

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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WU CHEN,

Plaintiff,

Decision and order

Index No. 527902/2021

- against -

697 DEKALB LLC, SHAHLA TASHKHISI, and
SHAUN YAFEH,

Defendants,

July 18, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complain on the grounds it fails to state any cause of action. The plaintiff has cross-moved seeking summary judgement. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

According to the complaint, the plaintiff paid \$300,000 for a 25% share of defendant corporation which was was formed to develop real estate. Thereafter, the plaintiff essentially alleges the project that was the subject of the contribution was mismanaged and the operating agreement had been violated on numerous occasions. The plaintiff sought a return of the investment and has now moved seeking dissolution pursuant to LLC Law §702. The defendant asserts there are no questions of fact dissolution is not warranted. The plaintiff argues he is

entitled to judgment as a matter of law.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

In Matter of 1545 Ocean Avenue LLC, 72 AD3d 121, 893 NYS2d 590 [2d Dept., 2010] the court held that the sole basis for dissolution of a limited liability company were the grounds outlined in Limited Liability Company Law §702, namely judicial dissolution upon proof that it is "not reasonably practicable to carry on its business in conformity with the articles of organization or operating agreement" (id). This is a more stringent standard than the dissolution of an ordinary corporation (Kassab v. Kasab, 195 AD3d 830, 145 NYS3d 836 [2d Dept., 2021]). Thus, the petitioner must establish 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" (Long Island Medical & Gastroenterology Associates P.C. v. Mocha Realty Associates LLC, 191 AD3d 857, 143 NYS2d 56 [2d Dept., 2021]). Concerning disagreements among the members "it is only where discord and disputes by and among the members are shown to be inimical to achieving the purpose of the LLC will dissolution under the "not reasonably practicable" standard imposed by LLC § 702 be considered by the court to be an available remedy to the petitioner" (Kassab v. Kasab, 60 Misc3d 1204(A), 109 NYS2d 832 [Supreme Court Queens County 2018]).

In this case the plaintiff alleges that Daniel Melamed a former manager of the corporation continues to act as manager even though he is currently incarcerated. Concerning actual mismanagement, however, the complaint merely states that "in the two years following Plaintiff's Capital contribution, the Project incurred numerous delays caused by mismanagement, disregard" (see, Complaint, ¶30). Further, the complaint alleges that Melamed and the other defendants sought an additional contribution from the plaintiff in the amount of \$485,275. Section 8 of the operating agreement dated June 7, 2019 states that "the Members are not required to make any additional capital

contribution to the Company, provided however, that additional capital contribution may be made at such time and in such amounts as the Members shall determine" (id). Thus, on its face the contribution of any additional capital requires the agreement of the "the members" and presumably requires the agreement of all three members. The defendant Shaun Yafeh asserts that "plaintiff in his Verified Complaint contends that under Section 8 of the Operating Agreement [sic] does not allow demand for Capital Contributions to be made without unanimous consent of the Members, however this is incorrect as the word "unanimous" does not appear in this section" (Affidavit of Shaun Yafeh, ¶ 17). The affidavit of Shala Tashkhisi likewise argues unanimous approval was not required (see, Affidavit of Shala Tashkhisi, ¶ 16). While it is true paragraph 8 does not state "all" members must agree (see, Paragraph 13, contra, "the Members may not cause the Company to admit one or more additional members to the Company without consent of *all* [emphasis added] Members") there can be no reasonable reading of paragraph 8 that limits the number of members that may impose a capital contribution. The mere fact paragraph 8 does not contain the word "all" does not change this analysis. For example, Paragraph 11 states that "a Member may not assign or transfer in whole or in part his interest in the Company without the consent of the other Member"

(id). However, there are three members, thus each member must obtain consent from the other two members, not just one member. Thus, these grammatical irregularities do not govern the plain meaning of the agreement.

In truth, there is a fundamental disagreement between the parties whether the initial contribution made by the plaintiff was intended to be the only contribution he needed to make or whether others were necessarily contemplated. Consequently, there are questions whether the company maintains the necessary finances to continue and whether it thus remains viable. These questions require further discovery to discern the intent and understanding of all parties. Therefore, there can be no summary determination whether dissolution is possible and likewise, there can be no summary determination that dissolution is required. Consequently, the motion seeking dismissal is denied and likewise the motion seeking summary judgement is also denied.

So ordered.

ENTER:

DATED: July 18, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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KINGS COUNTY CLERK
FILED