Matter of Sieni v JAMSFAB, LLC
2013 NY Slip Op 31473(U)
June 20, 2013
Supreme Court, Suffolk County
Docket Number: 13-1309
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 13-1309

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/15/13
ADJ. DATES 5/24/13
Mot. Seq. # 001 - MD
Mot. Seq. #002 - MG
CDISP: YES XX

IN THE MATTER OF THE APPLICATION OF
JOHN C. SIENI, a Member of JAMSFAB, LLC

Petitioner

for dissolution and accounting and winding up the affairs of JAMSFAB, LLC,

-against-

JAMSFAB, LLC, and ALLISTAIR MACLEAN

Respondents

MICHAEL G. WALSH, ESQ.
Atty. For Petitioner
860 Montauk Hwy.
Water Mill, NY 11976

FARRELL, FRITZ, PC
Attys. For Respondent MacLean
370 Lexington Ave.
New York, NY 10017

Upon the following papers numbered 1 to 10 read on the motion to dismiss the petition for dissolution and the petition as amended; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering papers 5-6; Replying papers 7; Other 8 (memorandum); 9 (reply memorandum); 10(petitioner's memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by respondent, Alistair Maclean [s/h/a Allistair MacLean], for an order dismissing the petitions served and filed in this proceeding for dissolution of the respondent, JAMSFAB, LLC, is considered under CPLR 3211(a)(1) and is granted; and it is further;

ORDERED that the relief demanded in the petition (#001) and the amended petition served in this special proceeding is denied as academic and the petitions are dismissed, as they were rendered moot by the granting of the respondent's motion to dismiss.

In 2010, the petitioner and respondent MacLean decided to form a business providing boutique hotel accommodations to those traveling to Shelter Island, the small, tranquil island that sits between

twin forks of eastern Long Island. In connection therewith, the petitioner utilized his separately owned company for purposes of purchasing a one and one-half acre parcel of land that housed a nineteenth century inn. Now housed on that land is a small, upscale hotel with a guest cottage, swimming pool and a french restaurant which the petitioner and the respondent operated jointly under the auspices of a limited liability company known as JAMSFAB, LLC [hereinafter "JAMSFAB"], that is the subject of this dissolution proceeding. JAMSFAB is a tenant of the land on which the hotel and other structures sit under the terms of a five year lease with the separate corporation owned by the petitioner.

The purchase of the land by the petitioner's separate company closed in the first quarter of 2011. Prior thereto, articles of organization for JAMSFAB, LLC were prepared by or on behalf of the petitioner and filed with the Secretary of State in August of 2010. An operating agreement is alleged to have been prepared in September of 2010 by the petitioner and/or his agents. However, this agreement was not fully executed by both the respondent and the petitioner until January of 2013. Most of the material terms of such operating agreement consist of standardized, pro-forma paragraphs which bear little or no relationship to the parties or their venture. For example, the pre-printed stated purpose of the company "is to conduct any lawful business for which limited liability companies may be organized and to do all things necessary or useful in connection with the foregoing" (*see* Article II A of the operating agreement attached as Exhibit B to the original petition). Other provisions which call for the subscribers of such agreement to particularize the terms by filling in spaces left blank, were mostly left blank, as in Article II, ¶ 4 which called for the company's termination date.

The operating agreement does, however, list the petitioner as a member owning a 70% share in the company while respondent MacLean was listed as a member owning the remaining 30% interest, albeit on a schedule not referable to the agreement other than by its attachment. This division is alleged to have reflected the fact that the contributions of the petitioner were principally monetary in nature with the rest going to oversight of the books, records and other business and financial aspects of the company and land management. The respondent's contributions took the form of services dedicated to business operations, facility management and marketing and he was employed by the hotel as its manager. Undaunted by the absence of a fully executed operating agreement, the parties embarked upon their capitalistic venture once the property purchase closed and the transformation of the old inn into its current status as a boutique hotel and restaurant was substantially complete.

In the petition originally filed herein in January of 2013, the petitioner alleged that "as organizer", he "is a 70% Member and an Operating Manager of the hotel while respondent MacLean is a member employed by the company as a manager of the hotel" (*see* ¶ 6 of the petition). Continuing, it is alleged that "after many months of operating the business, MacLean failed to report to work, failed to oversee the employees of the business, occupied a hotel unit with his family, drank and dined with his family on a consistent basis and without providing any supervision, work, labor or services to the company and business resulting in losses to the business for the period 2011-2012" (*see* ¶ 9 of the petition). In November of 2012, the petitioner "determined to remove MacLean as general manager and member of the company" (*see* ¶ 12 of the petition). After giving notice to the respondent, the petitioner conducted a meeting on December 16, 2012, at which, he "effected the removal of MacLean from his management position and terminated his membership interest for all purposes" (*see* ¶ 14 of the petition). After the respondent, through his attorneys, contested such

actions, the petitioner commenced this special proceeding wherein he seeks "judicial confirmation of his actions as the 70% majority interest Member/Manager of the company pursuant to the company's operating agreement and the Limited Liability Company Law of the State of New York and judicial dissolution of the company" (*see* ¶ 17 of the petition). These demands for relief are transformed in the wherefore clause of the petition into demands for a final order conferring the following relief: 1) dissolving JAMSFAB, LLC; 2) directing the respondent to file an accounting and that any assets of the LLC be liquidated; 3) that all accounts of the LLC be frozen and closed; and 4) that damages be awarded to the petitioner in an amount proved at trial.

In lieu of answering, respondent MacLean moved to dismiss the petition on the grounds that no cognizable claim for dissolution were stated. In response, the petitioner served opposing papers that included an "amended petition". The stated purpose of the amended petition "is to include matters raised in the related proceeding [commenced by the respondent against the petitioner]; to supplement the original Petition with further facts pertaining to the underlying bases [sic] supporting the application for dissolution; and to include additional facts regarding the acts that the Respondent Alistair MacLean has committed since the filing of the petition in January of 2013, which form an additional and separate bases [sic] for dissolution, to wit: Alistair MacLean has taken actions in an effort to damage the business by making unsubstantiated complaints to: a) the Shelter Island Building Inspector alleging violations of Zoning Code; b) the Suffolk County Health Department alleging violations of Sanitary Code; c) and unsubstantiated claims to the local Fire Marshall alleging violations of the NYS Uniform Fire Prevention and Building Code — which resulted in the filing of reports of the alleged violations against the premises" (*see* ¶ 4 of the affidavit in opposition of John B. Sieni).

In reply papers, counsel for respondent MacLean questions the propriety of the petitioner's inclusion of his "amended petition" in his opposing papers. This procedural objection has merit since the true nature of the "amended" petition is that of a supplemental pleading due to the inclusion of factual events occurring subsequent to the filing of the original petition. Because the statutory requirement that leave of court be obtained prior to the service and filing of a supplemental pleading was not met, the amended petition may be considered a nullity (*see* CPLR 3025[b]). Since, however, the respondents have opted to press for the dismissal of the amended petition upon the grounds that, like the original petition, no legally sufficient claim for dissolution of JAMSFAB has been stated and/or is possessed by the petitioner, the court will consider the merits of the claims for and against dismissal of both the original and amended petition on the legal ground of legal sufficiency. For the reasons stated below, the respondent's motion is granted.

Limited Liability companies in New York are creatures of a statute known as the Limited Liability Company Law ("LLCL"). Pursuant to LLCL § 203(d), "[a] limited liability company is formed at the time of the filing of the initial articles of organization with the department of state or at any later time specified in the articles of organization ... This filing of the articles of organization shall, in the absence of actual fraud, be conclusive evidence of the formation of the limited liability company as of the time of filing or effective date if later ... A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's article of organization."

JAMSFAB was formed in August of 2010 upon the filing of the articles of organization with the Secretary of State. The fact that the operating agreement was not fully signed until 2013 by both the petitioner and respondent until January of 2013 is without effect upon the formation of JAMSFAB, as the absence of an operating agreement does not render company action void or voidable but simply subjects it to governance by the default provisions of the LLCL (*see* ***In re Eight of Swords, LLC***, 96 AD3d 839, 946 NYS2d 248 [2d Dept 2012]). In any event, the petitioner's delayed execution of the operating agreement in January of 2013 bearing the notations "effective as of September 22, 2010", the date on which MacLean allegedly signed it, may have effected the "confirmation and ratification" that the petitioner intended by his use of those words and the others above quoted.

In determining applications for a judicial dissolution of a limited liability company, the court must first look to such company's operating agreement to determine "whether it is or is not reasonably practicable for the limited liability company to continue to carry on its business in conformity with the operating agreement" (***Matter of 1545 Ocean Avenue, LLC v Crown Royal Ventures, LLC***, 72 AD3d 121, 893 NYS2d 590 [2d Dept 2010]; *see* LLCL § 702). Considered a statutory "default provision" for judicial dissolution (*see* ***Man Choi Chiu v Chiu,*** 71 AD3d 646, 896 NYS2d 131 [2d Dept 2010]),.LLCL § 702 is *available* whenever the court finds that it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. Appellate case authorities have instructed that the court's initial analysis is one that is contract-based because the statute mandates an examination of the articles and operating agreement to determine the reasonable practicability of carrying on the business in conformity with these governing documents (*see* ***Matter of 1545 Ocean Avenue, LLC v Crown Royal Ventures, LLC***, 72 AD3d 121, *supra*).

JAMSFAB's operating agreement contains no provisions for the expulsion of any members, only provisions allowing for the admission and withdrawal of members upon transfers of the interests of a member (see *id.*, Article IX). Under Article V of the operating agreement, management of the company is vested in all of the members "who shall also serve as Operating Members", for terms elected, in whom certain powers are vested while others are proscribed. Operating Members are expressly prohibited from, among other things, making any decisions regarding employees absent the consent of two-thirds interest of the majority of the members (see Article V, ¶ (E)(7). Article X of the operating agreement, entitled Termination or Dissolution of Company, provides for the company's termination earlier than that specified in Article II, ¶ 4, [which was left blank] upon the consent of a majority of the members or if the company is otherwise dissolved. Termination occurs if a member withdraws, resigns or is expelled from the company [expulsion nor its processes being defined anywhere] or makes an assignment for the benefit of creditors or files for bankruptcy, liquidation, its own dissolution or other adjustment of debts or control by way of receiver or otherwise. Termination also occurs upon the death of a member or his or her adjudication as an incompetent (*see* Article X ¶ B of the operating agreement).

It is thus apparent that neither the articles of organization nor the operating agreement expressly provide for the dissolution of JAMSFAB on the grounds advanced here. The petitioner's application for dissolution shall thus be measured by the provisions of LLCL § 702 and controlling case authorities interpreting same which mandate an initial review of governing documents of JAMSFAB.

As indicated above, neither the articles of organization nor the operating agreement express the business purposes of JAMSFAB. However, the undisputed facts advanced in the record establish that the business purpose of JAMSFAB was to operate a small, chic hotel with an on-site restaurant and other accessory structures in a renovated nineteenth century inn located on Shelter Island, New York on land leased from a separate company owned by the petitioner. The business model of JAMSFAB called for the respondent, who is possessed of world wide experience in the hospitality and restaurant businesses, to manage the hotel and restaurant operations, their staff and facilities and third party contractors while the petitioner's role was dedicated to the investment of startup capital and to the oversight of the books, records and other business and financial aspects of the hotel and its accessory structures. The record further reflects that the company, once engaged in its predominantly "seasonal" business, enjoyed success premised upon its positive reputation in the community and its early fiscal returns.

To successfully petition for the dissolution of a limited liability company under the "not reasonably practicable" standard imposed by LLCL § 702, the petitioning member must demonstrate, in the context of the terms of the articles of incorporation of the operating agreement, the following: 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 (*see* ***Matter of 1545 Ocean Avenue, LLC., v Crown Royal Ventures, LLC***, 72 AD3d 121, *supra*; *see also* ***Doyle v Icon, LLC***, 103 AD3d 440, 959 NYS2d 200 [1st Dept 2013]). Disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that is operates in a manner within the contemplation of it purposes and objectives as defined in its articles of organization and/or operating agreement. It is only where discord and disputes by and among the members are shown to be inimicable to achieving the purpose of the LLC will dissolution under the "not reasonably practicable" standard imposed by LLCL § 702 be considered by the court to be an available remedy to the petitioner (*id.*, at 72 AD3d 130-132). Where the purposes for which the LLC was formed are being achieved and its finances remain feasible, dissolution pursuant to LLCL § 702 should be denied (*see* ***In re Eight of Swords, LLC***, 96 AD3d 839, *supra*).

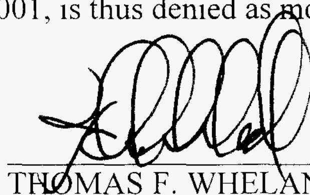
On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Leon v Martinez***, 84 NY2d 83, at 87–88, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]; ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]). Where evidentiary materials are submitted and considered by the court, the issue becomes whether the plaintiff has a cause of action, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Rosin v Weinberg***, ___ AD3d ___, 2013 WL 2420959[2d Dept 2013]; ***Woss, LLC v 218 Eckford, LLC***, 102 AD3d 860, 959 NYS2d 218 [2d Dept 2013]). Where, however, the plaintiff cannot establish a cause of action, a motion to dismiss should be granted (*see* ***Parekh v Cain***, 96 AD3d 812, 948 NYS2d 72 [2d Dept 2012]; ***Morales v Copy Right, Inc.***, 28 AD3d 440, 441, 813 NYS2d 731[2d Dept 2006]).

Here, the petitioner's claims for dissolution and related relief are principally premised upon allegations of purported derelictions of duties on the part of the respondent with respect to his employment with and/or membership in JAMSFAB and allegations that such conduct broke the working relationship between the parties and was harmful to the company financially, as well as otherwise. However, the claims directed at the purported failings on the part of the respondent to apply himself diligently to his employ and/or to the business of the subject LLC, even when credited as true, do not constitute the elements of a claim for dissolution under LLCL § 702. There are no allegations that company purposes have been or will be utterly defeated by the disputes between the petitioner and the respondent nor has it been shown that the strife between them is inimicable to achieving such purposes. As for the conclusory and attenuated causal claims of detriment to the company, including its purported financial downturn, such claims are not supported by the financial accounts attached to the original petition and are controverted by the evidentiary submissions of the respondent. In any event, such claims do not rise to the level of financial infeasibility that is required for dissolution under LLCL § 702. Instead, it appears that the purposes of JAMSFAB as expressed in both its articles of organization and in its recently executed operating agreement are being achieved and that its finances remain feasible (*see* ***In re Eight of Swords, LLC***, 96 AD3d 839, *supra*). That the petitioner failed to state a cognizable claim for dissolution in the first petition and that he has no cognizable claim under the facts alleged in his "amended petition" are both clear from a reading of his petitions and a review of the record adduced on this motion. Dismissal of the claims for dissolution of JAMSFAB pursuant to CPLR 3211(a)(1) is thus warranted.

As for the other demands for relief set forth in the petitions or in the wherefore clause, they are likewise legally insufficient. The petitioner has not stated nor is he personally possessed of cognizable claims for a declaration confirming his actions as a 70% owner in removing the respondent, nor a judgment mandating that the respondent "assign" his membership interest in JAMSFAB, LLC to the petitioner, nor a judgment compelling him to make capital contributions or awarding damages by reason of MacLean's purported breaches of the operating agreement (*see* ***Mizrahi v Cohen***, 104 AD3d 917, 961 NYS2d 538 [2d Dept 2013]; ***Man Choi Chiu v Chiu*** 71 AD3d 646, *supra*; *see also* ***Tzolils v Woff***, 10 NY3d 100, 855 NYS2d 6 [2008]; ***Yudell v Gilbert***, 99 AD3d 108, 949 NYS2d 380 [1st Dept 2012]).

In view of the foregoing, the motion by the respondent to dismiss the petitions served by the petitioner is granted pursuant to CPLR 3211(a)(7) and the petition and amended petitions are dismissed. The petition, bearing motion sequence number 001, is thus denied as moot.

DATED: 6/20/13



THOMAS F. WHELAN, J.S.C.