



**SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER TRIAL**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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In the Matter of the Application of

**TRIAL/IAS PART: 11
NASSAU COUNTY**

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

Index No: 610084/16

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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Petitioners Nicole D'Errico ("Nicole") and Louis D'Errico ("Louis") ("Petitioners") filed the instant proceeding seeking dissolution of Epic Gymnastics, LLC ("Epic") and an accounting of its assets, as well as other legal causes of action against Respondents Michelle Bruno-Camacho ("Michelle"), Rigoberto Comacho ("Rigoberto"), Anthony Bruno ("Anthony") and Epic. Three days before the commencement of trial, which had been scheduled for several months, Respondents filed a demand for jury trial on the legal claims. Thus, trial proceeded on August 20 and 21, 2018 solely on the questions whether Epic should be dissolved and whether Petitioners are entitled to an accounting.

At trial, Nicole was the sole live witness called by the Petitioners. The Petitioners also offered various exhibits into evidence, including deposition excerpts of the Respondents, Epic's organizing documents, Epic's bank statements, and the bank statements of another entity known as "Beyond Epic." Respondents extensively cross-examined Nicole, and offered excerpts from Petitioner's depositions as well as other documents. Both parties presented oral summations to the Court at the conclusion of the introduction of evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioners and Respondents founded Epic in 2014. Nicole, Louis, Rigoberto and Michelle each have a 21% membership interest in the entity. Anthony has a 16% membership interest.

Epic does not have a written operating agreement, and there is no stated purpose for the entity in its formation documents. Nevertheless, the credible testimony of Nicole established that Epic was formed initially to provide 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. That purpose expanded, as the facility offered cheerleading lessons and coaching, "Mommy and Me" classes, and birthday parties, all of which took advantage of the various gymnastics equipment at the Epic facility in Freeport.

Anthony made a cash infusion of over \$300,000 to purchase equipment and construct Epic's facility. The equipment included bars, beams, a "tumble track" and a "competition floor" to permit gymnastic floor exercises. The D'Erricos were to work at the facility in office/management capacities, where Nicole would take advantage of her accounting and bookkeeping background, as well as her experience in her family's business. The D'Erricos also each spent 60 hours or so per week at the facility during its construction.

In addition to her labor, Nicole contributed financially to the business. First, she executed a personal guarantee to pay the company's credit card. Second, she used her own personal credit card for various purchases both as the business was being formed and after it was up and running.

Epic opened in January 2015. Gymnastic students then signed up for the various programs at Epic, but the receivables from those programs were not sufficient to pay Epic's bills.

Tensions ensued between Petitioners and Respondents throughout 2016. In approximately July 2016, Nicole attempted to access Epic’s bank records on her computer, but the password had been changed. Since then, Nicole has had to visit TD Bank, in person, to obtain Epic’s bank records. Neither she nor Louis have been unable to obtain Epic’s books and records without great difficulty.

Epic’s credit card bills have been mounting; there are approximately \$38,000 in unpaid bills. Nicole has personally guaranteed that amount. As it has been unpaid, Nicole’s credit rating has been damaged. In addition, Nicole testified that she has some \$22,000 in personal credit card debt for purchases she made for the business.

Some time in 2017, Respondents, along with a third party not involved in this case, formed an entity known as “BeyondEpic.” Petitioners do not have any membership interest in that entity. BeyondEpic now collects all of the payment from what had been Epic’s students, and deposits money into Epic’s account. The money in Epic’s account is then used for similar purposes as when Petitioners and Respondents operated Epic, including payment of rent for the Freeport location, payroll, and taxes. Students and teachers use the same location, which still has signage saying “Epic.” Respondents have, however, changed the locks at the location.

There is no written agreement between BeyondEpic and Epic. Nor is there any regularity with which BeyondEpic deposits funds into Epic’s account. And, the amounts deposited vary greatly. As one example, in May and June 2018, deposits were made into Epic’s account as follows:

May 7	\$12,000
May 21	\$11,500
May 21	\$ 827
June 4	\$ 8,900
June 18	\$10,800
June 19	\$ 253.23
June 26	\$ 920.00

Finally, there is no question that Petitioners and Respondents do not, and cannot, get along with each other, as they have not spoken in several years.

The test for dissolution of an LLC is set forth in *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (2d Dept. 2010). There, the Second Department noted that, pursuant to LLCL § 702, dissolution of an LLC is warranted if it is not “reasonably practicable” to carry on the business of the LLC. The determination of whether carrying on a business is “reasonably practicable” initially requires a court to examine the LLC’s operating agreement to determine whether it is reasonably practicable for the LLC to continue to carry on its business in conformity with the operating agreement. Thus, the question whether dissolution is appropriate is initially a contract-based analysis. *Id.* at 128.

Where, as here, there is no operating agreement, the Court must divine the purpose of the LLC by the credible and competent evidence before it. *See Matter of Natanel v. Cohen*, 2014 N.Y. Misc. LEXIS 1901 (Sup. Ct. Kings County 2014); *see also Matter of Eight of Swords, LLC*, 96 A.D.3d 839 (2d Dept. 2012) (in the absence of an operating agreement, court correctly examined testimony and evidence to determine the purpose of an LLC). This is because the LLC law, by itself, “cannot define the purely contractual basis for forming the LLC so as to permit a determination of whether its purpose is being thwarted by the conflict between the members.” *Matter of Natanel*, 2014 N.Y. Misc. LEXIS at * 8.

In the context of the purpose of the LLC (whether determined by the members’ agreement or by credible and competent evidence in the absence of an agreement), the member petitioning for dissolution of the LLC must establish either (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. *1545 Ocean Ave.*, 72 A.D.3d at 131. Even if the LLC has a broad purpose, dissolution of an LLC is permissible upon a “strong showing that a confluence of situationally specific adverse financial, market, product, managerial or corporate governance circumstances make it nihilistic for the entity to continue.” *Id.*

Here, the credible and competent evidence established that Epic was formed to operate a facility providing gymnastic and cheerleading training, as well as other classes and programs (such as “Mommy and Me” classes and parties) that used Epic’s equipment. Epic’s purpose included operating a successful financial mechanism by which customers were regularly charged for the services they received, from which Epic could meet its expenses.

Epic's purpose has not been met for some time, particularly in light of Respondents' creation of BeyondEpic. BeyondEpic has reduced Epic to an entity which operates solely at BeyondEpic's sufferance. BeyondEpic, and it alone, determines when to fund Epic. BeyondEpic, and it alone, determines the amount of that funding. There is no agreement memorializing that funding obligation. And, BeyondEpic has a member who has no part of or monetary interest in Epic, and thus no apparent interest in keeping Epic as a going concern. In essence, BeyondEpic uses Epic's assets without any binding responsibility to pay for them. Meanwhile, Epic has failed to meet its expenses, as demonstrated by its unpaid credit card bills of \$38,000 that Nicole has personally guaranteed. Indeed, it appears that BeyondEpic has reduced Epic to a marionette to be manipulated at will by BeyondEpic. But Epic was not formed to be BeyondEpic's puppet. In sum, inasmuch as Epic is "propped up" solely by the monetary infusions from BeyondEpic, it is, as *1545 Ocean Ave.* stated, "nihilistic" for it to continue. Dissolution is thus appropriate, and the Court therefore orders that Epic is dissolved as of this date.

With respect to the cause of action for an accounting, Petitioners must show a demand for an accounting and a failure or refusal by Respondents, who possess the books, records, profits or other assets of the entity, to account to the Petitioners. *Conroy v. Cadillac Fairview Shopping Center Properties, Inc.*, 143 A.D.2d 726 (2d Dept. 1988) citing *Raymond v. Brimberg*, 99 A.D.2d 988 (1st Dept. 1984); *Arrants v. Dell Angelo*, 73 A.D.2d 633 (2d Dept. 1979). Here, the undisputed evidence demonstrated that Petitioners have not received the books and records of Epic with any regularity or without tremendous effort, and thus Petitioners have established their cause of action for an accounting.

LLCL § 703 provides that, upon dissolution of a limited liability company, the Court may appoint a receiver or liquidating trustee to wind up the affairs of that limited liability company upon application by any member. Inasmuch as the Petitioners have repeatedly asked this Court to appoint a receiver, which applications were denied prior to this hearing, the Court will entertain an application by the Petitioners to appoint such receiver or trustee. The Court will also entertain, consistent with *Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dept. 2013) an application by Respondents for a buyout of Petitioners' interest in Epic.

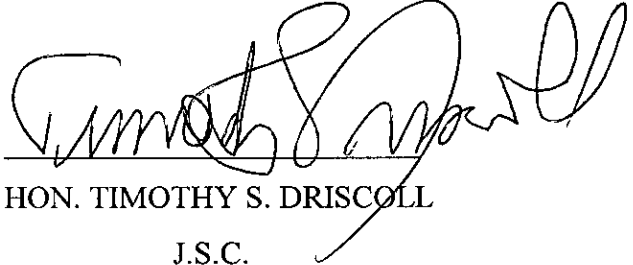
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear for a Pre-Trial conference on October 30, 2018 at 10:30 a.m., at which time counsel must provide all of the materials set forth in Commercial Division Rules 26-32. The Court will schedule the jury trial on the remaining causes of action on that date.

DATED: Mineola, NY
August 21, 2018

ENTER


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

ENTERED
AUG 22 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE