

Goureau v NBCUniversal Media LLC

2023 NY Slip Op 33111(U)

September 7, 2023

Supreme Court, New York County

Docket Number: Index No. 160490/2021

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

NICOLAS GOUREAU, STEPHANIE MENKIN, GOOBERRY CORPORATION,

Plaintiff,

INDEX NO. 160490/2021

MOTION DATE N/A

MOTION SEQ. NO. 014

- v -

NBCUNIVERSAL MEDIA LLC, A DELAWARE LIMITED LIABILITY COMPANY, MACHETE CORPORATION, A CALIFORNIA CORPORATION, MARCUS LEMONIS, ML RETAIL, LLC, A DELAWARE LIMITED LIABILITY COMPANY, MARCUS LEMONIS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, ROBERTA RAFFEL, MLG RETAIL, LLC A DELAWARE LIMITED LIABILITY COMPANY, ML FASHION, LLC, A DELAWARE LIMITED LIABILITY COMPANY

Defendant.

-----X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 270, 271, 272, 273, 274, 275, 276, 277

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This is a motion for summary judgment to dissolve Gooberry Corporation. Specifically, the remaining defendants Marcus Lemonis, ML Retail, LLC, Marcus Lemonis, LLC, and MLG Retail, LLC (herein, "Defendants") move for the judicial dissolution of Gooberry under BCL § 1111. Defendants assert that Gooberry's shares have no value and ask the court to dissolve the entity and give the plaintiffs its remaining valueless assets [e.g., Gooberry's books and records, etc.]. Plaintiffs agree that Gooberry should be dissolved, but they contest that Gooberry has no value and ask the court to fashion an equitable remedy or impose a surcharge on Defendants.

As an initial matter, Defendants have established, prima facie, that Gooberry's shares have no value and that the entity has nothing meaningful to distribute. In opposition, Plaintiffs have done nothing to demonstrate that Gooberry has any value.

First, plaintiffs admit they transferred all of Gooberry's assets and its business to MLG, a Delaware entity in 2017 (*see* Menkin Aff., EDOC 236 ¶¶ 10-12; Goreau Aff., EDOC 242 ["Gooberry's business was transferred to MLG Retail, LLC."]). The Asset Purchase Agreement [EDOC 226] shows that Gooberry sold all its assets, including inventory, to MLG, as does the Termination Agreement (EDOC 229 ["As of the date hereof [January 1, 2018], Gooberry has sold all its assets."]). The extent of MLG's assets or value does not change that Gooberry has no remaining assets and no value.

Further, plaintiffs' conclusory statements regarding Lemonis' purported misconduct underlying claims this court (and several others) have already dismissed do not give Gooberry value. Plaintiffs' argument that they should be compensated based upon the value and assets of a completely separate entity has no support in the law.

In addition, the court disregards plaintiffs' submission to the extent plaintiffs rely on documents they failed to produce in discovery. Plaintiffs refused to participate in discovery in this action and cannot now, on summary judgment, interpose documents they failed to produce (*see* EDOC 218 [Final Scheduling Order]). Finally, because plaintiff Merkin authorized the complete transfer of Gooberry's assets, there is nothing to "surcharge" or otherwise award to shareholders.

Nevertheless, the court cannot order judicial dissolution under BCL § 1111 here. Plaintiffs attempted to assert a claim for judicial dissolution under BCL § 1104-a in their [unverified] amended complaint. A petitioner cannot seek judicial dissolution under BCL §

1111, that relief must be sought under BCL §§ 1101, 1102, 1103, 1104, or 1104-a. Although defendants assert (and establish) that dissolution under section 1104-a is inapplicable, none of the parties interposed a dissolution claim under any other section of Article 11, or asserted a common law dissolution claim.

However, the court exercises its authority to search the record under CPLR 3212 (b) and finds it appropriate to dismiss plaintiffs' sole remaining cause of action for judicial dissolution (*see* EDOC 219 [defendants' notice of motion] [requesting an order "granting ML Defendants such other and further relief as the Court may deem just and proper"]). The amended complaint does not state a viable claim for judicial dissolution under BCL § 1104-a. If defendants had bothered to move to dismiss that cause of action at the outset of this case, the motion would have been granted. Under BCL Article 11, a shareholder or director of a closely held corporation may file a *petition* for judicial dissolution under certain circumstances. Pursuant to BCL § 1105, the petition must be verified. Plaintiffs commenced a plenary action, not a special proceeding for dissolution, and the amended complaint is not verified. For that reason, the plaintiffs' 23rd cause of action for judicial dissolution is dismissed.

Moreover, in opposition to defendants' motion, plaintiffs submit mainly their own testimony in the form of affidavits. This testimony was waived and is precluded. As a result of the parties' failure to comply with their discovery obligations, the court ruled that they waived their right to take depositions and the plaintiffs' testimony was precluded (EDOC 218). The court also precluded the parties from using documents they had failed to produce during discovery (*id.*). Thus, even if the judicial dissolution claim were not defective, plaintiffs cannot establish that judicial dissolution is warranted under BCL § 1104-a using their precluded testimony and these documents.


The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent that plaintiff's 23rd cause of action for judicial dissolution of Gooberry is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the amended complaint is dismissed with costs and disbursements to the moving defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and mark this case disposed.

<u>9/7/2023</u> DATE			 MELISSA A. CRANE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			REFERENCE