

SHORT FORM ORDER

INDEX

NO.: 601842-15

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt EmersonCLIFFORD MICKENBERG,

Plaintiff,

-against-

218 THOMPSON STREET, LLC, IRA MICKENBERG,  
Individually and as Trustee of the IRA MICKENBERG  
FAMILY REVOCABLE TRUST dated September 27,  
2007, NEIL MICKENBERG, Individually and as Trustee  
of the NEIL MICKENBERG FAMILY REVOCABLE  
TRUST dated April 8, 1998, and ALICIA MICKENBERG  
as Trustee of the ALICIA MICKENBERG TRUST,

Defendants.

MOTION DATE: 6-18-15

SUBMITTED: 7-23-15

MOTION NO.: 001-MOT D; ACAP

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Upon the following e-filed documents numbered 7-20 read on this motion to dismiss; Notice of Motion and supporting papers 7-14; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 15-17; Replying Affidavits and supporting papers 18-20; it is,

**ORDERED** that the branch of the motion by the defendants which is to dismiss the complaint insofar as it is asserted against the defendants Ira Mickenberg, individually, and Neil Mickenberg, individually, is granted without opposition; and it is further

**ORDERED** that the branch of the motion by the defendants which is to dismiss the complaint due to improper venue is denied; and it is further

**ORDERED** that the branch of the motion by the defendants which is to dismiss the complaint due to improper form is denied; and it is further

**ORDERED** the caption is amended and shall hereafter read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

\_\_\_\_\_  
In the Matter of CLIFFORD MICKENBERG,

Petitioner,

-against-

218 THOMPSON STREET, LLC; IRA MICKENBERG,  
as Trustee of the IRA MICKENBERG FAMILY  
REVOCABLE TRUST dated September 27, 2007;  
NEIL MICKENBERG, as Trustee of the NEIL  
MICKENBERG FAMILY REVOCABLE TRUST  
dated April 8, 1998; and ALICIA MICKENBERG,  
as Trustee of the ALICIA MICKENBERG TRUST,

Respondents.

\_\_\_\_\_  
x; and it is further

**ORDERED** that the parties are directed to conduct discovery and to serve and file supplemental papers in support of and in opposition to the remaining branches of the defendants' motion in accordance with the final paragraph of this order.


The defendants contend that the court lacks subject matter jurisdiction over this matter because venue in Suffolk County is improper. Subject matter jurisdiction concerns the court's competence to entertain a given kind of case. A court gets its subject matter jurisdiction from the constitution and laws of the sovereign that it serves (Siegel, NY Prac § 8, at 10 [5<sup>th</sup> ed]). Venue, on the other hand, means the geographical subdivision in which an action may be brought. The Supreme Court, for example, has statewide jurisdiction, which is subdivided into counties (Siegel, NY Prac § 116, at 216 [5<sup>th</sup> ed]). A mere defect of venue is not a ground for dismissal in New York practice. If a suit in the New York Supreme Court is brought in the wrong county, the court is required to entertain the case unless venue is changed to a proper county on motion (CPLR 509; Siegel, *supra* at 216-217). Since venue relates to the place of trial and not jurisdiction (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 509), dismissal is not warranted on that ground.

The defendants contend that judicial dissolution of a limited liability company must be commenced as a special proceeding with service of a petition rather than a complaint. In support thereof, the defendants cite to the Business Corporation Law and **Rahman v Bengal Poultry, Inc.** (32 Misc 3d 1239[A]), which apply to the judicial dissolution of corporations, not limited liability companies. The defendants also cite to **Flax v Shirian** (44 Misc 3d 1222[A]), a case involving judicial dissolution of a limited liability company that was not brought by a petition styled in the form of a special proceeding. The court found that Flax's claim for dissolution could

be summarily determined in accordance with CPLR article 4, which governs special proceedings, by the simple expedient of converting it into such form pursuant to CPLR 103(c) (Id. at \*5-\*6). CPLR 103(c) provides that the court shall not dismiss an action or proceeding solely for the reason that it was brought in the wrong form. When, as here, jurisdiction was obtained over the parties, the court may simply order a conversion to the proper form (*see*, Alexander, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C401:1; *see also*, **Matter of Schmidt [Magnetic Head]**, 97 AD2d 244, 250). Accordingly, the court will treat this matter as a special proceeding, and the caption is hereby amended.

The court reserves decision on those branches of the defendants' motion which are to dismiss the complaint on the merits. The court directs the parties to conduct limited discovery, if they be so advised, on the single issue of the purpose for which 218 Thompson Street, LLC, was formed. Such discovery may include, but shall not be limited to, depositions of any third parties who were involved in the creation of the LLC. Supplemental papers in support of the remaining branches of the defendants' motion shall be served and filed within 90 days after service of a copy of this order with notice of entry. Supplemental papers in opposition thereto shall be served and filed two weeks later, and reply papers one week thereafter. No extensions of time will be granted. Upon receipt of working copies of the parties' supplemental papers or expiration of the aforementioned time periods, the court will endeavor to render a decision on the remaining branches of the defendants' motion with all convenient speed.

DATED: April 12, 2016

  
J. S. C.