

To be Argued by:
KENNETH GUNSHOR
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Second Department

In the Matter of the Application of
HERMAN I. PORITZKY, Holder of One-Half of All Outstanding Shares
Entitled to Vote in an Election of Directors,

Docket Nos.:
2009-05307
2009-05309

Petitioner-Respondent,

For the Dissolution of DREAM WEAVER REALTY, INC.,
a Domestic Corporation,

Pursuant to Section 1104 of the New York Business Corporation Law,

STEPHEN T. DENAME and DREAM WEAVER REALTY, INC.,

Respondents-Appellants.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

Petitioner-Respondent ("Poritzky") hereby submits his response to the brief of Respondents-Appellants ("DeName" Or "Appellants"). As set forth herein, the Supreme Court, Westchester County (Rudolph, J.) (the "Lower Court") correctly ruled, in its sound exercise of judicial discretion, granted Petitioner's application seeking corporate dissolution pursuant to BCL 1104 (a)(2)(3) but without the necessity of a hearing. The record before the Lower Court was ample, extensive, and the necessity for a hearing was unnecessary, especially in light of DeName's pleadings which conceded the essential bona fides of the petition. Accordingly, the Lower Court properly exercised its discretion in granting the Petition, ordering corporate dissolution of Dream Weaver Realty, Inc., ("Dream Weaver") and appointment of a Receiver (Robert David Goodstein, Esq.), the Lower Court, which exercised its discretion should not be disturbed by this Court.

In a second, separate, and distinct appeal, DeName moved the Lower Court, almost simultaneously with the corporate dissolution petition, a motion to disqualify Petitioner's attorney.

The Lower Court correctly ruled and denied DeName's disqualification application as moot, upon order granting the petition for corporate dissolution. The Lower Court's decision

was based upon sound reasoning and exercise of discretion. Upon the granting of the corporate dissolution petition, that was no longer a corporation, Dream Weaver, or that DeName's application failed to meet the high standards to support disqualification of Petitioner's attorney of choice. Those issues were determined to be moot.

Faced with the Lower Court's two (2) clear and decisive separate rulings, DeName seeks reversal on the basis that the Lower Court improperly exercised its discretion in challenging the former order, granting corporate dissolution, based upon the fact that corporate dissolution was ordered without a hearing. DeName's argument flatly ignores the extensive record created wherein and whereby the record evidences the factors considered by the Lower Court in issuing its decision, and it is well supported as to bona fides and essential elements to grant corporate dissolution, as provided in BCL 1104 (a)(2)(3).

The question posed by Appellant DeName on this appeal is not as Appellant supports whether the Lower Court must hold an evidentiary hearing as a pre-condition in granting corporate dissolution, but rather the question before this Court is whether or not the Lower Court abused its discretion in granting Poritzky's Petition for corporate dissolution without a hearing but based on an extensive record created by both parties. It did not.

The Lower Court expressly studied and absorbed the facts in the record, the Lower Court considered and thoughtfully discussed all relevant factors in adjudicating Poritzky's Petition for corporate dissolution and DeName's application for disqualification of Petitioner's attorney. While DeName disagrees with this conclusion because DeName fails to identify any abuse of discretion by the Lower Court, the two (2) orders must be affirmed.

STATEMENT OF FACTS

The full record before the Trial Court, without exception, overwhelmingly established the existence of irreconcilable differences and deadlock between the two shareholders of Dream Weaver. This enabled the Court to grant Petitioner's request for dissolution, pursuant to BCL 1104 (a)(2)(3), and appoint a Receiver, all within its reasoned and sound discretion, without the need or necessity of a hearing. There was no contested issue regarding the essential bona fides of the Petition.

As the Court's decision states: (R.-6)

"The Court finds that Petitioner has established on the clear record before the Court and without the necessity of a hearing, that the Corporate affairs are rife with dissension and have ultimately resulted in a deadlock precluding the successful and profitable conduct of the Corporation's business. See Goodman v. Lovett, 200 A.D. 2d 670, 507 N.Y.S. 2d 52 (2nd Dept, 1994)" (P. 6). Emphasis added.

The full record in the Court below illustrated the absence of any contested issues regarding the essential elements of Petitioner's dissolution petition. Thus, no oral testimony by either Poritzky or DeName, or anyone else, could enhance or dispute, the essential elements of the relief sought. The record reflects in both the sworn submissions of DeName and Poritzky that each owns fifty (50%) percent of all of Dream Weaver's issued and outstanding stock (R. 41). The submission shows that DeName and Poritzky are intensely divided on every

issue, with an increasing environment of acrimony and bitterness that indeed, they are unable to communicate except through their respective attorneys (R. 42-43). Moreover, this acrimony and dissension has persisted for a period of 3 1/2 years (R.84) at the time this special proceeding was commenced.

The only question before the Court below was not which of the shareholders was at fault, but whether a deadlock within Dream Weaver existed, and, whether dissolution would benefit DeName and Poritzky, as the corporation's equal and sole shareholders. The record made clear that dissolution was the only course to follow.

With the appointment of a Receiver, the Trial Court intended to benefit both parties, eliminate the existing deadlock, foster the sale of Dream Weaver's four (4) properties, and thereafter, make appropriate division of the proceeds derived from the sale of the properties to Poritzky and DeName.

DeName's submission (R. 93-95) admits the existence of these essential elements and establishes the prima facie, the requisite elements, grounds and facts to support the dissolution petition, and prima facie shows the absence of any statutory issue which would necessitate a hearing.

The elements include: (1) DeName seized control of Dream Weaver's management (R. 129). DeName froze out and denied Poritzky any economic benefit since October, 2005 (R. 130-

134) (2). The acrimonious relationship grew more bitter and even more intense after 3 1/2 years, evidenced by on-going litigation involving Poritzky Funding Inc. and the deadlock in Dream Weaver (R. 73&109) (3). During this period of time, Dream Weaver, being deadlocked, failed to conduct business and incurred operating losses (R. 69-70) (4). DeName attempted to coerce additional capital contributions from Poritzky. (R. 69-70). Thus, DeName himself proves the elements of Poritzky's Petition, pursuant to BCL 1104(a) (2) (3).

The basic issue the Trial Court decided was that dissolution was appropriate, since it was not how long DeName and Poritzky's estrangement existed, or whose fault it was, or how it was created, but the fact that it existed and its existence was economically detrimental to its shareholders. No hearing could change these basic facts.

The second portion of this appeal addresses Respondent-Applicant's motion to disqualify Kenneth Gunshor from representing Petitioner Poritzky in this matter. That application was denied by the Court below (R.9). The application for disqualification was denied as "moot," based upon the decision to judicially dissolve Dream Weaver and should not be disturbed.

POINT I

**THE TRIAL COURT ACTED WITHIN ITS DISCRETION,
BASED UPON THE EXTENSIVE FACTUAL RECORD
BEFORE IT IN DISSOLVING THE CORPORATION
WITHOUT HOLDING A HEARING.**

The decision of the Court below, in granting Petitioner's dissolution petition in this special proceeding, without a hearing was proper, especially after a review of the record before it. The record clearly supports the relief granted, in that all the essential elements supporting the dissolution were clearly established. Having determined there was no real dispute and that dissension and deadlock existed, no hearing was necessary. Neville v. Martin, 29 A.D. 3d 444, 815 N.Y.S. 2d 91 (2d Dep't, 2006).

Respondents-Appellants have not identified any material or factual issues that would create the need or necessity of a hearing. In point of fact, Respondent's pleadings confirmed all essential facts to support the decision being reviewed. Appellant's brief adds nothing to disprove this.

The Court, in Eklund Farm Machinery, Inc. v. Pinkey 40 A.D. 3d 1325, 836 N.Y.S. 2d 733 (3rd Dep't 2007) provides a measure of insight into those of Respondents'-Appellants' argument:

"As a result, even if petitioners were shown to have created dissension to obtain dissolution, Supreme Court could not conclude that it was in bad faith or that the parties' differences were

reconcilable. Given these circumstances, 'the underlying reason for the dissension is of no moment' and a judicial remedy is appropriate."

The case of Goodman v. Lovett, 100 A.D. 2d 607 N.Y.S. 2D 52 (2nd Dep't, 1994) provides clarity in its reasoning and thoughts upon the issues were raised:

"...it is apparent that the dissension between the shareholders in this case is the result of a dispute over profit distribution, the underlying reason for the dissension is of no moment, nor is it at all relevant 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 affair (See Matter of T.J. Ronan Paint Corp., 98 A.D.2d 413, 422, 469 N.Y.S.2d 931.) The record amply demonstrates sufficient dissension among the parties to direct dissolution"

There is no basis to disturb the decision of the Trial Court. The extensive record below illustrates an absence of any contested issues with respect to special proceeding brought pursuant to BCL 1104 (a)(2)(3) that require a hearing. The bona fides of Poritzky's corporate dissolution application are well established and conceded in DeName's pleadings. Therefore, there was no need or necessity to withhold from Poritzky the relief sought in his petition for corporate dissolution until a hearing was held.

POINT II

**ONCE DISSOLUTION WAS GRANTED, THE ISSUE OF
DISQUALIFICATION WAS NO LONGER PRESENT.**

The second, separate, and distinct decision of the Hon. Kenneth W. Rudolph (R. 9), denying Respondent-Appellant, DeName's application should not be disturbed. The court below denied such motion as being "moot."

DeName's application seeking disqualification was used SOLELY in a misguided effort to gain a tactical advantage. The record before the Court below reflects an absence of a documented conflict of interest, nor any convincing evidence to satisfy the high bar permitting disqualification.

The record before this Court indicates that Respondent-Appellant has not addressed the standards under either theory propounded or as ongoing in this matter, assuming the continuing, participation and efforts of the Receiver.

The Respondent's-Appellant's dilemma is that such an application was brought prematurely and not applicable to a special proceeding pursuant to BCL 1104 (a)(2)(3) for corporate dissolution and associated reliefs.

The record, before the Lower Court, shows from the outset of the controversy, Klein was representing DeName, and Gunshor was representing Poritzky (R. 84). Thus, it was clear from the

outset each shareholder was represented by an attorney of their own choice. The record also reflects that Gunshor's Non Offer (Contract) was ever approved by Dream Weaver, thus, not a basis in fact as to representation of Dream Weaver. No offer was ever submitted to anyone, including the tenant as a prospective purchaser. No transfer was authorized by Dream Weaver. In addition, Dream Weaver never engaged or hired Gunshor, as an attorney to represent the corporation with any prospective buyer of the Brewster property.

The record illustrates a clear case of deadlock between Poritzky and DeName. Deadlock not conflict of interest between an attorney that was never engaged by the corporation was moot after dissolution order by the Lower Court. Through this whole process, Gunshor was never engaged or retained to represent Dream Weaver in the real estate transaction for the Brewster restaurant property, nor authorized by the corporation to submit an offer. (R. 61-63).

The Respondents-Appellants' next tong argues disqualification by imputation based upon the Attorney Witness Rule, baring Gunshor's future participation in the remainder of the corporate dissolution and liquidation process, even if working under the authority of the Receiver.

The Respondents-Appellants have not sustained the burden of proof by clear and convincing evidence that the attorney-witness

will provide testimony in connection with the petition, that's prejudicial to his client, Herman Poritzky, and the integrity of the judicial system will suffer as a result. See Murray v. Metropolitan Life Insurance Co., 583 F 3d 173 (2d Cir. 2009).

While the New York Courts have enunciated a somewhat different but equally high standard to support disqualification motion: (1) the existence of a prior attorney-client relationship, and (2) that the former and current representation are both adverse and substantially related. Under either of the above standards, the record fails to meet these standards to support any theory of disqualification. See Solow v. Grace & Co., 83 N.Y. 2d 303, 610 N.Y.S. 2d 128, 130 (1994).

Gunshor was never hired by Dream Weaver as provided in the unexecuted unratified, and unaccepted corporate resolutions (R. 61-63&97). That the record is clear that Gunshor never represented DeName and throughout and at all times represented Petitioner, Poritzky.

However, the federal courts have also crafted another resolution of this issue, going forward, assuming, post Receiver issues that could argumendo potentially involve Gunshor's testimony in the future. To protect my client's interests and to ward off any adverse affects to be potentially suffered by Poritzky, Gunshor has assured and assures this court, on a going forward basis, that he will limit his role in the case: (a) not

act as a trial counsel and (b) he will not take depositions of potential witnesses. Those representations, Gunshor previously provided to DeName's counsel, William Macreery, Esq., in a letter dated February 9, 2009, (R. 82-83). The submission of these representations satisfied the court in denying an application for disqualification in Amusement Industry Inc. v. Stein ___ F Supp2d ___, 2009 WL 3069 (SDNY Sept.28, 2009).

In substance that court observed in denying a disqualification application, in a balancing of rights the client using common sense, practical knowledge, and experience.

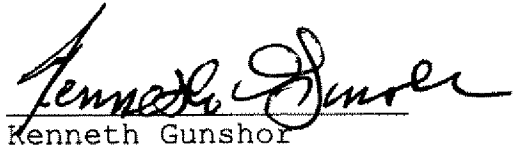
"the concerns underlying [the advocate-witness rule] arise out of an attorney's presence at trial allowing an attorney to continue his representation pre-trial does nothing to undermine those interests and protects the clients' right to choose their own counsel."

The decision of the Lower Court, although decided with a single word, "Moot," has the same practical and common sense result as to that separate application.

CONCLUSION

The two (2) separate decisions of Justice Kenneth W. Rudolph presiding in the Commercial Division should be sustained and not disturbed.

Dated: Mt. Kisco, New York
December 15, 2009



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