

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

<p>IN THE MATTER OF THE APPLICATION OF NISSIM KASSAB, individually and as a member of Mall 92- 30 Associates LLC,</p> <p style="text-align: right;"><i>Petitioner,</i></p> <p>For An Order Dissolving Mall 92-30 Associates LLC Pursuant To N.Y. LLC Law §702</p> <p style="text-align: center;">-against-</p> <p>AVRAHAM KASAB</p> <p style="text-align: right;"><i>Respondent.</i></p>	<p style="text-align: center;">Index No.: _____/2019</p> <p style="text-align: center;">VERIFIED PETITION</p>
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NATURE OF THIS PROCEEDING

1. Petitioner Nissim Kassab (“Nissim”), through his undersigned counsel, submits this verified petition for judicial dissolution of Mall 92-30 Associates LLC (“Mall”) pursuant to N.Y. Limited Liability Company Law (“LLCL”) § 702.

2. This petition for dissolution of Mall is based on new facts, which arose after the filing of any previously dismissed claim for dissolution of Mall, and which were not addressed by the Court on the merits in any previous decision or order. In particular: (a) the property of Corner 160 Associates, Inc. (“Corner”), adjacent to Mall’s property, has been sold, which makes it impossible to continue or resume the parking lot business that Respondent Avraham Kasab (“Avraham”) had conducted for years on the combined properties of Corner and Mall; (b) Mall has no curb cut of its own, and Avraham has not applied to create one, which makes it impossible to conduct a parking lot business on Mall’s property alone; (c) Mall, which is under Avraham’s unilateral control, has conducted no business activity for a year, and Avraham has demonstrated no plans for any; (d) as a result, Mall no longer has any revenue and no practical prospects of

generating any revenue; (e) Mall has significant ongoing real estate tax obligations, but no source of funds, as it has no revenue and cannot make a capital call under the terms of its Operating Agreement. The net result is that Mall is unable to meet its financial obligations as they become due – which makes it insolvent and therefore a financially failing business that is not “reasonably practicable” to continue. CPLR § 702.

3. A true copy of the Operating Agreement of Mall is attached as Exhibit 1 hereto.

FACTUAL AND PROCEDURAL BACKGROUND

4. Avraham and Nissim are brothers who were in business together for over 20 years and jointly owned two entities, Mall and Corner, in each of which Avraham’s share is 75% and Nissim’s share is 25%. For years, Corner and Mall were effectively operated as a single parking lot business (the “Business”) on three adjacent lots in Jamaica, Queens, two of which were owned by Corner and one was (and still is) owned by Mall. In March 2013, Avraham kicked Nissim out of the Business, cutting him off from any financial distributions from Corner and Mall. In the following four years, Avraham managed these companies and their combined Business unilaterally, while looting the revenue of that combined Business for his personal gain, to the detriment of his brother, the minority owner. Avraham had been in complete unilateral control of Corner until its dissolution in 2018, and still remains in complete unilateral control of Mall.

The First Prior Dissolution Action

5. In a previous proceeding before this Court, *Nissim Kassab v. Avraham Kasab et al.*, Index No. 711061/2015 (the “First Prior Dissolution Action”), the Court dismissed Nissim’s claim for dissolution of Mall at the pleadings stage, finding that the allegations in the petition were insufficient to state a cause of action for dissolution under LLCL §702 – but at the same time found the allegations sufficient to state a claim for dissolution of Corner under §1104-a of the BCL, and allowed that claim to proceed. The Second Department affirmed that ruling.

6. Following extensive discovery, numerous motions, eight days of bench trial, and voluminous post-trial submissions in the First Prior Dissolution Action, on August 3, 2017, the Court entered the Bench Trial Order and Judgment and Declaration (the “Judgment”), a true copy of which is attached hereto as Exhibit 2. In the Judgment, the Court found sufficient grounds for dissolution of Corner “under both common law and BCL §1104-a,” – and ruled that “liquidation of the corporation is the only feasible means whereby the petitioner’s rights will be protected and he may reasonably expect to obtain a fair return on his investment.” (Judgment at 18, 20).

7. Pursuant to BCL §1118(a), the Court exercised its discretion to give Avraham an option to avoid dissolution by buying Nissim out of Corner within 90 days at 25% of the value of Corner’s property that was determined based on the expert testimony at trial (plus the applicable interest). Noting that Mall’s “property comprises part of the parking lot” but that it “ha[d] no power to dissolve Mall,” the Court also gave Avraham “the option of purchasing Nissim’s share in Mall” within the same 90 days at 25% of the value of Mall’s property as determined based on the expert testimony at trial (plus the applicable interest). (Judgment at 21 and n.2).

8. By an order dated October 27, 2017, and entered on November 13, 2017 (a true copy of which is attached hereto as Exhibit 3), the Court denied Avraham’s post-trial motion seeking reconsideration of the Judgment, and granted Nissim’s cross-motion on the issue of adjusting the buyout value of Nissim’s interest in Corner.

9. Avraham passed on the buyout options set forth in the Judgment and let them expire.

10. On November 27, 2017, the Appellate Division, Second Department, denied Avraham’s motion for a stay of dissolution of Corner. As a result, as set forth more fully below, Corner was dissolved and the two parcels of realty it owned were sold at auction in 2018.

The Second Prior Dissolution Action

11. On November 20, 2017, Nissim commenced another proceeding in this Court, *Nissim Kassab v. Avraham Kasab et al.*, Index No. 716193/2017 (the “Second Prior Dissolution Action”), seeking dissolution of Mall and other relief based on the Court’s findings in the Judgment grounded in the evidence that came to light in the First Prior Dissolution Action.

12. By an order dated June 11, 2018 and entered on June 26, 2018 (a true copy of which is attached as Exhibit 4 hereto), the Court dismissed Nissim’s claim for dissolution of Mall asserted in the Second Prior Dissolution Action, holding that the facts established in the Judgment were still insufficient to overcome the Appellate Division’s previous affirmance of dismissal of the original claim for dissolution of Mall in the First Prior Dissolution Action. In the same order, the Court upheld some of Nissim’s other claims, and the Second Prior Dissolution Action continued.

13. On August 15, 2018, Nissim amended his petition in the Second Prior Dissolution Action, asserting a new claim for dissolution of Mall based on the new facts that post-dated the commencement of the Second Prior Dissolution Action, primarily those related to the dramatic changes in the business and financial situation of Mall arising from the dissolution of Corner and the sale of Corner’s property (which are set forth below).

14. By an order dated April 1, 2019 and entered on April 4, 2019 (a true copy of which is attached as Exhibit 5 hereto), the Court dismissed the claim for dissolution of Mall asserted in the Amended Petition as a “nullity,” holding that, as a result of the June 2018 dismissal of the original claim for dissolution of Mall in the Second Prior Dissolution Action, “the petition could no longer be amended, and the amended pleading cannot supersede the original petition.” (Ex. 5 at 4). The Court did not address the merits of Nissim’s claim for dissolution of Mall asserted in

the Amended Petition. Rather, it simply held that no such claim could be asserted in an amended pleading in the same action.

15. As a result, while the Second Prior Dissolution Action continues to the extent that it contains other claims (namely, breach and contract and accounting), it no longer has any pending dissolution claim.

16. The Court's reference to the dissolution claim asserted in the Amended Petition as a "nullity" means that the Court viewed that claim as if it had never been filed. Accordingly, the Court never considered or addressed the substance of that claim. It follows that no doctrine of preclusion applies to that claim, and it is proper to re-file that claim in a separate action so that its substance could be considered and addressed by the Court.

Background Facts Concerning Mall Established As a Matter of Law

17. The facts set forth in this section have been determined by this Court based on the trial evidence in the First Prior Dissolution Action and set forth in the Judgment. As a result, these facts have been established as a matter of law by virtue of the doctrines of *res judicata*, collateral estoppel, and other rules and principles of preclusion, and Avraham cannot contest them in this proceeding.

18. "Mall was formed in 2001." (Judgment at 6).

19. "Mall has an operating agreement, dated March 13, 2001, signed by both brothers," *i.e.* Avraham and Nissim. "The agreement lists the brothers as the two members of Mall, along with their respective percentage of ownership (Avraham 75% and Nissim 25%)." (Judgment at 6).

20. "Section 5 of the Operating Agreement provides that 'the business and affairs of the Company shall be managed by the Members.'" (Judgment at 6).

21. “Nissim invested 25% in Mall, and Avraham invested 75% of the funds in Mall.” (Judgment at 6).
22. “Mall purchased a lot adjacent to the two lots owned by Corner.” (Judgment at 6).
23. As a result, “Mall owns Lot 24 of the same block” as the two lots owned by Corner – that is, Block 10101. (Judgment at 5).
24. “When the properties were purchased, there were two buildings on the land owned by Corner and Mall. [I]n or about 2010, the brothers decided to demolish the buildings, and within the next two years they were demolished. Hence, there are no buildings in the land owned by either Corner or Mall.” (Judgment at 6).
25. “To fund the demolition, both brothers made investments into the business in approximate proportion to their ownership interest.” (Judgment at 6).
26. “Following the demolition of the buildings, the brothers operated a parking lot, as well as a flea market, on the three lots.” (Judgment at 6).
27. “Nissim took the primary role managing the properties on a day-to-day basis.” (Judgment at 6).
28. “The business is operated as a single entity on all three of the lots, owned by Corner and Mall, and goes by the name of Safe Parking.” (Judgment at 6).
29. “Mall is licensed by New York City to operate a parking lot.” (Judgment at 6).
30. “There is no access from the street directly to the property of Mall.” (Judgment at 6).
31. “The parking lot and the flea market are the only sources of income for Corner and Mall.” (Judgment at 6).

32. “The parking lot is a cash business. As it accepts cash only, no credit or debit cards are accepted as payment for parking.” (Judgment at 6).

33. “The parking lot is open five days a week, all year round except for snow days.” (Judgment at 6).

34. “The flea market operates on weekends during good weather, primarily during spring, summer and fall, and is also a cash business only.” (Judgment at 6).

35. “The property can accommodate 130 to 140 cars.” (Judgment at 6).

36. “The parties entered into an agreement, dated August 27, 2012, under which Avraham was to make distributions ... of 40% of the net income from Corner and Mall, after operating expenses to Nissim, with Avraham receiving the balance. The agreement reflected the work that Nissim had done managing the property over the years.” (Judgment at 8).

37. “[O]n March 4, 2013, Avraham told Nissim to get out of the office trailer in the parking lot. . . Nissim left the business at that point and did not return when Avraham was present.” (Judgment at 9).

38. “Avraham [has] failed to keep Nissim involved in major decisions concerning the business of Corner and Mall.” (Judgment at 10).

39. In particular, in considering various “options for the disposition of real estate holdings” of Corner and Mall, Avraham demonstrated “intractability” and engaged in “despotic decision-making practices.” (Judgment at 10). Avraham also hired “a new parking lot attendant and new accountant . . . for the business without consulting Nissim.” (Judgment at 10).

40. Avraham’s failure to communicate with Nissim about “major decisions concerning the business of Corner and Mall” was Avraham’s choice: “[t]he Court d[id] not credit Avraham’s

claim that he could not communicate with Nissim because he could not find him.” (Judgment at 10).

41. Avraham has “engaged in looting, waste, and diversion of corporate assets.” (Judgment at 20). Specifically, “Avraham understated the amounts of gross receivables from the parking business. . .” (Judgment at 20). In particular, “Avraham under-reported the amount of cars that were being parked in the parking lot, and thereby breached his fiduciary duty to Nissim as a shareholder to faithfully record the proceeds of the parking-lot business.” (Judgment at 15). Overall, Avraham has diverted “significant sums of unreported cash” from the brothers’ joint business. (Judgment at 15).

42. “The brothers have demonstrated an inability to agree on the direction of the corporation, and an inability to make a steady, growing profit from the parking business.” (Judgment at 20).

43. “Avraham has taken an intractable and pedantic stance where his brother is involved, insisting that things be done his way or not at all . . .” (Judgment at 20).

44. “[T]his business will continue on its present immutable course with the current ownership in place.” (Judgment at 20).

45. “The real estate market in Jamaica is at a peak at the present time due to an economic resurgence in the area.” (Judgment at 20).

46. “Stagnation or maintenance of the *status quo* will ill-satisfy the expectations of the minority investor . . . To continue to permit the *status quo* to exist, particularly given the upturn in the Jamaica economy and associated property values in the area, would serve neither of the litigants in this matter. Further opportunities may be lost, and these two individuals, whose basic philosophies of how to handle their business [are] vastly different, would accomplish nothing but

continue their personal disagreements and battles.” (Judgment at 20). Accordingly, dissolution of the business is “the only feasible means whereby the petitioner’s rights will be protected and he may reasonably expect to obtain a fair return on his investment. The dissolution of the real-estate holding company and the sale of its real-estate . . . appears to be the only way to permit the minority shareholder to effectuate his investment expectations.” (Judgment at 20).

Dramatic Changes in Mall’s Business as a Result of Dissolution of Corner

47. On January 5, 2018, the Court issued a Final Order in the First Prior Dissolution Action (the “Receiver Order,” a true copy of which is attached as Exhibit 6 hereto), appointing Joseph Covello, Esq., a former justice of the Appellate Division, Second Department, the receiver of the property of Corner (the “Receiver”), and charging him with the task of selling Corner’s real property, including in particular Lots 79 and 150 of Block 10101 in Jamaica, Queens (“Corner’s Property”).

48. The Receiver directed Avraham to close the parking business on Corner’s Property. In a subsequent order in the Prior Dissolution Action dated April 4, 2018 (a true copy of which is attached as Exhibit 7 hereto), the Court found that the parking lot on Corner’s Property must remain closed. In violation of the Court’s orders and the Receiver’s directions, Avraham re-opened the parking lot on Corner’s Property in April 2018. Following a temporary restraining order issued by the Court, the parking lot was closed on or about April 18, 2018, and has not been re-opened since.

49. Pursuant to the Receiver Order and the Court’s subsequent orders in the First Prior Dissolution Action, on June 14, 2018, Corner’s Property was sold at a public auction for \$18,000,000 (the “Sale”). On August 21, 2018, the closing of the Sale was completed, and the Receiver delivered to the purchaser a deed to Corner’s Property (a true copy of which is attached hereto as Exhibit 8). As a result, Corner no longer owns Corner’s Property, and neither Corner

nor either of the Kassab brothers has any further control over that property. Indeed, on information and belief, the purchaser subsequently sold Corner's Property to another buyer. Although Avraham's appeal from the Judgment and the Receiver Order is still pending (and Nissim has recently moved to dismiss it as moot), under the applicable law, the Sale is irreversible.

50. As a result of the Sale, the parking lot business on the combined properties of Corner and Mall, that Avraham maintained and controlled for several years, no longer exists and can no longer exist.

51. In the Judgment, the Court found that "[t]here is no access from the street directly to the property of Mall." (Judgment at 6). The property of Mall is also about three times smaller than the combined properties of Corner and Mall on which the parking lot was previously operated. As a result, it would not be feasible or cost-efficient to open a new parking lot business on the property of Mall (*i.e.* Lot 24) alone. In any event, Avraham has not, to date, opened a new parking lot business on Lot 24, or even applied to create a curb cut or driveway that would allow vehicles to enter Mall's property directly from the street.

52. In his March 7, 2019 deposition in the Second Prior Dissolution Action (a true excerpt from which is attached as Exhibit 9 hereto), Avraham admitted that (a) the lack of a curb cut is currently preventing Mall from operating a parking lot; and (b) Mall is currently not engaged in any business. (Ex. 9 at 85).

53. In the Judgment, the Court also found that "[t]he parking lot and the flea market are the only sources of income for Corner and Mall." (Judgment at 6). Since the combined parking lot was closed as a result of this Court's orders and the Receiver's directions, there has been no business activity on Mall's property, and Mall no longer has **any** source of income.

54. On information and belief, Avraham has taken no practical steps to date to open any new business on Mall's property or to create any new source of income for Mall. Avraham has also failed to involve Nissim in any decision-making with regard to any new business plans for Mall.

55. At the same time, Avraham refuses to sell Mall's property. The same buyer who purchased Corner's Property at auction has subsequently made an offer to purchase Mall's property as well. While Nissim suggested to respond with a counteroffer, Avraham refused to conduct any negotiations concerning sale of Mall's property with that buyer.

56. More recently, Nissim received a written offer made by a brokerage company on behalf of a potential buyer willing and ready to purchase the Mall Property for \$10 million (a true copy of which is attached as Exhibit 10 hereto). Nissim was willing to negotiate a sale with that potential buyer, but Avraham has rejected that offer as well.

57. In its June 2018 order, the Court noted with respect to Nissim's original petition in the Second Prior Dissolution Action: "Petitioner does not allege that Mall is unable to pay its expenses related to ownership of its real property, and, therefore, it continues to be a viable real estate holding company." (Ex. 4 at 10). Even if that was true when that original petition was filed (i.e. in November 2017), or even for some time thereafter, it is no longer true.

58. Now that the parking lot has been closed and Corner's Property sold, and Avraham, who still retains unilateral control of Mall, has failed to either agree to sell Mall's property or to come up with any alternative plan for Mall to earn any income to satisfy Mall's ongoing obligations, Mall is no longer able "to pay its expenses related to ownership of its real property." (*Id.*).

59. In particular, the real estate taxes for Mall's property (Lot 24) are about \$30,000

per annum. Mall has **no income** and therefore is unable to pay these taxes.

60. In his recent deposition, Avraham testified that he had “lent Mall the money” to pay its latest tax bill – without discussing with Nissim whether Mall, which has no income, should borrow money. (Ex. 9 at 92-93). Continuing such practice would mean that, while Mall’s valuable real property is being wasted and Nissim receives no return from his interest in Mall, the company would incur more and more debt to Avraham. Needless to say, 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. LLCL §702.

61. Notably, Section 6 of the Operating Agreement of Mall provides: “No Member is required to make any capital contributions to the Company.” (Ex. 1 at 1). Thus, under its Operating Agreement, Mall cannot raise any funds it needs by way of a capital call on its Members.

62. As a result, Mall is no longer a viable entity: it is financially failing and unable to pay its debts as they become due.

DEMAND FOR RELIEF

Dissolution of Mall Pursuant to LLCL §702

63. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

64. LLCL §702 provides: “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.”

65. Here, Section 4 of the Operating Agreement of Mall (Ex. 1) lists the two Members of Mall (Avraham and Nissim), and Section 5 expressly provides: “The business and affairs of the Company shall be managed by the Members.” Consistent with the apparent plain meaning and

intent of this provision, Avraham and Nissim managed the company together for many years. (Judgment at 6).

66. As set forth above, since March 2013, Avraham has completely excluded Nissim from the business of Mall. For the past six years, Nissim has played no actual role in Mall and has no say in the business, has no access to Mall's revenue or profits, and has not received any financial distributions from Mall. He has not been allowed to participate in any meetings about the business of Mall, and has not been consulted in any way about the business decisions for Mall. Avraham has been running Mall alone and has not been communicating with Nissim about its business.

67. As the Court also previously found based on the evidence, Avraham has engaged in under-reporting and diversion of Mall's income for his own personal benefit, which constitutes looting and waste of the company's assets. (Judgment at 11, 15, 20).

68. Moreover, as set forth above, since the parking lot that operated on the combined properties of Corner and Mall was closed as a result of the Court's orders in the First Prior Dissolution Action, and the property of Corner has been sold, Mall is no longer operating and is no longer able to operate a parking lot.

69. Nor has Avraham, who controls Mall, come up with any other business activity or business plan for Mall.

70. As a result, Mall has no income, is unable to pay its debts as they become due (including without limitation real estate taxes) and is financially failing. It is no longer a financially feasible entity.

71. In these circumstances, "it is not reasonably practicable to carry on the business [of Mall] in conformity with . . . [its] operating agreement." LLCL §702. Accordingly, Nissim is entitled to dissolution of Mall under LLCL §702.

72. Petitioner therefore requests that the Court, summarily and without any need for discovery or trial, order dissolution of Mall pursuant to LLCL §702, appointment of a receiver to sell Mall's property and liquidate its assets, distribution of the proceeds of such sale and liquidation to the members of Mall pursuant to LLCL §704 and other applicable law, and application of any other appropriate remedies available under the LLCL as well as the common law and equity.

WHEREFORE, Petitioner Nissim Kassab requests judgment against Respondent Avraham Kasab as follows:

(a) summarily and without any need for discovery or trial, dissolving Mall under LLCL §702, appointing a receiver for Mall, and directing sale and liquidation of Mall's property and assets and distribution of the proceeds to the two members of Mall in proportion to their ownership interests;

(b) awarding Nissim his reasonable attorney's fees and costs of prosecuting this action, to the extent allowed by the applicable law; and

(d) granting Nissim such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 22, 2019

Respectfully submitted,
SCHLAM STONE & DOLAN LLP

By:



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VERIFICATION

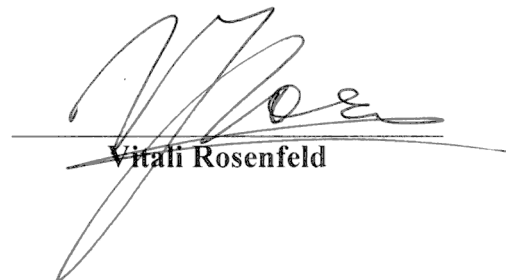
STATE OF NEW YORK)
)ss.
COUNTY OF NEW YORK)

Vitali Rosenfeld, Esq., being duly sworn, deposes and says:

1. I am a member of Schlam Stone & Dolan LLP, counsel for Petitioner Nissim Kassab ("Nissim"). Given that Nissim resides in Kings County and our office is located in New York County, I make this verification pursuant to CPLR 3020(d)(3).

2. Nissim is a 25% interest-holding member of Mall 92-30 Associates LLC ("Mall").

3. I have reviewed the foregoing Petition for dissolution of Mall. The factual allegations in that Petition are true to my knowledge, information and belief, as attorney for Nissim in prior litigation concerning Mall.



Vitali Rosenfeld

Sworn to before me this 23rd day of April 2019



NOTARY PUBLIC

GRETA JERNSTEDT
Notary Public, State of New York
No. 31-4979612
Qualified in New York County
Commission Expires April 1, 2023