

There is no dispute the LLC was formed in December 1996. Petition, ¶ 15; Andreotti Aff. ¶ 4. The Operating Agreement, which governs the LLC's operations and management, was entered into in March 1997. Petition, Ex. E at ¶ 2.3.

The Operating Agreement

The relevant provisions of the Operating Agreement are as follows:

Section 2.3 of the LLC's Operating Agreement[2] provides, in relevant part, with respect to the purpose of the LLC:

> The business and purpose of the Company is to acquire, own, hold, expand, renovate, lease, manage, sell, operate the real property located at 10 Sheridan Square, New York, New York (the "Premises") and such other business activities and operations that are reasonably related thereto . . . .

Petition, Ex. E.

The Operating Agreement sets the LLC's lengthy term of existence, at Section 3.1, as follows:

> The Company. . . and shall continue in full force and effect until December 31, 2079, unless earlier terminated pursuant to Section 3.2 hereof.

Id.

With respect to limitations on termination, Section 3.2 of the Operating Agreement provides:

> The Company shall continue in full force and effect for a period ending the earlier of:
>
> (a) December 31, 2019, the latest date on which the Company may dissolve;
>
> (b) The election by the Class A Members to terminate the Company; or
>
> (c) The death, insanity, bankruptcy, retirement, resignation or expulsion of any Class A Member, except as provided for herein or unless the Company is reorganized . . .
>
> (d) The occurrence of any event which under the Act, shall make it unlawful for the existence of the Company to be continued;
>
> (e) The sale of the Premises (a "Sale").

Id.

In terms of the important management decisions of the LLC, Section 5.1 of the Operating Agreement states, in relevant part that:

> (a) Except as hereinafter specified, the right to manage, control and conduct the business of the Company shall be vested exclusively in the Managers . . .

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2 A copy of the Operating Agreement is annexed as Exhibit F to the Petition.

> Managers must be Class A Members. Jeffrey S. Pikus and Stuart D. Goldstein are hereby designated to serve as the Managers. In the event of the death, incompetency, bankruptcy, resignation or retirement of one of the Managers the remaining Manager shall be the exclusive Manager of the Company. All decisions affecting the Company, its policy and management shall be made by the Managers including but not limited to the purchase, sale, finance, mortgage, lease of any real estate or personal property of the Company . . .
>
> * * *

Id. Relatedly, Section 5.2 of the Operating Agreement provides that SDG will be the Manging Agent for the Property:

> In carrying out Section 5.1, the Managers shall have the power to delegate their authority to qualified Persons. Any such delegation of authority may be rescinded at any time by the Managers. The Managers hereby designate SDG Management Corp., or a successor entity directly or indirectly controlled by Goldstein, ("Goldstein") as Managing Agent for the Premises . . . . The Managing Agent shall have the authority as is generally given to a Managing Agent including, without limitation, the right to enter into, make and perform any and all contracts, leases and other agreements related to the management of the Premises, whether or not such agreements are with persons or entities affiliated with any Member . . .
>
> The Managing Agent shall maintain the books and records of the Premises in good and accurate order and shall make all required filings with the necessary agencies and parties. The Managing Agent and shall make all reasonable and usual repairs to the Premises. Upon the death, incompetency, resignation, or bankruptcy of either Manager, the remaining Manager shall have the right to designate the Managing Agent for the Premises.

Id.

Thus, the Managing Agent is cloaked with broad management duties for the Property. In addition, Section 5.6 of the Operating Agreement states:

> (a) Notwithstanding anything to the contrary in Agreement or the Act, the Managers shall not undertake any of the following actions without the unanimous consent of all of the Members:
>
> (1) Amend this Agreement where such amendment would adversely after the Members; or
>
> (2) Deviate from any of the purposes of the Company as set forth in Section 2.3;
>
> (b) Notwithstanding anything to the contrary in Agreement or the Act, the Managers shall not undertake any of the following actions without the unanimous consent of Class A Members:
>
> * * *

(2) Liquidate or dissolve the Company, in whole or in part; or

* * *

Id.

Finally, Sections 11.4 and 11.5 of the Operating Agreement require any modification to be in writing and supersede any prior agreements of the LLC:

> All understandings and agreements heretofore made between the Members are merged in this Agreement, which alone fully and completely expresses their agreement with respect to the subject matter hereof. There are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, among the Members, other than as set forth in this Agreement and the Articles of Organization. All prior agreements among the Members (including any agreements binding the Company and the Members as members of the Company) are superseded by this Agreement, which integrates all promises, agreements, conditions, and understandings among the Members with respect to the Company and its property.
>
> No termination, revocation, waiver, modification or amendment of this Agreement shall be binding unless agreed to in writing and executed by the Members.

Id.

The Class B Members

As noted above, the Class B Members as defined above, hold approximately 1/3 of the total ownership interests in the LLC, a greater amount than Pikus and one comparable to the interest held by Goldstein. Andreotti Aff., ¶ 4. As detailed below, the Class B Members oppose dissolution and seek dismissal of the Petition. Even if one accepts Pikus' allegations as true – and the Class B Members believe them to be baseless – no basis exists for the dissolution of the LLC under the Operating Agreement and governing New York law, as it is clear that the purpose and business of the LLC continues profitably and unabated. Moreover, the Operating Agreement makes clear that no actual deadlock could exist that would warrant dissolution because the day-to-day operations for the LLC are entirely in the hands of SDG, where they have been for the past 17 years.

ARGUMENT

NEITHER THE OPERATING AGREEMENT NOR NEW YORK LAW PERMIT DISSOLUTION UNDER THE CIRCUMSTANCES FOUND HEREIN

Dismissal of the Petition is required pursuant to CPLR 404(a) and 3211(a)(7) because the allegations fail, as a matter of law, to state a claim for dissolution under the Operating Agreement and New York law. In addition, as noted above, dismissal is likewise required under CPLR 3211(a)(1), as well as CPLR 409(b), based on the documentary evidence and, in particular, the Operating Agreement which, *inter alia*, refutes any claim of deadlock in management of the LLC.

More specifically, Pikus seeks the dissolution of the LLC pursuant to Sections 701 and 702 of New York's LLCL. Section 701 provides, in relevant part, that:

> (a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following: (1) the latest date on which the limited liability company is to dissolve, if any, provided in the articles of organization, or the time specified in the operating agreement....; (2) the happening of events specified in the operating agreement; (3) subject to any requirement in the operating agreement requiring approval by any greater or lesser percentage in interest of the members or class or classes or group or groups of members, the vote or written consent of at least a majority in interest of the members or, if there is more than one class or group of members, then by at least a majority in interest of each class or group of members; (4) at any time there are no members...; or (5) the entry of a decree of judicial dissolution under section seven hundred two of this article.

Section 702 provides, in pertinent part, that:

> On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement . . . .

Thus, pursuant to Section 701, a court first looks to the Operating Agreement to determine whether dissolution is proper. See also Matter of Ocean Avenue, LLC, 72 A.D.3d 121, 129, 893 N.Y.S.2d 590 (2d Dep't 2010). Here, no basis exists for dissolution under the Operating Agreement and Pikus seemingly does not argue that the Operating Agreement provides a basis for dissolution. Instead, Pikus' argument is apparently premised on the claim

that it is no longer "reasonably practicable" for the LLC to carry on its business under LLCL 702 because of the purported "deadlock" among the Class A Members[3] and the alleged "self-dealing" with respect to the Goldstein Units.

However, dissolution motions have routinely been *denied* by courts, and petitions dismissed, under circumstances comparable (or worse) to what Pikus alleges in support of his "reasonably practicable" argument. For example, in Doyle v. Icon, LLC, 103 A.D. 3d 440, 959 N.Y.S.2d 200 (1st Dep't 2013), plaintiff, as here, sought the dissolution of a LLC and the appointment of a receiver, alleging he had been "systematically excluded" from the operations and affairs of the LLC. Defendants' motion to dismiss was denied but the Appellate Division, First Department, reversed, finding 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." 103 A.D.3d at 440, quoting Matter of 1545 Ocean Avenue, 72 A.D.3d at 131. The court in Doyle further stated that "the allegations show that the company has been able to carry on its business since the alleged expulsion of plaintiff . . ." Id. The same holds true here, where Pikus admits he has had no involvement in management for the past nine (9) months yet fails to allege any way in which the business of the LLC has been stymied or impaired.

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3 As detailed above, Pikus' counter-intuitive "deadlock" argument ignores that SDG runs the day-to-day operations of the Property pursuant to the Operating Agreement and that those operations have concededly continued for the past nine (9) months with zero involvement from Pikus. Moreover, to the extent Pikus' "deadlock" theory is predicated on his allegation of an oral modification of the Operating Agreement that gives him joint (or sole) management authority, Section 11.5 of that Operating Agreement provides it cannot be modified absent a signed writing by all the Members (and supersedes any prior agreements), and that claim therefore fails as a matter of law. See e.g. Ashwood Capital, Inc. v. OTG Management, Inc., 99 A.D.3d 1, 948 N.Y.S.2s 292 (1st Dep't 2012); Vision Development Group of Broward County, LLC, v. Chelsey Funding, LLC, 43 A.D.3d 373, 841 N.Y.S.2d 272 (1st Dep't 2007).

In 1545 Ocean Avenue, as here, a member petitioned for dissolution of a limited liability company. After the Supreme Court, Suffolk County granted the petition, the Second Department reversed. There, the LLC had two members and was formed to purchase a property, rehabilitate an existing building and to build a second building for commercial rental. 72 A.D.2d at 123. One of the members submitted a bid for the construction and the members – King and Van Houten – then disagreed as to whether the members had agreed to allow Van Houten's company, VHC, to do the work. King claimed he only agreed to pay VHC for demolition and excavation work on the condition no further work was done. VHC continued to do work. King and Van Houten then got into a dispute over remediation work and King claimed Van Houten would no longer meet with him and the construction could not be completed in a timely, or economical manner. King then attempted to withdraw from the LLC. Unsuccessful buy out attempts ensued before King sought dissolution.

The Appellate Division first concluded that "without more, disagreements between the parties with regard to the accounting of the entity are insufficient to warrant dissolution." Id. at 128. Then, after examining the LLC's operating agreement to determine whether it was "reasonably practicable" for the LLC to carry on its business and finding both that petitioner had not demonstrated that the company was "unable to function as intended or that it is failing financially" and that "[d]issolution is a drastic remedy," the court denied the petition and dismissed the action. Id. at 129-31. The court noted that the company's operating agreement did not require the business to be conducted by majority vote and that therefore no deadlock existed. Id. at 130. The court further noted that if petitioner was "truly aggrieved" by the other members' actions, a derivative action was available, although dissolution was not. Id. at 132. The circumstances alleged herein by Pikus are indistinguishable from those in 1545 Ocean Avenue

and dismissal is therefore required. See also Matter of Eight of Swords, LLC, 96 A.D.3d 839, 946 N.Y.S.2d 248 (2d Dep't 2012) (affirming denial of petition to dissolve LLC where "purpose of the LLC was being achieved and . . . the LLC remained financially feasible."). Artigas v. Renewal Arts Realty Corp., 22 A.D.3d 327, 803 N.Y.S.2d 12 (1st Dep't 2005) (affirming dismissal of petition where petitioner "did not plead the requisite grounds for dissolution of a limited liability company"); Matter of Horning v. Horning Constr., LLC, 12 Misc.3d 402, 405, 412, 816 N.Y.S.2d 877 (Sup.Ct. Monroe Co. 2006) (dismissing Petition despite allegations of breach of fiduciary duty and that Petitioner was "frozen at" out of LLC he started, where LLC "continues to thrive").

Pikus' limited authority offers no support for dissolution under the circumstances herein. In Matter of Natanel v. Cohen, 43 Misc.3d 1217(A), 2014 WL 1671557, 988 N.Y.S.2d 524 (Sup. Ct. Kings Co. 2014), dissolution was ordered where the court determined, in the absence of any operating agreement, that the purpose of the limited liability company was to be a holding company for the real property which housed another entity *which had since dissolved* and therefore the company's "purpose no longer exists and dissolution is mandated." Id., 2014 WL 1671557 at *5. No comparable allegations are made, or can be made, here and the court in Natanel observed that the members' "pointed hostility" towards one another did not justify dissolution. Id. at *2. In both Scibelli v. Beacon Building Group, LLC, 991 N.Y.S.2d 726 (Sup. Ct. Queens Co. 2014)[4] and Matter of Salata LLC, 2010 WL 1954125 (Sup. Ct. N.Y. Co., March 26, 2010)[5], cited by Pikus, dissolution was ordered where the limited liability companies were no longer economically viable, a fact not even alleged herein. In Scibelli, the company was no

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4 This case was actually withdrawn by the Court. Id.

5 The case name is actually Matter of Selcuk v. Yuran.

longer doing business. In Salata, the company's heavy debt made it impossible to continue in operation. Pikus has not identified any case in which dissolution has been ordered on allegations even remotely resembling those made here. There is no dispute here that the LLC is both operating and very profitable.

Furthermore, as noted above, Pikus' allegations of "self-dealing" and breach of fiduciary duty[6] are entirely irrelevant to the issue of whether dissolution is required. An allegation that the majority members breached their fiduciary duty to defendants and engaged in unlawful and oppressive conduct does not plead the requisite grounds for dissolution of a limited liability company. Widewaters Herkinar Company, LLC v. Aiello, 28 A.D.3d 1107, 817 N.Y.S.2d 790 (4th Dep't 2006). Whether the LLC is obtaining market rates (which it is), or sub-market rates, for less than a handful of apartments at the Property is not a question that speaks to whether the LLC can function as intended and there is, again, no allegation the LLC is failing financially.

As Pikus' dissolution claim fails, his requests for injunctive relief and the appointment of a receiver – each predicated on an entitlement to dissolution – also fail.

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6 Pikus' allegations regarding the Goldstein Units are addressed at greater length in the Andreotti Affidavit but it must be noted that the registration of those units (and all units in the Property) as "rent-stabilized" is not improper but, in fact, required by law for a building which, as here, receives J-51 tax abatements, following the Court of Appeals' ruling in Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388 (2009).

CONCLUSION

For the foregoing reasons, Pikus' Petition for Dissolution of the LLC and the appointment of a Receiver in connection therewith should be denied in its entirety and the action dismissed, along with such other and further relief as the court deems just, proper and equitable.

Dated: New York, New York
November 18, 2014

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