SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of the Application of
NILS YOUNGWALL, a Member of
Youngwall Realty, LLC,

Petitioner,

-against-

YOUNGWALL REALTY, LLC and
PERRY YOUNGWALL, a Member of
Youngwall Realty, LLC,

Respondents,

For the Dissolution of YOUNGWALL REALTY, LLC, pursuant to LLCL §§701(a)(5) and 702, and for related relief.

INDEX No. 022266/07

MOTION DATE: Feb. 1, 2008
Motion Sequence # 001

The following papers read on this motion:

Order to Show Cause..... X
Affidavit in Opposition..... X
Reply Affidavit.... X

This petition, brought on by an order to show cause, for an order of dissolution, and upon such dissolution, that a receiver or liquidating trustee to wind up the dissolved limited liability company be appointed, and granting petitioner such other relief as to the court may seem just and proper, is determined as hereinafter set forth.

The LLC was converted from a General Partnership in 2001; the General Partnership was formed in 1987. The sole substantial asset of the LLC was, and is, real property located at 80 Crossways Park Drive in Woodbury, New York. The property was leased (term September 30, 1977 to September 30, 2007) to Transaero, Inc.; and at the end of the lease, Transaero became a month-to-month tenant. Transaero was 80% owned by the petitioner's father, who is now deceased. The respondent Perry Youngwall is currently the 80% owner of Transaero. Thomas Megale has been the manager of the LLC since its inception in 2001 and was appointed by both members, and authorized to carry out the normal business relations of the LLC.

The petitioner asserts that the respondent Perry Youngwall, his brother is the "sole record shareholder of tenant Transaero, Inc.. . .."; that 40% of the Transaero stock is rightfully that of the petitioner; and that the petitioner disputes that ownership because, he avers, Perry Youngwall fraudulently obtained full ownership of the Transaero shares from their father, inter vivos, and that said 40% share rightfully belongs to him as one of their father's "two heirs or distirbutees". He further asserts that there is such animosity between petitioner and Perry that they are unable to confer or cooperate to carry on the LLC's business. He argues that the LLC's manager, Megale, has allied himself with Perry and Transaero to the detriment of the LLC and petitioner. He further argues that approval of a lease requires both his and Perry's consent; that the holdover tenancy of Transaero since September 30, 2007 is a clear violation of the terms of the Operating Agreement ("OA"); and that upon notice, Transaero vacated the premises as of November 30, 2007, with no new tenant to take possession. The petitioner contends that he was not permitted to inspect the Transaero premises when it was in possession, and Perry ". . .rejected petitioner's requests to cause the LLC either to sell or to find a new tenant for the Premises upon the termination of the Lease, by these actions the premises will not be an asset, but a liability because it cannot generate income without a tenant. He further argues that there is a deadlock; that Megale resigned as manager as of December 31, 2007, and appointed a person named Howard L. Morrel as a successor, which the petitioner rejects and all of these actions leaves the LLC unable to carry on its business and must be dissolved, the asset liquidated and a receiver appointed.

The respondent, Perry Youngwall asserts that there is no risk to the assets of the LLC; that the LLC (and prior partnership) has been successful and profitable for 21 years; that the LLC should, per the OA, exist indefinitely because Megale continues to be manager of the LLC and that there is a second agreement that is binding upon the members contradictory to the petitioner's main contention. As a factual background, the respondent avers that he has worked for and with his father in Transaero since 1985, rising through the ranks to become

its president in 1995, and remains to date; that the petitioner was fired from Transaero for causing problems and became totally estranged from his father. The general partnership (which later became the LLC) became the landlord for Transaero, from which the partnership received regular leasehold payments for 21 years, and the net amount was then divided equally between petitioner and respondent. Upon their father's death in August 2006, his will became effective, which disinherited the petitioner, and the petitioner is contesting that will in Surrogate Court, Nassau County. The respondent further avers that the LLC continues to operate under the management of Thomas Megale, who is pursuing the best interests of the LLC; that Transaero was fully paid on its rent through the end of the holdover on November 30, 2007; that Mr. Megale had full authority to consent to the two month holdover; and that while Mr. Megale did resign and appoint a successor, those actions have since been rescinded and Mr. Megale continues as the manager. The respondent's attorney argues that this court, in an order in a similar case, did not order dissolution where the entity held title and collected rent, because the entity was solvent and had an ongoing business.

In reply, the petitioner's attorney asserts that the papers show that the dysfunctional relationship between the two siblings has resulted in the LLC's single asset has now been devalued, the LLC becoming a losing proposition, and the manager is not a neutral administrator. Counsel further asserts that such circumstances dictate that it is not reasonably practical to continue the LLC's business; and points out that Mr. Megale was not approved to succeed himself, nor is there any document which rescinds his resignation. He avers that it was the respondent's litigation tactic, in the estate probate, to move Transaero, which led to this situation of leaving the LLC without a tenant and without income. The petitioner's attorney argues that the case law cited by the respondent's counsel are inapplicable herein, and distinguishes same from the instant action, differentiating the Business Corporation Law from the Limited Liability Company Law. The petitioner, in his reply affidavit, repeats his assertion that he and the respondent agree on nothing; that the sole asset of the LLC is non-income-producing; that Mr. Megale is the respondent's agent; and that the LLC's asset is now a drain. He argues that the respondent's motives are questionable in both aspects of the litigations between them. He further questions the respondent's future expectations for the LLC. He notes that the "Second Agreement" purported to have been reached by the parties relative to the LLC lacks any signature by these parties. He avers that he does not recall this document and does not have a copy; and that he is uninformed as to what actions are underway regarding the future of the LLC asset. He also disputes the legitimacy of Mr. Megale's opposition as self-serving, and the legitimacy of his remaining in office, and questions whether efforts have been made to obtain a new tenant or to sell, and notes that no accounting has been made for the last period of Transaero's occupancy.

DECISION

The applicable statute provides, in pertinent part, as follows:

> "On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement".

The language of that provision is clearly distinguishable from BCL§§1104 and 1104-a, which respectively provide, in pertinent parts, as follows:

> "The holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:
>
> (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
>
> (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
>
> (3) That there is internal dissension and two or more factions of shareholders are

> so divided that dissolution would be beneficial to the shareholders". (BCL§1104)
>
> "The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
>
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation". (BCL§1104-a)

Simply stated, the Business Corporation Law creates an action for either a holder of 50% of outstanding shares (§1104) or a holder of 20% or more of outstanding shares to seek judicial dissolution under certain specific circumstances: division of directors that votes for actions by the board can't be made; that the shareholders themselves are so divided that an election of directors can't be obtained; that internal dissension is so extreme that dissolution is beneficial; or that the directors are guilty of illegal fraudulent or oppressive actions against complaining shareholders; or that the assets of the corporation are being looted, wasted or diverted.

The LLCL is more general, while being more specific — the requirement being "not reasonably practicable to carry on the business [according to]. . .[the] operating agreement". The purpose of this LLC is, as set forth in the Operating Agreement, Article I, (3), "the

company is formed for any lawful business purpose. . .". "Business" is defined (LLCL §102(e)) as meaning "every trade, occupation, profession or commercial activity", which, the commentator states ". . .that the drafters intended that LLCs form for pecuniary profit". (Rich, Practice Commentary, McKinney's Cons Law of NY, Book 32A, p.183). The respondent emphatically states: "3. The LLC (and the partnership that preceded it) have operated smoothly and profitably for over 21 years. During that time, the venture has paid over $7.6 Million Dollars to its members". . . .[that] the LLC can continue to operate and make further profit for its members (Perry Youngwall affidavit, p.2). The plain and ordinary content and intent of the parties and the Operating Agreement of the LLC was, and is, to make a profit for the members, Perry Youngwall and Nils Youngwall (see, generally, Article 5, Operating Agreement).

The Court is cognizant of the past history of the LLC and its profit stream, and the uninterrupted income provided by the LLC and its predecessor partnership to the litigants/members herein. While instructive, it is not decisive of LLCL§702. The statute, as written, that a dissolution may be decreed when ". . .it is not reasonably practicable to carry on the [profitability]. . ." (emphasis supplied). That language clearly contemplates the future of the LLC, i.e., after November 30, 2007 (when Transaero vacated the premises). Transaero was the only tenant, and there is no dispute that the LLC is not a profit-making entity at this time. Nor is there any admissible documentary proof that either the manager or the members are actively pursuing a future/current replacement for Transaero, notwithstanding the self-serving statements of the respondent and the manager, whose motives are questionable, given the concurrent litigation in Surrogate Court and the latter's employment. The respondent's submission of an "agreement" purportedly dated October 8, 2001 does not qualify as documentary proof, inasmuch as there are numerous cross-outs and changes with no signature by either Nils Youngwall or Perry Youngwall.

With respect to the case law cited by the respondent as support for his position, careful research reveals that those cases are both legally and factually distinguishable for the case at bar. Due to the intense personal animosity between the members, the lack of any proof of the current profitability of the LLC, the apparent inability ". . .to function as intended. . ." (**Schindler v Niche Media Holdings, LLC**, 1 Misc3d 713, 772 NYS2d 781, 785, S.Ct., NY County, 2003), dissolution is appropriate.

Accordingly, dissolution is warranted and is directed herein and the petition is **granted**. Pursuant to LLCL 703(a), due to the attendant circumstances, a receiver is

appointed to wind up the LLC's affairs, including, but not limited to, the sale of the premises 80 Crossways Park Drive, Woodbury, New York, and any and all other assets for distribution to the members pursuant to LLCL§704. The Court appoints George Esernio, Esq. of 1050 Franklin Avenue, Garden City, NY 11530 as receiver. He shall obtain a surety bond in the sum of $ 3,000,000.00. The members of the LLC are directed to immediately pay the cost of the surety bond and to capitalize the current and future operating expenses of the receiver in the sum of $120,000.00, on an equal basis, and such future sums as the receiver deems appropriate. The manager of the LLC is directed to forthwith provide the receiver with the original fire and liability insurance policies for the subject property. The accounts of the LLC shall forthwith be transferred into the name of the receiver, and the receiver shall have all the powers as set forth in CPLR 6401(b).

Dated MAR 14 2008

J.S.C.

ENTERED

MAR 18 2008
NASSAU COUNTY
COUNTY CLERKS OFFICE