

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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In the Matter of the Application of FAVIO CEDANO,

Petitioner,

Decision and Order
Index No. 57761/2019
Seq #4

For an Order Dissolving F&B CAR SERVICE LLC pursuant to Limited Liability Company Section 702,

-against-

BIANCA RODRIGUEZ,

Respondent.

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The following papers were read on a motion for an order, pursuant to CPLR 404(a) and CPLR 3211(a)(7), dismissing the corporate dissolution petition:

Notice of Motion/Affirmation/Exhibit A/Affidavit/Exhibit A
Affirmation & Affidavit in Opposition/Exhibits A-I
Reply Affirmation/Exhibits A-B

Upon the foregoing papers, it is ordered that the motion to dismiss is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The petitioner, Favio Cedano ("Cedano") filed this petition on May 14, 2019, seeking the dissolution of F & B Car Service LLC a/k/a Yonkers Union Car Service ("F & B") and an accounting from the respondent, Bianca Rodriguez ("Rodriguez"). Cedano and Rodriguez are each 50% members of F & B. Rodriguez was the Chief Operating Officer of F & B and responsible for its financial operations, including ensuring that it complied with all applicable regulatory laws affecting its operations; ensuring that it complied all applicable tax laws; and ensuring that it complied with all of its contracts.

Cedano alleges that Rodriguez has engaged in criminal and fraudulent conduct in connection with F & B and states that the Yonkers Inspector General issued a report that F & B, under the supervision of Rodriguez, defrauded the Yonkers School District, by consistently over-charging it for non-existent services over the course of several years. . Rodriguez and F & B were indicted for tax fraud. Cedano asserts that F & B pled guilty to repeated failure to file corporate tax returns and Rodriguez has made unauthorized withdrawals from F & B's bank account in the amount of \$212,287.00. Cedano further asserts that Rodriguez failed to respond to a lawsuit by the State Insurance Fund and a \$118,003.06 default judgment was entered against F & B. He contends that Rodriguez has irreparably damaged F & B through her poor management, self-dealing, negligence, incompetence, fraud and criminal conduct.

Cedano's first cause of action for a decree dissolving F & B, alleges that Rodriguez's actions have destroyed the commercial viability of F & B and that it has received adverse publicity because of the indictment and the Yonkers School District contract; that Rodriguez has misappropriated funds from F & B; that Rodriguez's gross mismanagement, intentional malfeasance, and misappropriation of money, has financially devastated F & B; that F& B's guilty felony plea has irreparably damaged its business reputation and viability as a commercial entity.

Cedano alleges that Rodriguez is unable or unwilling to reasonably permit or promote the stated purpose of F & B to be realized and it is no longer possible to carry on the business in conformity with the Articles of Organization. Cedano's second cause of action alleges that Rodriguez has not rendered an accounting of the funds she has withdrawn from F & B.

Cedano then filed an order to show cause, seeking injunctive relief. By Order Granting Preliminary Injunction, dated August 12, 2019, this Court ordered that Rodriguez be enjoined from transferring, encumbering, selling or otherwise disposing of any of the assets of F & B, pending the conclusion of this proceeding; enjoined from engaging in any banking transactions, including and not limited to the withdrawal of funds from F & B, concerning the bank accounts of F & B, pending the conclusion of this proceeding; and enjoined from acting as an officer of F & B or transacting any business on behalf of F & B, pending the conclusion of this proceeding.

Cedano also filed another order to show cause seeking an order finding Rodriguez in contempt of Court for violating the injunctive relief granted by this Court, for failing to turn over the funds from a check received from a client to F & B.

Rodriguez, by an attorney, now files the instant motion to dismiss the complaint pursuant to CPLR 404(a) and CPLR 3211(a)(7), arguing that the petition has no basis in law or fact and fails to state a claim. Her attorney argues that the accounting cause of action fails to allege that Cedano made a demand for an accounting, which is required for such a claim. The attorney asserts that there is no such allegation because Cedano never made a demand for an accounting.

With regard to the dissolution, the attorney argues that such a remedy is one of last resort and members of a corporation are required to first try to dissolve the company mutually. He argues that a petition for judicial dissolution of a Limited Liability Company must be dismissed unless it alleges sufficient facts to meet the very high standard for the court's intervention. The attorney asserts that the petition makes insufficient allegation that F & B cannot continue operations as a Yonkers taxi business or that it is failing financially.

In opposition, Cedano, by his attorney, argues that the motion is both procedurally and substantively fatally flawed. The attorney contends that Rodriguez failed to submit an answer to the verified petition or a motion to dismiss by the return date, June 19, 2019. The attorney argues that CPLR 404(a) expressly requires that a motion to dismiss be returnable at the hearing for the petition, which was June 19, 2019. Therefore, the motion is time barred.

The attorney further argues, that if the Court finds the motion to be timely, the evidence in this case establishes that F & B should be judicially dissolved because the breadth of the misconduct perpetrated by Rodriguez is enormous and it has rendered F & B dysfunctional. The attorney further argues that Rodriguez's affidavit is a nullity because it was improperly notarized by a non New York notary, the statements of Rodriguez support the denial of the motion to dismiss, and also that Rodriguez does not meet the standard for dismissal under CPLR 3211(a)(7).

In reply, Rodriguez's attorney contends that Cedano's argument that the motion is untimely is flawed because a motion to dismiss may be made at any time before a hearing on the matter is scheduled and no hearing has been scheduled, since the June 19, 2019 date for the hearing was adjourned by the Court. The attorney also argues that even if that date was to be used, it is well settled that a motion to dismiss for failure to state a claim may be heard at any time. Further, Rodriguez has requested an extension of time, which should be granted, since there is no prejudice to the petitioner. Rodriguez refiled her affidavit with a notary from New York to address that defect.

With regard to the substantive arguments, Rodriguez's attorney reiterates that the petition presents no allegations about the company's operations or its financial condition,

but focuses exclusively on Rodriguez. The attorney further states that although Rodriguez consents to a dissolution, there is a significant difference between consent to a consensual dissolution and a non-consensual judicial dissolution and Rodriguez never withdrew as a member of F & B, only as a managing member. The attorney again set forth that the petition fails to state that a demand for an accounting was made.

DISCUSSION

CPLR 3211(a)(1) and (a)(7) states that:

[a] party may move for judgment dismissing one or more causes of action against him on the ground that:

(7) the pleading fails to state a cause of action....”

(N.Y. Civ. Prac. L. & R. 3211[a][7]).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence (*see, Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]).

Under CPLR 3211(a)(7), initially “[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “On a motion to dismiss [a] complaint [or petition] pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff [or petitioner] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*White Plains Plaza Realty, LLC*

v Cappelli Enterprises, Inc., 108 AD3d 634, 636 [2d Dept 2013]).

“Here, accepting as true the facts alleged in the petition and according the petitioner the benefit of every favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87), the petitioner failed to state a cause of action for judicial dissolution of the LLC pursuant to Limited Liability Company Law § 702” (*Kassab v Kasab*, 137 AD3d 1135, 1137), based on his allegations of criminal conduct and fraudulent billing, and misappropriation of funds. With regard to the procedural objections to the motion, a motion to dismiss based upon the failure to state a claim, may be made at any time (NY CPLR 3211[e]). Also, with regard to CPLR 404[a], since the hearing date was postponed by the Court, the respondent’s motion was submitted prior to the hearing date and will be considered. At any rate, the respondent is allowed to make a motion to dismiss in a special proceeding also (*White Plains Plaza Realty v Cappelli Enterprises, Inc.* @ 634).

With regard to the substantive claims in the motion, “LLC 702 provides for judicial dissolution as follows:

“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” (emphasis added) (*In re 1545 Ocean Ave, LLC*, 72 AD3d 121, 126 [2d Dept 2010]; NY Limit Liab Co § 702). “Despite the standard enunciated in LLC 702, there is no definition of “not reasonably practicable” in the context of the dissolution of a limited liability company” and the court must first examine the limited liability company’s operating agreement if available (*Id.*).

In this case, the petitioner's allegations, if true, would not establish that continuing the entity is not financially viable and in fact the respondent has submitted evidence to show that the company is still operating and is financially feasible. The petitioner has failed to establish that the company is presently unable to fulfill its stated purpose.

With regard to the second cause of action for an accounting, "[g]enerally to be entitled to an equitable accounting, a plaintiff must demonstrate that he or she has no adequate remedy at law" (see *Webster v Forest Hills Care Center, LLC*, 2018 WL 4607993 [2d Dept 2018]). "However, where...there is a fiduciary relationship between the parties, there is an absolute right of an accounting notwithstanding the existence of an adequate remedy at law" (*Id.*). 'A fiduciary relationship arises when one is "under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation"' (see *DiTolla v Doral Dental IPA of New York, LLC*, 100 AD3d 566 [2d Dept 2012]). 'It is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions"' (*Id.*). "A conventional relationship, without more, is insufficient to create a fiduciary relationship" (*Id.*). 'Rather, a plaintiff must make a "showing of 'special circumstances' that could have transformed the parties' business relationship to a fiduciary one....' (*Id.*). Here, there are no special circumstances which transformed the parties' business relationship to a fiduciary one and therefore, no fiduciary relationship between the parties.

Additionally, for the Court to aid in the equitable relief of an accounting, the petitioner must show a demand for an accounting and a failure or refusal by the party in possession of the assets to account to the petitioner. Here, the petitioner has not

sufficiently alleged a prior demand for and refusal of an accounting in the petition.

Accordingly, based on the foregoing, it is

ORDERED that the motion to dismiss based on failure to state a claim is granted;

and it is further

ORDERED that petition is dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 30, 2020


HON. SAM D. WALKER, J.S.C.