ORIGINAL

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 Application of

NICOLE D'ERRICO and LOUIS D'ERRICO, Holders of A Collective 42% Membership Interest, Individually and derivatively in the right of EPIC GYMNASTICS, LLC,

Petitioners,

For the Dissolution of, and Appointment of a Receiver or Liquidating Trustee for EPIC GYMNASTICS, LLC, Pursuant to §§ 702 and 703 of the Limited Liability Company Law,

- against

MICHELLE BRUNO-CAMACHO, RIGOBERTO CAMACHO, ANTHONY BRUNO, and EPIC GYMNASTICS, LLC,

Respondents.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 610084/16
Motion Seq. No: 1
Submission Date: 2/16/17

The following papers have been read on this motion:

Notice of Petition, Verified Petition and Exhibits.....x
N. D'Errico Affidavit in Support and Exhibits.....x
L. D'Errico Affidavit in Support.....x
Memorandum of Law in Support.....x
Attorney Affirmation in Opposition and Exhibit.....x
Reply Affirmation in Further Support and Reply Affidavits in Further Support.....x

This matter is before the Court for decision on the motion filed by Petitioners Nicole D'Errico ("Nicole") and Louis D'Errico ("Louis") ("Petitioners") on December 29, 2016 and

submitted on February 16, 2017. For the reasons set forth below, the Court refers the portions of the motion seeking dissolution and access to books and records to a hearing, and denies that portion of the motion seeking the appointment of a receiver. The Court directs counsel for the parties to appear before the Court for a conference on May 15, 2017 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

BACKGROUND

A. Relief Sought

Petitioners move for an Order, 1) pursuant to New York Limited Liability Company Law ("LLCL") §§ 701 and 702, dissolving Epic Gymnastics, LLC ("Epic"); 2) appointing a receiver or liquidating trustee, and 3) directing access to the books and records ("Books and Records") of Epic, pursuant to LLCL § 1102.

Respondents Michelle Bruno-Camacho ("Michelle"), Rigoberto Comacho ("Rigoberto"), Anthony Bruno ("Anthony") and Epic ("Respondents") oppose the motion.

B. The Parties' History

The Verified Petition ("Petition") alleges that this is a proceeding to dissolve Epic (the "Company"), which Petitioners describe as "an insolvent and hopelessly deadlocked limited liability company which has outlived its purpose and of which the Petitioners collectively hold a 42% membership interest" (Pet. at ¶ 1). The Company has no written operating agreement and was formed for the sole purpose of providing Nicole, Louis, Michelle and Rigoberto with a vehicle by which they could jointly operate a high quality gymnastics facility using USA Gymnastics ("USAG") trained and certified coaches and following USAG methodologies, curriculum and principals in training competitive gymnasts. Nicole, Louis, Michelle and Rigoberto each hold a 21% membership interest in the Company and Anthony holds a 16% interest in the Company.

The Petition provides a "breakdown of the Company's Ability to Function" (Pet. at p. 6) which includes allegations that 1) beginning in mid-April 2016 and continuing for approximately one month, Michelle did not respond to phone calls or texts from Petitioners who subsequently learned that she had been experiencing mental health issues for which she was receiving treatment; 2) Michelle and Rigoberto (the "Camachos") permitted a cheerleading coach

("Coach") whom they had hired to move into their home, thereby creating a conflict of interest between the Camachos and the Company with respect to the Coach; 3) the Camachos and the Coach began to operate the cheer program from the Camachos' home, rather than the Company's facility, thereby excluding Petitioners from knowledge of or input into the cheer program; 4) the Coach violated the Company's practices and procedures by, *inter alia*, permitting parents into the gym area and posting pictures of himself on social media; 5) Petitioners' disagreements with the Camachos regarding the Coach became "increasingly bitter" (Pet. at ¶ 44) to the point that Petitioners and the Camachos stopped speaking to each other; 6) in or about June 2016, the Coach advised Petitioners that he was leaving the Company to form his own gym, whose name Petitioners believed was confusingly similar to Epic's name; 7) Louis subsequently learned that Rigoberto and Anthony were involved in the opening of the competing gym, in violation of their fiduciary duties to the Company and Petitioners; 8) the Camachos locked out Petitioners physically from the Company's premises and from accounts that Nicole used on a daily basis to run the Company's operations; 9) the locking-out conduct ("Lockout") included a) Rigoberto advising the Company's software provider that he was the sole owner of the Company and that Nicole was no longer authorized to use the Company's account which resulted in the Company being unable to operate for 3 days; and b) the Camachos adding a padlock to the door of the Company's facility; and 10) as of August 2016, the Company has not been able to meet its monthly operating expenses.

The Petition also alleges *inter alia* that 1) at the time of the Lockout, the Company owed $19,498.48, exclusive of monthly interest that continues to accrue, in connection with a Chase Ink business credit card issued to the Company; 2) Petitioners have paid $2,494.00 to keep the Chase Ink account current and out of arrears; 3) Petitioners have paid sums to Chase Ink, Citibank Visa, Citibank Mastercard and American Express to keep the Company's accounts current and avoid damage to Nicole's credit; 4) Respondents and the Company, despite demand, have failed to may any payments towards these credit card charges; 5) the Company is insolvent, is operating under a deficit of at least $20,833.35 per month and is unable to meet its current operating expenses; 6) Petitioners learned that Michelle formed a competing company on or about June 4, 2016, prior to the Lockout; 7) there is no remaining trust between Petitioners and

Respondents and no prospect of meaningful communication or reconciliation; and 8) the Camachos breached their fiduciary duty to the Company and Petitioners by conduct including failing to collect monthly fees due from the Company's customers and forming a competing company.

In support of the motion, Petitioners affirm the truth of the allegations in the Petition. They affirm that the Company is no longer functioning as initially intended, and that the only gymnastics program operating at present is a recreational program that does not have certified coaches. Nicole affirms that she contacted USAG's offices and confirmed that the Company is not in good standing with the USAG. In addition, Petitioners and the Camachos can no longer operate a gymnastics facility together because the Camachos 1) have unilaterally dismantled the competitive gymnastics program at the Company's facility; 2) have permitted the Company to lose its membership standing with the USAG; 3) are only using coaches who are not USAG certified; and 4) are only operating a recreational gymnastics program. Thus, Petitioners submit, the Company is no longer serving the purpose for which it was formed. Petitioners affirm, further, that there is no trust or meaningful communication between Petitioners and Respondents, and that the Company is unable to meet its current financial obligations and is insolvent. Under these circumstances, Petitioners submit, it is no longer reasonably practicable to carry out the Company's business, and it should be dissolved.

In opposition, counsel for Respondents ("Respondents' Counsel") submits that the Company is actively and currently achieving its stated purpose. He affirms that the Company was established with the purpose of operating a gymnastics facility, and that the Company is fulfilling that purpose. He also affirms that Petitioners have "voluntarily left the entity" (Moran Aff. in Opp. at p. 2) and there is no reason for the Company to be dissolved.

Respondents' Counsel affirms that although the Company's profit margins are "slim" (Moran Aff. in Opp. at p. 2), the Company is making a profit, notwithstanding Petitioners' conduct. He affirms that when Petitioners left the Company, they took trainers, coaches and clients as well as funds from Company bank accounts. He submits that it was Petitioners' conduct that resulted in unprofitable months for the Company but affirms that the Company has operated at a profit in the past. In support, Respondents' Counsel provides a Profit and Loss

Statement of the Company for the period January through May 2016 (Ex. A to Moran Aff. in Opp.) which reflects net income in the amount of $6,404.80. He also affirms that liquidating the Company would cause irreparable harm to Respondents.

Respondents' Counsel affirms that Petitioners have not invested any money in the Company and, therefore, have no liability because they can simply assign their shares to Respondents. Respondents, however, have invested hundreds of thousands of dollars in the Company. He also affirms that Petitioners have taken over $20,000 from the Company and have used the Company credit card for personal purchases. Under these circumstances, Respondents' Counsel submits, Petitioners have not met their burden of establishing the appropriateness of dissolution of the Company. He submits, further, that in light of the fact that the Petition also seeks damages for Respondents' allegedly improper conduct, Petitioners have an adequate remedy at law.

In reply, Petitioners *inter alia* 1) deny that they left the Company voluntarily; 2) submit that Respondents do not dispute that the Company was formed to operate a competitive USAG certified gymnastics facility, and that Respondents' opposition papers confirm that this is no longer the nature of the Company's business; 3) affirm that the profit and loss statement provided by Respondents is from a time period during which Petitioners were operating the Company, and note that Respondents have not provided more recent financial data; 4) deny that they improperly removed funds from Company account; and 5) submit that Respondents' claim that Petitioners did not contribute their personal funds to starting the Company ignores the fact that Petitioners worked for the Company for two years, without compensation, while Respondents did nothing to contribute to the Company's development and operation.

C. The Parties' Positions

Petitioners submit that they have demonstrated their right to the requested relief by establishing, through the affidavits of Petitioners, that 1) the purpose of the Company can no longer be achieved in light of the fact that the Company is no longer being operated as a competitive gymnastics facility and no longer has USAG certified coaches; 2) Respondents have locked Petitioners out of the Company's operations and facility; and 3) the Company is unable to pay its creditors which, by definition, renders it insolvent. Petitioners also assert that they have

made several demands for access to the Company's books and records since the Lockout but Respondents have continued to deprive Petitioners of their right to the Books and Records, without justification.

Respondents oppose the motion. Respondents submit that 1) the Company has been operating, and can continue to operate, in a manner consistent with its stated purpose; 2) the Company is financially stable, as evidenced by the Profit and Loss statement provided; 3) liquidating the Company would irreparably harm Respondents; 4) Petitioners voluntarily left the Company and, as they did not contribute money to establishing the Company, they will not suffer damages if the Company continues to operate; and 5) Petitioners have used Company assets for personal purchases.

RULING OF THE COURT

A. Dissolution of a Limited Liability Company

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.

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. Thus, the dissolution of an LLC under LLCL § 702 is initially a contract-based analysis.

B. Appointment of a Receiver

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d at 632, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis*, the Second Department reversed the trial court's order granting plaintiff's motion for appointment of temporary receiver in light of plaintiff's failure to make the required evidentiary showing. 49 A.D.3d at 631-632.

C. Application of these Principles to the Instant Action

In light of (a) the absence of an operating agreement that expressly sets forth the purpose for which the Company was formed, and (b) the disputes regarding that purpose as well as the parties' conduct and the Company's financial viability which raise issues as to whether it is reasonably practicable for the Company to continue to operate, the Court refers the application for dissolution to a hearing. Moreover, in light of Respondents' assertion that Petitioners voluntarily left the Company, which Petitioners adamantly deny, there is a factual issue regarding Petitioners' claim that they have been deprived of access to the Company's Books and Records without justification. That issue, therefore, will also be the subject of the hearing. Because the Petitioners' application for the appointment of a receiver is, at this juncture, dependent at least in part on the unresolved factual disputes, the Court denies that application.

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 conference on May 15, 2017 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

ENTER

DATED: Mineola, NY
April 12, 2017

ENTERED
APR 13 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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