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**SUPERIOR COURT OF NEW JERSEY**
**CHANCERY DIVISION: BERGEN COUNTY**
**DOCKET NO. C- 64-12**

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**STEPHEN LERNER, individually and as a partner of Lerner-Heidenberg Associates,**

**Plaintiff,**

**-against-**

**ROBERT HEIDENBERG, individually and as a partner of Lerner-Heidenberg Associates,**

**Defendant,**

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**HEIDENBERG FAMILY PARTNERSHIP, et al.,**

**Third-Party Plaintiff,**

**-against-**

**STEPHEN LERNER, et al.,**

**Third-Party Defendant(s).**

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**CIVIL ACTION**

***OPINION***

**DECIDED: June 8, 2012**

**APPEARANCES: Leda Dunn Wettre for plaintiff (Robinson, Wettre & Miller, LLC, attorneys)**
**Lawrence B. Orloff for defendant (Orloff, Lowenbach, Stifelman & Siegel, attorneys)**

**HARRY G. CARROLL, J.S.C.**

BACKGROUND

Plaintiff Stephen Lerner commenced this action primarily seeking the judicial dissolution of his New Jersey general partnership with defendant, Robert Heidenberg, Lerner-Heidenberg Associates ("LHA"), a real estate management company in which each

are fifty percent partners.

Defendant responded with an Answer, Counterclaims and Third-Party Complaint (collectively referred to herein as "Counterclaims.") Simultaneously defendant filed this application, originally by way of Order to Show Cause and converted by the court to a motion, in which he seeks the following relief:

(a) Directing plaintiff to cause the so-called "Southport Entities" to resume the payment of monthly distributions from said entities to defendant in the total amount of $45,000;

(b) Enjoining plaintiff from interfering with the Southport Entities resuming and continuing to make such payments; and

(c) Appointing a special fiscal agent for the Southport Entities, to be vested with the ability to ensure that monthly $45,000 distributions continue to be paid.

In support of his application defendant certifies that LHA is a New Jersey general partnership that was formed in 1986 and which is owned 50% each by he and plaintiff. LHA is involved in the business of acquiring, developing, owning, leasing and managing shopping center properties each of which has been placed in the names of other entities but all of which have been managed by LHA. Defendant indicates that last July he informed plaintiff that he had decided to separate from him professionally. Since that time defendant accuses plaintiff of exerting financial pressure on him by (1) making unreasonable demands for unnecessary contributions to cover LHA shortfalls, rather than draining revenue from other entities to offset its operating expenses consistent with the parties' prior understanding and past practice; and (2) cutting off agreed upon distributions from three jointly owned properties designated as the "Southport Entities." In this latter regard, defendant asserts that on February 1, 2012 he and plaintiff mutually agreed on a 2012 operating budget for Southport, including a $45,000/month distribution to each. Nonetheless, plaintiff has directed that defendant's checks be withheld, purportedly due to LHA's operating expense shortfalls and a desire to establish "reserves" for mortgage loans coming due, reasons which defendant characterizes as pretextual and a repudiation of the 2012 agreed upon budget for Southport.

Defendant advances the following legal arguments in support of his application:

(1) Granting the requested relief would serve to maintain the status quo, whereby courts have historically taken a "less rigid view of the traditional Crowe factors." Crowe v.

DiGioia, 90 N.J. 126 (1982); Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008.)

(2) Defendant has a clear legal right to equitable relief from which there exists a reasonable probability of ultimate success on the merits. In this regard defendant asserts that claims for breach of contract and for breach of the implied covenants of good faith and fair dealing are well established, and that here the parties had a valid enforceable agreement evidenced by the express provision in the 2012 operating budget which plaintiff has undeniably breached by refusing to sign any more distribution checks. Plaintiff's conduct, it is argued, not only establishes his breach of contract but also a breach of his fiduciary duties owed to the defendant.

(3) An award of money damages will not adequately protect his expectation interest that he would receive a monthly distribution from Southport in the amount of $45,000 that was approved in the 2012 operating budget, and that only the remedy of specific performance will vindicate that expectation interest.

(4) The balancing of the equities favors granting the requested relief to preserve the status quo.

(5) The court should exercise its inherent equitable power to appoint a special fiscal agent during the pendency of this action to ensure that defendant receives his monthly distributions and that plaintiff cease his misuse and abuse of his managerial control over LHA and Southport to engage in self-dealing against the defendant.

Plaintiff opposes defendant's application and in turn cross-moves to dismiss Counts One through Four of defendant's Counterclaim on the grounds that they must be pursued in arbitration, that the court lacks jurisdiction to dissolve out-of-state entities, and/or because defendant failed to join indispensable parties. Plaintiff further seeks to bifurcate and stay Count Five of defendant's Counterclaims.

Plaintiff submits a Certification in which he indicates that he and defendant over the years have acquired ownership interests in numerous properties which are "single purpose" entities which often include other individuals or entities having ownership interests. Each single purpose entity has its own Operating Agreement. Two of those Operating Agreements provide for arbitration of disputes, including those for Rocky Point Drive-In Associates and Shirley Drive-In Associates, as to which defendant seeks dissolution in the First and Second Counts of his Counterclaim. Fifteen of those Operating Agreements contain mandatory

forum selection clauses for other forums, and twenty-five provide for the application of other states' laws. Twenty-eight of the thirty-four single purpose entities were formed under the laws of other states.

With respect to the Southport Shopping Center on Long Island as to which defendant presently seeks relief, it is owned by three different single purpose entities; (1) Shirley Drive-In Associates, L.P.; (2) HL Mastic Associates, LLC; and (3) Park Shirley, LLC. The first of those, Shirley Drive-In Associates, L.P., is a New Jersey Limited Partnership whose Partnership Agreement contains a mandatory arbitration clause. The other two entities are both New York limited liability companies, whose Operating Agreements provide that New York law governs and contain a dispute resolution provision whereby a management deadlock triggers the right of a member to offer to buy out the interest of the other members, and further requires the unanimous consent of the members (i.e. plaintiff and defendant) for all decisions.

While plaintiff admits agreeing to the potential distributions in the budget which was adopted, he indicates that subsequent concerns over the wisdom of the distributions caused him to withdraw his consent, and that he has taken such action to preserve their property rather than to "squeeze" defendant financially. Plaintiff further certifies that while LHA's operating funds are presently sufficient to cover its payroll, for two payroll periods this was not the case and hence he and defendant were obligated to advance funds sufficient to meet the company's payroll obligation. Plaintiff additionally denies any wrongdoing in refusing to further extend a loan which had matured when both sides were seeking to dissolve their partnership. As to any refinance of the Southport mortgage, defendant indicates this would trigger a prepayment penalty if done prior to June 1, 2013, and that in the exercise of good faith business judgment he wishes to procure competitive quotes from other mortgage lenders.

Plaintiff argues that as a matter of law defendant is not entitled to the preliminary injunctive relief which he now seeks, because:

(1) The "status quo" is that all three Operating Agreements pertaining to Southport allow a partner to withhold consent to distributions that he views as imprudent.

(2) Defendant is seeking the payment of money, i.e. a $45,000 monthly distribution, which does not qualify as "irreparable harm."

(3) Defendant does not have a reasonable likelihood of success on the merits since

the court lacks jurisdiction over all three entitles that own Southport, he cannot demonstrate that the budget is an enforceable contract, and he cannot demonstrate that plaintiff's actions constitute a breach of fiduciary duty.

(4) Balancing of the hardships weighs in favor of the plaintiff, since to grant the injunctive relief would unnecessarily meddle into the business of the properties, needlessly alter the status quo, and disturb his rights, including his right to withhold his consent to partnership distributions under the Southport agreements.

Plaintiff argues that the appointment of a special fiscal agent is not warranted as defendant has failed to put forth substantial evidence of financial mismanagement or self-dealing.

As to defendant's Counterclaims, plaintiff argues:

1. Count One seeks the dissolution of thirty-four single-purpose entities, of which twenty-eight were formed under the laws of other states and as to which this court hence lacks jurisdiction. The same argument is made as to Counts Three and Four, which seek the dissolution of New York limited liability companies, Park Shirley, LLC and H.L. Mastic Associates, LLC. Additionally, fifteen of the thirty-four entities' Operating Agreements contain forum selection clauses requiring that any disputes be adjudicated in a forum other than New Jersey.

2. Rocky Point Drive-In Associates should be dismissed from Count One, and Shirley Drive-In Associates, L.P. dismissed from Counts One and Two as their Operating Agreements provide for mandatory arbitration of all disputes.

3. Count One should be dismissed for failure to join all necessary and indispensable parties, i.e. the various other members and owners of the thirty-four single purpose entities.

Alternatively, if the motion to dismiss is not granted, plaintiff contends that bifurcation of this action to first adjudicate the dissolution of LHA is warranted.

In his Reply Certification defendant states that his agreement with the plaintiff to make monthly Southport distributions for the year 2012 was reached during a face-to-face meeting at LHA's Closter, New Jersey office at which they discussed and finalized a consolidated operating budget for the Southport Shopping Center. Defendant disputes the assertion that there was anything "potential" about budgeted monthly distributions, and states that over the years a course of conduct was established whereby partner distributions have been made in each year's agreed-upon Southport operating budget. He reiterates his

supposition that plaintiff's motivation is to create financial pressure on him by depriving him of his largest and most significant distributions.

Defendant further certifies that the principal place of business of the various single-purpose entities, including the Southport entities, is LHA's Closter, New Jersey office. Revenues generated by those entities are deposited in New Jersey bank accounts.

LEGAL ANALYSIS

1. Defendant's Request for Injunctive Relief.

Injunctive relief is an extraordinary remedy that should only be entered upon a showing, by clear and convincing evidence, of entitlement to the relief requested. Dolan v. DeCapua, 16 N.J. 599, 614 (1954) ("Injunctive judgments are not granted in the absence of clear and convincing proof"). Such relief serves "to maintain the parties in substantially the same condition 'when the final decree is entered as they were in when the litigation began."' Crowe v. DeGioia, 90 N.J. 126, 134 (1982) (quoting Peters v. Public Service Corp. of N.J., 132 N.J.Eq. 500 (Ch. 1942)).

The right to interim relief is governed by the standards set out in Crowe v. DeGioia. Under Crowe, the movant bears the burden of demonstrating that: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Crowe, 90 N.J. at 132-134. The Court will now proceed to analyze each of these factors.

(i) Irreparable Harm

The first Crowe element, "irreparable harm," is generally defined in equity as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-133. The inadequacy of money damages depends on "the nature of the injury or the right affected." Id. at 133. In Crowe, for example, the court explained that "[n]either unwarranted eviction nor reduction to poverty can be compensated adequately by monetary damages awarded after a distant plenary hearing." Id. Money damages may also be inadequate in circumstances involving "severe personal inconvenience." Id. (citing Hodge v. Giese, 43 N.J.Eq. 342, 350 (Ch. 1887) (granting a tenant the right to temporarily enter another tenant's premises to service a heater.)).

Here the relief sought by defendant in this application is to compel plaintiff to cause

the "Southport Entities" to pay him $45,000/month and to enjoin plaintiff from interfering with such monthly distributions. That relief is strictly monetary in nature. It is also easily quantifiable. The court concludes that it fails to qualify as the type of irreparable harm which would merit preliminary injunctive relief and accordingly that defendant has failed to satisfy this first prong of the Crowe analysis.

(ii) Well-Settled Underlying Law

The second Crowe element requires that "temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, supra, at 133.

Here the court finds that the types of claims advanced by defendant in this application, such as breach of fiduciary duty and breach of the covenants of good faith and fair dealing, are well-recognized causes of action which would serve as the basis for relief should defendant ultimately be able to establish those claims. While breach of contract is certainly also a well-recognized cause of action, less well-settled is a situation where, as here, the expectation interest which defendant asserts derives from discussions between the parties involving a budget, and/or the budget itself,, which is commonly viewed as a projection or estimate of revenues and expenditures, as opposed to a legally binding contractual undertaking.

(iii) Reasonable Probability of Success

The third Crowe element requires that "a preliminary injunction should not issue where all material facts are controverted." Crowe, supra, at 133. Therefore, a plaintiff must show "a reasonable probability of ultimate success on the merits" to prevail on its application for interim relief. Id. However, the court must balance this requirement with the principle that "mere doubt as to the validity of the claim" is not an adequate basis for denial of the relief. Id.

Here plaintiff has advanced various arguments to defeat defendant's claims, such as arbitrability and lack of jurisdiction over all three entities that own Southport. While the court will touch upon those arguments in greater detail below, notwithstanding those arguments the court finds that defendant has failed to establish this third prong of the Crowe analysis. While it is undisputed that defendant is not receiving the $45,000 monthly distributions and the budget contemplates same, what is disputed is whether discontinuation of these distributions was undertaken in bad faith for purposes of harassment and retaliation, as defendant contends, or based on plaintiff's contrary belief, rooted in his exercise of sound

business judgment, that it is not financially prudent to make distributions from Southport at this time.

While it is recognized that this prong of the Crowe analysis can be relaxed where the effect of the injunctive relief is simply to maintain the status quo, the court in this case cannot necessarily conclude that maintenance of the status quo would include continuing to make the monthly distributions, as defendant contends, or whether maintenance of the financial status quo is instead served by retaining these distributions pending an ultimate adjudication on the merits or agreement of the parties, as plaintiff argues.

(iv) Relative Hardships

Finally, the fourth Crowe element requires the court to consider "the relative hardships to the parties in granting or denying relief." Id. at 134. Certainly the court recognizes the potential for some degree of financial hardship to defendant if the monthly distributions are not received pending resolution of the parties' disputes. However, based upon the limited record which is presently before the court, the court is unable to assess whether that hardship exceeds the potential hardship to the plaintiff and/or the Southport entities if they are compelled to make such distributions contrary to sound and prudent business judgment.

In any event, since the court finds that defendant at this juncture has failed to establish the first and third prongs of the Crowe analysis, his application to compel payment of the monthly distributions is hereby denied.

2. Plaintiff's Application for the Appointment of a Special Fiscal Agent.

As part of this application defendant seeks the appointment of a Special Fiscal Agent for the Southport entities, to be vested with the authority to ensure that the $45,000 monthly distributions continue to be paid him.

Since the court has declined to order the continuation of these monthly distributions, for the reasons previously stated, it hence declines to order the appointment of a special fiscal agent for such purpose. Additionally, other than the disputed issue regarding the defendant's entitlement to these monthly distributions, this court finds insufficient clear evidence of any other fiscal mismanagement or impropriety which would warrant the imposition of such remedy at this time.

3. Plaintiff's Cross-Motion to Dismiss or Stay Defendant's Counterclaims.

A. Arbitration.

Defendant in Count One of his Counterclaim seeks the dissolution of LHA, conditioned upon the dissolution of numerous single-purpose entities. Count Two seeks the dissolution of Shirley, L.P.

Plaintiff argues that Count One of the Counterclaim should be dismissed since it seeks dissolution of various entities, including Rocky Point Drive-In Associates, whose Operating Agreement (Section 18) provides that any dispute arising under, out of, in connection with or in relation to such agreement or any breach thereof or in connection with its formation, operation or dissolution shall be determined by arbitration in New York City in accordance with the rules of the American Arbitration Association. Section 19 of the Operating Agreement of Shirley Drive-In Associates, L.P. contains a similarly worded broad arbitration provision mandating arbitration in New Jersey. However, Count One of the Counterclaim does not specifically seek the dissolution of those two entities; rather it seeks the dissolution of LHA, conditioned upon the dissolution of the various other entities, which is a condition that the court may or may not ultimately see fit to impose. Hence, at least at this juncture, the court does not view the presence of these arbitration provisions in the Operating Agreements of those two companies as mandating dismissal of Count One.

The court does, however, reach a different result as to Count Two, which seeks the dissolution of and related relief with respect to Shirley, L.P. Shirley's Operating Agreement, as noted, clearly provides for the resolution of all disputes, including dissolution, via arbitration. New Jersey has a strong public policy favoring arbitration as a means of resolving disputes. Garfinkel v. Morristown Obstetrics & Gynecology Assocs. P.A., 168 N.J. 124, 131 (2001). "Agreements to arbitrate should be read liberally in favor of arbitration." Id. at 132 (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993.))

Here the dispute between the parties as to Shirley, L.P. falls squarely within the scope of the arbitration provision contained in its Operating Agreement. Accordingly Count Two of the Counterclaim is hereby dismissed without prejudice to the rights of the parties to pursue those claims in arbitration.

B. Jurisdiction to Order Dissolution of Out-of-State Entities.

Plaintiff seeks to dismiss Count One of the Counterclaim on the basis that this court lacks jurisdiction to dissolve many of the companies referenced therein because they were formed under the law of States other than New Jersey. However, even if for purposes of this motion the court accepts the validity of this argument, as previously noted Count One

of the Counterclaim does not specifically seek the dissolution of those various entities. Rather, it seeks the dissolution of LHA conditioned upon the dissolution of those entities, a condition which the court may or may not ultimately see fit to grant or deny either in whole or in part. Accordingly the court deems plaintiff's argument premature and hence will not order dismissal of the First Count on such basis at this juncture.

The court again however reaches a different result as to Counts Three and Four, which specifically seek the dissolution of New York limited liability companies, Park Shirley, LLC and H.L. Mastic Associates, LLC, respectively, for the reasons which follow. The specific issue of whether New Jersey Courts possess jurisdiction to order dissolution of entities formed under the laws of other States does not appear to have been addressed in any reported decision in this State. The general view, however, appears to be that the court lacks jurisdiction, while an opposing view allows for the assumption of jurisdiction in the exercise of the court's discretion.

A comprehensive annotation collecting cases discussing this issue is found in "Dissolving or winding up affairs of corporation domiciled in another state," 19 A.L.R. 3d 1279, where the conflicting views are summarized as follows:

> Although it seems established that the courts of a state have jurisdiction to wind up the local business of an insolvent foreign corporation by taking possession of its assets within the territorial limits of the state and distributing such assets or their proceeds among the creditors[*], it also seems well established that the courts ordinarily do not have jurisdiction to dissolve or wind up the affairs of the foreign corporation as a whole, the rationale evidently being that the corporation should retain its legal existence until dissolved by the state which has incorporated it[*]. While most such decisions would appear to treat the matter of jurisdiction over the subject matter as one of competency or incompetency to render a judgment, there are other cases which have considered it to be one of discretion in the exercise of jurisdiction, in some circumstances, at least[*]. And at least some of these cases have taken the view that the court has inherent jurisdiction to entertain such actions, although the ability of the court to do complete justice by its decree may lead the court to apply the doctrine of forum non conveniens. In any event, in several cases seeking the dissolution or winding up of affairs of a foreign corporation, the court found that it would not be inappropriate for jurisdiction to be taken, pointing out such considerations as the fact that the bulk of corporate assets was within the forum, that much of the business had been done there, that the directors and officers were subject to the court's

[*] [footnotes omitted]

jurisdiction, or that the books and records were located within the state*.

> And although a number of courts have taken the view that since a court will not take jurisdiction over the internal affairs of a foreign corporation, the courts of one state ordinarily have no jurisdiction to appoint a receiver of the corporation with power to wind up its affairs*, notwithstanding the fact that a receiver of the local assets of the corporation may be appointed where such action is necessary to prevent waste or dispersion of such assets*, yet some courts have treated the matter as one of discretion in the exercise of jurisdiction rather than incompetency to render a decree, and found it proper for the local court to exercise jurisdiction to consider such an appointment where the bulk of the assets of the foreign corporation was in the state, most of its business was done therein, and the officers, directors, books, and records were likewise so located*.
> Id. at 1280-1281.

With respect to the general rule that the court lacks jurisdiction, it is noted:

> In many of the cases discussing the jurisdiction of a court, whether state or federal, to dissolve or wind up the affairs of a corporation domiciled in another state, the view has been taken that the court does not have jurisdiction over such actions. Such decisions are evidently based in most instances on the theory that since the corporation is a creature of the state creating it, that state alone should terminate its legal existence. Id. at 1281.

As to the competing view that jurisdiction may be assumed in the court's discretion, the annotation goes on to note:

> In discussing the jurisdiction of the courts of one state to dissolve or wind up the affairs of a corporation domiciled in another state, some courts at times have treated the problem as one of discretion in exercising the inherent jurisdiction of the court over the subject matter. To such courts the problem, in appropriate circumstances, at least, is apparently not one of absence of jurisdiction but one of enforceability of any judgments that might be rendered; thus, in situations showing strong ties to the forum, especially where the bulk of corporate assets are located there, the bulk of business has been done there, and corporate officers and directors are subject to the court's jurisdiction, the courts have found that jurisdiction for dissolving or winding up the affairs of the foreign corporation could properly be exercised.
> Id. 1285-1286.

As previously noted, while no New Jersey published decision appears to squarely

address the authority of this court to dissolve a foreign entity, cases addressing this court's authority to impose ancillary remedies support a conclusion that our courts will when appropriate exercise their discretion to do so. Thus, in Appleton v. Worne Plastics Corp., 140 N.J. Eq. 324, 329-330 (Ch. 1947), the court stated:

> The first problem is one of jurisdiction generally. The defendants moved to strike the bill filed herein, among other reasons, on the ground that said Worne Plastics Corporation is a foreign corporation and the Court of Chancery of this state has no power to regulate the management of the affairs of a foreign corporation. It is to be noted from the allegations of the bill of complaint, which allegations are not disputed by the defendants, that the Worne Plastics Corporation, although incorporated under the laws of the State of Delaware, is licensed to do business in the State of New Jersey, has conducted practically all of its business in the State of New Jersey and has all of its assets located in the State of New Jersey. It is further to be noted that all of the individual defendants who are directors of Worne Plastics Corporation, as well as the corporation itself, are before this court and amenable to its process.
>
> The question propounded is whether the Court of Chancery has the power and authority to appoint a receiver for a solvent foreign corporation independent of any state statute. As a general rule, Courts of Chancery will not exercise jurisdiction and control over the management of the internal affairs of foreign corporations. The reasons for such a general rule are self-evident, i.e., the rights of its members are governed by the laws of the state of its incorporation and the courts of that state furnish the most appropriate forum for an adjudication upon the relationship between stockholders and the corporation, particularly since normally such courts alone possess power adequate to the enforcement of all decrees that justice may require. It is the inability of the court to do complete justice by its decree and not its incompetency to decide the question involved that determines the exercise of this power by our Court of Chancery.

In determining to deny the defendants' motion to dismiss on jurisdictional grounds the court concluded:

> It would seem, as a general proposition, that the Court of Chancery has inherent jurisdiction to appoint a receiver of a foreign corporation where, as here, its assets are located within this state, its officers and directors are amenable to process of or before the courts of this state, most of its business is conducted in this state and there is no dispute as to a doubtful foreign statute. This seems a complete answer to defendants' motion to strike on the ground of jurisdiction and their motion on this ground will be denied. Id. at 333.

In Hungerford & Terry, Inc. v. Geschwindt, 24 N.J. Super. 385 (Ch. Div. 1953), plaintiffs' complaint sought construction of an amendment to the Certificate of Incorporation of a Delaware Corporation, and instructions as to the action which they should take as to a

proposed additional amendment to the Certificate of Incorporation. Defendants argued that the court lacked jurisdiction, since the question involved the internal affairs of a foreign corporation. In rejecting this defense, the court ruled:

> The question of whether the New Jersey courts will assume jurisdiction over the internal affairs of a foreign corporation is one more of discretion than of jurisdiction. When, as here, the corporation is foreign in origin only, resulting from incorporation in a foreign state, but whose business is actually conducted, and its books and records are located in this State; whose directors' and stockholders' meetings are here held, and whose stockholders, directors and officers are residents of this State and subject to process issued by New Jersey courts, the courts of this State may assume jurisdiction and grant the relief demanded. *Mayer v. Oxidation Products Co., Inc., 110 N.J. Eq. 141 (Ch. 1932)*; *Hill v. Dealers' Credit Corp., 102 N.J. Eq. 310 (Ch. 1928)*; *Appleton v. Worne Plastics Corp., 140 N.J. Eq. 324 (Ch. 1947).*
>
> The corporate plaintiff in the present suit meets all of these qualifications. This defense is a well held to be without merit.
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> Id. at 394.

For purposes of the present motion the court concludes that it is unnecessary to choose between the general rule that it lacks jurisdiction to dissolve these two New York entities, or the competing view that it has the discretion and authority to do so. Rather, even if the court possesses the authority to order the dissolution and winding up of these entities, the exercise of such discretion to do so under the totality of the facts and circumstances of this case would be inappropriate for the following reasons:

(i) The primary assets of these companies consist of real estate, all of which is located in the State of New York. These companies, along with Shirley Drive-In, own the three adjacent parcels of real estate which together comprise the Southport Plaza Shopping Center, a sizeable shopping center located on Long Island. While their books and records may be maintained here, clearly all their physical assets are located in New York and all their revenues derived from their operations in New York.

(ii) This court is unable to effect complete relief as to Southport, since as previously noted one of its members, Shirley L.P., is subject to mandatory arbitration.

(iii) It is uncertain whether and to what extent the State of New York would recognize or enforce any decree entered by this court. In Rimawi v. Atkins, 42 A.D. 3d 799; 840 N.Y.S. 2d 217 (3d Dept. 2007), plaintiff filed suit in New York seeking to dissolve

defendant Quik-Flight, a Delaware limited liability company which operated an air charter service in New York. The New York court refused to entertain this claim, ruling:

> Finally, we conclude that plaintiffs' cause of action seeking dissolution of Quik-Flight must also be dismissed. A limited liability company is a hybrid entity and is, in all respects pertinent here, most like a corporation (see Tzolis v. Wolff, supra at 143).
>
> Thus, unlike the derivative claim involving the internal affairs of a foreign corporation, plaintiffs' claim for dissolution and an ancillary accounting is one over which the New York courts lack subject matter jurisdiction (see Vanderpoel v. Gorman, 140 N.Y. 563, 572, 35 N.E. 932 [1894]; Matter of Porciello v. Sound Moves, 253 A.D.2d 467, 675 N.Y.S.2d 903 [1998]; Matter of Warde-McCann v. Commex, Ltd., 135 A.D.2d 541, 542, 522 N.Y.S.2d 19 [1987]; 17 Fletcher, Cyclopedia of the Law of Corporations § 8432 [2006]; 17A Fletcher Cyclopedia of the Law of Corporations § 8579 [2006]; but see Matter of Hospital Diagnostic Equip. Corp. [HDE Holdings-Klamm], 205 A.D.2d 459, 459, 613 N.Y.S.2d 884 [1994] ).
>
> Rimawi v. Atkins, supra, at 42 A.D. 3d at 801; 840 N.Y.S. 2d at 218-219.

Moreover, both Operating Agreements for Park Shirley, LLC and HL Mastic, LLC expressly provide that they "shall be governed by and construed in accordance with the laws of the State of New York, without regard to conflict-of-laws principles." Further, the New York statute conferring jurisdiction with respect to dissolution provides in relevant part:

> 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.
>
> New York Limited Liability Law § 702 (emphasis added).

Accordingly, since the court finds that either it lacks subject matter jurisdiction to decree the relief sought by defendant in Counts Three and Four of the Counterclaim or alternatively that it would be inappropriate to exercise its authority to do so, those counts are hereby dismissed without prejudice to the rights of the parties to seek such relief in the State of New York.

Parenthetically, the court notes that it has now dismissed defendant's claims against all three entities which own the Southport property as to which defendant sought injunctive relief. Dismissal of these entities from this litigation on the grounds set forth above thus

constitutes a separate, independent basis for denial of the injunctive relief sought by defendant in this application.

C. Dismissal/Bifurcation.

Alternatively plaintiff seeks to bifurcate and/or stay defendant's claims pending dissolution of LHA. The court finds no basis to grant such relief. Similar to plaintiff, defendant also seeks dissolution of LHA in the First Count of his Counterclaim. The court can certainly determine each party's application for dissolution of that entity, and under what terms and conditions it may be appropriate, in the context of a single proceeding. As to the sole remaining count of the Counterclaim, i.e. Count Five, it seeks the dissolution of Flemington Retail, LLC which is a New Jersey limited liability company as to which the law of this state applies. Consideration of this additional claim will not render this litigation unduly complex and will foster the interests of judicial efficiency and economy as opposed to piecemeal adjudication. Hence, for these reasons, plaintiff's alternative relief is denied.

Conclusion

For the reasons set forth above, defendant's application for injunctive relief and the appointment of a special fiscal agent for the Southport entities is denied. The Second, Third and Fourth Counts of defendant's Counterclaim are dismissed without prejudice to the rights of the parties to seek relief in other forums. Plaintiff's cross-motion to dismiss and/or to stay the proceedings is denied as to Counts One and Five of the Counterclaim.

Dated: June 8, 2012

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HARRY G. CARROLL, J.S.C.