SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

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.

----------x

TRIAL/IAS PART: 11
NASSAU COUNTY

Index No: 610084/16
Motion Seq. Nos: 3 and 4
Submission Date: 8/7/18

The following papers have been read on these motions:

Notice of Motion, Affirmation in Support, Affidavits in Support and Exhibits.....x
Notice of Cross Motion, Affirmation in Opposition/Support, Affidavits in Opposition/Support and Exhibits.....x
Memorandum of Law in Opposition/Support.....x
Affirmation in Opposition/Reply.....x
Affidavit in Further Support/Opposition and Exhibit.....x

This matter is before the Court for decision on 1) the motion filed by Respondents Michelle Bruno-Camacho ("Michelle"), Rigoberto Comacho ("Rigoberto"), Anthony Bruno

("Anthony") and Epic Gymnastics, LLC ("Epic") ("Respondents") on July 20, 2018, and 2) the cross motion filed by Petitioners Nicole D'Errico ("Nicole") and Louis D'Errico ("Louis") ("Petitioners") on July 31, 2018, both of which were submitted on August 7, 2018. For the reasons set forth below, the Court 1) grants Respondents' motion to the extent that the Court dismisses the fourth and ninth causes of action in the Verified Petition, and otherwise denies the motion; and 2) grants Petitioners' motion to the extent that the Court dismisses Respondents' first, second and third counterclaims, and otherwise denies the motion.

BACKGROUND

A. Relief Sought

Respondents move for an Order 1) pursuant to CPLR § 3212, granting summary judgment to Respondents based on Petitioners' failure to strictly comply with Limited Liability Company Law ("LLCL") § 702; 2) sanctioning Nicole and her attorney; 3) removing the instant action from the Commercial Division; 4) amending the complaint to remove Respondents individually from the caption; and 5) amending their counterclaims to reflect the sum of $84,000.00, representing loss revenues of $3,500.00 per month that Epic (the "Company") lost after Petitioners took 8-10 students in July of 2016.

Petitioners cross move for an Order 1) pursuant to CPLR § 3212, granting Petitioners summary judgment on their First through Fourth causes of action; and 2) pursuant to CPLR § 3212, granting Petitioners summary judgment dismissing all of Respondents' counterclaims.

B. The Parties' History

The parties' history is outlined in detail in the prior decision ("Prior Decision") of the Court dated April 12, 2017 and the Court incorporates the Prior Decision by reference as if set forth in full herein. The Prior Decision addressed Petitioners' prior motion for dissolution of the Company, access to Company books and records, and the appointment of a receiver. In the Prior Decision, the Court referred the portions of the motion seeking dissolution and access to books and records to a hearing, and denied that portion of the motion seeking the appointment of a receiver. As noted in the Prior Decision, the Verified Petition ("Petition") (Ex. A to Moran Aff. in Supp.) alleges that this is a proceeding pursuant to, *inter alia*, LLCL §§ 701 through 703, to dissolve Epic, 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.

The Petition contains nine (9) causes of action:

1) Request for dissolution and liquidation of the Company;

2) Breach of Fiduciary Duty to the Company and Petitioners;

3) Request for an accounting of the Company's business affairs;

4) Request for appointment of Petitioners as a receiver to wind up the Company's affairs;

5) Respondents and the Company breached an agreement pursuant to which Nicole agreed to incur credit card charges on her credit cards on behalf of the Company and, in exchange, Respondents and the Company agreed that the Company would pay all credit card charges incurred on behalf of the Company;

6) the Company and Respondents have been unjustly enriched as a result of their failure to reimburse Nicole for their use of her credit cards;

7) Respondents have converted property belonging to Petitioners, specifically an iPad, contents of Petitioners' children's lockers, and five desks;
8) Petitioners are entitled to the inspection of the Company's books and records pursuant to LLCL § 1102; and
9) Request for a judgment declaring the rights and legal relations of the parties; declaring that Petitioners, as minority members of the Company, are permitted to associate with a gymnastics business that is independent of Epic; and that such acts do not violate any fiduciary duty owed by Petitioners to Epic and Respondents.

In their Answer (Ex. F to Moran Aff. in Supp.), Respondents assert the following four (4) counterclaims:
1) Defendants have a valid counterclaim for malicious prosecution and counterclaims Petitioners in the amount of $25,000 plus reasonable attorney's fees;
2) Defendants have a valid counterclaim for tortious interference with contract against Petitioners in the sum of $25,000 or some other amount as the Court directs;
3) Defendants have a valid claim for $25,000 for amounts that Petitioners have taken from the Company's bank accounts; and
4) Anthony has a claim against Petitioners for $350,000 for sums loaned to Epic, in addition to $40,000 in taxes and penalties to "retrieve" that $350,000 (Answer at ¶ 18).

In support of Petitioners' motion, Anthony submits that the documents produced in this action demonstrate that the Company is financially sound, and that there is no basis for dissolution of the Company. Anthony contends, further, that the Company's stated purpose is being achieved, as evidenced by the hundreds of students that attend the Company's facility. Anthony submits that Petitioners have not produced any evidence demonstrating that they were locked out. Anthony disputes Petitioners' allegation that the Company is operating at a deficit, and submits that the Company's bank records do not reflect any deficit. Anthony submits that Petitioners voluntarily left the operations of the Company, as evidenced by their July 2016 email. Respondents provide a copy of an email chain that includes emails dated July 3, 2016, July 5,

2016 and July 6, 2016 (Ex. R to Moran Aff. in Supp.). That chain includes an email from Nicole to numerous individuals dated July 3, 2016, which states as follows:

> Dear Gymnastics Team Parents,
>
> It is with sadness, but also with hope that we write this letter. As you know, ownership of Epic has been a partnership up to this point. However, recent events have led to a rift that could not be mended. Please know that we have put our hearts and souls into building and running Epic, and have put just as much effort into trying to resolve the issues at hand. However, we have only been met with resistance from our partners at this point.
>
> We opened the doors of Epic less than two years ago, with the intention of providing a safe and healthy environment, where aspiring gymnasts could receive optimal training and excel at the sport. This is a goal we refuse to compromise on. The ideals we have, coupled with more recent events that have caused us to question the safety of the environment, have led us to our current decision. We offered our partners a buy-out. However, this option was once again met with resistance. Therefore, we have made the decision to move on. Several staff members have already resigned, refusing to take part in the management to come.
>
> Rest assured that since our love of gymnastics runs deep, we will find a way to continue with our program. We have already been in contact with other gyms, and have been welcomed to train at FGA in Farmingdale. This is a spacious gym that includes two pits and high-end equipment. This is a viable option that will allow our children to continue on their paths as we rebuild. We stand with Joe, Diana, and Lilia and feel confident that our team will continue to excel. We are confident in our staff and hope that you feel the same. We believe that the girls on the Epic gymnastics team have bonded and encouraged each other toward the common goal of being the best that they could be. We would like to allow them to continue on that path.
>
> Although the current situation is not optimal, it is not irreparable. We hope that you will join us as we write the next chapter. We welcome any questions and concerns you may have, and are happy to provide additional information. We will make ourselves available to meet with you on Monday morning at Farmingdale Gymnastics Academy (FGA) at 121 Carolyn Blvd. in Farmingdale, NY. We have made arrangements to carefully remove items from the girls' lockers and place them in separate bags which we will bring with us on Monday morning. We apologize for the short notice, but recent events have made the expediency of this decision necessary. Every decision made is with every one of our children's best interest at heart.

Anthony affirms that Petitioners did not use any of their own money to start or operate the Company, and received free gymnastics training for their daughters. After Petitioners left the Company, Anthony determined that Petitioners had made thousands of dollars worth of charges on the Company credit card for personal items, including airline tickets, meals, hotels and house rentals. Anthony submits that the July 2016 email injured the Company, in part because it requested that paying customers join Petitioners. Anthony affirms that as a result of the July 2016 email, at least 8 students left the Company, resulting in a loss of $2,500 per month.

Anthony affirms that he has invested over $350,000 in the Company, as well as numerous hours devoted to developing the Company. Anthony contends that Petitioners, who did not invest any of their own money in the Company, have locked Respondents out of multiple accounts, taken students, disparaged the Company's name, and used Company funds for personal expenses. Under these circumstances, Anthony submits, the Court should deny Petitioners' application for dissolution of the Company.

In further support of the motion, Rigoberto and Michelle similarly submit that, as evidenced by the bank statements and other evidence provided, the Company is financially feasible and is promoting its stated purpose. Thus, they contend, there is no basis for dissolution of the Company. Rigoberto and Michelle affirm that Petitioners voluntarily left the Company, and dispute Petitioners' claim that they were locked out, or that the Company was operating at a deficit. Rigoberto and Michelle affirm that they have invested over $350,000 of their own money in the Company, and devoted numerous hours to developing the Company. They also reaffirm the truth of Anthony's affirmations regarding Petitioners' improper conduct, including their use of Company funds for personal matters.

In further support of Respondents' motion, counsel for Respondents ("Respondents' Counsel") provides numerous exhibits, including the following (Exs. M-U to Moran Aff. in Supp.): transcript of Nicole's May 14, 2018 deposition (Ex. M); transcript of Louis' May 14, 2018 deposition (Ex. N); June 21, 2018 letter from counsel for Petitioners ("Petitioners' Counsel") to the Court, outlining counsel fees to which Petitioners believe they are entitled as a result of their "multiple and extended efforts" to obtain discovery in this action (Ex. O); three years of Company bank statements (Ex. Q) which reflect that the Company did not have a

negative balance up to and including December 2017; documentation reflecting that hundreds of students are enrolled at the Company's facility (Ex. S); the Company's 2016 tax return (Ex. T) which, Respondents, submit, demonstrates that the Company was able to pay its bills for 2016 and "operate at a nominal loss" (Moran Aff. in Supp. at ¶ 50); and July 2016 emails (Ex. U) which, Respondents submit, demonstrate that Petitioners voluntarily left the Company and then locked Respondents out of the primary operational account known as "Jackrabbit" (Moran Aff. in Supp. at ¶ 51).

Respondents' Counsel affirms that Respondents "have adopted an Operating Agreement" (Moran Aff. in Supp. at ¶ 23) (Ex. P to Moran Aff. in Supp.). The operating agreement provided is dated July 6, 2018, states that it was made and entered into by Michelle, Rigoberto and Anthony, and is signed by Michelle, Rigoberto and Anthony. It contains signature lines for Nicole and Louis, but is not signed by them. Respondents' Counsel submits that this operating agreement is in conformity with the operating agreement presented in *Shapiro v. Ettenson*, 130 A.D.3d 861 (2d Dept. 2015). [1] Respondents' Counsel affirms that this operating agreement calls for a capital call and the reduction of shares for members who do not act in the financial interests of the Company, as determined by a majority of the members.

In support of Petitioners' cross motion and in opposition to Respondents' motion, Petitioners' Counsel submits that any provision of an operating agreement that covers capital contributions and financial obligations of a minority members must be explicitly assented to by the affected minority member. Thus, Petitioners submit, "Respondent's attempts to "retroactively" prohibit events that have already occurred in the past, and expel the Petitioners from the company, is not binding upon the Petitioners or this Court" (Horz Aff. at ¶ 18). Moreover, Petitioners' Counsel submits, the creation of this operating agreement is consistent with Respondents' position that they may do as they please, and continue to breach their fiduciary duties to Petitioners. Petitioners submit that this conduct will continue unless the

[1] Petitioners' Counsel affirms that Respondents have incorrectly cited this case, and that the correct citation which is *Shapiro v. Ettenson*, 146 A.D.3d 650 (1st Dept. 2017) (Horz Aff. at ¶ 17).

Company is dissolved. Petitioners' Counsel also disputes Respondents' contention that this matter is not properly in the Commercial Division, and suggests that Respondents have made this assertion in an effort to further delay the trial of this action.

Petitioners' Counsel submits, further, that Respondents' application for sanctions is unfounded and without merit. Petitioners' Counsel affirms that Respondents' Counsel posed numerous irrelevant questions at Petitioners' depositions, and submits that she acted properly in inquiring as to the relevancy of a line of questioning which she believed was "harassing and palpably improper" (Horz Aff. at ¶ 22).

In further support of the cross motion and in opposition to Respondents' motion, Nicole submits that the stated purpose of Epic is not being realized or achieved. Rather, the evidence demonstrates that Respondents formed a competing company called Beyond Epic Athletics, LLC ("Beyond Epic") in May or June 2016 with another party, and have diverted all of the students from Epic to Beyond Epic. Nicole affirms that Beyond Epic places its income into its own bank account, and then transfers the minimum amount of funds needed to the Epic bank account to cover rent, payroll for their competing company, and expenses including loans that Michelle and Rigoberto obtained without notice to Petitioners or Anthony. Nicole submits that Epic is not operating but, rather, is used by Respondents as a "shell company" (Nicole Aff. at ¶ 4).

Nicole affirms that Respondents admitted that they formed Beyond Epic prior to the time at which the members of Epic reached an impasse regarding Epic, which occurred in July 2016. Nicole cites deposition testimony and other evidence in support of her contention that Michelle, Rigoberto and a third individual formed Beyond Epic in May 2016. Moreover, although Rigoberto testified that he formed Beyond Epic to prevent damage that Petitioners allegedly caused to Epic beginning in July 2016, Rigoberto conceded that Beyond Epic was formed prior to that date. In addition, Michelle admitted at her deposition that Epic's business at the time of its formation was to provide a facility for their daughters' gymnastics team. Nicole submits that this is consistent with Petitioners' assertion that this was the purpose of Epic, which is no longer being fulfilled.

Nicole disputes Respondents' assertion that Epic has hundreds of students. Nicole submits that the Court should reject the purported enrollment rolls provided by Respondents in

support of their motion. Nicole notes that Rigoberto admitted during his deposition that enrollment of all former students of Epic was funneled to Beyond Epic, with the exception of a competitive gymnastics team that allegedly exists. Rigoberto also admitted that all new students were enrolled with Beyond Epic, and all payments for classes go into Beyond Epic's account. Nicole submits that the evidence demonstrates that Epic is no longer operating and that Respondents have diverted all of Epic's asserts to Beyond Epic without any consideration.

Nicole also submits that the evidence demonstrates that it is financially unfeasible to continue to operate Epic. When Petitioners first filed this action, Epic was in debt, owed money to vendors and failed to pay its bills. Its expenses exceed its income and, when Nicole was the Company's bookkeeper, minimum payments were made on the credit card and other charges, in an effort to keep the Company afloat. She submits that Respondents have not presented any evidence demonstrating that these creditors have been paid, and affirms that Epic never made a profit. Nicole submits that Respondents' assertion that Epic is economically viable is not persuasive because Respondents have funneled money into the Epic account in an effort to maintain a positive balance.

Nicole affirms that, after reviewing Epic's bank statements, Petitioners determined that Respondents had applied for a loan for Epic in August 2017, after they began diverting students from Epic. Nicole provides a copy of the loan application (Ex. 7 to Nicole Aff.). Nicole submits that this loan application, signed by Respondents, contains several misstatements, including Rigoberto's claim that he owned 61% of Epic, even though he held only a 21% interest. Nicole affirms that a loan in the amount of $20,000 was provided and those funds were deposited into Epic's account. The money was used for the purchase of equipment, including equipment for classes that Beyond Epic planned to provide, as well as payroll expenses for Beyond Epic. Nicole submits that it "defies logic that a company is economically feasible but has to borrow money to cover its payroll" (Nicole Aff. at ¶ 24). In addition, Nicole recently learned that Respondents took out another loan through Epic's bank account in the sum of approximately $12,000, which was not disclosed to Petitioners. The loan proceeds were deposited into Epic's account on July 11, 2018, after Respondents provided affidavits swearing to the financial feasibility of Epic.

Nicole disputes many of Respondents' other contentions. Nicole affirms *inter alia* that 1) the credit card charges incurred by Respondents to book trips for the competitive team and their parents and coaches were completed with the knowledge and approval of Petitioners; 2) after those charges were incurred on the Company credit card, the parents then either paid their child's share via cash or check to Epic, and Petitioners never misappropriated any funds; 3) Petitioners did not voluntarily leave Epic but, rather, the parties met with Epic's accountant and agreed that it was in everyone's best interest to go their separate ways via a buyout; 4) the email to which Respondents make reference was sent, in part, to address the fact that Epic's competitive gymnastics coach was leaving and to "quash rumors" (Nicole Aff. at ¶ 47); and 5) Respondents' contention that Petitioners did not contribute any of their own money to open Epic is a "red herring" (*id.* at ¶ 55) in light of Respondents' admission that neither Michelle nor Rigoberto contributed any of their own money to open Epic.

Louis reaffirms the truth of the affirmations of Nicole. He also affirms that when he was testifying at his deposition, Respondents' Counsel only showed him portions of Epic's bank statements. Those portions reflected only the opening and closing balances for the accounts for each month. Thus, when the accounts were in overdraft, those portions of the bank statements were not shown to Louis, and he was not permitted to testify about them. In light of the foregoing, Louis submits, Respondents have not provided a complete picture of Epic's financial feasibility.

In reply, Respondents' Counsel disputes Petitioners' contention that Epic is not financially viable. Respondents' Counsel submits that, in light of Petitioners' admission that Beyond Epic deposits thousands of dollars into Epic's bank accounts, Epic is obviously liquid. Respondents' Counsel affirms that Epic has a lease until 2019 (Ex. AA to Moran Reply Aff.) which reflects that Petitioners are managing members, and that the property is to be used to operate a gymnastics training facility. Respondents' Counsel submits that this lease, which pertains to property located in Freeport, New York, demonstrates that Epic continues to be a viable entity, contrary to Petitioners' allegations.

C. The Parties' Positions

Respondents submit that 1) this matter was not properly placed in the Commercial

Division of the Supreme Court; 2) there is no basis for dissolution of the Company in light of documentation demonstrating that the Company has continued to operate without any deficit, and Petitioners have failed to produce evidence establishing that it is no longer practical to operate the Company or that the Company is not operating under its stated purpose; 3) the evidence, including the July 2016 email, establishes that Petitioners voluntarily left the Company and refutes Petitioners' allegation that they were systemically excluded from and locked out of the Company; 4) the July 2016 email establishes that Petitioners breached their fiduciary duty, as that email resulted in Petitioners taking members and students from the Company's facility, resulting in financial harm to Respondents; 5) evidence, including Nicole's deposition testimony, establishes that Petitioners commingled Company and personal funds; and 6) Petitioners' Counsel and Nicole violated the New York Code Rules and Regulations when Petitioners' Counsel made multiple improper speaking objections, directed her client not to respond to certain inquiries, and "coached" her clients regarding their response (Moran Aff. in Supp. at ¶ 55).

Petitioners oppose Respondents' motion. As to the branch of Respondents' motion seeking leave to amend, Petitioners submit that the Court should deny this application both because it is late, being made on the eve of trial, and because Petitioners do not state the grounds, if any, for their claim that they should not be named individually in this action. Petitioners submit that they should not be placed in the position of speculating as to the grounds of this portion of Respondents' motion. As to the branch of their motion seeking to increase the damages demand, Petitioners submit that Respondents have been aware since July or August of 2016 that several gymnasts left Epic, and have offered no reasonable excuse as to their delay in seeking to amend their counterclaims. Moreover, Petitioners contend, Respondents lack standing to seek the damages that they assert because the claim of lost customers would rest with the Company, and not with Respondents individually. Finally, Petitioners submit that the Respondents' motion is deficient because it fails to annex the proposed amended pleading, warranting denial of the motion to amend. Petitioners also contend that there is no grounds for amending the complaint to remove Respondents individually from the caption, given that there are claims pending against them, and in consideration of Respondents' failure to articulate the basis for this relief. Petitioners also oppose Respondents' motion for sanctions, contending that Petitioners' Counsel acted properly in representing her clients, and that there is no basis for Respondents' application for sanctions.

Petitioners submit that they have established their right to summary judgment on the first through fourth causes of action in the Petition by demonstrating that the purpose of the Company can no longer be achieved. Petitioners contend that the Company was formed to operate a competitive gymnastics facility for the parties' daughters' gymnastics team. That purpose can no longer be achieved, given that Epic is no longer being operated as a competitive gymnastic facility, and is now being used to pay bills for Beyond Epic, Respondents' competing company. Petitioners contend, further, that Epic is not financially viable, given its inability to pay its creditors and its current lack of income. Petitioners submit that Epic relies on transfers of money from Beyond Epic to pay its bills, and that the reality is that Epic does not have students and is not generating income. Petitioners contend, further, that this evidence supports the appointment of a receiver, as requested by Petitioners in the fourth cause of action.

Petitioners contend, further, that dismissal of Respondents' counterclaims is warranted. They submit that Respondents fail to set forth any allegations in support of their first, second and third counterclaims, and that the evidence adduced does not support the counterclaims. With respect to the fourth counterclaim, asserted by Anthony, Petitioners submit that the documents signed by him and his own testimony confirm that no loan was provided to Petitioners, and that Petitioners never agreed to make payments to him.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action. *Nomura Asset Capital Corp.*, 26 N.Y.3d at 49, citing *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Alvarez*, 68 N.Y.2d at 324. Viewing the evidence in the light most favorable to the non-moving party, if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate. *Nomura Asset Capital Corp.*, 26 N.Y.3d at 49, quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011).

B. 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*, 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. Accordingly, to dissolve 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. *Id.* at 131.

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 reasonable practicable to carry on the business. *Matter of Horning v. Horning Constr.*, 12 Misc. 3d 402, 408 (Sup. Ct. Monroe Cty. 2006), citing *Schindler v. Niche Media Holdings*, 1 Misc. 3d 713, 716-17 (Sup. Ct. N.Y. Cty. 2003).

C. 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).

D. Declaratory Judgment

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh. den.*, 256 N.Y. 681 (1931).

E. Leave to Amend

While leave to amend a pleading shall be freely granted, a motion for leave to amend is committed to the broad discretion of the court. *Oh v. Jin*, 124 A.D.3d 639, 640 (2d Dept. 2015), citing CPLR § 3025(b) and *Ravnikar v. Skyline Credit-Ride, Inc.*, 79 A.D.3d 1118, 1119 (2d Dept. 2010). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts on which the motion was predicated and whether a reasonable excuse for the delay was offered. *Oh*, 124 A.D.3d at 640, quoting *Cohen v. Ho*, 38 A.D.3d 705, 706 (2d Dept. 2007). Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. *Oh*, 124 A.D.3d at 640 citing, *inter alia*, *Rodgers v. New York City Tr. Auth.*, 109 A.D.3d 535, 537 (2d Dept. 2013). Where, however, the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious. *Oh*, 124 A.D.3d at 640-641, citing *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d 827, 828 (2d Dept. 2008), quoting *Clarkin v. Staten Is. Univ. Hosp.*, 242 A.D.2d 552 (2d Dept. 1997). Moreover, when leave is sought on the eve of trial, judicial discretion should be exercised sparingly. *Oh*, 124 A.D.3d at 641, quoting *Morris*, 49 A.D.3d at 828.

F. Application of these Principles to the Instant Action

The Court grants Respondents' motion to the extent that the Court dismisses the fourth and ninth causes of action in the Verified Petition, and otherwise denies the motion. The Court grants Petitioners' motion to the extent that the Court dismisses Respondents' first, second and third counterclaims, and otherwise denies the motion. Preliminarily, the Court will not consider the *ex post facto* operating agreement submitted by Respondents, based on the Court's conclusion that there is no basis in logic or law for this operating agreement to apply to the parties' dispute. The Court also concludes that this matter is properly before the Commercial Division, both because it is a dissolution action which is properly placed in the Commercial Division, and because it meets the monetary threshold for that assignment.

The Court dismisses the fourth cause of action, in which Petitioners seek an order appointing Petitioners as receiver, based on the Court's conclusion that Petitioners have not produced evidence that would meet the stringent standard to warrant the appointment of a receiver. This dismissal is without prejudice as to any application to appoint a receiver in aid of enforcement of any judgment.

The Court dismisses the ninth cause of action, seeking a declaratory judgment, based on the Court's conclusion that the other causes of action in the Petition provide Petitioners with a full and adequate remedy. The Court otherwise denies Respondents' motion to dismiss the Petition based on the Court's conclusion that Petitioners have set forth sufficient evidence demonstrating that dissolution of Epic is appropriate. Petitioners have produced evidence supporting the conclusion that Respondents established a competing company and simply maintained sufficient funds in Epic so that it would appear to be economically viable, even though it was not. Petitioners have also tendered evidence supporting their assertion that the purpose of Epic, which was to provide a facility for the parties' daughters' gymnastics team, is no longer being fulfilled. In light of the extensive factual disputes, however, a trial is needed. The Court notes that the 2016 email set forth herein is clearly not dispositive of any of the factual issues in this action. The Court concludes, further, that these factual disputes necessitate a trial on the other remaining causes of action in the Verified Petition.

The Court denies Respondents' application for sanctions. Preliminarily, the Court agrees with Respondents that, in most cases, it is improper for counsel to instruct a client not to answer a question at a deposition or otherwise suggest an answer with counsel's comments. Where,

however, the question does not relate to matters that are "material and necessary in the prosecution and defense of an action," CPLR § 3101, such question is improper. Such improper questions (and Petitioners' counsels speaking objections and instructions) are among those upon which Respondents base their application for sanctions, such as Respondents' counsel's inquiry as to the amount of Petitioners' home mortgage and the monthly payment. An answer to those questions is hardly "material and necessary" to any issue in this case. Moreover, Petitioners' counsel's suggestion to her client to "answer that question carefully" hardly suggests an answer to the question, and is certainly not an instruction not to answer.

The Court denies Respondents' motion to amend their counterclaims as moot in light of the Court's dismissal of the counterclaims to which the motion is addressed, although the Court would have denied that application in light of the lateness of Respondents' application and the absence of an explanation for their delay in seeking that relief. The Court denies Respondents' application to amend the complaint to remove Respondents individually from the caption based on the Court's conclusion that there are viable claims against Respondents, and in consideration of Respondents' failure to explain the basis for this application.

The Court denies Petitioners' motion for summary judgment on the first through fourth causes of action in the Petition based on its conclusion that, in light of the numerous factual disputes, a trial is needed. The Court has dismissed the fourth cause of action in the Petition based on its conclusion that, even viewing the evidence in the light most favorable to Petitioners, Petitioners have not met their burden of demonstrating that the Court should appoint Petitioners as receiver of Epic. The Court grants Petitioners' motion to dismiss Respondents' first, second and third counterclaims in light of Respondents' failure to adduce evidence supporting those counterclaims, or to articulate in their motion papers why those counterclaims are viable. The Court denies Petitioners' motion to dismiss the fourth counterclaim based on the Court's conclusion that there are issues of fact precluding summary judgment on that counterclaim.

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 on August 20, 2018 at 11:00 a.m. for a pre-trial conference, and the trial to follow immediately that day.

ENTER

DATED: Mineola, NY
August 9, 2018

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