

Matter of Goyal v Vintage India NYC, LLC
2018 NY Slip Op 31926(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 657004/2017
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**In the matter of the application of
PRASHANT GOYAL,**

Petitioner,

-against-

**DECISION AND ORDER
Index No.: 657004/2017**

Motion Sequence No.: 002

**For the judicial of
VINTAGE INDIA NYC, LLC
Pursuant to Section 702 of the
New York Limited Liability Act,**

Respondent.

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O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss (motion sequence number 002), these facts are taken from the Amended Verified Petition (NYSCEF Doc. No. 53).

Petitioner Prashant Goyal is a 50% member of Vintage India NYC, LLC (Vintage India), and petitions for the dissolution of that entity and that its affairs be wound up pursuant to LLC Law sections 702-03.

Goyal and Lynn Keller are both alleged to be 50% owners of Vintage India. The firm has no operating agreement. It operates a clothing/accessories store with an Indian theme at 132 Lexington Avenue, in Manhattan. Goyal and Keller decided to work together in November 2014. Keller, the silent partner, put up \$200,000 by obtaining a line of credit from Morgan Stanley. Goyal was to provide knowledge and experience from working in the clothing business.

Vintage India leased on a retail property. Goyal borrowed money from his wife, Rochi Goyal (Rochi) and purchased inventory worth \$23,000. The store opened in December 2014. Goyal managed the store and hired six employees. Rochi and Keller also worked in the store part-time. Vintage India repaid the line of credit set up by Keller. Goyal was not paid for his time in the store.

In January 2016, after about \$25-30,000 had been paid back on the line of credit, Goyal and Keller decided to take out another loan, and subsequently others, from On Deck Capital (On Deck). On Deck is now suing Goyal for default on a \$25,000 loan.

In February 2017, Keller confronted Goyal in the presence of her muscular friend and threatened to “harm Petitioner and [get him] and his family deported from the country if he did not give her [his] percentage of the business” (Amended Verified Petition, ¶ 24). It is not clear if he signed. Goyal’s counsel, Howard Shragain, then received notice of a meeting. On or about March 1, 2017, Goyal found large withdrawals from Vintage India’s account in Keller’s name, despite the company being in arrears to its landlord. On March 21, 2017, Keller purported to hold a members meeting in which she ousted Goyal as a member of Vintage India.

Goyal has been cut out of the company and no longer has access to information about the store’s operations, business, or finances. He believes Keller is looting the company.

In this petition Goyal seeks:

- 1) Dissolution pursuant to LLC law section 702 and winding up of the company;
- 2) A temporary receivership to oversee the assets of Vintage India;
- 3) Access to financial records; and
- 4) An injunction preventing Keller from transacting business for Vintage India.

Vintage India now moves to dismiss the Petition. The motion is DENIED.

II. ARGUMENTS

A. Respondent’s Arguments to Dismiss

Keller agrees that she and Goyal formed Vintage India together, and that all of the capital was provided by Keller. She claims that, for providing the capital, she received a vested 50% interest in Vintage India. Goyal, who was to provide sweat equity, received an un-vested 50% interest, according to Keller. While Goyal never took a salary, \$200,000 was transferred from Vintage India’s accounts to Rochi’s account.

Keller states she noticed financial irregularities in the books and discovered large amounts of money missing. She took over Vintage India on February 12, 2017. Goyal left and took all of the financial records. Keller then performed an accounting and found personal charges, unauthorized loans to Goyal, and a variety of other irregularities (Memo, NYSCEF Doc. No. 70, at 4). Keller called a members meeting. Goyal refused to appear or respond to the allegations. Keller removed Goyal for cause at the March 21, 2017, meeting (*id.*). Goyal then opened a competing business across the street from Vintage India, Heritage India, using a similar color scheme and logo (*id.* at 5).

Vintage India moves to dismiss the petition based on documentary evidence, but does not specify the documentary evidence on which she relies. Instead she points out deficits and omissions in Goyal's supporting documentation for the Petition. Keller's affidavit attaches two documents. One is an e-mail between counsel discussing deficiencies in the amended notice of petition. The other is an email exchange between Goyal and Keller in which Goyal demands that Vintage India reimburse him for money spent before the store opened.

Vintage India also moves to dismiss for lack of standing, arguing that since Goyal was removed for cause, he no longer has a membership interest in Vintage India, as his interest did not vest (*id.* at 8, citing *Bank of New York v Silverberg*, 86 AD3d 274, 275 [2d Dept 2011] [a party which does not actually hold he notes lacks standing]). As Goyal did not contribute cash and his membership had not vested, he was properly removed for cause, now lacks standing, and is barred from the relief he seeks (Memo at 8).

Vintage India argues that this action is frivolous and brought in bad faith, as petitioner failed to discuss the \$200,000 Goyal embezzled, the substance of the members' meeting, and the substantial facts behind Goyal's removal (*id.* at 9). Respondent also argues that Goyal is perpetrating a fraud on the court, that the documents and affidavits submitted by respondent in this action (largely in response to motion sequence number 001), give the true picture and Goyal is omitting relevant facts. Respondent asks that the petition be dismissed and that Goyal and/or his counsel be sanctioned in the amount of respondent's attorneys' fees and costs.

B. Goyal's Opposition

Petitioner notes that respondent moves to dismiss based on documentary evidence pursuant to Limited Liability Partnership Law ("LLP law") section 100, et sec. (Opp., NYSCEF Doc. No. 79, at 2, citing Notice of Motion, NYSCEF Doc. No. 67, ¶ 2). Accordingly, this portion of the motion must fail, as the LLP law does not apply to Vintage India, a limited liability company. He disputes omitting critical facts. His papers omit only respondent's baseless allegations. Further, respondent's claim of lack of standing assumes the validity of the ouster of petitioner, the very issues in dispute in this action. Goyal argues that respondent's documentary evidence (although not specifying what document) is not dispositive and is not undeniable (*id.* at 3-4). Goyal also claims Keller acknowledged in an e-mail that he put money into the business (*id.* at 4, *see* Goyal aff, NYSCEF Doc. No. 72, ¶ 21, referring to the e-mail discussed above, in which he asks to be reimbursed). Goyal also disputes that his membership did not vest (*id.* at 4, without citation). The

vote at the members meeting cannot serve to take away Goyal's ownership share as it lacked a quorum, and, was procedurally flawed. At most, if done properly, a majority could have removed him from being a managing member, not from membership (*id.* at 4, citing LLC Law § 404).

Vintage India Reply

Respondent concedes the LLC law applies, as there was no operating agreement, and the reference to Limited Liability Partnership law was a scrivener's error (Reply, NYSCEF Doc. No. 87, at 2). Respondent contends that the dissolution contemplated by LLC law 702 is extreme, and unnecessary, as Vintage India is a going concern, and a viable entity should not be dissolved because it expelled a member for embezzlement (*id.* at 4-5).

Respondent also argues that, if there were any defects in procedure or substance as to how Goyal was removed, he should be estopped from asserting them more than a year later (and after having opened a competing store across the street). Goyal did nothing for 8 months after the meeting at issue.

Respondent also argues Goyal never made a capital contribution (Reply at 6). Goyal only provides a single e-mail to support his claim that he made a contribution, and the evidence is disputed and vague. Accordingly, as Goyal failed to meet the burden of establishing standing, the petition should be dismissed (*id.* at 7).

Vintage India also argues Goyal should be sanctioned to punish Goyal for the "FrivilouaxSs" [sic] filings (*id.*).

III. DISCUSSION

A. Standing- CPLR § 3211 (a) (7)

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause

of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Vintage India argues the Petitioner has failed to state a claim because he is not a member of Vintage India NYC, LLC. Goyal was, according to respondent, “removed for cause” at the March 2017 meeting (Memo at 3, *see Keller Aff*, NYSCEF Doc. No. 16, at 5-7). Keller claims Goyal was removed as a member and expelled from the LLC, and that his interest in Vintage India, which was unvested at that time, was revoked at that meeting. Vintage India cites a handful of cases as part of this section of its memo, but fails to explain how the cases support its position. The Annotations to the Limited Liability Company Law, however, state that “neither the LLC nor the other members have the statutory right to expel a member from the LLC. . . . The right to expel a member must be expressly set forth in the operating agreement” (NY Limit Liab Co Ch. 34, Refs & Annos, 6.12.2 Expulsion, *see also Man Choi Chiu v Chiu*, 71 AD3d 646, 647 [2d Dept 2010] [“Although Limited Liability Company Law § 701 mentions expulsion of members, there is no statutory provision authorizing the courts to impose such a remedy. Rather, the reference to expulsion of members contemplates the inclusion of such a provision in an operating agreement”]) *Man Choi Chiu v Chiu*, 71 AD3d 646, 647 [2d Dept 2010]). Further, while the Limited Liability Company Law provides that a manager of an LLC may be removed, that requires a majority vote, which Keller lacks as Goyal owns half of the interest in Vintage India (*see LLCL* § 414).

Respondent provides no law to support its argument that Goyal’s shares had not vested (Memo at 8). While there is a dispute as to whether Goyal paid money into the LLC and the amount, it is undisputed that he put in “sweat equity” and held a 50% interest in the firm. At most, there is a dispute as to whether his shares had vested. The defense that Goyal’s interest is unvested is unexplained and is unsupported by citation to either caselaw or statute.

Accordingly, the claim that Goyal lacks standing is REJECTED.

B. Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a

defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’” (*id.* at 84-85).

Here, the documentary evidence identified is all of the documentation attached to Keller’s affidavit, which Vintage India claims shows Goyal’s embezzlement of funds and that proper procedure was followed with regard to the member meeting. These are not the types of documents which typically qualify as documentary evidence for purposes of CPLR 3211 (a) (1). Additionally, while the documents referred to by respondent may support its narrative, they fall far short of utterly refuting the factual allegations of the petition. Most importantly, as the discussion above shows, Keller could not remove Goyal as a member.

As far as Vintage India takes issue with the failure of petitioner to provide documentary evidence in support of his petition, on a motion to dismiss, the court must take the allegations of the complaint as true. Documentary proof is not required (*see Monroe v Monroe*, 50 NY2d, 481, 484 [1980]).

C. Sanctions

As the motion to dismiss fails, the claim for sanctions fails as well.

Accordingly, it is hereby

ORDERED that the motion of respondent to dismiss the petition is DENIED; and it is further

ORDERED that respondent answer the petition within thirty (30) days of this Decision and Order; and it is further

ORDERED that counsel for the respective parties shall appear for a preliminary conference on Tuesday, October 2, 2018 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 7, 2018

ENTER,



O. PETER SHERWOOD J.S.C.