

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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,

Plaintiff,

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, and other relief,

- against -

DAVID WINIARSKI, ESTHER WINIARSKI, MYRON
WINIARSKY, ROBERT LUBIN, ARYEH WEBER, and
THE LAW OFFICE OF ARYEH WEBER, ESQ.,

Defendants,

- and -

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

Nominal Defendants.

Index No.: 502779/2020

Mot. Seq. # 010

**PLAINTIFF’S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HER
MOTION FOR RECONSIDERATION AND REARGUMENT**

GOLDBERG WEPRIN
FINKEL GOLDSTEIN LLP
Zachary D. Kuperman, Esq.
Attorneys for Plaintiff Rena Pachter
1501 Broadway, 22nd Floor
New York, NY 10036
(212) 221-5700
zkuperman@gwfglaw.com

Plaintiff, Rena Pachter (“Plaintiff”), in her representative capacity as Administrator of the Estate of Judith Lindenberg (“Estate”), 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 (collectively, the “Companies”), by and through her attorneys, Goldberg Weprin Finkel Goldstein LLP, respectfully submits this reply Memorandum of Law in further support of her motion pursuant to CPLR 2221 for reconsideration and/or reargument of this Court’s Decision and Order dated May 5, 2021 ([Doc. No. 284](#)) to the extent said Decision and Order granted the request by Defendants, David Winiarski, Esther Winiarski, Myron Winiarski (collectively, “Defendants”),¹ to dismiss, pursuant to CPLR 3211, Plaintiff’s First Cause of Action (Equitable Dissolution) as asserted in Plaintiff’s Verified Amended, Consolidated, and Converted Complaint (“Complaint”), and for such other and further relief as this Court deems just and proper. Reconsideration should be granted and, upon reconsideration, Plaintiff’s equitable dissolution claim should be reinstated.

I. RECONSIDERATION SHOULD BE GRANTED

This Court, through a well-reasoned and cogent analysis, correctly upheld Plaintiff’s equitable dissolution cause of action by Decision and Order dated October 13, 2020 ([Doc. No. 147](#)). The Court should adhere to that decision. Plaintiff thus respectfully seeks reconsideration of the Decision and Order dated May 5, 2021 ([Doc. No. 284](#)) to the extent that it, without further analysis, reversed course and dismissed the Complaint’s equitable dissolution claim.

The standard for reconsideration is met for several substantive and procedural reasons, including the correctness of this Court’s prior order. Contrary to Defendants’ contention, Plaintiff is not obligated to assert new facts or explain lack of prior knowledge of such facts on

¹ Defendants claim the request to dismiss Plaintiffs equitable dissolution claim was made by the Defendants as well as Robert Lubin and Aryeh Weber. However, parties who are not members or managers of an LLC lack standing to seek dismissal of claim for the company’s judicial dissolution.

this motion.

II. DEFENDANTS FAIL TO ADDRESS SEVERAL POINTS WHICH ARE THUS DEEMED CONCEDED

Defendants' opposition fails to address several of movant's points, particularly Plaintiff's Point III ("It Was Error for the Court to Reverse Its Prior Order"). Arguments which are unopposed are deemed conceded. *See Kronick v. L.P. Thebault Co.*, 70 A.D.3d 648, 649 (2d Dep't 2010); *Genovese v. Gambino*, 309 A.D.2d 832, 833 (2d Dep't 2003). Accordingly, the several arguments made in Point III, among others, are unchallenged and thereby deemed conceded. Plaintiff's motion should be granted on this basis alone.

III. REARGUMENT IS WARRANTED ON THE LAW

In *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (2d Dep't 2010), the petitioner asserted Partnership Law statutes and Business Corporation Law statutes as grounds for dissolution of an LLC. But the court there held that those statutes do not apply to LLCs. The *Ocean Avenue* case does not address the applicability of nonstatutory doctrines in LLC actions.

As to nonstatutory doctrines and their applicability to LLCs, the Court of Appeals held in *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008) that all well-established equitable doctrines for redressing harms by corporate fiduciaries are available in the LLC context in the absence of a "clear legislative mandate to the contrary." Without any, much less a "clear" legislative abrogation of equitable dissolution for LLCs, the text of LLCL § 702 cannot be judicially expanded to eliminate this doctrine.

Indeed, the Second Department has held that equitable doctrines do apply in dissolution of LLCs, despite the absence of statutory authority. *See Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dep't 2013) (error for court to refuse equitable remedy of forced buyout in dissolution of LLC even in the absence of a statutory provision); *Matter of Superior Vending, LLC*, 71 A.D.3d 1153

(2d Dep't 2010) ("Although the Limited Liability Company Law does not expressly authorize a buyout in a dissolution proceeding, the Supreme Court properly determined that the most equitable method of liquidation in this case was" buyout); *Lyons v. Salamone*, 32 A.D.3d 757 (1st Dep't 2006). If LLCL § 702 were, as Defendant's argue, the sole and exclusive standard for judicial dissolution in the LCL context, these equitable doctrines repeatedly upheld in dissolution of LLCs would not exist, and there would be no such thing as attorney general dissolution or contract-based dissolution of LLCs.

In fact, all general common law and equitable doctrines—the business judgment rule, de facto corporation doctrine, piercing the corporate veil—apply equally to LLCs as they do to other business entities. *See, e.g., Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 19 (2015) (applying veil piercing to LLC); *Lehlev Betar, LLC v. Soto Dev. Grp., Inc.*, 131 A.D.3d 513, 514 (2d Dep't 2015) (despite not meeting statutory requirements under the LLCL, de facto corporation doctrine applied to create LLC); *Zuckerbrod v. 355 Co., LLC*, 113 A.D.3d 675, 676 (2d Dep't 2014) (business judgment rule applies to LLCs). There is no reason equitable dissolution should be any different.

Just as equitable dissolution continues to apply to corporations following enactment of the Business Corporation Law's dissolution provisions, so too should this doctrine continue to apply to LLCs following enactment of the LLC Law.

Accordingly, Plaintiff's equitable dissolution claim should be sustained.

IV. DEFENDANTS' FACTUAL ASSERTIONS OUTSIDE THE PLEADINGS ARE IMPROPER ON THIS MOTION

Defendants' brief contains a confusing host of assertions that are not found anywhere in Plaintiff's Complaint, are not relevant to any issue here, and appear to be simply fabricated. These assertions are improper and should be disregarded.

1. Procedurally Outside the Complaint

The procedural framework of this motion is dismissal under CPLR 3211. Therefore, Defendants' several factual claims asserted on this motion should be disregarded as outside of the Complaint and not grounded in documentary evidence. *See Bou v. Llamaza*, 173 A.D.3d 575, 575–76 (1st Dep't 2019). Regardless, factual assertions in an attorney's briefing lack foundation and should be given no credence.

2. Substantively Immaterial

The Court should disregard Defendant's several tax statements as irrelevant. Defendants have failed to explain how Plaintiff's (or any particular petitioner's) taxes are germane to the merits of equitable dissolution. Indeed, no aspect of the legal propriety of granting or denying equitable dissolution has anything to do with the Estate's taxes.

3. Fabrications

Defendant's assertions regarding expert forensic accountant Glenn Liebman—who Defendants incorrectly style as "Plaintiff's accountant"—are fabricated. Mr. Liebman is an expert witness who has testified in this action regarding embezzlement of the Companies' assets. Defendants, in opposition, assert that Mr. Liebman has opined in this action regarding the values of the Properties at issue, even providing specific figures as to Mr. Liebman's supposed valuation conclusions. *See* Defs.' Br. at 11-12. Where Defendants could possibly have derived these statements is perplexing. In no rational reading of Mr. Liebman's affidavit, or any affidavit Mr. Leibman (or any other expert for that matter) submitted in this or any related action, can he be said to provide an opinion or analysis as to the value of any of the Properties, Companies, or of the Estate's membership in the Companies in any way that even approaches anything resembling Defendants' statements.

Finally, Defendants make several assertions regarding the Estate's taxes. Defendants cannot possibly know how much, if any, state and federal taxes the Estate is obligated to pay, nor when it is obligated to file returns or pay any such taxes. Nevertheless, Defendants attempt to make something of a "bond affidavit" submitted to the Surrogate's Court as part of routine estate administration. Surrogate's Court procedures require the filing of preliminary information at the inception of the administrator's appointment to determine the amount of the administrator's bond and the court's filing fee for the estate. Here, the bond was waived entirely and the Estate paid the highest possible filing fee. This form asks the amount of outstanding, overdue taxes (if any) as of the time of submission. The filing provides no indication in support of Defendants' statements regarding the Estate's overall tax obligations. Defendants have, apparently, simply contrived these statements for their benefit.

CONCLUSION

For the reasons stated herein and in Plaintiff's moving brief, Plaintiff's motion for reconsideration should be granted and, upon reconsideration, the Complaint's equitable dissolution claim should be reinstated.

Dated: New York, New York
June 21, 2021

GOLDBERG WEPRIN
FINKEL GOLDSTEIN LLP

By: 

Zachary D. Kuperman, Esq.
1501 Broadway, 22nd Floor
New York, New York 10036
(212) 221-5700
zkuperman@gwfglaw.com

*Attorneys for Plaintiff Rena Pachter in her
capacity as Administrator of the Estate of
Judith Lindenberg*