SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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In the Matter of the Application of

RENA PACHTER, in her representative capacity as Administrator of the ESTATE OF JUDITH LINDENBERG, Deceased, individually and derivatively on behalf of 3046 WEST 22 ST PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Petitioner,

Index No. 502779/2020

For the Dissolution of 3046 WEST 22 ST PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

AFFIRMATION IN REPLY

- against -

DAVID WINIARSKI, ESTHER WINIARSKI, and MYRON WINIARSKY,

Respondents,

- and –

3046 WEST 22 ST PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Nominal Respondents
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Nativ Winiarsky, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalties of perjury:

1. I am a member of Kucker Marino Winiarsky & Bittens, LLP, counsel to the respondents David Winiarski, Esther Winiarski, and Myron Winiarsky, Esq. and nominal respondents 3046 West 22 St Properties LLC (hereinafter "3046 West 22"), D-Win Properties LLC (hereinafter "D-Win"), Homes R Beautiful RE LLC (hereinafter "Homes R Beautiful"), and

Park 50 West Properties LLC (hereinafter "Park 50") (hereinafter collectively referred to "Respondents").

2. This affirmation is respectfully submitted by the Respondents in further support of the Respondents' cross-motion seeking an order pursuant to C.P.L.R. §3211 (a) dismissing with prejudice the first four causes of action of the petition of Rena Pachter (hereinafter "Petitioner") in her representative capacity as administrator of the Estate of Judith Lindenberg, deceased, individually and derivatively on behalf of 3046 West 22 St. Properties LLC, D-Win Properties LLC, Homes R. Beautiful Re LLC, and Park 50 West Properties LLC (hereinafter collectively referred to as "LLC Entities").

3. In opposition to the Respondents' Cross-Motion, the Petitioner submits a twenty-nine (29) page memorandum filled with case law from Delaware, Michigan, Connecticut, and various other states. However much the Petitioner may seek to complicate this application for purposes of staving off dismissal, the issues are actually quite straight forward and can be distilled to rather distinct and limited principles of law which the Petitioner seemingly craves to avoid.

STANDARD ON A MOTION TO DISMISS IN A SUMMARY PROCEEDING

4. The Petitioner commences its opposition brief by setting forth the standard on a motion to dismiss in a typical plenary action. This is not a plenary action. This is a summary proceeding commenced under Article 4 of the C.P.L.R. and as such, "[p]ursuant to CPLR 409 (b), in a special proceeding, where there are no triable issues of fact raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it (*see Matter of Friends World Coll. v Nicklin*, 249 A.D.2d 393, 394, 671 N.Y.S.2d 489 [1998])." Korotun v. Laurel Place Homeowner's Ass'n, 6 A.D.3d 710, 711-712,

775 N.Y.S.2d 567 (2nd Dept. 2004). *See also*, Matter of FR Holdings, FLP v. Homapour, 154 A.D.3d 936, 63 N.Y.S.3d 89 (2nd Dept. 2017). Here, a review of the pleadings and supporting affidavits and exhibits reveals that the Petitioner has failed to raise any triable issues of fact that it would be in the best interest of the members for the various entities to be dissolved.

THE PETITIONER SIMPLY FAILS TO MAKE OUT A CASE FOR STATUTORY DISSOLUTION

5. The Petitioner may seek to cite as many out of state cases as it may like, but the fact remains that in New York State, the Petitioner's application for dissolution must be measured by the provisions of LLCL § 702 and controlling case authorities interpreting same. To this end, virtually every case that speaks to a dissolution of a limited liability company will generally always be guided by, and cite to, three (3) principal cases; two (2) from the Appellate Division Second Department and one (1) from the Appellate Division First Department, namely Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2nd Dept. 2010) (hereinafter "1545 Ocean Ave."); Matter of Kassab v. Kasab, 137 A.D.3d 1135, 29 N.Y.S.3d 39 (2nd Dept. 2016) (hereinafter "Kassab"); and Doyle v. Icon, LLC, 103 A.D.3d 440 (1st Dept. 2013) (hereinafter "Doyle"). Any and all analysis of whether the LLC Entities are entitled to a judicial dissolution must begin and end with an analysis of these three cases.

6. In the first instance, these cases tell us that in determining applications for a judicial dissolution of a limited liability company, the court must first look to such company's operating agreement to determine "whether it is or is not reasonably practicable for the limited liability company to continue to carry on its business in conformity with the operating agreement" (1545 Ocean Avenue, *supra*, at 128; see LLCL § 702). Considered a statutory "default provision" for judicial dissolution (*see* Man Choi Chiu v Chiu, 71 A.D.3d 646, 896 N.Y.S.2d 131 [2nd Dept. 2010]), LLCL § 702 is available whenever the court finds that it is not

reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. Appellate case authorities have instructed that the court's initial analysis is one that is contract-based because the statute mandates an examination of the articles and operating agreement to determine the reasonable practicability of carrying on the business in conformity with these governing documents (*see* 1545 Ocean Avenue, LLC, *supra*, at 128).

7. As set forth in ¶¶ 40 and 42 of the Petition (NYSCEF Doc. No. 1), there does not exist an operating agreement for 3046 West 22 St. Properties, LLC, and Homes R. Beautiful RE LLC. Accordingly, the Petitioner's application for dissolution must be measured by the provisions of LLCL §702 and controlling case authority interpreting same. *See*, Man Choi Chiu v Chiu, *supra* at 647.

8. As further set forth in ¶¶ 41 and 43 of the Petition (NYSCEF Doc. No. 1), there does exist operating agreements for D-Win Properties LLC and Park 50 West Properties LLC. The operating agreements for both entities are annexed as Exhibits "J" (NYSCEF Doc. No. 11) and "K" to the Petition (NYSCEF Doc. No. 12) and both operating agreements state that "the Company is formed for the purposes of engaging in any lawful act or activity for which limited liability companies may be formed under the LLC." See par. 3 of both operating agreements.

9. To successfully petition for the dissolution of a limited liability company under the "not reasonably practicable" standard imposed by LLCL § 702, the petitioning member must demonstrate, in the context of the terms of the articles of incorporation of the operating agreement, the following: 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 (*see* 1545 Ocean Avenue, *supra* at 131; Kassab, *supra*, at 1137; Doyle, *supra* at 440.)

10. Disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that operates in a manner within the contemplation of its purpose and objective as defined in its articles of organization and/or operating agreement. It is only where discord and disputes by and among the members are shown to be inimical to achieving the purpose of the LLC will dissolution under the "not reasonably practicable" standard imposed by LLCL § 702 be considered by the court to be an available remedy to the petitioner (1545 Ocean Avenue, *supra*, at 130-132).

11. The Petition herein contains nothing but unfounded accusations of alleged misconduct by Respondents and lacks the required specifics to demonstrate that dissolution is warranted here. More importantly, however, the bigger issue with these alleged improper actions – Respondents' allegedly having taken control of the LLC Entities for themselves, usurpation of control, freeze-out, exclusion from governance, alleged failure to provide access to the LLCs' books and records – is that, *even if true, none of them satisfy the standard for dissolution under LLC Law 702*. That is, they do not show either that the LLC Entities cannot achieve their purpose or that they are financially unfeasible. For example, in Kassab, the minority 25% member of a two-member LLC alleged "that the LLC should be dissolved based on oppressive conduct by the respondent, who was trying to remove him from the management of the LLC." The court in Kassab dismissed the petition, however, 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.'" *Id.* at 41 (*citing* 1545 Ocean Avenue). Similarly, in Doyle the court, applying the standard set forth in 1545 Ocean Avenue,

held that "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." *Id.* at 440.

12. In a very recent case decided less than two weeks ago on September 9, 2020 entitled Lazar v. Attena LLC, 2020 N.Y. Misc. LEXIS 5706, 2020 NY Slip Op. 33003(U) (Sup. Ct., N.Y. Cty 2020), the Honorable Andrea Masley presented the issues raised herein in a systematic cogent fashion that should prove to be dispositive.

> Respondents argue that petitioners have failed to establish a *prima facie* case for dissolution under LLC Law § 702 which provides that "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." 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, 893 N.Y.S.2d 590 [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.
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> 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 Rested 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.
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> 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, 959 N.Y.S.2d 200 [1st Dept 2013]; *see also Barone v. Sowers*, 128 AD3d 484, 485, 10 N.Y.S.3d 22 [1st Dept 2015]).

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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 ["Plaintiffs allegations that he has been systematically excluded from the operation and affairs of the company [*7] 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, 29 N.Y.S.3d 39, 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 440-441.)

Supra at *3-7

13. In another recent case on point entitled Huggins v. Scott, 2019 N.Y. Misc. LEXIS 6353, 2019 NY Slip Op 33506(U) (Sup. Ct., N.Y. Cty. 2019), after citing to the standards set forth in both Kassab and Doyle, the court set forth the following conclusion:

"Disputes between members are not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that is operated in a manner within the contemplation of it[s] purposes and objections as defined in its articles of organization and/or operating agreement" (*Kassab v Kasab*, 60 Misc 3d 1204[A], 2018 NY Slip Op 50934[U] [Sup Ct Queens Cnty 2018]). Moreover, allegations that the movant has been systematically excluded from the operation and affairs of the subject company are insufficient to establish that it is no longer "reasonably practicable" for the company to carry on its business, as required for judicial dissolution under LLCL § 702 (*Doyle*, 103 AD3d at 440, quoting LLCL § 702).

Here, accepting as true the facts alleged in the petition and according Petitioner the benefit of every favorable inference, Petitioner has failed to establish a case of action for judicial dissolution of the Company, pursuant to LLCL § 702, based on

her allegation of mismanagement of the Company's funds and Respondent's efforts to exclude her from the management of the Company (*see Kassab*, 60 Misc 3d 1204[A], 2018 NY Slip Op 50934[U]). The Operating Agreement states that the purpose of the Company is to conduct any lawful business whatsoever that may be conducted by limited liability companies pursuant to the LLCL in New York (NYSCEF Doc. No. 3, Art. 1). The Petition and affirmation in support fail, to establish that the Company is presently unable to fulfill its stated purpose by operating a gym at the Premises. The Company continues to possess a leasehold interest in the Premises, to finance its monthly operating costs of approximately $10,000.00, and to provide services to its client members (NYSCEF Doc. No. 25, ¶¶ 35-36).

In her Letter, Petitioner concedes that, despite the lack of her involvement in the operations and finances of the Company, the Company as led by Respondent has remained open for business and able to pay its expenses without additional capital contributions since Respondent began operating the gym in 2017. Petitioner's allegations, thus, are insufficient to demonstrate that the management of the company is unable or unwilling to reasonably permit or promote the stated purpose of the Company to be realized or achieved or that continuing the Company is financially unfeasible (*see Kassab v Kasab*, 137 AD3d 1135, 1136, 29 N.Y.S.3d 39 [2d Dept 2016]).

As for Petitioner's request for the appointment of a receiver, the court must proceed with "extreme caution" in determining whether to appoint a temporary receiver because of the drastic intrusion it imposes on the defendant's interests prior to determination of the underlying action on the merits. (*Hahn v Garay*, 54 A.D.2d 629, 387 N.Y.S.2d 430 [1st Dept 1976]). The appointment must be "necessary" to protect the property from waste, dissipation or disappearance. (*In re Armienti*, 309 A.D.2d 659, 661, 767 N.Y.S.2d 2 [1st Dept 2003]). Thus, courts require clear and convincing evidence of the danger of irreparable loss or damage (*see, e.g., McBrien v. Murphy*, 156 A.D.2d 140, 548 N.Y.S.2d 186 [1st Dept 1989]), and thus are particularly hesitant to appoint a receiver with respect to a profitable, ongoing business (*see, e.g., Martin v. Donghia Associates, Inc.*, 73 A.D.2d 898, 424 N.Y.S.2d 222 [1st Dept 1980]). In view of Petitioner's failure to establish her entitlement to judicial dissolution of the Company, there is no occasion for the appointment of a receiver (*see Doyle*, 103 AD3d at 440, *citing* LLCL § 703).

Supra at *6-8; *See also*, Matter of Kassab v. Kasab, 60 Misc.3d 1204(A), *18, 109 N.Y.S.3d 832 (Sup. Ct., Queens Cty. 2018) (Petitioner does not allege that Mall is unable to pay its expenses related to the ownership of real property, and therefore, it continues to be a viable real estate holding company"); Kassab v. Kasab, 2020 N.Y. Misc. LEXIS 5787, *13, (Sup. Ct., Queens Cty.

2020) (holding, "Petitioner's assertion that Mall is not capable of sustaining itself financially and is incapable of paying its real estate taxes . . . is not supported by any financial data. . . Thus Court finds that as petitioner's claims are insufficient to rise to the level of financial infeasibility that is required for dissolution, under the Limited Liability Law §702, respondent's cross-motion to dismiss the petition on the grounds of failure to state a cause of action is granted.")

14. Here, Petitioner's allegations likewise fail to establish judicial dissolution. The claims directed at the purported failings on the part of the Respondents, even when credited as true, do not constitute the elements of a claim for dissolution under LLCL § 702. There are no allegations that company purposes have been or will be utterly defeated by the disputes between the Petitioner and the Respondents nor has it been shown that the strife between them is inimical to achieving such purposes. There is no claim that the real estate properties held by the LLC Entities are unable to operate. There is no evidence that the LLC Entities are in financial turmoil, insolvent or otherwise cannot meet their debts and obligations. Petitioner does not allege that the LLC Entities are unable to pay their expenses related to the ownership of real property. Petitioner simply does not allege that continuing the LLCs is financially unfeasible. The claims asserted by the Petitioner herein do not rise to the level of financial infeasibility that is required for dissolution under LLCL § 702. Instead, the purposes of the LLC Entities are being achieved and its finances remain feasible (*see* In re Eight of Swords, LLC, *supra*). That the Petitioner failed to state a cognizable claim for dissolution is both clear from a reading of its Petition and a review of the record adduced on this motion. Dismissal of the second cause of action for statutory dissolution pursuant to C.P.L.R. 3211(a)(1) is thus both warranted and mandated.

NEW YORK DOES NOT ALLOW FOR COMMON LAW DISSOLUTION

15. Try as the Petitioner might to cite to various cases from various other jurisdictions, there is not a single case in New York State (whether appellate or otherwise) that allows for dissolution of an LLC outside the strict ambit of LLCL §702. Thus, as a threshold matter, while the determination of dissolution is soundly within the discretion of the court, such discretion is limited as to whether dissolution meets the requirements of LLCL §702 and despite the Petitioner's lengthy dissertation in its opposition as to why equitable dissolution outside the strictures of LLCL §702 should be allowed, case law has made no such exception and unless and until the Legislature rules otherwise, dissolution is strictly subject to the statutory scheme set forth in LLCL § 702 mandating the dismissal of the Petitioner's first cause of action.

ABSENT DISSOLUTION THERE CAN BE NO EQUITABLE BUYOUT

16. The Petitioner in its opposition lead this Court on a long discourse as to why equitable buyout should be granted in this instance (all of which are without merit) but Petitioner fails to in any way distinguish Matter of Kassab v. Kasab, 137 A.D.3d 1138, 27 N.Y.S.3d 680 (2nbd Dept. 2016) which held that:

> accepting as true the facts alleged in the petition/complaint and according the petitioner the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d at 87), the petitioner failed to state a cause of action for an "equitable buyout" of his interest in the LLC. While "[t]he Limited Liability Company Law 'does not expressly authorize a buyout in a dissolution proceeding' " (*Mizrahi v Cohen*, 104 AD3d 917, 920, 961 NYS2d 538 [2013], *quoting Matter of Superior Vending, LLC [Tal—Plotkin]*, 71 AD3d 1153, 1154, 898 NYS2d 191), "in certain circumstances, a buyout may be an appropriate equitable remedy upon the dissolution of an LLC" (*Mizrahi v Cohen*, 104 AD3d at 920 [emphasis added]). Here, since this Court has determined, in a companion appeal, that the petitioner failed to state a cause of action for the judicial dissolution of the LLC pursuant to Limited Liability Company Law § 702, there is no basis to invoke the equitable remedy of a buyout (*see Matter of Kassab v Kasab*, 137 AD3d 1135, 29 NYS3d 39, 2016 N.Y. App. Div. LEXIS 2086, 2016 NY Slip Op 02089 [2016]]). Accordingly, the Supreme Court properly granted that branch of the respondent's

motion which was to dismiss the eighth cause of action for failure to state a cause of action.

Supra at 1140

17. Likewise inasmuch as the Petitioner failed to state a cause of action for dissolution under LLCL §702, and there exists no ground for common law dissolution, there is no basis for invoke the equitable remedy of a buyout and thus the Petitioner's third cause of action must be dismissed.

THE PETITIONER MAY NOT UNILATERALLY WITHDRAW FROM THE LLC ENTITIES

18. The Petitioner failed to distinguish any of the case law that under LLCL §606 (a), a member may withdraw from an LLC only as provided in its operating agreement. If the operating agreement is silent, a member may not withdraw prior to the dissolution of the company. *See*, Spires v. Lighthouse Solutions, LLC, 4 Misc. 3d 428, *18, 778 N.Y.S.2d 259 (Sup. Ct., Monroe Cty. 2004). Here, the Operating Agreements provide, "[a] member may withdraw from the Company in accordance with the [LLCL]." See ¶ 12 of operating agreements annexed as Exhibit "J" and "K" to Petition. Therefore, as there is no dissolution of the LLCs, the Petitioner is not entitled to withdraw from the LLCs.

IN THE ABSENCE OF GROUNDS FOR DISSOLUTION, THERE CAN BE NO APPOINMENT OF A RECEIVER

19. As the above cited decisions make clear, in view of Petitioner's failure to establish its entitlement to judicial dissolution of the LLC Entities, there can be no basis for the appointment of a receiver. *See* Doyle, *supra* at 440; Huggins v. Scott, *supra* at *8; Lazar v. Attena LLC,, *supra* at *7.

WHEREFORE, it is respectfully requested that this court enter an order denying the granting the Respondents' cross-motion in its entirety and granting the Respondents such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 28, 2020

Nativ Winiarsky