Matter of Shure v S&S Eatery, L.L.C.
2012 NY Slip Op 31091(U)
April 9, 2012
Sup Ct, Nassau County
Docket Number: 000950-12
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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In the Matter of the Petition of Elaine Shure,

Petitioner,

For the Judicial Dissolution of S&S Eatery, L.L.C.,

Respondent.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 000950-12
Motion Seq. Nos: 1 and 2
Submission Date: 2/17/12

The following papers have been read on these motions:

Order to Show Cause, and Verified Petition..x
Affidavit in Support and Exhibits...x
Emergency Affirmation in Support..x
Proposed Order of Dissolution..x
Memorandum of Law in Support...x
Notice of Cross Motion..x
Affidavit in Support/Opposition,
Affirmation in Support/Opposition and Exhibits..x
Affirmation in Opposition to Cross Motion and Exhibit..............................x

This matter is before the Court for decision on 1) the Order to Show Cause filed by Petitioner Elaine Shure ("Shure" or "Petitioner") on January 26, 2012, and 2) the cross motion filed by Anthony Spota, a member of Respondent S&S Eatery, L.L.C. ("S&S") and the plaintiff in the related action titled *Anthony Spota v. Elaine Shure*, Nassau County Index Number 8663-11 ("Related Action") also pending before the Court.[1] For the reasons set forth below, 1) with respect to Petitioner's Order to Show Cause, the Court a) concludes that Petitioner has established her right to dissolution of S&S; b) determines that a hearing is necessary to determine

[1] In a recent decision in the Related Action ("Related Decision"), the Court denied plaintiff's motion for injunctive relief.

whether the appointment of a receiver and/or granting of injunctive relief is appropriate; c) denies Petitioner's application for injunctive relief at this juncture; and d) denies, as moot, Petitioner's application for an Order directing Respondent to produce certain records, in light of the stipulation entered into by the parties and so-ordered by the Court; and 2) reserves decision on Respondent's cross motion to consolidate the above-captioned action ("Instant Action") and the Related Action.

BACKGROUND

A. Relief Sought

In her Order to Show Cause, Petitioner moves for an Order 1) dissolving S&S pursuant to New York Limited Liability Company Law ("LLCL") § 702; 2) winding up the affairs of S&S pursuant to LLCL § 703; 3) temporarily, preliminarily and permanently restraining Anthony Spota from a) transacting any business and from exercising any LLC powers, except by permission of the Court; and b) collecting or receiving any debt or other property of S&S, and/or from disbursing or otherwise transferring or delivering any property of S&S, except by permission of the Court, pursuant to LLCL § 703(a) and/or CPLR Article 63; 4) upon the grant of dissolution, appointing a receiver for S&S so that its assets can be properly safeguarded, preserved and protected; and 5) directing that Anthony Spota provide to the accountant for S&S, Kenneth Neu, CPA, all records of sales and cash receipts (including all cash register tapes), all inventory records, all purchase records, any sales journal, purchase journal, and all other records necessary to calculate the amount of sales tax and other taxes due and owing to the State of New York and ultimately to fairly distribute the assets of S&S to the members, adjusting such distribution by the amount that Mr. Spota has already wrongfully withheld.

Respondent opposes Petitioner's Order to Show Cause and cross moves, pursuant to CPLR § 602(a), for an Order consolidating the Instant Action with the Related Action.

B. The Parties' History

The Verified Petition ("Petition") alleges as follows:

Shure was and is a member and 50% owner of S&S, a domestic limited liability company. S&S is a restaurant business that was formed on or about July 15, 2010 for the purpose of developing and operating a restaurant at 908 Rockaway Avenue, Valley Stream, New

York ("Premises"). Respondent Anthony Spota ("Spota") is the only other member of S&S. S&S is operated pursuant to an Operating Agreement dated August of 2010 (Ex. A to Shure Aff. in Supp.). The Operating Agreement was modified by an agreement dated September 3, 2010 ("September Agreement") (*id.* at Ex. B).

In or about June of 2010, Spota approached Shure and proposed that they enter into a joint venture involving the operation of a restaurant/luncheonette. Spota advised Shure that he had extensive experience in the restaurant business, and Shure had business experience operating an antique store. Spota and Shure agreed that Spota would manage the kitchen and Shure's responsibilities would include overseeing the company's books, carrying out other administrative responsibilities and picking up and delivering food to the restaurant.

By virtue of her position as trustee of Unified Credit Trust Under the Will of Barnett Shure, Landlord (her late husband) ("Trust"), Shure was able to arrange for the lease of the Premises to S&S. Spota represented to Shure that if, in addition to arranging for the Premises to be leased, she would also provide funding for the venture in an amount equal to the amount of money provided by Spota, Shure would be given an equal share of the business, as well as co-management responsibilities. Shure provided half of the financing, arranged for the lease ("Lease") and, therefore, is a 50% owner of S&S.

Petitioner further alleges that she was promised that her rights as a manager would include the right to determine which employees should be hired and other similar business decisions. The September Agreement provides, *inter alia*, that 1) the work time at the restaurant would be divided equally between Shure and Spota (¶ 9); 2) all bills related to S&S must be paid before any profits are "obtained" by Elaine or Anthony (¶ 6); 3) no salary will be paid unless all bills are paid (¶ 10); and 4) any check over $4,000 must be authorized by both parties (¶ 8). Petitioner further alleges that she performed daily activities for S&S, including picking up and unloading groceries and other necessary supplies.

The members' rights were also memorialized in the Operating Agreement which provides at Article III, Paragraph 1 that "management of this Company shall be vested in the members[.]" Petitioner also alleges that she was promised full access to S&S books and records, which right was memorialized in Article III, Paragraph 4 of the Operating Agreement which states that

"[e]ach member may inspect and copy, at his own expense, for any purpose reasonably related to such member's interest as a member, the Articles of Organization, the Operating Agreement, minutes of any meeting of members and all tax returns or financial statements of the Company for the three years immediately preceding his inspection, and other information regarding the affairs of this Company as is just and reasonable."

The Petitioner alleges, further, that Spota has been hostile and abusive towards Shure, which conduct included the use of profane language when speaking with her and disparaging her ability to operate the business. As a result, Shure alleges, she has been afraid to confront Spota regarding his refusal to permit her to participate in the management of S&S. She affirms that Spota has prevented her from exercising her management rights, and denied her access to the company's books and records, as well as information necessary to operate the business.

Petitioner alleges that Spota has conducted the affairs of S&S in a manner that renders it impracticable for S&S to continue in existence as an LLC. His conduct has included 1) engaging in intimidating conduct designed to prevent Shure from exercising her management rights; 2) denying Shure access to the company's financial records; 3) failing to pay real estate taxes and utility fees pursuant to the Lease; and 4) failing to collect sales tax, thereby exposing S&S to civil and criminal liability.

In opposition, Spota reaffirms the truth of the allegations in the complaint in the Related Action, which are set forth in detail in the Related Decision. Those allegations include Spota's claims that 1) Shure breached the provisions in the agreements dated July 9, 2010 and September 3, 2010 stating that the hours would be divided equally between the parties regarding the daily operation of S & S by refusing to perform any work related to S & S's daily operations; and 2) Shure is liable for abandonment and breach of the covenant of good faith and fair dealing as a result of her reopening the antique store previously operated by her son and late husband, and failing to devote the required time to operating S & S. Spota also affirms that Shure, in her capacity as trustee of the Trust, initiated a landlord-tenant action against Spota on behalf of S&S, related to the Lease at the Premises.

Spota agrees that the eventual dissolution and winding up of the affairs of S&S is appropriate, but submits that the Court should not grant dissolution until the issues raised in the Related Action are addressed. He submits that if the dissolution proceeds without first addressing his claims in the Related Action, he will lose the time and money he has invested in S&S, as well as any potential resale value, including the company's good will. He argues, further, that Shure will be unjustly enriched if S&S is dissolved without compensating Spota for the improvements for which he paid.

Spota submits, further, that the Court should not enjoin the operations of S&S, but rather permit the business to continue to operate until its eventual dissolution. While Spota affirms that he will comply with the Court's directives if a receiver is appointed, he does not believe that such an appointment is necessary in light of the fact that S&S is a small business, and in consideration of the significant costs attendant to the appointment of a receiver.

With respect to Shure's application for an Order directing Spota to provide documentation to Mr. Neu, the company accountant, Spota affirms that 1) he has always provided Mr. Neu with updated cash and check receipts; 2) as of January 23, 2012, Mr. Neu was provided with current financial records of S&S; and 3) Spota agrees to provide updated financial information to Mr. Neu in the manner requested. The Court notes that the parties executed a stipulation dated January 27, 2012, which the Court so-ordered, reflecting Spota's agreement to provide certain documentation to Mr. Neu by February 6, 2012.

Finally, Shure submits that consolidation of the Instant and Related Actions is appropriate in light of their common questions of law and fact, and because consolidation will serve the ends of judicial economy.

C. The Parties' Positions

Petitioner submits that the Petition establishes Petitioner's right to an Order 1) determining that, pursuant to LLCL § 702, the continued existence of S&S has been rendered impracticable and issuing an Order terminating and dissolving S&S; 2) enjoining S&S and/or Spota from transferring or concealing any assets of S&S, or selling any portion of the shares of S&S to any individual; 3) directing Respondent immediately to turn over the financial books and records of S&S to Kenneth Neu, CPA, the accountant for S&S, so that the dissolution of S&S

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and the payment of any taxes or other liabilities due to the State or any other governmental body can be effected in an efficient manner; and 4) directing that, upon the audit of S&S by the accountant, the Court is authorizing the distribution of such profits as are disclosed to the members of S&S.

Petitioner opposes consolidation of the Instant and Related Actions on the grounds that consolidation will unduly prejudice Shure's rights to a speedy resolution of the Instant Action, and will allow Spota to continue to engage in his allegedly improper conduct.

RULING OF THE COURT

A. Dissolution of a Limited Liability Company

LLCL § 702, titled "Judicial dissolution," provides 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. A certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance.

Despite the standard for dissolution enunciated in LLCL § 702, there is no definition of "not reasonably practicable" in the context of the dissolution of an LLC. *Matter of 1545 Ocean Avenue, LLC v. Ocean Suffolk Properties, LLC*, 72 A.D.3d 121, 127 (2d Dept. 2010). Most New York decisions involving LLC dissolution issues have avoided discussion of this standard altogether. *Id.*, citing, *inter alia*, *Matter of Extreme Wireless*, 299 A.D.2d 549, 550 (2d Dept. 2002). The standard is not to be confused with the standard for the dissolution of corporations pursuant to Business Corporation Law ("BCL") §§ 1104 and 1104-a, or partnerships pursuant to Partnership Law § 62. *Id.* Unlike the judicial dissolution standards in the BCL and Partnership Law, the court must first examine the LLC's operating agreement to determine, in light of the circumstances presented, whether it is or is not "reasonably practicable" for the LLC to continue to carry on its business in conformity with the operating agreement. *Id.* at 128. Thus, the dissolution of an LLC under LLCL § 702 is initially a contract-based analysis.

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The Second Department, in *Matter of 1545 Ocean Avenue, LLC,* outlined relevant case law in New York and other jurisdictions, including Delaware, and concluded that, for dissolution of an LLC pursuant to LLCL § 702, the 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. 72 A.D.3d at 131. The Court noted that dissolution is a drastic remedy, *id.*, citing *Matter of Arrow Inv. Advisors, LLC*, 2009 Del Ch LEXIS 66, * 2 (2009), and that the appropriateness of an order for dissolution of the LLC is vested in the sound discretion of the court hearing the petition, *id.* at 133, quoting *Matter of Extreme Wireless*, 299 A.D.2d at 550.

B. Consolidation

CPLR § 602(a) permits consolidation "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial or any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." CPLR § 602(b) provides, *inter alia*, that where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.

Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Gutman v. Klein*, 26 A.D.3d 464 (2d Dept. 2006). A motion to consolidation rests in the sound discretion of the trial court. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d 527 (2d Dept. 1999).

The party seeking consolidation must establish the existence of common questions of law or fact. *Beerman v. Morhaim*, 17 A.D.3d 302 (2d Dept. 2005). Once the movant has established the existence of common questions of law or fact, the party opposing consolidation must demonstrate that it will suffer prejudice to a substantial right if consolidation is granted. *Mattia v. Food Emporium, Inc., supra.* Absent that showing, consolidation should be granted if the

movant meets its burden. *Id. See also Viafax Corp. v. Citicorp Leasing, Inc.*, *supra*; and *Mas-Edwards v. Ultimate Services, Inc.*, 45 A.D.3d 540 (2d Dept. 2007).

C. Appointment of a Receiver

With respect to Petitioner's application for the appointment of a receiver, CPLR § 6401 provides as follows:

> (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.
>
> (b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.
>
> (c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis*, *supra*, the Second Department reversed the trial court's order granting plaintiff's motion for appointment of temporary receiver in light of plaintiff's failure to make the required evidentiary showing. *Id.* at 631-632.

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C. Application of these Principles to the Instant Action

The Court concludes that Petitioner has established her right to dissolution of the LLC in light of the terms of the Operating Agreement regarding the parties' obligation to contribute equally to the management of the LLC, and their allegations that the other member has not fulfilled his/her obligation. Moreover, Respondent agrees that the eventual dissolution and winding up of the affairs of S&S is appropriate, but submits that the Court should not grant dissolution until the issues raised in the Related Action are addressed. Under these circumstances, the Court concludes that it is not reasonably practicable to carry on the business in conformity with the Operating Agreement.

In light of the issues raised by the parties however, including Respondent's concerns as outlined in the Related Action that Shure may be unjustly enriched if S&S is dissolved without compensating Spota for the improvements for which he paid, and the conflicting affidavits regarding the parties' conduct, the Court concludes that a hearing is necessary to determine whether the appointment of a receiver and/or granting of injunctive relief is appropriate. The Court denies Petitioner's application for injunctive relief at this juncture, concluding that it is appropriate to permit the business to continue to operate until its eventual dissolution. The Court denies, as moot, Petitioner's application for an Order directing Respondent to produce certain records, in light of the stipulation entered into by the parties and so-ordered by the Court.

With respect to Respondent's cross motion for consolidation, the Court agrees that consolidation of the Instant and Related Actions is appropriate in light of the similarity of issues in the Instant and Related Actions. Consolidation of these Actions, however, is complicated somewhat by the fact that the instant dissolution proceeding is a matter to be tried before the Court but the plaintiff in the Related Action may have a right to a jury trial. Accordingly, the Court reserves decision on Respondent's cross motion to consolidate and will discuss with counsel, at the next conference, a stipulation that the two Actions will be tried before the Court.

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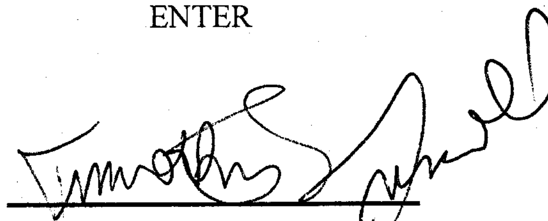
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on June 6, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 9, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

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