To be Argued by:
AARON H. PIERCE
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket No.: 2011-02051

In the Matter of the Application of Dina DiCenso, as A Member,

Petitioner-Appellant

For the Dissolution of EIGHT OF SWORDS LLC
a New York Limited Liability Company, Pursuant to
Section 702 of the Limited Liability Company Law

- against -

DAVID WALLIN,

Respondent-Respondent

BRIEF FOR RESPONDENT-RESPONDENT

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Question 1: When members of a limited liability company have not executed a written operating agreement concerning allocation of profits and losses, should the members' voting rights in the company be determined on the basis of the value of each member's contributions to the company?

Answer: The trial court was correct when it answered in the affirmative.

Question 2: When a limited liability company is financially viable and continues to achieve its business purpose, should a minority member's petition to dissolve the company be dismissed?

Answer: The trial court was correct when it answered in the affirmative.

INTRODUCTION

Petitioner-appellant Dina DiCenso ("DiCenso" or "appellant") brings this appeal on specious grounds solely to waste the time and money of respondent-respondent David Wallin ("Wallin" or "respondent"). DiCenso contends that the trial court erroneously looked to her share of the revenue of Eight of Swords, LLC ("the LLC") to determine her voting interest in the LLC. (*See* Appellant's Opening Brief ("App. Brief"), p. 1, Question 1.) It is telling, however, that DiCenso's brief offers not a single record citation in support of that contention. In fact, the record readily demonstrates that the trial court correctly applied New York Limited Liability Company Law ("LLCL") sections 402 and 503 and determined DiCenso's voting interest *on the basis of the value of her contributions to the LLC*, not her share of revenue. (*See, e.g.*, R. 296 lines 7-13; R. 242 lines 22-25; R. 243 lines 1-3; R. 197 lines 13-18.)

DiCenso further argues that the LLC should have been dissolved simply because she was not granted co-equal control over it. This argument, however, misapplies the standard for judicial dissolution of an LLC set forth by this Court in *Matter of 1545 Ocean Ave. LLC*, 72 A.D.3d 121 (2nd Dep't 2010). That standard allows for dissolution only when either: 1) management is unable or unwilling to achieve the purpose of the LLC; or 2) continuing the entity is financially unfeasible. *See 1545 Ocean Ave.*, 72 A.D.3d at 131. Here, as the trial court found,

the purpose of the Eight of Swords, LLC was to operate a tattoo parlor, to sell merchandise, to employ additional tattoo artists, and to host art shows. (R. 582 lines 15-21; R. 583 lines 18-24.) The trial court further found that these purposes had been met (R. 582 lines 13-24; R. 583 lines 18-24), and that the LLC was indeed financially viable. (R. 582 lines 23-24.)

The trial court examined the facts and correctly applied the law. Pursuant to LLCL section 503, the court determined the parties' share of the LLC's profits according to their contributions. Then, pursuant to LLCL section 402, the court determined the parties' voting interest according to their share of profits. Finally, having scrutinized all the testimony and evidence before it, the trial court determined that the business purpose of the LLC – to operate a tattoo parlor – had been, and could be, achieved. The trial court's dismissal of DiCenso's dissolution petition was clearly proper, and this Court should similarly reject DiCenso's appeal.

COUNTERSTATEMENT OF FACTS

David Wallin is a tattoo artist who has worked in New York City for many years. Ms. DiCenso, a former equity analyst, met Mr. Wallin when she got a tattoo from him in 2008. (R. 71, 373.) At that time, Mr. Wallin had been considering opening his own tattoo parlor (R. 159), and in early 2009, Ms. DiCenso told Mr. Wallin that she could assist him in that endeavor. (R. 72 160.) Thereafter, Mr.

Wallin organized Eight of Swords, LLC with the State of New York (R. 18, 19), DiCenso provided a loan and administrative support to the LLC (R. 74), and the tattoo parlor was opened in Brooklyn in June 2009.

The parties did not create a written operating agreement for the LLC, and their business arrangements were based solely on oral agreements and some emails between Mr. Wallin and Ms. DiCenso. The parties had agreed that DiCenso would be entitled to 30% of the LLC's revenue from merchandise sales and guest artist tattooing (tattooing done by artists other than Mr. Wallin), but nothing more. (R. 74, 90.) Revenue generated by Mr. Wallin's tattooing would go to Mr. Wallin.

Mr. Wallin's tattooing was the primary source of revenue for the LLC. Indeed, the trial court determined that Mr. Wallin's contribution was "the heart of the productivity of the LLC" (R. 180 lines 16-22), and that "while Mrs. DiCenso did make some contributions in assisting, ... Mr. Wallin is the one who has carried the burden of managing the business day-to-day, and generated the revenue, paid the bills." (R. 581 lines 11-16.)

Not long after the tattoo parlor was opened in Brooklyn, the relationship between Mr. Wallin and DiCenso began to deteriorate. Ultimately, in April 2010, DiCenso brought a petition in Kings County Supreme Court Commercial Division to dissolve Eight of Swords, LLC pursuant to LLCL section 702.

COUNTERSTATEMENT OF THE PROCEEDINGS BELOW

DiCenso tried her dissolution petition to the Kings County Supreme Court Commercial Division (Honorable Carolyn Demarest presiding) between April 2010 and January 2011. A trial was had, and the trial court heard days of testimony from both Mr. Wallin and Ms. DiCenso.

The court first queried whether DiCenso was a member of the LLC and whether she had standing to bring her dissolution petition. (R. 67 lines 4-9.) Answering those questions in the affirmative (R. 187 lines 5-6), the court went on to address whether dissolution was appropriate under the standard of LLCL section 702 and *1545 Ocean Ave.* (R. 188 lines 12-16; R. 185 lines 12-20.) The court specifically declined to rule on the precise voting interest of each member before it had determined whether dissolution was appropriate. (R. 201 lines 23-25; R. 202 lines 1-3.) After hearing testimony and receiving evidence from both sides, the trial court ruled from the bench that the LLC continued to achieve its business purpose (R. 582 lines 11-21; 584 lines 1-2) and was financially viable (R. 582 lines 18-24), and dismissed the dissolution petition. (R. 584 lines 4-5.)

On January 13, 2011, the trial court entered its written order. (R. 3.) As pertains to this appeal, the January 13, 2011 order determined: 1) that DiCenso's dissolution petition be dismissed; 2) that the LLC's business purpose "has been met and continues to be met, and can continue to be met;" 3) that "Dina DiCenso's

interest in Eight of Swords, LLC is minimal, and that Dina Dicenso's interest is certainly less than 20%, and may be as little as 1% to 5%;" and 4) "that the approximate $31,000.00 to $32,000.00 is a loan from Dina DiCenso to Eight of Swords, LLC, and is not a measure of her membership interest and is strictly a loan." (R. 3.) This appeal followed.

ARGUMENT

I. The record demonstrates that the trial court applied the correct standard from Limited Liability Company Law sections 402 and 503 and determined DiCenso's interest based on the value of her contributions to the LLC.

In the absence of an operating agreement delineating the voting power of an LLC's members, the LLCL prescribes that "each member of a limited liability company shall vote in proportion to such member's share of the current profits." LLCL § 402(a). In turn, a member's share in the LLC's profits is determined (again, in the absence of an operating agreement) "on the basis of the value ... of the contributions of each member." LLCL § 503.

A review of the record readily demonstrates that the trial court followed the rules of LLCL sections 402 and 503 and determined DiCenso's voting interest *based on the value of her contribution to the LLC*:

1. On the first day of testimony, June 14, 2010, the trial court twice explained to the parties and their counsel the LLCL's rule for determining membership interest in an LLC: "The presumption [of membership interest]

is in proportion to their investment." (R. 180 lines 10-11.) "This is going to be based on what's been going on in the last year and who has contributed what." (R. 181 lines 17-19.)

2. On the next day of testimony, July 15, 2010, DiCenso's trial counsel explained to the court that he intended "to offer evidence which will establish [DiCenso's] capital contribution as to her membership interest in the company." (R. 197 lines 13-18.) DiCenso's counsel later stated he would establish DiCenso's interest "based on her contributions." (R. 225 lines 21-25.) The trial court asked of DiCenso's counsel: "What is your offer of proof, Mr. Berg, with respect to her contributions? How many hours is she claiming? What did she actually do?" (R. 227 lines 13-16.)

3. Later on July 15, the court twice reiterated the standard: "I made a ruling that she was a member, based on those contributions." (R. 228 lines 13-14.) "In determining the membership interest, it would normally be appropriate to apportion the contribution of each of the member [sic], and you're taking overall value or cost or capital investments that were made in forming this entity, and you figure out what each party contributed to that." (R. 242–243.)

4. On August 5, 2010, the court once again announced the standard it used to determine DiCenso's membership interest: "[T]he law is that a

proportion of interest is determined by the contribution to the entity. So, in order to determine Ms. DiCenso's interest as a member of this entity, we are obviously going to have to know what her contributions were." (R. 296 lines 7-13.)

It is clear that the trial court applied the correct rule and determined the respective voting interests of Wallin and DiCenso based on their contributions to the LLC. Indeed, in light of the above, it is frivolous for DiCenso to argue that the trial court determined her voting interest based on her share of the LLC's revenue.

II. Applying Limited Liability Company Law sections 402 and 503, the trial court found, as a matter of fact, that DiCenso had a minority interest in the company.

The trial court applied LLCL sections 402 and 503, examined each members' respective contributions, and made a reasoned decision that DiCenso had a minority interest in the LLC. The record again clearly demonstrates that the trial court examined and compared the full range of contributions from both Ms. DiCenso and Mr. Wallin:

1. At the June 14, 2011 hearing, the court stated, "Now, of course, the contribution to the LLC can come from the labor and efforts of the party and not necessarily in dollars and cents." (R. 180 lines 16-18.)

2. At the same hearing, the court acknowledged the $32,000 loan from DiCenso to the LLC ("What we have is $32,000 from the Petitioner." [R.

180 lines 16-22]), and characterized Mr. Wallin's contribution of labor as "the key to this business." (R. 183 line 21.)

3. At the July 15, 2011 hearing, the court noted, "there have also been services provided and managed by petitioner and management and various things on behalf of the LLC" (R 198 lines 11-15), and noted DiCenso's contribution of "time and energy." (R. 228 lines 13-14.)

4. At the July 15 hearing, the court stated, "[i]t's a business which on the one hand Mr. Wallin is seems to be running [sic], Ms. DiCenso had contributed significantly, she did a lot of work." (R. 237 lines 9-11.)

5. Again on July 15, the court stated, "[w]e have Ms. DiCenso's loan, right? We have an allegation that services were provided. We have her signature on a number of the formation documents." (R. 243 lines 5-7.)

The trial court's reasoning is best summed up by Justice Demarest's December 13, 2010 bench ruling:

> "Now, after the initial testimony which I believe took place on June 14, 2010, the Court determined that Mrs. DiCenso was, in fact, a member of the LLC, and it remains to be determined what percent that would be. I made a finding on the 14th of June, and I adhere to that, that the $32,000 or $31,000 I have been hearing today is a loan from petitioner to the LLC. Accordingly, that is not a measure of her membership interest, it's strictly a loan, it's apparently being repaid. There was a finding on that day that *neither member provided capital for the initial creation of this LLC business but both provided labor and expertise* ... At that that time, there was a finding that both members have had some management responsibility, however, I must say, having heard a great deal more

testimony subsequently, my view is that, in fact, from the very beginning, both, based on the agreement between the parties and the operation of the business, that in fact Mr. Wallin is the sole managing member. And that is reflected in e-mails, it is reflected in testimony.

It is clear that it was at all times anticipated that Mr. Wallin would be the sole manager of the business, and I believe there was testimony, both sides, that Mrs. Dicenso would do as much or as little as he wanted. In fact, *he has been the primary and virtually sole generator of revenue, he has paid the bills, he operated the business. And based on the de facto evidence of what has been going on since the early stages of this, while Mrs. DiCenso did make some contributions in assisting, in setting up the LLC, and doing the legal work that was necessary, Mr. Wallin is the one who has carried the burden of managing the business day-to-day, and generated the revenue, paid the bills*. And I think we are, unfortunately, not a whole lot closer to ascertaining or determining exactly what percent of membership Mrs. DiCenso has except that I do find now, having heard a great deal of testimony not only in June of this year but also in October and again just in the last few days, that her interest is minimal, and that her interest is certainly less than 20%, it may be as little as one to 5%." (R. 580 – 581 [emphasis added].)

Contrary to DiCenso's protests on appeal, the trial court did "compare the value of the parties' contributions to the company." (App. Brief p. 11.)

The trial court's determinations of fact are entitled to considerable deference. "Due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the witnesses. Moreover, the trial court's determination will not generally be disturbed on appeal unless it could not have been reached under any fair interpretation of the evidence." *Koslowski v. Koslowski*, 297 A.D.2d 784, 784-785 (2d Dep't 2002)(internal quotations omitted). Justice Demarest herself acknowledged that the trial court's

evaluation of the evidence was "completely an issue of credibility" (R. 229 lines 19-20) – an issue squarely within the domain of the finder of fact.

Clearly, the trial court was in a position to determine the facts and balance the weight of the evidence, and it cannot be said that its conclusions were an unfair interpretation of that evidence. Therefore, the trial court's decision regarding the parties' relative voting interests in the LLC must stand.

III. Having determined that the LLC's business purpose had been met and could be met, and that the LLC was financially viable, the trial court properly dismissed DiCenso's dissolution petition.

The standard for judicial dissolution of a limited liability company was set forth by this Court in *1545 Ocean Ave., LLC*:

> "[T]he petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, 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."

Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131 (2nd Dep't 2010).

The trial court faithfully applied this standard. With no operating agreement available, the court first looked to the evidence to determine that the LLC's business purpose was to operate a tattoo parlor, to sell merchandise, and to conduct other subsidiary business activities. (R. 577 lines 2-9; R. 582 lines 11-24.) This determination had ample support in the record. On June 14, 2010, the court asked DiCenso to describe the nature of the business, and DiCenso testified: "[i]t was

primarily a tattoo shop, and we were going to be selling merchandise." (R. 90, lines 6-9.) The second sentence of DiCenso's very opening brief in this appeal states: "The business was to be a tattoo parlor that also sold merchandise, held art shows, and conducted other business activities." (App. Brief, p. 2.)

The court then queried "whether this is a functional LLC" (R. 439 lines 14-15; *see also* R. 234 lines 2-4), and finally determined "that Mr. Wallin as the primary, I now find, sole managing member, has been able to operate the business consistent with its primary business purpose." (R. 582 lines 11-15.) The court concluded "from all of the evidence that the business purpose bas been met, and continues to be met, and can continue to be met under the operation and management by Mr. Wallin as managing member." (R. 583-582.) The court also determined that the LLC was financially viable: "[A]pparently, there is some money being generated." (R. 582 lines 23-24.)

To side-step the trial court's holding, Ms. DiCenso now argues that the LLC's business purpose was not tattooing or sales, but rather was to provide DiCenso with equal say in its management. (*See* App. Brief p. 1 Question 2, pp. 13, 14.) This tortured argument misses the point. A voting interest is not a business purpose, and that Ms. DiCenso was not allocated the 50% interest she wanted does not render the business dysfunctional. The trial court determined Ms. DiCenso had a minority interest in the LLC, and that she had standing to bring her

dissolution petition. Then, the court found that the LLC was achieving its purpose of operating a tattoo parlor, and rejected the dissolution petition. The trial court correctly applied the *1545 Ocean Ave.* standard.

CONCLUSION

"The appropriateness of an order for dissolution of [a] limited liability company is vested in the sound discretion of the court hearing the petition." *1545 Ocean Ave.*, 72 A.D.3d at 132. With no operating agreement delineating the parties' voting interests in Eight of Swords, LLC, the trial court correctly looked to the each party's contributions to determine their share of profits, and concluded as a matter of fact that DiCenso had a minority voting interest in Eight of Swords, LLC. The court properly applied the standard of LLCL section 702 and *1545 Ocean Ave.* to determine that the LLC's business purpose was being met, and could continue to be met, and dismissed DiCenso's dissolution petition. For these reasons, this Court should uphold the January 13, 2011 order of the trial court and reject the dissolution petition.

Dated: Brooklyn, New York
November 13, 2011

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CERTIFICATE OF COMPLIANCE
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