

Matter of Norvell v Guchi's Idea LLC

2016 NY Slip Op 32307(U)

November 18, 2016

Supreme Court, Kings County

Docket Number: 513623/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of November, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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In the Matter of the Application of

TARA NORVELL, as a Managing Member of
GUCHI's IDEA LLC and on behalf of
GUCHI's IDEA LLC,

Petitioner,

for an Order and Judgment dissolving the company
pursuant to New York Limited Liability
Corporation Law LLCL §702

- against -

GUCHI's IDEA LLC and YUJI HARAGUCHI,
individually and in his capacity as a Managing
Member of GUCHI's IDEA LLC,

Respondent.

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The following papers numbered 1 to 10 read herein:

DECISION AND ORDER

Index # 513623/2016

Papers Numbered

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Petitioner, TARA NORVELL ("Norvell"), the owner of a 25% membership interest¹ in GUCHI'S IDEA LLC ("Guchi"), a New York State Limited Liability Company with its principal place of business in the borough of Brooklyn, moves by order to show cause for an Order: (1) pursuant to Section 702 of the Limited Liability Company Law ("LLCL"), for a judicial dissolution of Guchi; (2) for a declaratory judgment that any operating agreement signed unilaterally by Respondent, YUJI HARAGUCHI ("Haraguchi") is null and void; (3) for the appointment of a

¹ Norvell alleges that she is between 25% to 50% owner of the company, however, the evidence submitted herein establishes that, at most, Norvell is a 25% owner of Guchi.

[* 2]

receiver to supervise the management and liquidation of Guchi; (4) for an accounting; and (5) enjoining Haraguchi from transacting any business or entering into any agreements outside the ordinary course of Guchi's business and from making any distributions of corporate monies including salaries and profits except by permission of the Court. Haraguchi opposes and cross-moves to dismiss the petition.

Background

Guchi is operated as a high-end Japanese restaurant known as Okonomi in Williamsburg, Brooklyn. Each party's respective role in the company and its creation is disputed. Norvell states, by way of affidavit, that she has always been the chef and operating partner of Guchi and has taught Haraguchi how to make sushi and present omakase.

The petition states that Norvell holds "at least 25%" of all membership interests and profit distributions as one of two voting members of the company, the other member being Haraguchi. The petition further states that, in May 2016, Haraguchi made an unnecessary and false "capital call" that improperly reduced her share of the company to 14.6% when she did not contribute the called-for capital of \$25,000. Further, that there is no operating agreement but that Haraguchi unilaterally executed an operating agreement as of April 17, 2016. The petition also states that, on or around December 29, 2015, Haraguchi raised his annual salary from \$48,000 to \$145,000 retroactive for 2015; that Haraguchi has wasted and looted the company's assets by paying for his honeymoon, wedding, and a trip for all employees to Japan with company funds; and that, because she and Haraguchi are hopelessly deadlocked, Guchi can no longer function as intended and that dissolution is therefore necessary.

In addition to judicial dissolution, Norvell seeks a declaratory judgment that any operating agreement signed by Haraguchi is null and void; an appointment of a receiver for Guchi; an accounting of corporate funds; and a preliminary injunction restraining Haraguchi from "transacting any unauthorized business; transferring any corporate assets and exercising any corporate powers except in the normal course of business..."

In opposition and in support of his motion to dismiss the petition, Haraguchi argues that Norvell cannot establish a claim for dissolution because, despite her unsupported claims to the contrary, she holds only a 25% minority interest in the company as evidenced by Norvell's own statements to third parties and the company's 2014 tax filings. In support, Haraguchi attaches emails from Norvell to several third-party individuals offering to sell to them her 25% share of Guchi.

Haraguchi presents the following: Norvell began working for the company in 2013 as a kitchen employee. That in 2014, he granted Norvell a 25% interest in Guchi but that Norvell did not provide any capital contribution for her share of the company, only services. In August 2015, Norvell was terminated from Guchi. According to Haraguchi, Norvell's termination was based on her neglect of day-to-day duties and conflict with other staff members. It is Haraguchi's position that Guchi has flourished financially since Norvell's departure, as evidenced by the most recent year's profits, and that the restaurant is both financially feasible and able to achieve its purpose. Moreover, Haraguchi contends that the "deadlock" alleged by Norvell is an impossibility considering he is the majority member and thus able to make all necessary actions on behalf of the company.

Haraguchi also contends that the actions of terminating Norvell's employment, raising his own salary, adopting the operating agreement, and issuing a capital call are proper under the LLCL as he represents the majority interest in Guchi. In addition, Haraguchi submits that his increase in salary is reasonable and appropriate because his prior salary of \$48,000 a year was "well below market rate for his position as manager and executive chef of Okonomi" and he has now "assumed Ms. Norvell's duties and responsibilities in addition to his own."

With regards to Norvell's allegations of looting the company, Haraguchi states his wedding occurred in 2013, before Norvell became a member and that the employee trip to Japan, which included Norvell, was for the purpose of opening and operating a pop-up Yuji Ramen² in Japan to further promote the business. To the extent Haraguchi used any funds originating from the company, it is Haraguchi's position that such funds were either from his guaranteed payments as a restaurant employee or from his profit distributions.

Discussion

Limited Liability Company Law § 702 provides for judicial dissolution 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" (emphasis added).

² In the evening, for dinner service, Okonomi is operated as Yuji Ramen.

The petitioning member satisfies the “not reasonably practicable” standard under LLCL § 702 when, in the context of the terms of the operating agreement or articles of incorporation, the petitioner can show 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 (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 129-30 [2d Dept 2010]).

Here, it is undisputed that when the partnership commenced, there was no operating agreement signed by the parties. Thus, the issue is whether, currently, the purpose of the LLC is being achieved and whether it remains financially feasible. The evidence before the Court indicates that both the purpose of Guchi, as a Japanese restaurant, and its financial viability are being achieved. That Norvell disagrees with Haraguchi’s control and operation of Guchi is insufficient to warrant dissolution of Guchi (*see Matter of Belardi-Ostroy, Ltd. v American List Course...*, 2016 N.Y. Misc. LEXIS 1468, 2016 NY Slip Op 30727(U), *10 [NY County 2016]). Thus, that portion of the petition seeking dissolution of Guchi must be denied.

Because Norvell is an undisputed minority shareholder of Guchi who currently exercises no control or operation of the business, that portion of Norvell’s petition seeking a preliminary injunction is granted to the extent that Haraguchi is enjoined from transferring any corporate assets except in the ordinary course of business but is otherwise denied. Additionally, because the financial viability of the business is being achieved, the Court finds that the circumstances herein do not warrant an appointment of a receiver pursuant to CPLR §6401 (*see Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379, 380 [2d Dept 2003]).

As for the other demands for relief set forth in the petition and order to show cause,³ the Court finds that the parties’ motion papers are insufficient to resolve these issues as a matter of law and discovery is needed for a determination as to these issues. Thus, a preliminary conference shall be scheduled before the Court as set forth herein.

³ Such as the validity of the “capital call” and the alleged wasting of corporate assets.

Accordingly, it is hereby

ORDERED that the petition for dissolution pursuant to LLCL §702 is DENIED; it is further

ORDERED that Norvell's application for a preliminary injunction is granted solely to the extent that Haraguchi shall not transfer any corporate assets except in the ordinary course of business; it is further

ORDERED that Haraguchi's motion to dismiss the petition is granted to the extent that the application for dissolution is dismissed but that the motion is otherwise denied with leave to renew; and it is further

ORDERED that a preliminary conference shall be held on Thursday, January 12, 2017, at 10:00 a.m. in Room 541.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.