

Lazar v Attena LLC
2020 NY Slip Op 33003(U)
September 9, 2020
Supreme Court, New York County
Docket Number: 655110/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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GABRIEL LAZAR and JOEL SHEINBAUM,

Petitioners,

- v -

ATTENA LLC, HEMERA LLC, NESSA LLC, ARIK MOR,
and URIEL ZICHRON,

Respondents.
-----X

INDEX NO. 655110/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISSAL

Respondents Arik Mor and Uriel Zichron move pursuant to CPLR 404(a), 3211(a)(1) and (7), and NY Limited Liability Law § 702 to dismiss the petition.

Petitioner’s Gabriel Lazar and Joel Sheinbaum initiated this special proceeding pursuant to NY Limited Liability Law § 702 to dissolve three respondent LLCs: Attena, Hemera, and Nessa. Petitioners also ask for the appointment of a receiver or liquidating trustee to wind up the affairs of the LLCs pursuant to LLC Law § 703(a); and restrain respondents Mor and Zichron from filing any final tax returns on behalf of the LLCs without the prior express written consent of petitioners or receiver. (NYSCEF Doc. No. [NYSCEF] 1, Petition).

Petitioners allege that “[t]he sole purpose of the LLCs was to acquire, own and operate five separate multi-family properties located in Manhattan.” (*Id.* ¶ 65).

Petitioners further allege that all five properties were acquired in 2012 and 2013; that

Attena was formed to hold the first two properties acquired (22 Bradhurst Avenue and

West 156th street); that Hemera was formed to hold the next two properties acquired (West 137th Street and West 135th Street); and that Nessa was formed to partially hold the fifth property acquired (West 133rd Street). (*Id.* ¶¶ 14-19). Allegedly, the intended purpose of the LLCs -- which was to own and operate the Properties -- ceased when the properties were sold in December 2015. Petitioners conclude that “the LLCs have run their course and can no longer be operated consistent with their purpose.” (*Id.* ¶ 67). “Because it is no longer practicable to carry on the business – in fact, there is no business to carry on -- in conformity with the operating agreement, judicial dissolution should be ordered in accordance with LLC Law §702.” (*Id.* ¶ 68).

LLC Law § 703(a) provides that “[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company’s affairs upon application of any member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee.”

As a preliminary matter, this motion is proper under CPLR 404(a). CPLR 404(a) permits respondents in a special proceeding to move to dismiss upon “an objection in point of law.” (*See Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 5 [1st Dept 2009] [the “evident purpose” of CPLR 404[a] “is to permit a motion to be made on all grounds available in an action under CPLR 3211”]). “Unlike a complaint in a plenary action, a petition in a special proceeding must be accompanied by competent evidence raising a material issue of fact.” (*Matter of Trustco Bank, N.A. v Strong*, 261 AD2d 25, 28 [3d Dept 1999]). “The drafters indicated that the court is not restricted to the face of the petition in determining its legal sufficiency; extrinsic

evidentiary materials, such as affidavits, may be considered.” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 404). Accordingly, the court rejects petitioners’ procedural objections.

Respondents argue that petitioners have failed to establish a *prima facie* case for dissolution under LLC Law § 702 which provides that “[o]n 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.” The key determination for a court is whether it is “reasonably practicable to carry on the business” of the limited liability company. (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121 [2d Dept 2010].) 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.) Here, to maintain this special proceeding, petitioners must establish whether continuing the LLCs is financially unfeasible or management is unable or unwilling to reasonably permit or promote the stated purpose of the LLCs.

The purpose of the LLCs here is “any lawful business purpose” (NYSCEF 2, Attena Amended and Restated Operating Agreement, ¶ 3; NYSCEF 4, Nessa Limited Liability Company Operating Agreement ¶ 3; NYSCEF 3, Hemera Amended and Restated Operating Agreement ¶ 3.) Nowhere in the operating agreements does it state, as petitioners allege, that the “sole purpose of the LLCs was to acquire, own and operate

five separate multifamily properties located in Manhattan.” (NYSCEF 47, Petitioners’ Memorandum of Law in Opposition to Respondents’ Motion to Dismiss Petition 19 [emphasis added]). Nowhere do petitioners claim respondents have failed to promote or permit the LLCs’ stated purposes.

Petitioners’ legal support is not otherwise. In *Matter of Fassa Corp.* (31 Misc 3d 782, 785 [Sup Ct, Nassau Cty, 2011]), the court granted a dissolution petition because the operating agreement provided for written notice to other members to dissolve the company which was unquestionably triggered dissolution and the company’s purpose was to acquire real property and resell the property. Here, the operating agreements have no such trigger and do not limit the purpose of the LLCs to acquiring and selling properties. In *Matter of 47th Rd. LLC* (54 Misc 3d 1217[A] [Sup Ct, Queens Cty 2017]), the court held that if the general nature of the business purpose is ultimately “vague,” the evidence must make it clear that the purpose of the company is no longer being fulfilled to necessitate dissolution. Petitioners here offer no evidence to support the claim that the generally stated purpose of the LLCs to engage in “any lawful activity” is no longer being fulfilled.

Moreover, courts have dismissed dissolution petitions containing the same broadly stated purpose provision found in the LLC operating agreements. For example, in *Yu v Guard Hill Estates, LLC*, (2018 WL 3953795, at *2-3 [Sup Ct, NY Cty 2018]), the court dismissed a dissolution petition based on operating agreements that provided that the purpose of the companies was to acquire certain real property and engage in “any other lawful act or activity for which limited liability companies may be formed under the LLCL and engaging in any and all activities necessary or incidental to the foregoing.”

Similarly, petitioners fail to show respondents are unable or unwilling to promote or achieve the generally stated purpose of the LLCs.

Petitioners also fail to satisfy the second alternative. There is no evidence that the LLCs are in financial turmoil, insolvent or otherwise cannot meet their debts and obligations. Petitioners also do not allege that continuing the LLCs is financially unfeasible. (*Doyle v Icon*, 103 AD3d 440, 440 [1st Dept 2013]; see also *Barone v. Sowers*, 128 AD3d 484, 485 [1st Dept 2015]).

Petitioners' reliance on *Natanel v Cohen*, 43 Misc 3d 1217[A], 2014 NY Slip Op 50677[U] [Sup Ct, Kings Cty 2014] for the proposition that the court may look beyond whether the company is able to function is misplaced. *Natanel* is distinguishable. The parties in *Natanel* did not have an operating agreement compelling the court to evaluate the purpose of the business. (*Natanel*, 43 Misc 3d 1217[A], *1.)

Accordingly, petitioners' allegations of improper actions – Respondents' alleged nonpayment of shareholder loans and alleged failure to provide access to the LLCs' books and records – even if true, are insufficient to satisfy the standard for dissolution under LLC Law §702. Oppressive conduct is not sufficient. (*Doyle*, 103 AD3d at 440 [“Plaintiff’s allegations that he has been systematically excluded from the operation and affairs of the company by defendants are insufficient to establish that it is no longer ‘reasonably practicable’ for the company to carry on its business under [LLC Law] 702”]; see also *Kassab v Kasab*, 137 AD3d 1135, 40 [2d Dept 2016] [finding that the petitioner’s “allegations of oppressive conduct and the respondent’s efforts to exclude him from the management of the LLC,” even if true, “would not establish that ‘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 [that] continuing the entity is financially unfeasible.”].) Therefore, this action is dismissed

In light of dismissal, petitioner’s request for a receiver must also be denied. (Doyle, 103 AD3d at 440-442.)


Alternatively, this proceeding is dismissed in favor of the first filed plenary action pursuant to CPLR 3211(a) (4). In both actions, petitioners allege the same bad acts against the same parties.

The court has considered the parties’ remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is,

ORDERED that the special proceeding is dismissed.

Motion Seq. No. : 02
9/9/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	OTHER
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: