

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY

Justice

PART 35

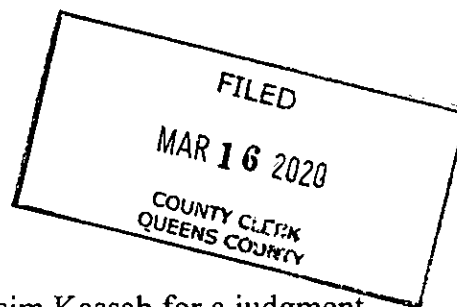
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**IN THE MATTER OF THE
APPLICATION OF NISSIM KASSAB,
individually and as a member of Mall 92-30
Associates LLC ,
Petitioner,**

**Index No.: 707148/19
Motion Date: 10/22/19
Mot. Seq. 1**

**For An Order Dissolving Mall 92-30 Associates
LLC Pursuant to N.Y. LLC Law § 702**

-against-

**AVRAHAM KASAB,
Respondent,**



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The following papers read on this special proceeding by Nissim Kassab for a judgment (1) summarily dissolving Mall 92-30 Associates LLC (Mall), pursuant to Limited Liability Company Law § 702, appointing a receiver for Mall, and directing the sale and liquidation of Mall's property and assets and distributing the proceeds to Mall's two members in proportion to their ownership interests; and awarding petitioner reasonable attorneys' fees and costs of prosecuting this proceeding. Respondent Avraham Kasab cross-moves for an order dismissing the petition in its entirety, pursuant to CPLR 404(a), 406, 3211(a)(5) and (7); imposing financial sanctions on petitioner and his counsel of record in this proceeding pursuant to 22 NYCRR §§130-1.1 and CPLR 2214; and reimbursing respondent's reasonable attorneys' fees incurred in this proceeding, pursuant to 22 NYCRR §§130-1.1 and CPLR 2214.

	<u>PAPERS NUMBERED</u>
Notice of Verified Petition-Verified Petition-Exhibits.....	EF 1-12
Notice of Cross-Motion-Affirmation-Exhibits-Memorandum of Law.....	EF 33-43
Reply/Opposing Affirmation-Exhibit-Memorandum of Law..	EF 44-46
Reply Affirmation-Exhibit-Memorandum of Law.....	EF 47-49

Upon the foregoing papers, the petition is denied and the cross-motion is granted in part and denied in part, as follows:

Petitioner Nissim Kassab and respondent Avraham Kasab are brothers. Nissim Kassab has a 25% ownership interest in Mall and Avraham Kasab has a 75% ownership interest in Mall. In 2001, Mall acquired a parcel of real property, known as Block 10101, Lot 24. The brothers were also shareholders in Corner 160 Associates Inc. (Corner). Said entity was the owner of two adjoining parcels of real property adjacent to Mall's property, known as Block 10101, Lots 79 and 150. All three properties are located in Jamaica, New York. Lot 150 was continuously operated as a parking lot. In 2011, the buildings on Lots 24 and 79 were demolished and Corner and Mall operated a commercial parking lot on all three lots five days a week, and an outdoor flea market on weekends during certain months. The parking lot was closed, in April 2018, and Corner was judicially dissolved (*Kassab v Kasab*, 56 Misc3d 1213[A][Sup Ct, Queens County 2017](Index No. 711061/15). Corner's two adjoining parcels of real property were sold at public auction, on June 14, 2018.

In the within special proceeding, the petitioner seeks judicial dissolution of Mall, pursuant to Limited Liability Company Law § 702, on the grounds that continuing the entity is "financially unfeasible" based upon events that occurred after the sale of the Corner properties. Petitioner seeks summary determination of his petition without any need for discovery or a trial, dissolving Mall, appointing a receiver, and directing the sale and liquidation of Mall's property and assets, and distributing the proceeds to Mall's two members, in proportion to their ownership interests. He further seeks an award of reasonable attorney's fees and costs.

The petition recites, in part, the history of the parties' prior litigation, and quotes extensively from this Court's Judgment in the Corner dissolution proceeding (Index No. 711061/15). It is alleged, that as Corner's properties have been sold, the former parking lot/flea market business that operated on the three adjoining properties no longer exists, and that Mall cannot, at present, resume the parking lot business on its own lot due to the lack of curb cut or drive way. It is also alleged that the operation of such a business on Mall's lot is not feasible or cost-efficient, due to the size of the lot. Petitioner alleges that there has been no business activity on Mall's, since April 2018, and that the company has

no source of any income. He further alleges that respondent Avraham has taken no practical steps to open any new business on Mall's property, create a new source of income for Mall, or sell the property despite receiving an offer to purchase the property for \$10 million.

Petitioner alleges that as Mall has no income, it is no longer able to pay its expenses related to the property to ownership of the property consisting of real estate taxes of approximately \$30,000 per annum. The petition alleges that Avraham, at a recent deposition, stated that Mall was not operating a parking lot due to the lack of curb cut and was not currently engaged in any business, but intended to do so in the future. Further, Avraham stated at said deposition that he had lent Mall the money to pay its latest tax bill, but did not discuss this with Nissim. Petitioner alleges that continuing such practices would result in the waste of Mall's valuable property; that he receives no return from his interest in Mall; and that the company would incur more and more debt to Avraham. It is alleged that "a growing involuntary indebtedness to Avraham is not a viable business plan for Mall and does not constitute continuing the business "in conformity with" the company's Operating Agreement." Petitioner therefore alleges that "under the Operating Agreement, Mall cannot raise any funds it needs by way of a capital call on its Members" and that as a result Mall "is no longer a viable entity, it is financially failing and unable to pay its debts as they become due".

In support of the petition, the petitioner submits excerpts from Avraham's March 7, 2019 deposition in the hybrid proceeding/action commenced, under Index No. 716193 2017; a copy of Mall's Operating Agreement; copies of certain prior orders issued in the prior proceedings; the deed for the Corner properties sold on August 21, 2018; and a March 4, 2019, offer to purchase Mall's property for \$10 million dollars.

Respondent Avraham Kasab in a pre-answer motion, cross- moves for an order dismissing the petition on the grounds of res judicata, collateral estoppel and failure to state a cause of action, pursuant to CPLR 404(a), 406, 3211(a)(5) and (7), and seeks an order imposing financial sanctions on the petitioner and his counsel, pursuant to 22 NYCRR 130-1.1 and CPLR 2214, and reimbursing respondent's attorney's fees and costs incurred in this proceeding. Respondent asserts that the within petition is an attempt to circumvent this Court's orders in the prior proceedings, which dismissed Mall's

dissolution claim on the merits and dismissed the amended petition, as a “nullity.” It is further asserted that the petition is barred by the doctrines of res judicata and collateral estoppel, as the within petition contains no new material facts, and the current allegations were previously alleged in the dismissed amended petition in the second Mall dissolution proceeding.

Respondent contends, that even if the within petition was not barred by the doctrines of res judicata and collateral estoppel, it does not state a cognizable cause of action under Limited Liability Company Law §702, in that it does not plead facts adequate to meet the requisite showing for dissolution. It is also asserted this Court previously determined that although Mall can apply for a curb cut, it is not required to do so, and that pursuant to its Operating Agreement it is not required to operate a parking lot on its property. Respondent further argues that petitioner’s allegations that Mall is “financially failing”, “unable to pay its debts” and “no longer a financially feasible entity” is absurd and frivolous, as Mall owns an unencumbered real estate parcel that petitioner values at \$10 million; that this Court in a prior proceeding determined that Mall’s operation as a real estate holding company is a viable and permissible business operation; that petitioner alleges that Mall has various options with respect to said real estate parcel; that the loan by the respondent majority member enabling Mall to maintain its assets, credit and good standing is a lawful and ordinary business practice, and respondent does not need petitioner’s consent to make such decisions.

Petitioner, in opposition to the cross-motion, submits copies of email correspondence between counsel for the parties. Nissim argues that his current dissolution claim is based upon new facts that arose after the filing of the original petition in the second dissolution proceeding; that only some background allegations were repeated herein; that this Court made no determination on the merits with respect to the allegations asserted in the amended petition in the second dissolution proceeding, as said petition was dismissed purely on procedural grounds, and, therefore, the allegations made herein constitute new facts; and that respondent’s assertion that all of the allegations set forth in the within petition were previously rejected by the Court, in its June 2018 Order, is inaccurate and misleading. Petitioner reiterates that it is financially unfeasible for Mall to continue to operate for the following reasons: the property owned by Corner has been

irreversibly sold, making it impossible to continue or resume the parking lot business that Avraham had conducted for years on the combined property of Corner and Mall; Mall's property does not have a curb cut and Avraham has not applied for it, so that it is impossible to conduct a parking lot business on Mall's property; that Mall is under Avraham's unilateral control and has conducted no business activity for over a year, and Avraham has taken no practical steps leading to any such activity or to raise any revenue for Mall; that under the terms of the Operating Agreement, Mall cannot raise revenue by a capital call to its members; Mall no longer has any revenue and no practical prospects of generating revenue; Mall has ongoing real estate tax obligations that it is unable to meet without borrowing money from Avraham, which is not a viable business model; that Mall is unable to meet its financial obligations when they become due, making it insolvent and therefore warrants dissolution. Petitioner further asserts that respondent's request for sanctions is without merit.

Respondent's counsel, in reply, submits a copy of a bank statement for Mall for August 2019, showing a balance of \$146,266.13. In a memorandum of law, respondent reiterates the arguments raised in support of the cross-motion.

It is well settled that "[w]here a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply" (*Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009]; see also *Abdelfattah v Najjar*, 173 AD3d 657 [2d Dept 2019]; *Shahid v Legal Aid Socy.*, 173 AD3d 1099, 1101 [2d Dept 2019]; *Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142, [2d Dept 2010]). Petitioner Nissim Kassab unsuccessfully sought to judicially dissolve Mall on several prior occasions (see *Matter of Kassab v Kasab*, 137 AD3d 1138 [2d Dept 2016] and 137 AD3d 1135 [2d Dept 2016]; see also *Kassab v Kasab*, 63 Misc 3d 1216[A] [Sup Ct 2019] and 60 Misc 3d 1204 [A] [Sup Ct, 2018]). However, contrary to respondent's assertions, Nissim's prior petitions were not dismissed on the merits.

Respondent's reliance upon this Court's Order, dated April 1, 2019, (Index No. 716193 2017, Motion Sequence No. 5), which dismissed the amended pleading as a nullity, is misplaced. This Court determined that as the original petition had already been dismissed, said petition could not be amended or superceded as an amended pleading. Contrary to respondent's contention, this Court did not determine that Nissim's claim for

judicial dissolution of Mall was a nullity. Rather, as no determination was made on the merits as to any of the claims asserted in the amended petition, the doctrine of res judicata does not apply here.

This Court in its Order, dated June 11, 2018, (Index No. 716193/17, Motion Sequence Nos. 3 and 4) dismissed Nissim's petition for judicial dissolution of Mall on the grounds that the pleading failed to state a cause of action. Nissim's first petition for judicial dissolution of Mall on the grounds of failure to state a cause of action was dismissed on the grounds of failure to state a cause of action (*Matter of Kassab v Kasab*, 137 AD3d 1138, *supra*). However, neither of these dismissals constituted a determination on the merits (*see Shahid v Legal Aid Socy.*, 173 AD3d at 1101; *Pereira v St. Joseph's Cemetery*, 78 AD3d at 1142).

The dismissal of a prior petition on the grounds of failure to state a cause of action would have a preclusive effect as to "a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" (*175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 [1980]; *Brenderline Blake v City of NY*, 144 AD3d 1071, 1073 [2d Dept 2016]). Although the within petition repeats some of the allegations that were asserted in the prior petitions, it does not seek judicial dissolution on the same basis as previously alleged by petitioner, i.e. being excluded from the management of Mall, respondent's refusal to consider selling the property, or oppressive conduct. Rather, the within petition seeks dissolution of Mall solely on the ground that its existence is no longer "financially feasible," based upon a change in circumstances, and is not merely a reassertion of the prior insufficient claims. In addition, petitioner's repetition of allegations contained in the amended petition in the proceeding commenced under Index No. 716193 2017 does not warrant dismissal of the within petition, as said amended pleading was dismissed solely due to a procedural defect, and not on the grounds of failure to state a cause of action. The doctrine of res judicata, therefore, does not apply here (*see Abdelfattah v Najar*, 173 AD3d at 657; *Shahid v Legal Aid Socy.*, 173 AD3d at 1101; *Hock v Cohen*, 125 AD3d 722, 723 [2d Dept 2015]; *Pereira v St. Joseph's Cemetery*, 78 AD3d at 1142).

The party seeking to invoke the benefit of collateral estoppel must prove that the identical issue was "necessarily decided" in the prior action and is decisive in the present

action and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*see D'Arata v New York Central Mutual Fire Insurance Co.*, 76 NY2d 659, 664 [1990]). Here, as stated above, Nissim's prior petitions for judicial dissolution of Mall were dismissed on the grounds of failure to state a cause of action and the amended pleading in the prior proceeding, commenced under Index No. 716193/17, was dismissed on procedural grounds. Contrary to respondent's assertion, Nissim's claim for judicial dissolution of Mall was not "necessarily decided" by this Court in its Order of April 1, 2019, nor was this claim "necessarily decided" in any other prior proceeding. Respondent has not established that Nissim's present grounds for dissolution of Mall was previously before the Court and necessarily decided in the prior special proceedings. Therefore, the doctrine of collateral estoppel is not applicable here.

Turning now to the within petition and the remainder of the cross-motion, in order to demonstrate entitlement to dissolution of a limited liability company, the member seeking such relief "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" (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131[2d Dept 2010]; *see Mace v Tunick*, 153 AD3d 689, 690-691 [2d Dept 2017]; *Matter of Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]; Limited Liability Company Law § 702).

On a motion to dismiss, pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591[2005]; *see Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "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, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275[1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414[2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Neuman v Echevarria*,

171 AD3d 767 [2d Dept 2019]; *Matter of Kassab v Kasab*, 137 AD3d 1135, 1137 [2d Dept 2016]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181[2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.* 70 AD3d 928 [2d Dept 2010]).

Mall's operating agreement, dated March 13, 2001, states that the company was "formed for the purpose of engaging in any lawful act or activity for which limited liabilities companies may be formed under the Limited Liability Company Law and engaging in any and all activities necessary or incidental to the foregoing." Mall, thus, may engage in any lawful activity, including owning undeveloped real property.

Petitioner's assertion that Mall is not capable of sustaining itself financially and is incapable of paying its real estate taxes of approximately \$30,000 per annum is not supported by any financial data. Respondent, however, has submitted evidence that Mall's checking account had a balance of \$146,266.13, as of August 30, 2019.

Avraham, in his March 7, 2019 deposition in the proceeding/action commenced under Index No. 716193/17, stated that approximately two months earlier, Mall paid its real estate taxes; that he had loaned the money to Mall for this purpose; and that the amount paid was approximately \$3000 to \$6000 more than the tax bill of \$63,635.89. As Mall's Operating Agreement does not prohibit or restrict its members from making loans to the company, Avraham has the right to lend money to Mall, pursuant to Limited Liability Company Law §611. Furthermore, neither the Operating Agreement nor Limited Liability Company Law would require Avraham, the majority member with unilateral control over Mall, to discuss with Nissim his decision to lend money to the company. The Court further notes that although the Operating Agreement provides that the members cannot be required to make capital contributions to Mall, said agreement would not prohibit a member from voluntarily making such a contribution, if he so desired.

This Court therefore 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 Company Law §702, respondent's cross-motion to dismiss the petition on the grounds of failure to state a cause of action is granted. Those branches of the cross-motion which seeks to impose sanctions on petitioner and his counsel and an award of attorney's fees, expenses and costs, are denied in their entirety.

Accordingly, it is

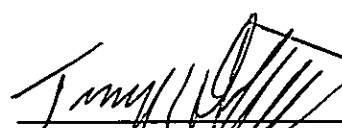
ORDERED that petitioner’s application for a judgment (1) summarily dissolving Mall 92-30 Associates LLC (Mall), pursuant to Limited Liability Company Law § 702, appointing a receiver for Mall, and directing the sale and liquidation of Mall’s property and assets and distributing the proceeds to Mall’s two members in proportion to their ownership interests; and awarding petitioner reasonable attorneys’ fees and costs of prosecuting this proceeding is denied, for the reasons stated above; and it is further

ORDERED that respondent’s cross-motion to dismiss the petition on the grounds of failure to state a cause of action is granted; and it is further

ORDERED that those branches of respondent’s cross-motion which seeks to impose sanctions on petitioner and his counsel and an award of attorney’s fees, expenses and costs, are denied in their entirety.

The foregoing constitutes the decision and order of this Court.

Dated: March 11, 2020


TIMOTHY J. DUFFICY, J.S.C.
FILED
MAR 16 2020
COUNTY CLERK
QUEENS COUNTY