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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY : CIVIL TERM : PART 39

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In the matter of

ADVANCED 23, LLC and DAVID SHUSTERMAN,

Petitioners,

INDEX NO.  
650025/2016

And

CHAMBERS HOUSE PARTNERS, LLC,  
ANITA MARGILL and HERBERT MARGILL,

Respondents,

For the Dissolution of Chambers House  
Partners, LLC pursuant to Limited  
Liability Company Law 702.

-----x  
January 2, 2019

60 Centre Street  
New York, New York

B E F O R E :

HON. SALIANN SCARPULLA,

Supreme Court Justice.

A P P E A R A N C E S :

THE LAW OFFICES OF SETH L. MARCUS  
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Attorneys for the Respondents

KAREN MENNELLA  
Senior Court Reporter

1 Proceedings

2 THE COURT: Hello. Happy New Year everyone.  
3 Please be seated. Before we start, let me just ask you,  
4 have you tried at all to resolve this?

5 MR. LEDERMAN: We have tried multiple, multiple  
6 times and, you know, unfortunately there just seems to be a  
7 need for a ruling from the court.

8 THE COURT: All right. So what happens? I had a  
9 petition to dissolve the corporation, and I sent it out for  
10 a hearing because it was an allegation in the answer that  
11 one of the parties had acted in a way to try and force the  
12 dissolution of the corporation. I have a report from the  
13 hearing officer, who held a three-day hearing, and the  
14 hearing officer found that certain of the actions were taken  
15 to force a dissolution of the corporation, some were not.  
16 And so that was what was reported to me.

17 And now I have a motion to confirm, disaffirm in  
18 part and a cross motion to affirm, correct?

19 MR. MARCUS: Correct.

20 MR. LEDERMAN: Correct. And in the motions are --  
21 in the motions to confirm the cross motion are motions to  
22 have a dispositive judgment on the original petition.

23 THE COURT: Right. But then you also sought a  
24 hearing for breach of fiduciary duty. This is a petition.  
25 Whatever you want to bring, what other lawsuit you want to  
26 bring, is fine. This is a petition for dissolution. That's

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all it is. And so I sent it out for a hearing. The hear  
and report -- there was a hear and report and I'm going to  
resolve the petition based on that hearing, if I affirm it,  
okay. Whatever else you want to do is up to you. Okay.

MR. LEDERMAN: May I ask permission for  
Mrs. Margrill to sit up here? She is a little older.

THE COURT: Of course. Do you have any objection?

MR. MARCUS: I have no objection.

THE COURT: You made the first motion to affirm in  
part and disaffirm in part, correct?

MR. MARCUS: Yes, I did, Your Honor. You gave the  
synopsis of what had occurred and how we got to the hearing.  
I think it's important to keep in mind in the decision that  
in which you issued the order for reference there were very  
specific actions in which you said they established a prima  
facie case for dissolution and there was certain discrete  
issues that were sent out to the referee for further  
inquiry.

The actions that established the prima facie case  
occurred between October and December 2015 in which there is  
a clear violation of the operating agreement, because the  
Respondents misappropriated rents and cleaned out the  
account, which are fairly fundamental violations. And the  
order of reference went out to the referee.

And according to my reading of a decision that you

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2 cited in WRD Sales v. Falcon, what the respondents need to  
3 show was that somehow the actions of my client caused them  
4 to loot the account; caused them to, in effect, price them  
5 out of participation in the LLC. And where I think the  
6 referee went ary was not necessarily in her findings of fact  
7 but in how she applied them in the ultimate conclusions that  
8 we made. And I think she went ary because she, frankly,  
9 pointed to no action prior to October 2015. No breach of  
10 the agreement by my client prior to October 15, 2015.

11 Now, she found that the very act of filing a  
12 petition in response to having to having the company's bank  
13 accounts looted was somehow a breach of the operating  
14 agreement, which I think legally is way off base for a  
15 number of reasons. One, we didn't need an order of  
16 reference for that. If his filing the petition was, in  
17 fact, a violation of the operating agreement, that would  
18 have appeared from the papers. Number two, you know,  
19 Section 702 of the LLC Law is discrete from the section that  
20 deals with, you know, how you dissolve under an operating  
21 agreement. So it's by virtue of the fact that you're  
22 seeking dissolution, you're seeking something outside the  
23 operating agreement. I don't see how filing a petition can  
24 violate. And it necessarily happened after my client was  
25 frozen out.

26 Similarly, she focused on issues of distributions.

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2 Now, prior to October 2015, all distribution checks were  
3 signed, right. It was only after the litigation commenced  
4 that there was an argument as to the interpretation of an  
5 interim order that you signed for the management company.  
6 You actually resolved that dispute in motion number three.  
7 Distribution checks were issued in accordance with that  
8 motion. She, nonetheless, found that among my client's  
9 breaches of the operating agreement that would preclude  
10 dissolution was after the litigation was commenced she felt  
11 his conduct in not wanting to take further distributions  
12 somehow violated the operating agreement.

13 THE COURT: You know, I think -- let me say this.  
14 First, when was the mortgage? When was that supposed to be  
15 paid off; prior to or after the litigation was commenced?

16 MR. MARCUS: It was paid off prior to the  
17 litigation being commenced.

18 THE COURT: And so her view was that the whole  
19 mortgage thing was one.

20 MR. MARCUS: Right.

21 THE COURT: When did your client and the Defendants  
22 have the altercation; prior to or after the litigation was  
23 commenced?

24 MR. MARCUS: Which altercation are you talking  
25 about?

26 THE COURT: The garbage one.

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2 MR. MARCUS: The garbage one occurred prior to the  
3 litigation, but she found --

4 THE COURT: So that was it. This whole argument  
5 that nothing occurred, she found that that was a breach of  
6 his fiduciary duty. His breach of his duty of loyalty. I  
7 have no problem with that. She heard both sides of the  
8 story. She made a factual finding. It was straight up.  
9 And it was -- and she, in her view, that was a manufactured  
10 thing for him, right?

11 MR. MARCUS: No, actually that wasn't.

12 THE COURT: That wasn't. But, I mean, there were a  
13 number -- so you're saying that everything that she found  
14 that was created to cause the breach, was created to cause  
15 the dissolution, which happened after the --

16 MR. MARCUS: Correct. She looked at the garbage  
17 dispute and the altercation in the hallway. And she found  
18 while it might be a technical breach, it wasn't for the  
19 purpose of forcing a dissolution, which was the second half  
20 of the showing they had to make. She found that people got  
21 angry.

22 THE COURT: No, no, no, that's not right. She  
23 found that your client abused the Defendants. Let's be  
24 real. She found that your client was incredible, for the  
25 most part. She found that your client basically was not  
26 telling the truth. And I have to say, look, I wasn't at the

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2 hearing. And unless the credibility determination is off  
3 the wall, then I'm going with it.

4 MR. MARCUS: Your Honor, you don't -- the  
5 credibility -- we're's not challenging the credibility  
6 determination.

7 THE COURT: You are saying that because everything  
8 that she found that he did to cause the dissolution occurred  
9 after the commencement of the petition --

10 MR. MARCUS: Right.

11 THE COURT: -- that I cannot -- those cannot be  
12 bases for the --

13 MR. MARCUS: Your Honor, if he didn't breach the  
14 agreement before they looted the account, then he couldn't  
15 have procured his own freezing. There was a two-part  
16 showing that they needed to make. Number one, he breached  
17 the agreement for the specific purpose of causing the  
18 Defendants or the Respondents to act in the manner that they  
19 did for causing his own -- causing them to breach, right.

20 For that to happen, the breach had to be in a time  
21 before they acted, before October 16, 2015.

22 THE COURT: I don't agree with that. I think it  
23 happens up until the date of the hearing, because they  
24 always have the right to amend the answer.

25 MR. MARCUS: It's not a question of amending the  
26 answer.

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2 THE COURT: And to conform the pleadings to the  
3 proof.

4 MR. MARCUS: They can conform the pleadings to the  
5 proof, but --

6 THE COURT: Your client's the one who filed the  
7 dissolution petition, not them.

8 MR. MARCUS: Yes.

9 THE COURT: So that he files a dissolution petition  
10 and then he does ten thousand things to make sure it happens  
11 in violation of his duties under the operating agreement.

12 I mean, I don't think your argument is really going  
13 very far. But, okay, I hear it.

14 MR. MARCUS: Please, if you look at the W. Ortley  
15 case, which was the one that you cited, right, it's clear  
16 that it's a limited equitable doctrine that he had to  
17 procure his own freeze out. The freeze out occurred in  
18 October 2015. Anything he did after that has nothing to do  
19 with the actions that Respondents took that were illicit  
20 that established his prima facie entitlement to dissolution.

21 Once they took -- I mean, once they took the money,  
22 right, then it's a fundamental breach of an operating  
23 agreement. Frankly, if they can do that without a  
24 compelling reason when they did it, all of the protections  
25 that are routinely built into these operating agreements are  
26 futile.



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My client, even if he's not a nice guy, invested \$2 million into this property, right. The operating agreement, which is fairly standard, says that having, you know, paid the piper he gets a say in how the tune is called, right. So he gets a 50 percent say in what happens. And they effectively stripped him of that right. And they did it October of 2015 and at the date they did it --

THE COURT: I don't think that's right. I think your view is not the referee's view. Your view of the case is not the referee's view.

MR. MARCUS: That's true.

THE COURT: The referee's view was right. So, I have to say, I thought the referee did a great job.

MR. MARCUS: But my view is actually from your order and the --

THE COURT: No, no, no, don't put it on me. That's not right.

MR. MARCUS: Your Honor, you cite --

THE COURT: That is not correct, Counsel. I wanted to know what he was -- whether or not this was an inducement. That's been their claim the whole time. That he has tried -- these are two older people. He invests in this property thinking I'm going to kick them out, make them sell the property and take it myself. That's been their claim the whole time. He knows it, you know it, counsel

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2 knows it, I know it. And I wanted to know does that claim  
3 hold water. And the referee said yes, it does.

4 MR. MARCUS: Your Honor, how you behave after  
5 somebody has stolen money from your company is different  
6 from how you behave beforehand.

7 THE COURT: No, no, no. Him refuse -- him saying  
8 not going to refinance happened before. The altercation  
9 with the Respondents happened before. It's not all after  
10 the petition was filed.

11 MR. MARCUS: It wasn't a breach not to refinance.  
12 She didn't find that he breached the agreement refusing to  
13 refinance. In fact, the agreement specifically gives him  
14 discretion to not refinance.

15 THE COURT: No. What it doesn't do is allow him to  
16 tell the bank by himself that we're not even considering  
17 this. That is a breach of his fiduciary duty.

18 MR. MARCUS: Your Honor, he went to a meeting.  
19 They couldn't come to an agreement.

20 THE COURT: I'm not going to reargue. She found  
21 what she found, right. And the question that you're saying  
22 to me, under the law, even what she found is not sufficient  
23 to --

24 MR. MARCUS: She exceeded her brief is what I'm  
25 saying. I'm saying she went beyond the order of reference.  
26 She didn't have discretion to found what she's found. And

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saying that legally she needed to find a breach that occurred between October 16, 2015, and she did not, right. And I'm also saying that you can accept all of her credibility determinations and based upon that, right, it's simply you can still find that dissolution is proper.

And I would finally urge that, as a practical matter, the statute says is it practicable to operate this business. If you don't dissolve it, you are just condemning these people to endless litigation.

THE COURT: I have tried to find a way for everyone to do it.

MR. MARCUS: Three years as well, Your Honor.

THE COURT: What is the -- how is it that we are not resolving this?

MR. MARCUS: We had reached --

THE COURT: Lets go off the record.

(Whereupon, there was an off-the-record discussion.)

THE COURT: Go ahead. So, anything else?

MR. MARCUS: I think you understand my argument, Your Honor.

THE COURT: I do. Okay. Counsel.

MR. LEDERMAN: All right. Your Honor, I do think you have a very good grasp of the case, but I'd like to take a few minutes, particularly with my client here, to review

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the issues.

This is a petition for dissolution of a closed corporation. So the court knows it's a corporation that has a single asset, building 154 Chamber Street. It's right by the subway station at Chamber Street. You can see it, its got the hardware store. The whole building consists of a hardware store on the ground floor, one commercial space; two apartments, the top and bottom apartment, which are owned and occupied by the two parties to this case, and two rental apartments in the middle.

The operating agreement provides, as do most, that if anyone's unhappy they certainly can sell their interest subject to a right of first refusal. The real reason we're here is Dr. Shusterman bought his interest at approximately a 50 percent discount to its value because of the lack of marketability, and he doesn't want to sell his interest for what he bought it for. What he wants to do is force a judicial dissolution so that the property is sold for approximately its current fair market value, meaning they'll have a profit of approximately 100 percent on his investment. He has an investment that he's completely able to go back to sell to someone else that wants to live there. He is not without remedy.

But the question becomes legally this is a petition to dissolve a limited liability company. Judge Austin's

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2 decision in the Second Department, which has been adopted by  
3 the First Department, the 1514 Ocean case, which I know Your  
4 Honor cited in a case which was written up in the Law  
5 Journal a few weeks ago, is the current state of the law  
6 that says as long as a company can -- an LLC can function  
7 there is a difference statutorily between the LLC Law and  
8 the Business Corporation Law. And as long as the  
9 corporation can function, its dissolution is an equitable  
10 remedy and it's up to the court to decide what to do.

11 In this case, and I'll get to -- it's clear the  
12 corporation can function. There were fights in 2015. Since  
13 2015, once a month the Margrills leave five checks stapled  
14 to their door and Dr. Shusterman signs five checks. And it  
15 goes on. It's not a good marriage, but it functions.

16 There was one incident in 2015, October, which led  
17 to this lawsuit. And Your Honor issued a very thorough  
18 decision, and I believe there has been a  
19 mischaracterization. Your Honor cited some cases at Page 12  
20 of the decision, the references order that an evidentiary  
21 hearing is directed to be conducted before a special referee  
22 to determine whether Shusterman breach his duties and  
23 obligations under the operating agreement to force  
24 dissolution. Your Honor didn't set any guidelines. There  
25 was a reference to a Nassau County Supreme Court decision,  
26 but Your Honor didn't say that was the law of the case.

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2 Your Honor just asked the referee to determine what  
3 happened.

4 The referee heard three days of testimony of the  
5 parties and a non-party. The attorney was actually on it.  
6 And what comes out loud and clear from the decision -- I  
7 mean, it's really actually a very thorough, extraordinary  
8 deposition. In the report she reflects that Dr. Shusterman  
9 is a young, very large man, a physically fit man.

10 Ms. Margrill, will you stand up? Ms. Margrill is  
11 in court.

12 MR. MARCUS: Objection, Your Honor.

13 MR. LEDERMAN: She is approximately five-foot  
14 two --

15 MS. MARGRILL: Two and a half.

16 MR. LEDERMAN: Five foot two-and-a-half. You're  
17 how old?

18 MS. MARGRILL: I will be 82 April Fool's Day.

19 MR. LEDERMAN: Okay. And, among other findings,  
20 while she didn't -- she considered it and found that it was  
21 done out of anger, perhaps, that he hit her with a piece of  
22 cardboard. I mean, he didn't throw her down a flight of  
23 stairs, but it got to the level that he hit her.

24 The issue which led to this litigation, which is  
25 discussed at length in the referee's report, is the mortgage  
26 was coming due in December of 2015. As with anybody, it's a

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2 very serious issue where you have a building and a mortgage  
3 coming due. The referee report recites that for weeks and  
4 months they were sending him e-mails saying what are you  
5 going to do to help us refinance the building when the  
6 actual operating agreement talks about that there's a  
7 mortgage that he signed a reaffirmation for.

8 What the referee found, and she quoted  
9 Mr. Reichman, the attorney who was at the hearing, and said  
10 he was extremely credible and saying it was the most  
11 extraordinary thing he ever saw. There's a meeting. He  
12 says, you know, we need to discuss this. You had written  
13 that you have contacts. You're a fairly successful  
14 physician, private banking where you had said you have a  
15 proposal, where is the proposal. He said, I don't have  
16 to -- words to the effect that I don't have to tell you,  
17 it's not here. What's going to happen, the mortgage is  
18 going to come due. And the referee found it credible that  
19 he said, well, I guess they're going to have to sell their  
20 apartment.

21 This is all part of what goes not to the Nassau  
22 County Supreme Court case, but to the law from the Appellate  
23 Division Second Department, which has been affirmed that  
24 it's an equitable issue to decide whether or not dissolution  
25 is a fair remedy when the corporation can function.

26 Now, the court asked how are they going to get

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2 along. Actually, this morning my client, in general,  
3 without breaching confidence, the court in dissolution is  
4 like a divorce. The court can say you're divorced or you're  
5 not divorced. The court can't say you have to love one  
6 another. That's beyond the power of this court. And while  
7 I certainly like Your Honor as a person, et cetera, I don't  
8 relish coming here.

9 But we have now established, which wasn't  
10 established before, the operating agreement does have a  
11 provision for arbitration of any dispute over \$25,000.  
12 There was a dispute over whether or not to repair the two  
13 apartments, file the petition before the AAA. Approximately  
14 four months later we had a decision approving renting the  
15 apartments. Your Honor said she wasn't going beyond the  
16 scope of that; you're going to use the same contractor and  
17 the same proposal and do it. They objected to arbitration  
18 saying it shouldn't be arbitrated. The arbitrator overruled  
19 it. They did not seek to stay the arbitration. And we have  
20 established that this corporation can function.

21 THE COURT: Are the apartments getting renovated?

22 MR. LEDERMAN: They're being renovated as we speak.  
23 There's a problem. Dr. Shusterman's bathtub is leaking into  
24 the apartment below. But the workers are there as we speak.  
25 I was personally there about two weeks ago. They're  
26 painting, they're cleaning. They want to go. It's



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expensive, it's awkward.

But for my client, whose lived there, you know, for since 1980 something, and who plans on living there and have their children, and doesn't want to pay approximately \$2 million in capital gains tax, they're not happy to spend money on me. They're not happy to go through this procedure. They would like Dr. Shusterman, with all due respect, to just grow up and be a nice guy and work with them. They don't have to like each other.

THE COURT: Let's go back to --

MR. LEDERMAN: Going back to this, the issue before the court is should the LLC be dissolved. The fact that they don't like each other, the courts -- the First Department, Second Department have said that is not grounds. In the BCL you could have a deadlock in a C corporation. You can't in a LLC. Deadlock is not enough.

The cases, and I believe Your Honor may have cited this, not in this decision but another decision, there was a case out in Queens where two brothers were so violent with one another that the property was foreclosed and they couldn't even go on. Here, for better or worse, they had to pay off the mortgage. My client didn't want to pay off the mortgage. They took their savings and paid off the mortgage.

My client would like to meet with Dr. Shusterman

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2 once a month, discuss the building, work with him. If he  
3 chooses not to, you know -- I'll discuss my cross motion. I  
4 respectfully suggest that because they filed the petition  
5 the right remedy here, based on their petition and their  
6 motion saying that they -- that Dr. Shusterman believes it's  
7 irreparably broken, under their petition the court should  
8 rule to remove him as manager. They still have a fiduciary  
9 duty with him, but he creates this deadlock by refusing to  
10 return calls, et cetera.

11 So I submit that on my cross motion, in addition to  
12 denying the petition, the court, because he filed the case,  
13 asked for such other and further relief, should award their  
14 attorneys fees under the guarantee he signed and remove him  
15 as a manager. In fact, it makes them fiduciaries for him  
16 and accountable for every penny that he can go to  
17 arbitration if he thinks something has been done wrong.

18 But if Dr. Shusterman is going to come before the  
19 court and say that this is irrevocably broken; I can't fix  
20 it; I'm afraid to be in the same room with Ms. Margrill,  
21 because she'll attack me, there is a remedy.

22 So I would submit that the petition should be  
23 denied, but I would go further and say that the court should  
24 rule --

25 THE COURT: I'm not going any further. I'll tell  
26 you right now.

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MR. LEDERMAN: I understand.

THE COURT: I have a petition. I sent it out for a hearing on some factual issues, which came back, and I'm going to rule on the petition only, okay. But I hear your argument.

MR. LEDERMAN: I ask you to consider it. I ask you to look at the counterclaims, which we do have a right in a special proceeding to bring counterclaims.

THE COURT: Well, what I would do -- what I'm definitely going to do --

MR. LEDERMAN: If you dismiss it without prejudice, we may go to arbitration and ask him to do that.

THE COURT: I'll do a plenary proceeding, whatever you want to do, but I'm here only for the petition.

MR. LEDERMAN: As long as it's without prejudice to rights to either an arbitration or before you seek attorneys' fees and to seek to have him removed for conditions imposed, we may let an AAA arbitrator deal with that. But dissolution would be terribly burdensome and unfair to Respondents.

Petitioner does have his remedy. Someone will pay him the \$2 million he bought, he just won't get to double his money.

Thank you, Judge.

THE COURT: All right. Anything you else you want

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2 to say, Counsel?

3 MR. MARCUS: Very briefly, Your Honor.

4 I would, just for the pleading record, that I did  
5 distinguish the Ocean Avenue case in the papers based upon  
6 the fact that that case the company could be running  
7 unilaterally. In this case it cannot. And I elaborated  
8 that on papers. I don't think I need to further elaborate.

9 The other thing that I would simply point out is  
10 that counsel in his argument has presumed the building is  
11 worth \$18 million. He said that he could sell his unit for  
12 \$2 million. And also they said in regard to tax  
13 consequences, that may or may not be the case, we haven't  
14 had any factual hearing on any of that. So to the extent  
15 that was going to influence you, I would object to you  
16 taking that into consideration.

17 But having said that, I think you understand my  
18 argument and, unfortunately, you don't agree with it, but  
19 we'll deal with it as it comes due.

20 THE COURT: Exactly. So if you'll -- because you  
21 cross moved, if you'll get me a copy of the transcript and  
22 then I'll mark the petition --

23 MR. MARCUS: I'm sorry, one final thing. I just  
24 haven't responded to their cross motion, because you  
25 indicated --

26 THE COURT: I've already indicated the only thing

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I'm doing on this motion is deciding the petition. Anything that's brought up in the way of counterclaim I will just dismiss without prejudice. There is no issue about statute of limitation. So, all right.

So get me the transcript and then I'll issue a decision.

MR. LEDERMAN: We'll just split the cost.

THE COURT: Yes, split the cost. Thanks, counsel.  
Happy New Year.

MR. MARCUS: Happy New Year.

\*\*\*\*\*

C E R T I F I C A T E

I, Karen M. Mennella, a Senior Court Reporter for the State of New York do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes.



Karen M. Mennella,  
Senior Court Reporter