

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 12th day of August 2021.

PRESENT:

Honorable Reginald A. Boddie, JSC

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ISAAC AZARIA, Individually and Derivatively
on behalf of 695 MONROE LLC,

Plaintiff,

-against-

MICHAEL UHR, JONATHON RUBIN a/k/a
JONATHAN RUBIN, and 695 MONROE LLC,

Defendants.
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Index No. 504057/2020
Cal. No. 5 MS 1

DECISION AND ORDER

2021 AUG 17 AM 9:40
KINGS COUNTY CLERK
FILED

Papers Numbered
MS 1 Doc. # 1-36

Upon the foregoing cited papers, the decision and order on plaintiff's motion for default judgment against defendants, pursuant to CPLR 3215, is as follows:

Plaintiff Isaac Azaria seeks an accounting, judicial dissolution of 695 Monroe LLC (695 Monroe) pursuant to Limited Liability Company Law § 702 (LLCL 702), and the appointment of a receiver empowered to facilitate the wind up, liquidation and distribution of 695 Monroe's assets to plaintiff and defendant Michael Uhr. As an initial matter, the motion was withdrawn as to defendant Jonathan Rubin.

Plaintiff, the 58% member in 695 Monroe, seeks judicial dissolution on the ground that defendant Uhr, the 42% member in 695 Monroe, failed to update the offering plan filed with the Attorney General. Plaintiff alleged the purpose of 695 Monroe is to convert the property into a condominium building and sell the units, which requires the Attorney General's approval. Plaintiff

averred that without an updated offering plan, the Attorney General will be prevented from approving the offering because General Business Law § 352-e (1) (a) requires that the offering plan include the names, addresses and business background of the principals involved. Plaintiff averred if the offering plan cannot be approved and accepted, then 695 Monroe will be unable to convert the property into a condominium and sell the units. Plaintiff argued defendant's failure to update the offering plan is illegal and thwarts the purpose of the LLC.

On a motion for leave to enter a default judgment, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (CPLR 3215). Plaintiff's motion must provide the Court with sufficient facts to determine whether there exists a viable cause of action (*see First Franklin Fin. Corp. v Alfau*, 157 AD3d 863, 865 [2d Dept 2018]). LLCL 702 provides for judicial dissolution of an LLC “. . . whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.” In determining whether plaintiff has stated a prima facie case for judicial dissolution of 695 Monroe, the Court must first examine the provisions of the operating agreement relating to dissolution (*see In re 1545 Ocean Ave., LLC*, 72 AD3d 121, 128 [2d Dept 2010] [concluding that dissolution of a limited liability company under LLCL 702 is initially a contract-based analysis]). Judicial dissolution is a drastic remedy reserved for situations in which, “in the context of the terms of the operating agreement or articles of incorporation, [] (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 at 131).

Here, Article 3 (1) of the July 30, 2019 operating agreement, executed by plaintiff and defendant Uhr, provided “[t]he Company shall continue until the earliest to occur of: (a) the sale

or other disposition of all or substantially all of the property of the Company; (b) the incompetence or permanent disability of the sole remaining Member, if applicable.” Plaintiff provided no proof that either contingency triggering dissolution under the operating agreement occurred.

Plaintiff argued, accurately, that the parties intended to develop condos and sell them. Article 8 of the operating agreement, under subsection titled Distributions, provided that the building “shall be condos and sold as 4 condos.” However, this section further provided, “[i]n the event that we determine that sale is not feasible option and turn it to rental building, after building is stabilized we shall refinance, proceeds of refinance will be same as above, ownership of building shall be 58% Isaac Azaria and 42% to Michael Uhr.” It is therefore evident that the parties contemplated a rental building as an alternative. Moreover, Article 2 of the operating agreement, titled Purposes, provided “[t]he purpose of the Company shall be to engage in any business in which a Limited Liability Company may lawfully engage in the State of New York.”

Here, the complaint failed to allege Uhr was unwilling or unable to reasonably permit 695 Monroe from engaging “. . . in any business in which a Limited Liability Company may lawfully engage in the State of New York.” The operating agreement indicated that the parties contemplated alternatively renting the units, and there was no showing that the continued operation of 695 Monroe is financially unfeasible. Rather, plaintiff’s argument in support of his request for an accounting is that he has been unable to obtain information about the financial stability of 695 Monroe. Therefore, plaintiff failed to establish entitlement to judicial dissolution and the consequent appointment of a receiver (*see Kassab v Kassab*, 137 AD3d 1135, 1137 [2d Dept 2016], citing *Matter of 1545 Ocean Ave., LLC*, 72 AD3d at 131; *see Barone v Sowers*, 128 AD3d 484, 485 [1st Dept 2015]; *Doyle v Icon, LLC*, 103 AD3d 440, 440 [1st Dept 2013]). Accordingly, that branch of the motion is denied.

To the extent plaintiff's motion seeks an accounting against defendant Uhr, and the motion lacks an affidavit of non-military service for defendant Uhr, that branch of the motion is denied without prejudice.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court

2021 AUG 17 AM 9:40

KINGS COUNTY CLERK
FILED

**HON. REGINALD A. BODDIE
J.S.C.**