

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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In the Matter Of The Petition Of

**NOEL WEINTRAUB, owner of 50% of the
membership interests of Road Runners L.L.C. and
Road Runners TOLA, L.L.C.,**

**For the dissolution of Road Runners
L.L.C. and Road Runners TOLA, L.L.C.,**

TRIAL/IAS PART: 14

NASSAU COUNTY

**Index No. 602499-15
Motion Seq. No. 1
Submission Date: 10/28/15**

Petitioner,

-against-

**RICHARD GILBERT, owner of 50% of the membership
interests of Road Runners L.L.C. and Road
Runners TOLA, L.L.C.,**

Respondent.

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Papers Read on this motion:

- Order to Show Cause, Affirmation in Support,**
- Verified Petition and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Verified Answer.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the court on the motion filed by Petitioner Noel Weintraub ("Petitioner" or "Weintraub") on April 28, 2015 and submitted on October 28, 2015. For the reasons set forth below, the Court refers the motion to a hearing, which shall take commence on September 26, 2016. The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on February 23, 2016 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Petitioner moves for an Order, pursuant to New York Limited Liability Company Law (“LLCL”) § 702, directing the dissolution of Road Runners L.L.C. (“Road Runners”) and Road Runners TOLA, L.L.C. (“Tola”) (the “LLCs”).

Respondent Richard Gilbert (“Gilbert” or “Respondent”) opposes the motion.

B. The Parties’ History

The Verified Petition (“Petition”) alleges as follows:

The parties formed Road Runners in 2000 and Tola in 2012. The parties have had disputes over the years but were able to resolve those disputes. Recently, however, the conflict between the parties has developed to the point that there is no communication between the parties, the sole members of the LLCs. Petitioner alleges that the LLCs have been adversely affected, and that Respondent is responsible. Petitioner alleges that it is not reasonably practicable to carry on the business of the LLCs because of Respondent’s conduct which “threatens the very viability of the entities” (Pet. at ¶ 4). Petitioner also alleges that Respondent has become unwilling, or unable, to carry out his obligations as a member of the LLCs, and has engaged in “antagonistic behavior, which has alienated sales personnel and manufacturers (*id.* at ¶ 5). By way of example, Petitioner alleges that Respondent, in 2014, caused a top salesperson to terminate her relationship with the LLCs by shouting at her in public and acting aggressively towards her. Petitioner alleges that the loss of that salesperson’s services caused a severe decline in the LLCs’ revenues in 2013 and 2014. Petitioner also alleges that one of Respondent’s principal obligations is to collect money owed to the LLCs, most of which is owed to outside sales representatives who rely on Respondent to collect money owed to them in a timely manner. Petitioner alleges that numerous salespeople have stated that they will not continue to work for the LLCs unless there is a change in the manner in which they operate.

Petitioner also alleges that dissolution of the LLCs is appropriate in light of the fact that, unbeknownst to Petitioner, Road Runners’ Articles of Organization, which Respondent prepared, appear to make the members of the LLC for all debts and obligations of the LLC. Petitioner submits that such a provision is inconsistent with the creation of an LLC and Petitioner is unwilling to further expose his personal assets to Road Runners’ debts and obligations and, therefore, will not approve any further business transactions that could lead to Petitioner’s

personal liability for those transactions. As Petitioner owns 50% of the membership interests, this will effectively prevent Road Runners from operating. Petitioner also alleges that, if the Court does not grant dissolution, he will likely resign his management position with the LLCs because the parties “simply cannot stay in business together” (Pet. at ¶ 11).

Petitioner provides copies of the LLCs’ Articles of Organization (Exs. A and B to the Pet.). Petitioner alleges that the parties never adopted an operating agreement for either LLC. The parties formed Road Runners for the purpose of providing services to companies that manufacture gifts, stationery, home goods, toys, accessories and similar items. Tola was formed to provide the same services in the Southwestern United States. The LLCs’ principal business is to establish relationships with manufacturers and retailers, and to facilitate the sale of products from the manufacturer directly to the retailer, including at trade shows, during in-person meetings and in showrooms maintained by the LLCs in Atlanta and Dallas. The LLCs work through Petitioner, Respondent and independent sales representatives. The LLCs are compensated by the manufacturers based on a percentage of the total dollar amount of the orders placed by retailers. The bulk of that compensation is, in turn, paid to outside sales representatives.

Petitioner alleges that he and Respondent have their own retail accounts that they service, and they receive and retain separate compensation for sales made by and to their accounts. Petitioner’s responsibilities were intended to include, *inter alia*, vendor relations, pursuing new vendors, planning sales meetings and communicating with salespeople regarding any concerns. Respondent’s primary responsibilities were intended to include collecting monies due, paying commissions to outside salespeople and overseeing the LLCs’ information technology infrastructure. Petitioner affirms, however, that the parties’ actual division of labor was somewhat different, with Petitioner handling vendor relations, the planning of trade shows and meetings and engaging new salespeople in expanded territories and Respondent handling salespeople in New York and New Jersey, compiling information for tax purposes, scheduling New York trade shows, collecting money from manufacturers, paying commissions to salespeople and overseeing information technology. The parties also shared responsibilities including attending trade shows and meetings with manufacturers and participating in conference

calls to discuss business.

Petitioner outlines Respondent's conduct that, he alleges, threatens the continued existence of the LLCs (*see* Pet. at ¶¶ 27-61). Respondent's alleged conduct includes, but is not limited to, 1) making errors regarding the finances of the LLCs, including a) paying his personal taxes with checks from Road Runners' checking account (*see* checks, Ex. D to Pet.); b) depositing funds into the Road Runners' bank account instead of into the Tola account, causing Tola to miss a rent payment due for its Dallas showroom; and c) overpaying commissions to salespeople; 2) failing to carry out his duties and obligations by a) failing to collect commissions owed by manufacturers; and b) failing to address salespeople's inquiries regarding commissions; 3) being hostile to sales personnel, as evidenced, *e.g.*, by a text message from Respondent to Petitioner (Ex. E to Pet.) in which he refers to salespeople in a disparaging way; 4) alienating customers by failing to attend to their concerns, prompting one of Road Runners' largest manufacturers to advise Petitioner that one of Respondent's top retail accounts no longer wishes to conduct business with the LLCs because of Respondent's conduct; 5) acting in a hostile manner to Petitioner as evidenced by Respondent cursing at Petitioner during an October 2014 conference call; and 6) in February 2015, intentionally shutting down access to the corporate server so that Petitioner and others were unable to obtain information from the computer. Petitioner also objects to the provision in the Articles of Organization for Road Runners (Ex. A at ¶ 7) which provides, in handwritten language, that "All members of [Road Runners] would be obligated equally for all debts, obligations or liabilities." Those Articles of Organization are signed only by Respondent and Petitioner alleges that he only recently learned about the provision which arguably makes him personally liable for Road Runners' obligations.

In opposition, Gilbert submits that dissolution is not warranted because the LLCs are prospering financially and achieving the purpose for which they were formed. Gilbert denies engaging in conduct adversely affecting the LLCs' financial condition and submits that any differences between the parties have not interfered with the LLCs' ability to continue generating profits and achieving their purpose. Gilbert confirms that the LLCs are not governed by operating agreements and that their articles of organization do not identify the purpose for which the LLCs were formed. Gilbert affirms that the purpose of the LLCs is to make money and, more

specifically, to generate profits by providing services in companies that manufacture items including gifts, stationery, home goods, toys and accessories, and submits that the allegations in the Petition support that assertion.

Gilbert submits that the Petition is grounded in part on the “flawed premise” (Gilbert Aff. in Opp. at ¶ 5) that the LLCs are no longer financially feasible. Gilbert provides charts and documentation reflecting the distributions to the parties in 2013 and 2014 and the LLCs’ gross receipts (*see* Exs. A-C to Gilbert Aff. in Opp.) which, Gilbert submits, contradict Petitioner’s assertion that the LLCs are experiencing any financial difficulties. Gilbert also disputes Weintraub’s contention that Gilbert’s dispute with a particular salesperson, resulting in her termination, adversely affected Road Runners. Gilbert provides documentation (Ex. D to Gilbert Aff. in Opp.) reflecting that sales in this salesperson’s territory were down 76% in the year before her termination and that sales increased in that territory following the salesperson’s termination. Gilbert affirms that he argued with the salesperson in July of 2014 because she was inebriated at a Road Runners’ showroom at a trade show. Gilbert affirms that he wanted to terminate this salesperson prior to July of 2014 but agreed not to in consideration of Petitioner’s desire that she not be terminated.

Gilbert also affirms *inter alia* that 1) he collected more than 99% of all receivables due in 2013 and 2014; 2) the banking errors identified by Petitioner were unintentional; 3) Petitioner, also, has committed financial errors, including charging personal expenses on the Road Runners’ credit card, as evidenced by the email provided (Ex. E to Gilbert Aff. in Opp.); 4) to the extent that paragraph 7 in the Road Runners’ Articles of Organization subjects the parties to personal liability, Respondent is agreeable to amending those Articles of Organization to address Petitioner’s concerns; and 5) Respondent would be at a significant disadvantage if the LLCs were dissolved because Petitioner, by virtue of the parties’ division of labor, has been cultivating personal relationships with manufacturers and their principals over the years and would be able to keep that business for himself if the parties were forced to separate.

C. The Parties’ Positions

Petitioner submits that he has established his right to dissolution of the LLCs by establishing that 1) it is not reasonably practicable to carry on the business of the LLCs; 2) management of the LLCs are unable or unwilling to reasonably permit or promote the purpose

for which the LLCs were formed to be realized or achieved; 3) continuing the LLCs is, and will further become, financially unfeasible; 4) the members of the LLCs are so divided that dissolution is necessary and required; and 5) Respondent is not willing or able to contribute equally to the management of the LLCs.

Respondent opposes the application. Respondent notes that there are no operating agreements for the LLCs, and the Articles of Organization are silent as to their purpose. Respondent submits that the motion papers demonstrate that the purpose of the LLCs was to earn profits by providing services to companies that manufacture items including gifts, stationery, home goods, toys and accessories, and the documentation provided establishes that the parties each earned in excess of \$200,000 each of the last two years and that the LLCs' sales are increasing. Thus, Respondent submits, the LLCs' purposes are being achieved, notwithstanding the parties' differences. Under these circumstances, Respondent contends, Petitioner has not established that dissolution is appropriate.

RULING OF THE COURT

A. Dissolution of LLC

LLCL § 702, titled "Judicial dissolution," provides as follows:

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. A certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance.

For dissolution of an LLC pursuant to LLCL § 702, the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that 1) 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 2) continuing the entity is financially unfeasible. *Matter of 1545 Ocean Avenue, LLC v. Ocean Suffolk Properties, LLC*, 72 A.D.3d 121, 131 (2d Dept. 2010). The appropriateness of an order of dissolution of an LLC is vested in the sound discretion of the court hearing the petition. *Matter of Extreme Wireless, LLC v. Molina*, 299 A.D.2d 549, 550 (2d Dept. 2002).

Despite the standard for dissolution enunciated in LLCL § 702, there is no definition of "not reasonably practicable" in the context of the dissolution of an LLC. *Matter of 1545 Ocean*

Avenue, LLC v. Ocean Suffolk Properties, LLC, 72 A.D.3d 121, 127 (2d Dept. 2010). Most New York decisions involving LLC dissolution issues have avoided discussion of this standard altogether. *Id.*, citing, *inter alia*, *Matter of Extreme Wireless*, 299 A.D.2d 549, 550 (2d Dept. 2002). The standard is not to be confused with the standard for the dissolution of corporations pursuant to Business Corporation Law (“BCL”) §§ 1104 and 1104-a, or partnerships pursuant to Partnership Law § 62. *Matter of 1545 Ocean Avenue, LLC v. Ocean Suffolk Properties, LLC*, 72 A.D.3d at 127. Unlike the judicial dissolution standards in the BCL and Partnership Law, the court must first examine the LLC’s operating agreement to determine, in light of the circumstances presented, whether it is or is not “reasonably practicable” for the LLC to continue to carry on its business in conformity with the operating agreement. *Id.* at 128. Dissolution in the absence of an operating agreement can only be had upon satisfaction of the standard of LLCL § 702, *i.e.*, “whenever it is not reasonably practicable to carry on the business. *Horning v. Horning Construction, LLC*, 12 Misc. 3d 402, 408 (Sup. Ct., Monroe Cty. 2006), citing *Schindler v. Niche Media Holdings, LLC*, 1 Misc. 3d 713, 716-717 (Sup. Ct., N.Y. Cty., 2003).

B. Application of these Principles to the Instant Action

The Court refers the motion to a hearing. Petitioner’s allegations, if credited, would support the dissolution of the LLCs by establishing that it is not reasonably practicable for the LLCs to continue to operate. Those allegations, in addition to Respondent’s alleged alienation of salespeople and financial errors, include Petitioner’s claim that he recently learned that Respondent included paragraph 7 in the Road Runners Articles of Organization, which arguably makes Petitioner liable for Road Runners’ obligations. Petitioner alleges that he will not approve any further business transactions that could lead to Petitioner’s personal liability for those transactions. While Respondent has expressed a willingness to consent to the modification of the Articles of Organization, the inclusion of paragraph 7 in the Road Runners Articles of Organization without Petitioner’s knowledge, coupled with Petitioner’s other allegations, state a cause of action for dissolution of the LLCs. In light of Respondent’s opposition, in which he disputes Petitioner’s allegations and maintains that dissolution of the LLCs is unwarranted, a hearing is required. That hearing shall commence on September 26, 2016, in conjunction with the commencement of trial on all other causes of action asserted by and between the parties.

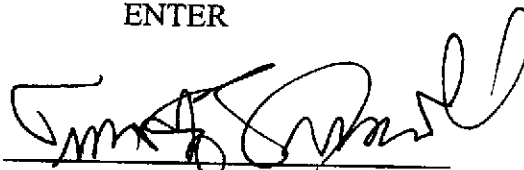
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on February 23, 2016 at 9:30 a.m.

DATED: Mineola, NY
December 9, 2015

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

DEC 17 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE