

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ROBERTA CANN
Justice

PART 49

SOHTEL DARVISIT

INDEX NO. 123089/01

MOTION DATE 6/8/04

MOTION SEQ. NO. 008

MOTION CAL. NO. 4

- v -

HAS LACNA, INC

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DISPOSITION IN MOTION SEQUENCE**

**DATA ENTERED
COMMERCIAL DIVISION**

Dated: 9/27/04

He. Ch
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
In the Matter of the Application of :
SOHEIL DARVISH, Holder of One-Half of All :
Outstanding Shares Entitled to Vote in an Election : Index No. 123089/01
of Directors of HASLACHA, INC., URBAN HOMES, :
INC., and PRIMARY RESIDENCE, INC., :
Petitioner, :
:
For the Dissolution of HASLACHA, INC., URBAN :
HOMES, INC., and PRIMARY RESIDENCE, INC., :
Domestic Corporations, Pursuant to Section 1104 of the :
BCL. :
-----X

Herman Cahn, J.

This is a proceeding to dissolve three real estate holding corporations on the ground of shareholder deadlock, inter alia, BCL 1104. Petitioner moves (seq. no. 008) for partial summary judgment, dissolving two of the corporations, CPLR 3212; and the appointment of a receiver to oversee the disposition of their assets, BCL 1113, 1202, et seq.

Background:

Haslacha, Inc., owns and operates one parcel of Manhattan real property. Urban Homes, Inc., and Primary Residence, Inc., each own and operate two parcels of Brooklyn real property. Petitioner, Soheil Darvish, alleges that he and Shahram Lavian, a respondent herein, are the sole and equal shareholders and directors of all three corporations. It is alleged that Lavian bore the responsibility of funding the purchase and renovation of properties to be held by the corporations, while Darvish bore the responsibility of locating the properties and selling them after renovation.

The petition alleges that irreconcilable internal disputes have arisen between

Darvish and Lavian and, therefore, they have ceased to function as a Board of Directors. It is further alleged that this and other shareholder actions have been commenced, at great expense, due to Lavian's alleged waste of corporate assets.

Lavian maintains that he is the sole shareholder, director, and officer of Haslacha, Inc. While acknowledging Darvish as an equal shareholder in the other two corporations, he alleges that Darvish, not he, has breached duties of loyalty to those corporations, including the diversion of corporate opportunities.

Darvish now moves for partial summary judgment of dissolution and receivership vis-a-vis the two corporations which Lavian concedes are equally owned by them both, i.e., Urban Homes, Inc., and Primary Residence, Inc.

Discussion:

Section 1104 of the Business Corporation Law provides, in pertinent part:

[T]he holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote . . . may present a petition for dissolution on or more of the following grounds:

- (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
- (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
- (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

(BCL 1104 [a].)

At a bare minimum, the third statutory criterion of internal dissension is evident in this proceeding.

Petitioner accuses Lavian of causing Urban Homes, Inc., and Primary Residence, Inc., to default on their corporate franchise and real property tax obligations, and other governmental charges, submitting computer print-outs substantiating the defaults. In this regard, petitioner accuses Lavian of unilaterally changing the corporate notice address to his own address – 208 East 51st Street, Suite 174, New York, New York 10022 – as further indicated by the submitted print-outs generated from an official New York City website. It is alleged that Lavian did so to conceal his non-payment of public charges.

Petitioner alleges that the defaults in public charges have led to the institution of in rem foreclosure proceedings and, indeed, have even resulted in sua sponte proclamations of dissolution of both corporations by the Secretary of State, submitting documents in support. Significantly, it is alleged that since dissension between the parties started in 1998, the corporations have ceased to function.

Lavian's response concedes that the corporations are in default in public charges, but casts the blame on Darvish, alleging that the majority of such charges were caused by Darvish's neglect to properly maintain the premises, leading to the issuance of Housing Department violations. Lavian does not address the issue of his alleged change of corporate address, which may have kept the defaults from Darvish, and led to the institution of the in rem foreclosure proceedings.

In addition to blaming petitioner for the defaults, Lavian's counsel argues that petitioner's portrayal of the defaults is exaggerated, and that a better alternative to dissolution and receivership would be to simply order the parties to contribute equally toward the satisfaction of outstanding public charges. Counsel misses the point:

[W]here dissolution is sought, the underlying reason for the dissension is of no moment; nor is it at all relevant to attempt to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs.

(Matter of Dissolution of T.J. Ronan Paint Corp., 98 AD2d 413, 422 [1st Dept], appeal withdrawn 63 NY2d 773 [1984].)

In addition to above-described dispute concerning the cause of the defaults, the pleadings are permeated by mutually cast aspersions relating to each side's loyalty to the corporations. The pleadings are, themselves, strong indicators of paralytic corporate dissension, which has existed, at the very least, since the commencement of this proceeding in 2001. Consequently, and consonant with the Secretary of State's proclamations of dissolution (Amended Notice of Motion Ex. C), Darvish is entitled to partial summary judgment of dissolution with regard to Urban Homes, Inc., and Primary Residence, Inc. (*e.g., Matter of Dissolution of T.J. Ronan Paint Corp., supra*).

Lavian's counsel has argued in favor of a stay of this BCL 1104 dissolution proceeding, in favor of alternative proceedings, under BCL 1104-a, "for judicial dissolution under special circumstances." Such a proceeding allows for one shareholder to buy out the ownership interest of another shareholder upon valuation by the court (BCL 1118) – an option which Lavian apparently prefers.

Counsel's request is denied. No motion has been made for relief under BCL 1104-a; but more importantly, the "special circumstances" required to be shown under that statute involve "illegal, fraudulent or oppressive actions" and other similar misconduct (BCL 1104-a [a]). No such showing is necessary here, in view of the demonstrated corporate

dissension supporting the instant BCL 1104 petition. Respondent should not be allowed to protract this three-year-old proceeding by unnecessarily injecting issues of willful misconduct requiring costly and undoubtedly lengthy evidentiary hearings. This is especially so, in light of the undisputed defaults in public charges which have put the corporate property at impending risk.

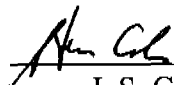
Upon judicial dissolution of a domestic corporation, a receiver can be appointed to manage, and oversee the final disposition of, the corporate property (BCL §§ 1202-03, 1206-07, 1210-12). As a consequence of dissolution herein, Darvish's application for the appointment of a receiver for Urban Homes, Inc., and Primary Residence, Inc., is granted. Said receiver, to be designated by further order of the court, shall possess all the powers of a permanent receiver, including, the sale of the corporate property and distribution of proceeds to creditors and shareholders, in accordance with the priority of distribution fixed by law (*see, id.*).

The proceeding shall continue with regard to Haslacha, Inc., due to outstanding issues concerning its ownership.

Settle order.

Dated: September 27, 2004

ENTER :



J. S. C.