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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

In the Matter of the Petition of JEANIE HOLLAND,
Holder of One-Half of All Issued and Outstanding
Shares Entitled to Vote in an Election of Directors,
and as a One-Half Member of the Limited Liability
Company,

Petitioner,

INDEX NO.: 008871/2007
MOTION DATE: 11/26/2008
MOTION SEQUENCE: 003 and 004

For the Judicial Dissolution of ROMPER
NURSERY, INC., a New York Corporation, Pursuant
to Business Corporation Law Section 1104; and, the
Judicial Dissolution of ROMPER REALTY, LLC, a
New York Limited Liability Company, Pursuant to
Section 702 of the Limited Liability Company Law,

- against -

MARGARET A. ZACK,

Respondent.

The following papers read on this motion:

Order to Show Cause, Affirmation & Exhibits Annexed	1
Notice of Motion & Affidavit	2
Petitioner's Memorandum of Law in Support of Motion	3
Opposing Affirmation of Robert B. McKay & Attachments	4
Affirmation for Adjournment of Robert B. McKay	5
Affirmation in Opposition to Motion to Dismiss Without Prejudice of Charles A. Singer & Exhibit Annexed	6
Reply Affirmation of Robert B. McKay & Exhibit Annexed	7
Reply affirmation of Charles A. Singer & Exhibit Annexed	8

This motion by respondent for an order pursuant to CPLR §§ 3216 and 3217(b) dismissing the above captioned special proceeding with prejudice is denied on procedural grounds. The motion by petitioner for an order pursuant to CPLR 3217(b) dismissing this special proceeding without prejudice is determined as follows.

Petitioner alleges that she commenced this proceeding out of concern for the well-being of the children of the nursery school, (Romper Nursery, Inc.), sought to be dissolved. She alleges that harm to them was likely to result from the conduct of respondent including but not limited to opening the school in inclement weather, use of unsafe buses and hostility to the staff. However, she moves the court for dismissal of this, the second, proceeding brought to dissolve Romper Nursery, Inc. and Romper Realty, LLC on the following grounds: 1) the cost of this litigation; 2) the psychological and emotional drain of this litigation; and 3) the uncertainty of the outcome of this litigation despite the “rosy predictions” of her former counsel.

She argues that a dismissal with prejudice would serve as an absolution of respondent’s potentially or actually harmful behavior. She argues that should defendant’s behavior in the future cause a threat to the safety and well being of the children attending Romper Nursery it would be a “travesty” to allow defendant’s past behavior to be considered irrelevant.

Petitioner’s application to dismiss with lack of prejudice is denied. Pursuant to the authority granted in CPLR 3217(b), the court directs that those acts by respondent which are central to this special proceeding are precluded from serving as a basis for initiating another lawsuit. Brenhouse v Anthony Industries, 156 A.D.2d 411 (2d Dept 1989). To allow petitioner to sue respondent for the same acts as have been vigorously defended in this lawsuit would prejudice a substantial right of defendant to have a timely resolution of the matter after committing substantial resources to her defense, or to be free of litigation. Mathias v Daily News, 301 A.D.2d 503, 504 (2d Dept 2003). But, subject to application of evidentiary rules by the justice presiding over any future matter any prior acts may be introduced into evidence for other purposes.

Seemingly petitioner has figuratively weighed the perceived danger to the nursery school children against the tangible and intangible costs she has paid to protect them, and found the costs to be greater than the danger. The future will not change the present, only perceptions of it,

and petitioner's decision based on facts known to her now is final. The law does not permit a litigant to change his or her mind based on hindsight once given a full and fair opportunity to seek redress for a wrong.

Upon the parties submitting a stipulation that the action be discontinued, in compliance with section 3217.(b) of the CPLR the court will order that the action is dismissed with prejudice. In the alternative that parties should be prepared to proceed to trial on March 9, 2009.

Dated: December 30, 2008


J.S.C.

ENTERED

JAN 07 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**