

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 652036/2021

DURST BUILDINGS CORPORATION,

MOTION SEQ. NO. 002

Petitioner,

- v -

DECISION + ORDER ON MOTION

EDELMAN FAMILY CO. LLC,

Respondent.

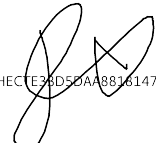
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38 were read on this motion to/for APPOINT - REFEREE.

The court declines to sign respondent's order to show cause. Respondent did not address binding Appellate Division and persuasive Delaware cases brought to the parties' attention in multiple conferences (or comply with Part Rule 44). Instead, it is ORDERED that, by July 15, 2021 at 9:30 a.m., the parties shall e-file briefs showing cause why the court should not dismiss the first five causes of action in the amended petition for lack of subject matter jurisdiction (see Raharney Cap., LLC v Capital Stack LLC, 138 AD3d 83, 84 [1st Dept 2016] ["the courts of this state do not have subject matter jurisdiction to judicially dissolve a foreign business entity. Instead, the decision as to whether dissolution is appropriate lies with the courts of the state in which the entity was created"], accord Sutton v Houllou, 191 AD3d 1031 [2d Dept 2021]; see also Seokoh, Inc. v Lard-PT, LLC, 2021 WL 1197593, at *9 [Del Ch Mar. 30, 2021] ["I cannot agree with Seokoh that the New York Opinion is controlling in this statutory dissolution proceeding. Although the Court generally will respect the parties' choice of forum, the parties cannot contract for jurisdiction where it otherwise is unavailable. It is well-settled in New York that New York courts do not have subject matter jurisdiction to order dissolution of a foreign business entity; instead, that question is rightfully addressed to the courts of the state in which the entity was created. The New York court, therefore, lacks jurisdiction to issue a decree of judicial dissolution for PTP"].

Petitioner should also confirm that it consents to a dismissal without prejudice of the sixth cause of action if the court dismisses its other claims (see Dkt. 33). Respondent is urged to carefully consider whether its defamation counterclaims are barred by the absolute litigation privilege and whether they should be withdrawn before petitioner expends funds moving to dismiss them (see Peck v Peck, 180 AD3d 558, 559 [1st Dept 2020]).

The parties are of course free to resolve this case on their own, though it seems clear by now that they will not imminently do so. They cannot, however, waive the court's lack of subject matter jurisdiction (*Wells Fargo Bank, N.A. v Chukchansi Econ. Dev. Auth.*, 118 AD3d 550, 551 [1st Dept 2014], citing *Newham v Chile Expl. Co.*, 232 NY 37, 42 [1921]; see *Nemes v Tutino*, 173 AD3d 16, 23 [4th Dept 2019] ["it is black letter law that a defect in subject matter jurisdiction may be raised at any time by any party **or by the court itself**, and subject matter jurisdiction cannot be created through waiver, estoppel, laches, or consent"] [emphasis added]).

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7/8/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER