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KARTIK PATEL and
SHIV HOSPITALITY, LLC,

Plaintiffs-Appellants,

v.

DEPARTMENT OF TREASURY,
DIVISION OF REVENUE AND
ENTERPRISE SERVICES.

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2370-22

Civil Action

On Appeal from a Final Order of the
Superior Court of New Jersey,
Mercer County, Law Division
Docket No. MER-L-1883-22

Sat Below:
Hon. Robert Loughy, A.J.S.C.

**AMENDED BRIEF OF *AMICUS CURIAE*
NEW JERSEY STATE BAR ASSOCIATION**

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PRELIMINARY STATEMENT

The New Jersey State Bar Association (“NJSBA”) is the largest legal organization in New Jersey. Part of its mission is to promote access to the justice system and fairness in its administration. There are approximately 16,000 attorneys who are members of the NJSBA and whose practices, whether private or public, involve every area of the law. The NJSBA often advocates before the executive, legislative and judicial branches of government on issues that affect New Jersey lawyers and the practice of law.

The NJSBA, through its Business Law Section, was instrumental in the enactment of the New Jersey Revised Uniform Limited Liability Company Act (“NJ-RULLCA”), N.J.S.A. 42:2C-1 et seq. Its members represent parties on all sides of business transactions and disputes, including business entities, such as corporations and limited liability companies (“LLC”). Having clear guidance governing the authority of the New Jersey Division of Revenue and Enterprise Services (“NJDORES”) to file business records is essential to the ability of NJSBA members to adequately advise their clients on a daily basis. Therefore, the NJSBA has a special interest in this matter and is in a unique position to assist the Court in the resolution of an important public issue at the center of this matter.

The NJSBA submits there must be certainty when delivering a certificate or other record for filing to the NJDORES, the Respondent in this action. Stated simply, if a record complies with the requirements of NJ-RULLCA and the filing fee is paid, NJDORES must file the record. Any dispute over whether a record was signed by an authorized person can be resolved through litigation.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA will rely on the Procedural History and Statement of Facts as presented by the parties.

LEGAL ARGUMENT

POINT I

NJDORES HAS A MINISTERIAL DUTY TO FILE A RECORD IF IT SATISFIES THE REQUIREMENTS OF NJ-RULLCA.

NJDORES has a ministerial duty to file a record if the record satisfies the requirements of NJ-RULLCA and the filing fee is paid. It is not required to verify the authority of a person signing a record, and it does not have the discretion to refuse to file a record that otherwise satisfies statutory requirements.

A. NJDORES Has a Ministerial Duty to File a Record.

NJ-RULLCA clearly sets forth NJDORES' obligation to file a record presented to it:

A record authorized or required to be delivered to the filing office for filing under this act shall be captioned to describe the record's purpose, be in a medium permitted by the filing office, and be delivered to the filing office. If the filing fees have been paid, unless the filing office determines that a record does not comply with the filing requirements of this act, the filing office shall file the record ...

N.J.S.A. 42:2C-22(a) (emphasis added). Therefore, if the record complies with the requirements of NJ-RULLCA and the filing fee has been paid, NJDORES must file the record. NJDORES has a ministerial duty to do so. It does not have

the power or discretion to determine whether or not to file a record when the record complies with NJ-RULLCA.

NJ-RULLCA was based on the Revised Uniform Limited Liability Company Act (“RULLCA”) drafted by the Uniform Law Commission (“ULC”). NJ-RULLCA was based on the 2011 version of RULLCA, with N.J.S.A. 42:2C-22 corresponding to RULLCA § 205 (“Delivery to and Filing of Records ...”).¹ The 2011 version of RULLCA § 205 has been replaced in the 2015 version of RULLCA with RULLCA § 210 (“Duty of [Secretary of State] to File ...”), which is the most recent version of RULLCA.²

RULLCA § 210(a) provides: “The [Secretary of State] shall file a record delivered to the [Secretary of State] for filing which satisfies this [act]. The duty of the [Secretary of State] under this section is ministerial.” The ULC’s comments to this provision state:

Under this subsection the filing office is required to file a record if it “satisfies this [act].” The purpose of this language is to limit the discretion of the filing office to a ministerial role in reviewing the contents of records. If the record submitted is in the form prescribed, contains the information required by this act, and the appropriate filing fee is tendered, the filing office must file the record. Consistent with this

¹ The 2011 version is available at nybusinessdivorce.com/wp-content/uploads/sites/94/migrated/ullca_final_06rev.pdf.

² The 2015 version is available on the ULC’s website at uniformlaws.org/viewdocument/final-act-83?CommunityKey=bbea059c-6853-4f45-b69b-7ca2e49cf740&tab=librarydocuments.

approach, this subsection states explicitly that the filing duty of the filing office is ministerial. ...

ULC Comment to RULLCA § 210(a).³ See also ULC Comment to RULLCA § 206 (“The filing office’s duty ... ministerial”, citing RULLCA § 210(a)).

B. NJDORES Does Not Verify the Authority of a Signature on a Record.

NJ-RULLCA states that a record must be signed by an authorized person:

a. A record delivered to the filing office for filing pursuant to this act shall be signed as follows:

(1) a record signed on behalf of a limited liability company shall be signed by a person authorized by the company.

N.J.S.A. 42:2C-20(a)(1).

NJ-RULLCA does not address how an LLC authorizes a person to sign a record. Nor does NJ-RULLCA authorize NJDORES to verify whether a person is authorized by the LLC to sign the record.

N.J.S.A. 42:2C-20(a)(1) is derived from RULLCA § 203(a)(1). The ULC’s comment to RULLCA § 203(a)(1) provides in pertinent part:

The filing office will not check whether a person who purports to be authorized to sign a record on behalf of an LLC actually has that authority, even if a statement

³ The Court may rely on ULC commentary to RULLCA to better understand and interpret NJ-RULLCA. The courts have relied on ULC commentary to other uniform laws that were used as a basis for New Jersey statutes. See, e.g., Insulation Corp. of Am. v. Berkowitz, 274 N.J. Super. 337, 344 (App. Div. 1994) (citing ULC comment to Uniform Partnership Act). The NJSBA cites to the ULC’s most recent commentary, which is the 2015 version of RULLCA.

of authority pertaining to the matter is in effect. Indeed, even if the filing office somehow “knows” of a statement limiting authority, the office lacks the authority to reject a record on that basis.

ULC Comment to RULLCA § 203(a)(1) (emphasis added).

Further, the ULC notes: “To be filed a record must be signed by the appropriate person. ... Who is an appropriate person is determined under Section 203, but the filing office will not check to determine whether a person purportedly authorized to sign is in fact authorized.” ULC Comment to RULLCA § 206(a)(4).

Therefore, if a record complies with the requirements of NJ-RULLCA and the filing fee has been paid, NJDORES must file the record. NJDORES does not review the signature on the record to verify whether the person was authorized by the LLC to sign the record.

C. The Certificate of Dissolution and Termination Complied with NJ-RULLCA.

An LLC seeking to dissolve is required to file a certificate of dissolution. N.J.S.A. 42:2C-49(b)(2)(a). This certificate must state “the name of the company and such other information as may be required by the filing office to correctly identify the company and that the company is dissolved.” Id. In addition to the name of the LLC, NJDORES requires the certificate to include the LLC’s business ID number, the date of its formation, and a statement to the

effect that “all assets have been discarded and have been applied to creditors or distributed to its members.” See, e.g., Pa:015.

After an LLC completes winding up, it is required to file a certificate of termination. N.J.S.A. 42:2C-49(b)(2)(f). NJDORES requires this certificate to state the name of the LLC and that the LLC has been terminated. Id. NJDORES allows an LLC to file a combined certificate of dissolution and termination, which is the type of certificate filed by the Appellants. See Pa:015.

It should be noted that the combined certificate of dissolution and termination delivered for filing by the Appellants complied with the requirements in NJ-RULLCA because it was completed online through the NJDORES website. See Pa:015.

D. NJ-RULLCA Provides Remedies for Improperly Signed Records.

NJ-RULLCA provides an aggrieved person (e.g., the LLC or its members) with remedies when a record is filed with inaccurate information or is defectively signed. For example:

If a record delivered to the filing office for filing under this act and filed by the filing office contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from: (1) a person that signed the record, or caused another to sign it on the person’s behalf, and knew the information to be inaccurate at the time the record was signed.

N.J.S.A. 42:2C-24(a)(1).

In addition to civil liability for damages, a person who signs a record without authority from the LLC faces possible criminal liability: “An individual who signs a record ... to be filed under this act affirms under penalty of perjury that the information stated in the record is accurate.” N.J.S.A. 42:2C-24(c).

Based on all of the foregoing, NJDORES had a ministerial duty to file the certificate of dissolution and termination that was delivered to it for filing through the NJDORES website because it complied with the requirements of NJ-RULLCA and the filing fee was paid.

POINT II

THERE IS NO STATUTORY AUTHORITY PERMITTING THE RESCISSION OF A CERTIFICATE OF DISSOLUTION AND TERMINATION; THEREFORE, NJDORES DOES NOT HAVE THE AUTHORITY TO TAKE SUCH ACTION.

NJ-RULLCA does not authorize the rescission of a certificate of dissolution and termination. Therefore, NJDORES cannot rescind such a certificate.

A. NJ-RULLCA Does Not Authorize the Rescission of a Certificate of Dissolution and Termination.

As noted, an LLC seeking to dissolve is required to file a certificate of dissolution. N.J.S.A. 42:2C-49(b)(2)(a). After an LLC completes winding up, it is required to file a certificate of termination. N.J.S.A. 42:2C-49(b)(2)(f). NJDORES allows an LLC to file a combined certificate of dissolution and termination, which is the type of certificate filed by the Appellants. See Pa:015.

The most recent version of RULLCA, dated August 19, 2015, includes a provision on rescinding dissolution. See RULLCA § 703. However, when NJ-RULLCA was adopted in 2012, RULLCA § 703 was not in existence.⁴ Therefore, NJ-RULLCA does not address rescission of a certificate of

⁴ NJ-RULLCA was enacted on September 19, 2012 and became effective on March 18, 2013. See IE Test, LLC v. Carroll, 226 N.J. 166, 177 n.3 (2016) (citing L. 2012, c.50). As noted in footnote 1, *supra*, NJ-RULLCA was based on the 2011 version of RULLCA. See Gianfranco A. Pietrafesa, “Awaiting Case Law, Amendments a Decade into NJ-RULLCA”, 347 N.J. Lawyer 16, 17 n.3 (April 2024).

dissolution. As a result, NJDORES does not have the statutory authority to rescind a certificate of dissolution.

B. Even if NJ-RULLCA Authorized Rescission, NJDORES Cannot Rescind a Certificate of Termination.

Even if NJ-RULLCA included a provision equivalent to RULLCA § 703, which permitted the rescission of a certificate of dissolution, once a certificate of termination is filed, rescission is difficult, if not impossible.

RULLCA § 703(a) provides: “A limited liability company may rescind its dissolution, unless a statement of termination applicable to the company has become effective, ...” The ULC’s comments to this provision note: “The first exclusion [i.e., a statement of termination ... has become effective] results inevitably from the effect of a statement of termination (i.e., the limited liability company ceases to exist). A ‘dead’ entity lacks both the capacity and power to bring itself back from the dead.” ULC Comment to RULLCA § 703(a).

With apologies to the film *The Princess Bride*, an LLC that is in dissolution is “mostly dead”; that is, “slightly alive”, so its certificate of dissolution may be rescinded. However, an LLC that is terminated is “all dead” and its certificate of termination may not be rescinded.⁵ Therefore, even if

⁵ *The Princess Bride* is a 1987 fantasy adventure comedy directed by Rob Reiner. When the hero of the film, Westley (played by Cary Elwes), is feared dead, his friends take him to a healer, Miracle Max (played by Billy Crystal), who advises them that “your friend here is mostly dead. There’s a big difference between

NJDORES had the statutory authority to rescind a certificate of dissolution, it would not have the statutory authority to rescind a certificate of termination. See Mortgage Grader, Inc. v. Ward & Olivo, LLP, 225 N.J. 423, 437 (2016) (discussing the difference between dissolution and termination in the context of a partnership).

Accordingly, NJDORES does not have the statutory authority to rescind a certificate of dissolution and termination.

mostly dead and all dead. Mostly dead is slightly alive.” Miracle Max cures the mostly dead / slightly alive Westley.

POINT III

A CERTIFICATE OF CORRECTION IS INAPPLICABLE TO THIS MATTER BECAUSE IT CAN ONLY CORRECT A FILED RECORD, NOT RESCIND IT.

For completeness, the NJSBA notes that a certificate of correction could not have been used to remedy the situation at bar.

NJ-RULLCA provides:

A limited liability company ... may deliver to the filing office for filing a certificate of correction to correct a record previously delivered by the company to the filing office and filed by the filing office, if at the time of filing the record contained inaccurate information or was defectively signed.

N.J.S.A. 42:2C-23(a) (emphasis added). NJ-RULLCA further provides: “When filed by the filing office, a certificate of correction ... is effective retroactively as of the effective date of the record the certificate corrects ...” N.J.S.A. 42:2C-23(c).

Based on the foregoing statutory provisions, a filed record, such as a certificate of dissolution and termination, can only be corrected (with the correction being retroactive to the date of filing), not rescinded. Therefore, N.J.S.A. 42:2C-23(a) is inapplicable to the question facing the Court in this matter.

POINT IV

A COURT MAY RESCIND A CERTIFICATE OF DISSOLUTION AND TERMINATION ON EQUITABLE GROUNDS BASED ON THE SPECIFIC FACTS OF A CASE; HOWEVER, IT REQUIRES A FULLY DEVELOPED FACTUAL RECORD TO DO SO.

As noted in Point II, *supra*, there is no statutory authority for NJDORES to rescind a certificate of dissolution and termination (especially a certificate of termination), which would reinstate an LLC. However, there may be equitable grounds allowing a court to do so. In this regard, NJ-RULLCA provides: “Unless displaced by particular provisions of this act, the principles of law and equity supplement this act.” N.J.S.A. 42:2C-7. See Investors Bank v. Torres, 243 N.J. 25, 40-41 (2020) (quoting a nearly identical provision in the New Jersey Uniform Commercial Code and noting that courts may use this statutory authority to reconcile statutory provisions with other potentially relevant law).

Even in the absence of such a statutory provision, the NJSBA submits that a court has the power and discretion to fashion an appropriate remedy on equitable grounds if warranted by the facts of a case. As noted in Point II, *supra*, there is a difference between dissolution and termination of an LLC. The length of time between the filing of a certificate of termination (or a certificate of dissolution) and the requested rescission of the same is an important factor to be considered by a court. Further, a court may decide that, as a matter of law, a

certificate of termination (or a certificate of dissolution) may not be rescinded due to (among other things) the length of time between the filing of the certificate and the request to rescind it.

If the Court determines that rescission of a certificate of dissolution and termination may be appropriate on equitable grounds, but only has limited facts available, the NJSBA submits that it should take appropriate action, such as a remand to the trial court, for the development of a factual record to make a fully informed determination. In the current case before the Court, for example:

- Why did a former member's accountant file the certificate of dissolution and termination?
- Did the accountant have the authority of the LLC or the former member to file the certificate of dissolution and termination?
- Is there good cause for the two-year delay between the filing of the certificate of dissolution and termination and the filing of the complaint in this action?
- Are there disputes pending between the current member(s) and former member(s) or those who allegedly filed the misinformation? If so, what was the outcome, or what is the status, of that lawsuit? If not, why not?
- What is the alleged harm?

Only after a court has a fully developed factual record can it make an informed determination about whether it should use its equitable powers to rescind a filed certificate of dissolution and termination.

CONCLUSION

For the forgoing reasons, the NJSBA respectfully requests this Court to conclude that (1) NJDORES must file a record if the filing fees have been paid and the record complies with the filing requirements of NJ-RULLCA and (2) NJDORES does not have the authority under NJ-RULLCA to rescind a certificate of dissolution and termination (which would reinstate an LLC).

Further, the NJSBA respectfully submits that a court can rescind a certificate of dissolution and termination, resulting in the reinstatement of an LLC, if a court determines there are equitable grounds to do so. The NJSBA further submits, however, that such action should not be taken until a full factual record is available on which a court can base its determination.

Respectfully submitted,

NEW JERSEY STATE BAR
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Dated: April 19, 2024