

<b>Advanced 23, LLC v Chambers House Partners, LLC</b>
2017 NY Slip Op 32663(U)
December 15, 2017
Supreme Court, New York County
Docket Number: 650025/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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ADVANCED 23, LLC, DAVID SHUSTERMAN,

Petitioner,

INDEX NO. 650025/2016

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 002

CHAMBERS HOUSE PARTNERS, LLC, ANITA MARGRILL,  
HERBERT MARGRILL

Respondent.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 20, 21, 22, 23, 42  
were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

In this special proceeding seeking, *inter alia*, a judicial decree dissolving  
Chambers House Partners, LLC (“CHP”) pursuant to Limited Liability Company Law  
(“LLCL”) § 702, Respondents CHP, Anita Margrill (“Anita”), and Herbert Margrill  
(“Herbert”) move to dismiss the petition’s first cause of action seeking the judicial  
dissolution of CHP pursuant to CPLR 3211(a)(7) (motion seq. no. 002). Petitioners  
Advanced 23, LLC (“Advanced”) and David Shusterman (“Shusterman”) (collectively,  
“Petitioners”) oppose the motion.

## Background<sup>1</sup>

CHP owns and operates the land and building located at 154 Chambers Street, New York, NY 10013 (hereinafter referred to as “the Building”). When CHP was formed, Herbert and Anita (collectively, “Respondents”) each held a 25% membership share in the Building, and Ephraim Resnick and Hisako Resnick (“the Resnicks”) held a 50% membership share in the Building. Respondents each continue to possess their 25% membership share in the Building.

On February 1, 2013, Advanced<sup>2</sup> purchased the 50% membership share in the building from the Resnicks, and Respondents and Shusterman executed CHP’s Amended and Restated Operating Agreement (“Operating Agreement”). On that same day, they also executed separate guarantees, each in favor of half of the \$547,760.30 HSBC Bank mortgage on the Building, which was to become due and payable on December 1, 2015. CHP’s business purpose, as defined in Operating Agreement ¶ 2.3, is “to own and operate the building known and located at 154 Chambers Street, New York, NY 10013 . . . ; to provide a residence for its Members; and to conduct any lawful business as the Members may from time to time determine.”

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<sup>1</sup> Unless otherwise specified, all facts are taken from the Petition and exhibits annexed to the Petition and will be accepted as true only for purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). See CPLR 3014 (“A copy of any writing which is attached to a pleading is a part thereof for all purposes.”); *Wernham v Moore*, 77 AD2d 262, 263 (1st Dept 1980).

<sup>2</sup> Shusterman owns 100% of Advanced.

Shortly thereafter, Shusterman and Herbert began to manage CHP as Co-Managers pursuant to Operating Agreement Article 4. As Co-Managers, Herbert and Shusterman are responsible for making CHP's business decisions, most of which require Members' unanimous consent. Despite it being a "material obligation" of Operating Agreement ¶ 4.1(d) that CHP is "actively managed on an equal basis by Herbert and Shusterman," Petitioners allege that Herbert's management responsibilities are "largely clerical in function."

In accordance with Operating Agreement ¶ 8.1 – which requires that all of CHP's funds be deposited into an account established by the Co-Managers, and any withdrawals or checks written from that account require the signatures of Co-Managers, absent unanimous written consent by the Co-Managers allowing otherwise – CHP established a bank account at Capital One Bank, N.A. ("Capital One Account"), of which both Shusterman and Herbert were signatories. Rent checks from the Building's tenants were to be deposited into this account, and payments of expenses were to be withdrawn from it. While Shusterman wanted to use electronic banking, Herbert insisted that they use paper checks. One of Herbert's managerial responsibilities is to write the checks from the Capital One Account to pay for building expenses, which the Operating Agreement requires to be signed by both Co-Managers. Because Herbert insisted on using paper checks, Shusterman would often sign blank checks to pay for the building expenses, at Herbert's request.

In July 2015, Anita allegedly began to harass Shusterman and his companion, and she used her key to enter Shusterman's apartment without permission on at least one

occasion. There was also an alleged physical altercation between Shusterman and Anita. Because of the unresolved tensions, Herbert appointed an attorney on September 17, 2015 to negotiate with Shusterman on his behalf regarding Petitioners' obligations in the Operating Agreement.

In anticipation of the Building's mortgage becoming due and payable on December 1, 2015, Shusterman and the Respondents began discussing refinancing options, however, no agreement could be reached. As a result, Respondents and Shusterman each paid half of the outstanding mortgage balance by December 1, 2015, thereby discharging their HSBC guarantees.

In mid-November 2015, Petitioners allege that Respondents unilaterally created a separate bank account entitled "Anita & Herbert Margrill Trustees in Trust for Chambers House Partners LLC" at TD Bank ("TD Bank Account") and deposited the November rent checks from CHP, in violation of Operating Agreement ¶¶ 4.1 and 8.1. On November 24, 2015, Herbert wrote a letter to Shusterman, informing him that Respondents created the TD Bank Account "in order to ensure the timely and full payment of all [CHP] obligations" because Shusterman's "conduct has seriously interfered with the operation of [CHP]."

On December 3, 2015, Respondents transferred \$75,000 from the Capital One Account into the TD Bank Account without Shusterman's authorization, although the check used to transfer the funds includes the signatures of both Herbert and Shusterman. As a result, Petitioners allege that Respondents either forged Shusterman's name on the

check, or they improvidently used one of the blank checks that Herbert had Shusterman sign, which was supposed to be used to pay CHP's expenses.

On December 16, 2015, a CHP tenant, Larisa Cherby ("Cherby") wrote an email to Shusterman and Respondents requesting to use a portion of her security deposit to pay for that month's rent. On December 18, 2015, Shusterman sent an email to Cherby, denying her request and demanding that the rent be paid as soon as possible. Cherby responded to Shusterman's email on the same day, informing him that Respondents already verbally consented to Cherby's request. Petitioners allege that this unilateral action taken by Respondents violates Cherby's lease and directly damages CHP's business. Petitioners further allege that Respondents gave consent to Cherby in exchange for her testimony regarding the alleged physical altercation between Shusterman and Anita.

Based upon the foregoing, Petitioners assert three causes of action seeking: (1) a judicial decree dissolving CHP pursuant to New York's Limited Liability Company Law ("LLCL") § 702, directing that its real property be sold, and that CHP be liquidated; (2) an accounting of all transactions from the TD Bank Account and any other transactions Respondents unilaterally entered into with CHP funds without Shusterman's authorization or consent; and (3) injunctive relief to maintain the status quo and to prevent irreparable harm to CHP's business during the pendency of this proceeding.

Respondents move to dismiss Petitioners' first cause of action for failure to state a claim, pursuant to CPLR 3211(a)(7).<sup>3</sup> Respondents first argue that LLCL § 701(a)(2) and (3) provide that a limited liability company's operating agreement governs the dissolution of the limited liability company, and, therefore, dissolution is improper because Respondents did not consent to dissolution, as required by Operating Agreement ¶ 10.1.<sup>4</sup> In their reply, Respondents argue that judicial dissolution pursuant to LLCL § 702 is improper because CHP has subsisted in conformity with its operating agreement for more than 32 years; to prove this, Respondents attach evidentiary material to their reply affirmation. I do not consider this additional material, as it was submitted for the first time in reply.

### Discussion

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must "accept the facts as alleged in the [petition] as true, accord [petitioners] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88 (internal citations omitted); *see also Hedges v E. Riv. Plaza, LLC*, 126 AD3d 582

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<sup>3</sup> Respondents' initially brought this motion to dismiss pursuant to CPLR 3211(a)(1), (3), and (7). Their argument -- that dismissal is warranted pursuant CPLR 3211(a)(1) and (3) because Advanced lacks the legal capacity to institute this proceeding as there is no Affidavit of Publication on file with the Department of State, which is required by LLCL § 206 -- has since been cured and is no longer at issue. At the March 1, 2017 oral arguments, Respondents averred that they are only pursuing their motion to dismiss on CPLR 3211(a)(7) grounds.

<sup>4</sup> "[CHP] will be dissolved only upon the unanimous determination of the Members to dissolve." Operating Agreement ¶ 10.1.

(1st Dept 2015). When the Court considers evidentiary material submitted in support of a CPLR 3211(a)(7) motion, “the criterion . . . is whether a [petitioner] has a claim, not whether he or she has stated one,” *Weksler v Weksler*, 81 AD3d 401, 402 (1st Dept 2011) (citing *Guggenheimer v. Ginsburg*, 43 N.Y.2d 268, 275 (1977)), and the motion will not be granted unless the petitioner alleges a material fact which is shown to be “not a fact at all . . . and no significant dispute exists regarding it.” *Guggenheimer*, 73 N.Y.2d at 275 (internal citations omitted).

### ***Judicial Dissolution Pursuant to LLCL § 702***

A court may order the 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.” LLCL § 702 (McKinney 2017). In determining whether a limited liability company should be dissolved pursuant to LLCL § 702, “the court must first examine the limited liability company’s operating agreement to determine, in light of the circumstances presented, whether it is or is not ‘reasonably practicable’ for the limited liability company to continue to carry on its business in conformity with the operating agreement.” *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 128 (2d Dept 2010). The petitioner seeking judicial dissolution must either “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.” *Doyle v Icon, LLC*, 103 AD3d 440, 440 (1st Dept 2013) (quoting *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d at 131) (internal citations and quotation marks omitted).



In their papers, Respondents argue that, because they have lived in the Building since the 1980's and Herbert has successfully managed the Building for more than thirty-two years, as "a matter of fact the petitioners can not [sic] demonstrate that it is not reasonably practicable to carry on the business in conformity with the operating agreement." Respondents' Reply Affirmation in Support of Motion to Dismiss, ¶ 6.

However, "[w]hether a [petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). While Respondents' assertions may be relevant to the underlying issue of determining whether Petitioners are entitled to a judicial decree dissolving CHP, the petition's "essential facts have not been negated beyond substantial question by the" evidence submitted by Respondents in support of their motion to dismiss "so that it might be ruled that the [petitioner] does not have the cause[] of action.

*Guggenheimer*, 43 NY2d at 275.

At oral argument, Respondents relied on *Doyle v Icon, LLC*, to show that petitioners have failed to state a claim for judicial dissolution. *Doyle*, 103 AD3d 440. Respondents' reliance on *Doyle* is misplaced. In *Doyle*, an LLC member with a 33% share in an LLC brought an action for judicial dissolution after being excluded from the operation of that LLC. The limited liability company did not have an operating agreement and the complaint at issue in *Doyle* merely pled that dissolution was warranted because the other shareholders excluded him from the LLC, which continued to operate in his absence. As the First Department found, the complaint failed to include any factual

allegations that would indicate that the continuing function of the LLC was no longer reasonably practicable or financially feasible. *Id.*

Unlike the complaint in *Doyle*, the petition here alleges facts sufficient to support a claim for judicial dissolution. Petitioners allege a history of disagreements and a contentious relationship between Shusterman and Respondents which may be sufficient to establish that it is not reasonably practicable to continue CHP's business operations in conformity with the Operating Agreement and that CHP's business purpose is no longer able to be achieved.

CHP's Operating Agreement requires that the Building be jointly managed by Shusterman and Herbert, and most, if not all, of the business decisions necessary to effectively manage and operate the Building require the unanimous consent and cooperation of Shusterman and Respondents. Despite this requirement, Petitioners allege numerous unilateral actions taken by Respondents, in direct violation of the Operating Agreement, which support Petitioners' claim for judicial dissolution.

The specific allegations of respondents' unilateral action, which allegedly occurred without Shusterman's knowledge or permission, include Respondents giving permission to a CHP tenant to use part of her security for her rent and Respondents creating a new CHP bank account, the TD Bank Account, withdrawing \$75,000 from the Capital One Account, and depositing that money in the TD Bank Account. *See In re Cannon*, 2005 WL 7984335 (Sup Ct, NY County 2005) (motion to dismiss denied where allegations that a LLC shareholder "is looting money and preventing members from accessing the companies' book").

Petitioners have alleged additional, specific allegations showing that the parties' relationship has become significantly strained such that the continued operation of CHP may not be feasible. These allegations include: Herbert felt compelled to hire an attorney to negotiate with Shusterman (rather than speak with him directly) regarding Petitioners' obligations under the Operating Agreement; Anita harassed Shusterman's girlfriend and entered Shusterman's apartment without his permission; a physical altercation between Anita and Shusterman; and Shusterman and Respondents were not able to agree on refinancing CHP's mortgage. *See In re Natanel v. Cohen*, 2014 WL 37887 (Sup Ct, Kings County 2014) (citing *Matter of 1545 Ocean Avenue, LLC*, 72 AD3d 121) (motion to dismiss denied where allegations "that the two 50% members of the LLC are not on speaking terms and that decision-making has been seriously frustrated, rais[ed] questions of facts as to the feasibility of continuing the LLC").

For the foregoing reasons, petitioners have adequately pled a claim for judicial dissolution pursuant to Limited Liability Company Law § 702, sufficient to withstand respondents' motion to dismiss for failure to state a cause of action.

In accordance with the foregoing, it is

ORDERED that the motion of Respondents Chamber House Partners LLC, Anita Margrill, and Herbert Margrill to dismiss the petition's first cause of action (mot. seq. no. 002) is denied in its entirety.

This constitutes the decision and order of the Court.

12/15/17  
DATE

*Saliann Scarpulla*  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: