5-13-14

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES Justice — IA Part 17

In the Matter of the Application of NASSIM KASSAB,

Petitioner,

For an Order Dissolving Mall 92-30 Assoicates LLC Pursuant to N.Y. LLC Law § 702 and An Order Dissolving Corner 160 Associates Inc. Pursuant tot N.Y. Bus. Corp. Law § 1104-A and For an Appointment of a Receiver Under § 1202(A)(1).

-against-

AVRAHAM KASAB,

Respondent.

Index Number 14428/ 2013

Motion Date October 16, 2013

Motion Seq. No. 1 & 2

The following papers numbered 1 to 24 read on this hybrid special proceeding and action by Nissim Kassab for a judgment (a) dissolving Mall 92-30 Associates LLC (Mall), pursuant to Limited Liability Company Law § 702; (b) appointing a receiver for Mall, pursuant to CPLR 6401(a); (c) in the alternative permitting petitioner to withdraw as a member of Mall, and be paid the reasonable value of his membership interest; (d) dissolving Corner 160 Associates Inc. (Corner), pursuant to Business Corporation Law § 1104-a; (e) appointing a receiver to oversee the dissolution and distribution of Corner, pursuant to Business Corporation Law § 1201(a)(1); (f) awarding damages for breach of contract; and (g) awarding damages for breach of fiduciary duty; and for injunctive relief pending the hearing of the petition. Defendant Avraham Kassab separately moves for an order dismissing the second, third, fifth, sixth and seventh causes of action set forth in the petition pursuant to CPLR 3211(a)(5) and (7).

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Upon the foregoing papers the petition and motion are consolidated for the purposes of a single decision and order and are determined as follows:

Petitioner Nissim Kassab and respondent Avraham Kassab are brothers.[1] Petitioner alleges that he has a 25 % membership interest Mall and is a 25% shareholder of Corner. Corner is the owner of two adjoining parcels of real property and Mall is the owner of another adjoining parcel of real property. These three properties, identified as Block 10101, Lots 79, 150 and 24 are located in Jamaica, New York. Corner acquired Lot 79 in 1992 and Lot 150 in 1994. Mall acquired Lot 24 in 2001. Lot 150 has continuously been operated as a parking lot. In 2011, the buildings on Lots 24 and 79 were demolished, and entire property became a commercial parking lot, with an outdoor flea market operated on a portion of Lot 79.

Petitioner, in his first cause of action seeks judicial dissolution of Corner, pursuant to Business Corporation Law § 1104-a, and the appointment of a receiver; the second cause of action seeks the dissolution of Mall pursuant to Limited Liability Company Law § 702 and the appointment of a receiver; petitioner in his third cause of action, in the alternative, seeks to withdraw from Mall, pursuant to Limited Liability Company Law §

[1] Avraham is also known as Albert, and in some instances he spells his surname as Kasab, and not Kassab.

606, and to recover distributions due to him at the time of the withdrawal and the fair value of is membership interest; the fourth cause of action seeks the appointment of a receiver pursuant to Business Corporation Law § 1202(a)(1); the fifth cause of action seeks to recover compensatory and punitive damages for breach of fiduciary duty; the sixth cause of action seeks to recover damages for breach of contract; and the seventh cause of action to declare that the parties June 1992 Option Agreement is invalid, unenforceable, and never took effect.

Respondent Avraham Kassab, in a pre-answer motion seeks to dismiss, seeks to dismiss the fifth cause of action for breach of fiduciary duty and the seventh cause of action for declaratory judgment on the grounds that these claims are barred by the applicable statute of limitations. Respondent seeks to dismiss the second cause of action for judicial dissolution of Mall and the appointment of a receiver, on the grounds that the allegations contained in the petition are insufficient to state a cause of action; to dismiss petitioner's third cause for permission to withdraw from Mall on the grounds that the allegations in the petition are insufficient to support this claim; and to dismiss the sixth cause of action for breach of contract on the grounds that petitioner's allegations are insufficient to state a cause of action.

On a motion to dismiss a claim on the grounds of statute of limitations, the moving party must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the claimant to raise an issue of fact as to whether the ~~statute of limitations is tolled or is otherwise inapplicable~~ (~~see~~ *Vilsack v Meyer*, 96 AD3d 827 [2d Dept 2012]: *Zaborowski v Local 75, Serv. Empls. Int. Union, AFL-CIO*, 91 AD3d 768, 768-769 [2d Dept 2012]; *Baptiste v Harding-Marin*, 88 AD3d 752 [2d Dept 2011]).

Claims that a party breached a fiduciary owing by that party to another is governed by a six-year statute of limitations in cases where allegations of fraud are essential to the claim and a three year statute governs where the relief sought sounds in tort for which money damages are principally demanded (see CLR 213(8); 214(3); *McDonnell v Bradley*, 109 AD3d 592, 594-595 [2d Dept 2013]; *Nichols v Curtis*, 104 AD3d 526 [1st Dept 2013]; *Carbon Capital Management, LLC v American Exp. Co.*, 88 AD3d 933 [2d Dept 2011]; *Scott v Fields*, 85 AD3d 756, 759 [2d Dept 2011]). Here, the fifth cause of action alleges that Avraham breached his fiduciary duty to Nissim by inducing him to enter into the Option Agreement in 1992, and Avraham's exercise of said option to purchase 75% of the shares in 2001. It is noted that petitioner seeks to recover monetary damages, and also alleges that he was fraudulently induced to enter

into the option agreement. Therefore, even if allegations of fraud are essential to petitioner's claim, the statute of limitations expired no later than 2007.

Petitioner's claim that the statute of limitations has been extended here under the doctrine of continuous wrong. The "continuous injury" or "continuous wrong" doctrine extends the statute of limitations in certain specific cases, such as, nuisance, where there is a series of continuing wrongs that are said to create separate and successive causes of action (*see generally Jensen v General Elec. Co.*, 82 NY2d 77, 85 [1993]; *Covington v Walker*, 3 NY3d 287 [2004] [a divorce action]; *Bloomingdales, Inc. v New York City Transit Authority*, 52 AD3d 120 [2008] *affirmed* 13 NY3d 61 [2009]). In general, the continuous wrong doctrine is applicable where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed (*see also 509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48 [1964]]). The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive nuisance (*see Jensen*, 82 NY2d at 85; *see also 509 Sixth Ave.*, 15 NY2d at 52). The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission (*Covington v Walker*, 3 NY3d at 292). Here, petitioner alleges that the breach of fiduciary duty occurred when the parties entered into the option agreement in 1992 and again when Avraham exercised the option to purchase 75% of the shares in 2001. Petitioner further alleges that in 2011 Avraham began to force him out of Corner, and that this was part of a "plan" that began in 2001, when the option was exercised. These allegations are insufficient to extend the statute of limitations as petitioner clearly asserts that the alleged harm can exclusively be traced to Avraham's acquisition of the shares of stock, in 2001 pursuant to the 1992 agreement. Therefore, as the statute of limitations has long since expired, that branch of respondent's motion which seeks to dismiss the fifth cause of action for breach of fiduciary duty, is granted.

A claim for declaratory relief is governed by the six year "catch all" period of limitations prescribed by CPLR 213(1) unless a more specific time period is applicable thereto because the facts underlying the claim could have been brought in the form of a different cause of action (*see Fucile v L.C.R. Development, Ltd.*, 102 AD3d 915 [2d Dept 2013]). Petitioner's reliance on *Riverside Syndicate, Inc. v Munroe* (10 NY3d 18 [2008]), for the proposition that a statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time" is misplaced. In *Riverside Syndicate*, the Court of Appeals determined

that an action to declare that a contract is void ab initio is not subject to the six year statute of limitations applicable to "an action upon a contractual obligation or liability." *Riverside Syndicate* involved an illegal contract between a landlord and tenants to lease a rent-stabilized apartment at a rent far in excess of the apartment's legal maximum rent. After a series of disputes with the tenants, the landlord sued for a declaration that the contract was void. The landlord was awarded judgment on appeal, and the Court of Appeals affirmed despite the tenant's contention that declaratory relief was barred by the statute of limitations. *Riverside Syndicate* is wholly inapplicable here for two reasons. First, in that case, the subject matter of the contract was illegal. As the applicable statutory law expressly rendered such contracts void, the contract at issue could never have been enforced, regardless of whether the statute of limitations had run. (*Id.* at 877-78). Second, the case cited by the court in *Riverside Syndicate* for the proposition that the statute of limitations cannot render a void contract enforceable , expressly distinguishes between contracts that are voidable because of fraud in the inducement and contracts that are void at their inception (*see Pacchiana v Pacchiana*, 94 AD2d 721 [2d Dept 1983]).

Petitioner's reliance upon *408 East 10th St. Tenants Assoc. v Nespral*, (2013 NY Slip Op 32172(U), 2013 NY Misc. Lexis 4130 [Sup Ct, New York County [2013]), is also misplaced. That action involved a residential lease in a building subject to 28 RCNY § 34-04(b), which explicitly provides that "[i]f any dwelling unit in the Building is or becomes vacant, the Tenant Association will not sign a lease for such vacant dwelling unit, or allow such vacant dwelling unit to be come occupied, without the prior written approval of HPD", and the Tenant's Association had not obtained the prior written approval of HPD.

In New York, an option agreement in writing is enforceable without respect to the doctrine of consideration (*see* General Obligations Law § 5-1109; *Levey v Saphier*, 83 Misc2d 146, 150 [Sup Ct, Nassau County 1975], *affirmed* 54 AD2d 959 [2d Dept 1975], *mot for lv to app den* 41 NY2d 805 [1977]). Therefore, petitioner's assertion that the option agreement is void *ab initio*, due to the lack of consideration, and therefore his claim for declaratory judgment is not governed by the six-year statute of limitations, is rejected. It is further noted that the subject option agreement recited a nominal sum of $10.00 and "other valuable consideration", and provided for the payment of $25,000.00 upon the exercise of the option. As six-year statute of limitations has long since expired, petitioner's seventh cause of action for declaratory judgment is time-barred, and that branch of respondent's motion which seeks to dismiss this cause of action, is granted.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.* 70 AD3d 928 [2d Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2d Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed*, 66 NY2d 946 [1985]).

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.; accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25 at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2d Dept 2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [1st Dept 2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2d Dept 2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2d Dept 2003]; *Doria v Masucci*, 230 AD2d 764, 765 [2d Dept 1996], *lv to appeal denied*, 89 NY2d 811 [1997]).

Petitioner's second cause of action seeks judicial dissolution of Mall pursuant to Limited Liability Company Law § 702. To successfully petition for the dissolution of a limited liability company under the "not reasonably practicable" standard imposed by Section 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 [2d Dept 2010]; *Doyle v Icon, LLC*, 103 AD3d 440 [1st Dept 2013]). Disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve a limited liability company that is operated 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 limited liability company will dissolution under the "not reasonably practicable" standard imposed by Section 702 be considered by the court to be an available remedy to the petitioner (*Matter of 1545 Ocean Avenue, LLC. v Crown Royal Ventures, LLC.*, 72 AD3d 130-132). Where the purposes for which the limited liability company was formed are being achieved and its finances remain feasible, dissolution pursuant to Limited Liability Company Law § 702 should be denied (*see Matter of Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]).

Here, Mall's operating agreement, dated March 13, 2001, states that the company was "formed for the purpose of engaging in any lawful act or activity for which limited liabilities companies may be formed under the Limited Liability Company Law and engaging in any and all activities necessary or incidental to the foregoing."

Petitioner's allegations that he has been systematically excluded from the operation and affairs of Mall by the respondent, and that the respondent has refused to consider selling the real ~~property owned by Mall, is insufficient to establish that it is no~~ longer "reasonably practicable" for the company to carry on its business, as required for judicial dissolution under Limited Liability Company Law § 702. These allegations do not show that "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 [that] continuing the entity is financially unfeasible" (*see Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]; *Schindler v Niche Media Holdings*, 1 Misc 3d 713, 716 [Sup Ct, NY County 2003]). Indeed, the allegations show that the company has been able to carry on its business and the allegations that the properties jointly generate income of $1,000,000.00 and that respondent failed to award him distributions equal to 40% of the net income, demonstrates that the company is financially feasible (*see Doyle v Icon, LLC, supra*). As to petitioner's assertion that the company is not capable of sustaining itself financially, this claim is not supported by financial accounts attached to the original petition, and petitioner's evidentiary submissions are admittedly based upon

incomplete financial data. In any event, such claims do not rise to the level of financial infeasibility that is required for dissolution under Limited Liability Company Law § 702. As petitioner has failed to state a cognizable claim for dissolution of Mall, that branch of respondent's motion which seeks to dismiss the second cause of action, is granted.

With respect to petitioner's third cause of action to withdraw as a member of Mall, Limited Liability Company Law § 606(a) provides, in pertinent part, that "[a] member may withdraw as a member of a limited liability company only at the time or upon the happening of events specified in the operating agreement and in accordance with the operating agreement. Notwithstanding anything to the contrary under applicable law, unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company."

Thus, under the statute, a member may withdraw from a limited liability company only as provided in its operating agreement. If the operating agreement is silent, a member may not withdraw prior to the dissolution of the company (*Matter of Horning v Horning Constr., LLC*, 12 Misc3d 402, 408 [Sup Ct, Monroe County 2006]; *Spires v Lighthouse Solutions, LLC*, 4 Misc3d 428, 437 [Sup Ct, Monroe County 2006]). Here, Mall's operating agreement provides, in pertinent part, that "[a] Member of the Company may withdraw from the Company in accordance with the Limited Liability Company Law". Therefore, as there has been no dissolution of Mall, and as petitioner does not allege the existence of some other agreement or consent, the third cause of action fails to state a claim for withdrawal under the provisions of Limited Liability Company Law § 606. That branch of respondent's motion which seeks to dismiss the third cause of action, is granted.

With respect to the sixth cause of action, this court finds that the petition adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract, to wit: the existence of a contract, the petitioner's performance under the contract, the respondent's breach of that contract, and resulting damages (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Agway, Inc. v Curtin*, 161 AD2d 1040, 1041 [3d Dept 1990]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). A review of the August 27, 2012 agreement between Nissim and Avraham provides, in pertinent part, that "All distributions of net income (after operating expenses) from CORNER 160 ASSOCIATES INC and MALL 92-30 ASSOCIATES, LLC shall be made by Albert [Avraham] as follows: (a) to Nissim 25% on account of his interest plus 15% for management services, and (b) balance to

Albert". Contrary to respondent's assertion, the agreement does not require Corner and Mall to make said distributions. Nissim in his petition alleges that the respondent has failed to pay him his Furthermore, contrary to respondent's assertions Nissim, in his reply affidavit does not admit that to directly taking funds from Corner and Mall. Rather, Nissim complains that the funds he received between November 2011 and August 2012, and between August 2012 and February 2013 amount to less than 40% of the entities net income, and that since February 2013 he has not received any distributions. Accordingly, as the complaint sufficiently states a cause of action to recover damages for breach of contract (*see* CPLR 3211[a][7]), that branch of respondent's motion which seeks to dismiss the sixth cause of action, is denied.

The Court shall now address petitioner's application for an order dissolving the corporation pursuant to Business Corporation Law § 1104-a. This section states in relevant part: "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."

Here, the conflicting allegations of the parties have raised issues of fact as to whether the respondent is guilty of oppressive action or whether the assets of the corporations are being wasted, looted or diverted. In this situation it is appropriate to hold a hearing to resolve these disputed factual issues (*see Matter of WTB Props.*, 291 AD2d 566 [2d Dept 2002]; *Matter of Steinberg (Cross Country Paper Prods. Corp.)*, 249 AD2d 551 [2d Dept 1998]).

The branch of petitioner's application seeking the appointment of a receiver is denied. The provisional remedy of receivership is only appropriate in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interest (*see Kristensen v Charleston Square*, 273 AD2d 312 [2d Dept 2000]). The appointment of a temporary receiver is only warranted where the applicant establishes by clear and convincing evidence that such a drastic remedy is needed (*see Beatty v Williams*, 227 AD2d 912 [4th Dept 1996]). Here, the petitioner has failed to demonstrate that the appointment of a receivership is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties (*Matter of Steinberg*, 249 AD2d at 553). To the

extent that petitioner seeks the appointment of a permanent receiver, this request is premature (see Business Corporation Law § 1202).

Accordingly, respondent's motion to dismiss the second, third, fifth and seventh causes of action is granted. That branch of the motion which seeks to dismiss the sixth cause of action for breach of contract is denied, and respondent is directed to serve an answer to said cause of action, within 20 days from the date of service of a copy of this decision, together with notice of entry.

Petitioner's request for judicial dissolution is denied, and a hearing on the issue of judicial dissolution, pursuant to Business Corporation Law § 1104-a, shall be held. The parties shall appear for a conference on May 13, 2014, at 9:30 A.M. in IAS part 17, courtroom 116, at the Supreme Court Queens County, located at 88-11 Sutphin Boulevard, Jamaica, New York 11435, at which time the hearing will be scheduled. The petitioners' request for the appointment of a receiver is denied. The temporary restraining order granted in the order to show cause shall continue through the date of said hearing of the petition.

Dated: March 12, 2014

J.S.C.

Fax Message

To: 12123447677

Fax: 12123447677

From:

Date: 3/13/2014 10:02 AM
Pages: 1 of 12 (including this page)
Subject: Internet Fax Job

Image data has been attached.

Chambers of Orin R. Kitzes
Justice of the Supreme Court
88-11 Sutphin Boulevard
Jamaica, NY 11435

To: Vitali Rosenberg
Fax No. 212.344.7677
From: Sheila Hannigan
Date: March 13, 2014
Re: Kassab
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Attached, as a courtesy, is a copy of Justice Kitzes's Signed Order, re above.