

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ANIL C. SINGH Justice

PART 45

Index Number : 654920/2016
CUHNA, IN THE MATTER OF
vs.
BRIGADE MARKETING LLC
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/27/17

[Signature] J.S.C.
ANIL C. SINGH

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X

In the Matter of Application of TOM CUNHA,

Petitioner,

For the dissolution of BRIGADE MARKETING  
LLC, a New York Limited Liability Company,  
pursuant to Section 702 of the New York Limited  
Liability Company Law,

**DECISION AND  
ORDER**

Index No.  
654920/2016

Mot. Seq. 001-002

-against-

BRIGADE MARKETING LLC and  
ADAM KERSH,

Respondents.

-----X

**HON. ANIL C. SINGH, J.:**

In this action for dissolution of a New York Limited Liability Company, Tom Cunha (“Cunha” or “petitioner”), co-owner of Brigade Marketing LLC (“Brigade”) alleges that Brigade should be judicially dissolved under New York Limited Liability Company Law (“NYLLCL”) § 702 due to the entity’s failure to continue to do business and conform with its original stated purpose of integrating traditional public relations and digital marketing services into one company to cooperatively serve the film and television industries. Adam Kersh (“Kersh” or “respondent”), the other co-owner of Brigade, seeks to dismiss the petition for dissolution pursuant to CPLR § 3211(a)(1) (mot. seq. 002). Petitioner opposes.

Petitioner's notice of petition for dissolution (mot. seq. 001) and the motion to dismiss (mot. seq. 002) are consolidated herein for purposes of this decision.

### Facts

Cunha and Kersh both have extensive professional experience in the public relations ("PR"), marketing, and advertising industries. Cunha Aff. ¶3. Cunha primarily focused on digital marketing which concentrates on promotions and advertising through use of social media, online websites, and mobile devices. Id. Kersh, in contrast, worked in traditional PR, which concerns tangible modes of advertising including newspapers, magazines, and print articles on both television and on the radio. Id. Cunha and Kersh decided to combine their talents and expertise to form a single company that provided traditional PR and digital marketing services in one inclusive and encompassing entity. Id. ¶4.

Brigade was formed as a New York limited liability company by Cunha and Kersh. Brigade filed the Articles of Organization under NYLLCL § 203 on May 6, 2010. See Kersh Aff. Ex. D. No written operating agreement was ever executed. Cunha Aff. ¶5. The purpose of Brigade is not defined in the Articles of Organization. Id. However, the Articles state that Brigade shall have perpetual duration with exception to "events of dissolution" under NYLLCL § 701. Kersh Aff. ¶3. Cunha and Kersh managed the daily operations of Brigade as fifty percent owners. Id. ¶4.

Although Brigade's Articles of Organization do not specifically denote any scope or purpose of the company, petitioner contends that the "original vision" for Brigade was clear from an October 2010 Press Release (the "Press Release"). Cunha Aff. ¶6; see also Cunha Aff., Ex. A. The Press Release contained statements jointly written by Cunha and Kersh. Cunha Aff. ¶6. The alleged purpose as stated in the Press Release would be for Brigade to offer fully integrated services of traditional and digitalized PR expertise to "seamlessly fuse" these skills to maximize potential media solutions to clients and overall profitability for the business. Cunha Aff. ¶¶6-8. Conversely, respondent alleges that there was no essential direction or business plan for Brigade, but instead that the two parties were "budding entrepreneurs" looking to test a new unconventional PR market with the ultimate goal of Brigade merging or being acquired as a "takeover target." Kersh Aff. ¶¶5-6.

Although it is undisputed that Brigade has enjoyed some profitable growth since its inception, much internal disagreement between Cunha and Kersh has allegedly caused the synergy of the entity to inherently dissipate. Cunha Aff. ¶9. It is alleged that Kersh and Cunha solicit clients separately, have not been able to work cooperatively, and a lack of coordination between the parties has made Brigade essentially two distinct and separate businesses operating under one roof. Id. ¶¶10-12. Cunha claims that Kersh has only focused on his side of the business and Cunha has no knowledge of his plans, campaigns, or conflicts of interest. Id. ¶9. In response,

Kersh alleges that Cunha has utilized Brigade's assets for personal gain and is trying to oust him from the business so Cunha can "reap the rewards of the company for himself." Kersh Aff. ¶8.

Ultimately in September 2016, Cunha filed this petition seeking dissolution of Brigade under section 702 of the NYLCLL.

### Analysis

#### Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleadings four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence,

are not entitled to such consideration.” Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

### The Business Purpose of Brigade is Ambiguous

Respondent’s motion to dismiss the petition for dissolution under NYLCCL § 702 is denied. Under section 702, judicial dissolution of a limited liability company may be ordered “whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.” The statute is ultimately silent on the meaning of “reasonably practicable” but the test is “whether it is reasonably practicable” to continue to execute the business in the context of its overall purpose, not whether it is impossible. In re 1545 Ocean Ave., LLC, 72 A.D.3d. 121, 132 (2d Dept. 2010) (internal citation omitted). It has been held by the Second Department that “not reasonably practicable [means] when disagreement or conflict among the members regarding the means, methods, or finances of the company’s operations is so fundamental and intractable as to make it unfeasible for the company to carry on its business as originally intended.” Id. at 133.

In order to warrant dissolution of a limited liability company pursuant to section 702, “the petitioning member must establish, in 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.” Id. at 131. If the general nature of the business purpose is ultimately “vague”, the evidence must make it clear that the purpose of the company is no longer being fulfilled to necessitate dissolution. See In re 47th Road LLC, 2017 WL 653096, at \*4-5 (Sup. Ct. Queens Cnty. Feb. 16, 2017).

“Given its extreme nature, judicial dissolution is a limited remedy that... [courts] grant sparingly.” In re 1545 Ocean Ave. at 130 quoting In re Matter of Arrow Inv. Advisor, LLC, 2009 WL 1101682, at \*2 (Del. Ch. Apr. 23, 2009). “However, where the economic purpose of the limited liability company is not met, dissolution is appropriate.” In re 1545 Ocean Ave., at 130. “The appropriateness of an order for dissolution of the limited liability company... [is within the sole discretion of the court] hearing the petition.” Id. at 133 citing In the Matter of Extreme Wireless, LLC, 299 A.D.2d 549, 550 (2d Dept 2002). However, a court should deny a petition for dissolution if “upon its findings the purpose of the LLC was being achieved and that the LLC remained financially feasible.” In re Eight of Swords, 96 A.D.3d 839, 840 (2d Dept 2012). Therefore, a petitioner must show that the limited liability company is “unable to function as intended or that it is failing financially.” In re 1545 Ocean Ave., at 129.

Cunha does not dispute that Brigade remains financially viable at the time the petition was filed. See Opp. Br. at 20. Therefore, the only issue presented is whether the stated business purpose of Brigade can still be realized despite the disagreement between management decisions by the two parties. See id. Cunha and Kersh have not provided any purpose of Brigade in the Articles of Incorporation, and the company has no written operating agreement. The only piece of evidence that could provide some insight into Brigade's original purpose was from the Press Release in October 2010. In the Press Release, both Cunha's and Kersh's statements about Brigade make mere generalizations about future goals of combining service to clients of "traditional publicity and digital marketing." See Cunha Aff., Ex. A. These statements made in the Press Release do not provide any specific insight on the original purpose of Brigade. The Press Release did not mention that Brigade would be a future takeover target, nor did it guarantee that Cunha and Kersh would be long-term business partners.

Additionally, "deadlock" is not an independent basis under NYLLCL for a court to order judicial dissolution. In re 1545 Ocean Ave., at 130. But generally, "the court must consider the managers' disagreement in light of the operating agreement and the continued ability of the LLC to function in that context." Id. Disagreements between partners are insufficient as to warrant the exercise of judicial dissolution. Natanel v. Cohen, 2014 WL 1671557, at \*12-13 (Sup. Ct. Kings Cty. Apr. 18, 2014).



Brigade does not have an operating agreement and no specific information on any business purpose is provided for within the Articles of Organization. Cunha and Kersh have clearly disagreed over essential management decisions including how each side of the business should operate, how to apportion clients that need both traditional and digital marketing expertise, how to appropriate business funds or allocate relevant costs, and what the future outlook of Brigade should entail moving forward.

“The court will not dissolve an LLC merely because the LLC has not experienced a smooth glide to profitability or because events have not turned out exactly as the LLC’s owners originally envisioned; such events are common in the risk-laden process of ... profitable ventures.” In re 1545 Ocean Ave., at 130-131 citing In re Matter of Arrow Inv. Advisor, LLC at \*2-3. “Uncertainty over the Company’s future, however, does not mean it is not reasonably practicable to carry on the business.” Belardi-Ostroy, Ltd. V. American List Counsel, 2016 WL 1558840, at \*10 (Sup. Ct. N.Y. Cty. Apr. 14, 2016). “Dissolution is reserved for situations in which the LLC’s management has become so dysfunctional or its business purpose thwarted that it is no longer practicable to operate the business.” In re 1545 Ocean Ave., at 130-131 citing In re Matter of Arrow Inv. Advisor, LLC at \*2-3.

Here, it is unclear as to whether Cunha and Kersh can settle their differences in controlling Brigade toward continuing essential business operations. Cunha claims that Kersh has completely denounced any means of communication and refused to cooperate in order to reunite the two halves of the company. Kersh, on the other hand, contends that dissolution is not proper and he is willing to work with Cunha rather than being bought out by Cunha. Other than the parties' affidavits and Press Release, there is little to no extrinsic evidence that shows whether management has become so dysfunctional or that the business purpose of Brigade cannot be satisfied. Both parties seek to argue that each co-owner has taken unilateral actions that are inconsistent with each other and Brigade's daily business functions.

Dissolution of a limited liability company under NYLLCL section 702 "is initially a contract-based analysis." In re 1545 Ocean Ave., at 128. "The necessary and critical issue of fact is, however, the purpose for the formation" of the limited liability company. Natanel, at \*3. If the Articles of Organization or the operating agreement do not define the business' purpose, "the testimony of the parties must be dispositive." Id. If there are "disputed issues relating to the authenticity of the operating agreement", then "dismissal of [the] causes of action [is] not warranted pursuant to CPLR 3211(a)(1)." Parekh v. Cain, 96 A.D.3d 812, 815 (2d Dept. 2012); see also Fakiris v. Gusmar Enterprises, LLC, 2016 N.Y. Slip Op. 51665(U), at \*2 (finding that a hearing on dissolution may be required if a case has conflicting

allegations between the parties' disagreement on management decisions and overall business purpose). On the other hand, if the operating agreement does not define the business purpose but undisputed facts exist in the record as to provide clarity and insight to the business purpose of the LLC, the request for dissolution should be denied. See In re the Sieni v. Jamsfab, LLC, 2013 WL 3713604, at \*5 (Sup. Ct. Suffolk Cnty. June 20, 2013).

Since, on a motion to dismiss, the court must take all factual allegations of the petitioner into account as true, there is a cognizable legal theory present here that dissolution may be warranted. However, further examination of the surrounding facts is necessary to determine the actual business purpose of Brigade. More evidence is ultimately needed. The inconsistent statements of both parties as well as the Press Release are not sufficient to order a judicial dissolution of Brigade and the documentary evidence is insufficient to merely dismiss the cause of action under section 702.

A hearing is necessary to determine whether Brigade should be dissolved.


Accordingly, it is hereby

ORDERED that Adam Kersh's motion to dismiss is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on April 6, 2017 at 2:30 PM at which time discovery will be expedited upon completion of which the matter will be referred to a Special

Referee to report on whether the stated business purpose of Brigade can still be realized despite the disagreement between management decisions by the two parties under Section 702 of the New York Limited Liability Company Law.

Date: March 27, 2017  
New York, New York

  
Anil C. Singh