

At the Supreme Court of the State of New York, held in and for the County of New York, 60 Centre Street, New York, New York, on _____ day of July, 2007

FILED
NEW YORK COUNTY CLERK
J.S.
NEW YORK COUNTY
JUL 31 2007
Unsigned Order to Show Cause

PRESENT:

HON.

07110474

Application of Robert T. Giaimo,
As Co-Executor of the Will of
EDWARD P. GIAIMO, JR.,
Deceased, for the Judicial Dissolution of
EGA ASSOCIATES, INC.

INDEX NO.

**ORDER TO SHOW CAUSE
WITH
TEMPORARY RESTRAINING
ORDER**

Upon reading and filing the annexed Petition of Robert T. Giaimo, as Co-Executor of the Will of Edward P, Giaimo, Jr., deceased, verified on July 30, 2007, and the exhibits annexed thereto, and on all prior proceedings had herein, and sufficient reason appearing therefor, it is hereby

ORDERED that respondents, EGA Associates, Inc., Janet Giaimo Vitale and Joseph O. Giaimo, Esq., show cause before this Court at 60 Centre Street, New York, at IAS Part ___, Room ___, on the ___ day of _____, 2007, a date not less than four weeks from the date hereof in accordance with CPLR 1106 (a), at 9:30 a.m. or as soon thereafter as the matter may be heard, why an order and judgment should not be entered in the above captioned proceeding:

A. dissolving EGA Associates, Inc. pursuant to BCL §1104 (a) (1), (2) and/or (3), and/or §1104-a (a) (1) and/or (2); and

B. pending the determination of this Petition and pending further order of the Court, preliminarily enjoining Respondents Janet Giaimo Vitale, as a shareholder, director and officer, and Joseph O. Giaimo, as a director and, if already elected, an officer, and each of them (a) from denying Petitioner and his representatives access to all records and all premises which may contain records or other documents of Decedent or of the Corporations, i.e., the Offices; (b) from transferring any property, whether real property, securities, cash, physical property, personal property or property of any other kind or description, including cash, out of the corporation; (c) from destroying or removing any records of the corporation from the Offices or any other place in which they may be kept; and (d) from conducting any shareholder or directors' meetings; and

C. granting Petitioner such further relief as is just; and it is further

ORDERED that pending the hearing of this Petition and pending further order of the Court, Respondents Janet Giaimo Vitale, as a shareholder, director and officer, and Joseph O. Giaimo, as a director and, if already elected, an officer, and each of them is hereby temporarily restrained (a) from denying Petitioner and his representatives access to all records and all premises which may contain records or other documents of Decedent or of the Corporations, i.e., the Offices; (b) from transferring any property, whether real property, securities, cash, physical property, personal property or property of any other kind or description, including cash, out of the corporation; (c) from destroying or removing any records of the corporation from the Offices or any other place in which they may be kept; and (d) from conducting any shareholder or directors' meetings; and it is further

ORDERED that Petitioner shall serve this order to show cause and the papers on which it is based on Respondents and the New York State Tax Commission in accordance with the requirements of BCL 1106 (c); and it is further

ORDERED that Respondents shall serve their opposing papers, if any, no later than thirty days after the date of service hereof.

ENTER:

J.S.C.

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

-----x

Petition of ROBERT T. GIAIMO, as Co-Executor of
the Will of EDWARD P. GIAIMO, JR.,
Deceased, for the Judicial Dissolution
of EGA ASSOCIATES, INC.

FILED

JUL 31 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

INDEX NO.

**PETITION TO DISSOLVE
EGA ASSOCIATES, INC.
PURSUANT TO
BCL 1104-a (a) (1) & (2)
AND 1104 (a) (1), (2) & (3)**

07110474

-----x
To EGA Associates, Inc., Janet Giaimo Vitale and Joseph O. Giaimo:

Petitioner, Robert T. Giaimo ("Petitioner"), as Co-Executor of the Will of Edward P. Giaimo, Jr., deceased, for his petition herein respectfully alleges:

Introduction

1. Petitioner, together with Janet Giaimo Vitale, Petitioner's sister ("Mrs. Vitale"), is the Co-Executor of the Last Will and Testament of Edward P. Giaimo, Jr. ("Decedent"). Petitioner and Mrs. Vitale are also beneficiaries under said Will.
2. EGA Associates, Inc. is a New York corporation with a principal place of business at 1057 First Avenue, New York, New York.
3. Decedent died on March 26, 2007, and was domiciled in Pelham, New York.
4. Decedent left a Last Will and Testament dated November 29, 2006 (the "Will"), that was admitted to probate by the Westchester County Surrogate's Court on or about May 21, 2007.
5. On May 21, 2007, letters testamentary were duly issued to Petitioner and Mrs. Vitale, upon their qualifying. They continue to act as Co-Executors of Decedent's Will.

Background

6. Decedent, who never married, managed the family real estate business, first with his father, Edward, Sr., and, after his father's death, by himself, and upon his illness, with Respondent, Mrs. Vitale.

7. The real estate business consisted of properties owned by Decedent and by two corporations, EGA Associates, Inc. ("EGA") and First Ave. Village Corp. ("FAV") (collectively, the "Corporations"), which, at the date of Decedent's death, were owned equally, one-third each, by Decedent, Petitioner and Mrs. Vitale, the only three children of the late Edward Giaimo, Sr.

8. In November 2006, approximately four months before his death, Decedent was diagnosed with cancer.

9. Almost immediately after such diagnosis, Decedent, an attorney, retained counsel to prepare his Will.

10. The Will, a copy of which is annexed hereto as Exhibit 1, provided among other things that Decedent's interests in the two Corporations, EGA and FAV, be divided equally between Petitioner and Mrs. Vitale, making Petitioner and his sister each 50% owners of the Corporations.

11. As Decedent's physical condition continued to deteriorate, so did his mental condition and it became clear that despite his intimate knowledge of the operation of the Corporations and the properties, he was no longer able to make decisions or manage the Corporations or the properties.

12. Petitioner and Mrs. Vitale discussed the possibility of retaining outside management or having Mrs. Vitale's husband, Paul Vitale, an experienced accountant, take over management of the office.

13. Mrs. Vitale, however, ultimately refused to agree to either proposal, insisting that (although she had neither the training nor the experience) she would manage the properties of the Corporations and Decedent.

14. As Decedent's condition worsened, and his ability to devote attention to and his mental capacity to deal with the family business continued to decrease, Mrs. Vitale commenced a campaign to seize control of the Corporations and their assets.

15. Decedent spent parts of the months of January and February 2007 in Mount Sinai Hospital in New York City, but most of the time he was in a house of Mrs. Vitale and under her care and control.

16. Mrs. Vitale controlled access to Decedent at her house almost up to the time of his death.

17. In or about February 2007, on the last occasion Decedent was in the hospital, Dr. James Holland, Decedent's treating physician and Chief of Oncology at Mount Sinai, asked Mrs. Vitale and Petitioner to come to his office on the first floor of the Hospital to meet with him.

18. At that meeting, Dr. Holland stated that Decedent would be discharged to die at home. He stated that Decedent's cancer was inoperable and untreatable and that Decedent had only a few months to live.

19. At that meeting, Dr. Holland explicitly advised Mrs. Vitale and Petitioner that Decedent did not have the mental capacity to execute documents or make business decisions and said that he would so state in Decedent's medical records.

20. Shortly thereafter, Decedent was discharged to Mrs. Vitale's house.

21. During the last two weeks of Decedent's life, Mrs. Vitale blocked Petitioner's access to Decedent. She discouraged Petitioner and his family from visiting Decedent, intercepted Petitioner's telephone calls to him, and either removed or disconnected the telephone and fax from Decedent's room or otherwise controlled his outgoing calls.

22. Decedent died on March 26, 2007.

23. Subsequent to Decedent's death, Petitioner was advised by Respondents for the first time that Decedent had on March 13, 2007, sold one share of his stock in each of EGA and FAV to Mrs. Vitale, giving her control of the Corporations and their assets.

24. In May 2007, Decedent's Will was submitted to the Westchester County Surrogate's Court for probate as part of a stipulation entitled "Designation of Co-Executor" among the named executor, Peter Giaimo, a first cousin of Decedent, Mrs. Vitale and Petitioner.

25. The stipulation provided that Peter Giaimo would renounce his right to Letters Testamentary if Mrs. Vitale and Petitioner were appointed as Co-Executors. See Exhibit 2 hereto. The Petition for Probate is Exhibit 3 hereto. Peter Giaimo's Renunciation is Exhibit 4.

26. Petitioner herein has commenced, pursuant to SCPA 2103, a proceeding in the Westchester Surrogate's Court for discovery and an inquiry with regard to certain assets of Decedent's estate (the "Estate"), including the one share of stock in each of EGA and FAV purportedly sold to Mrs. Vitale on Decedent's death bed.

27. After discovery and inquiry in the Surrogate's Court, Petitioner intends to bring a turnover proceeding to recover for the Estate, its creditors and beneficiaries the two shares of stock as well as the other assets that the respondents in that proceeding transferred out of the Estate.

28. Additionally, because of Mrs. Vitale's actions with regard to the Estate, including the delivery of more than \$3,000,000 to a claimant and her stated intention of transferring four parcels from FAV to a claimant, among other things, Petitioner has also prepared and will be filing shortly a petition to the Surrogate to revoke the letters testamentary issued to Mrs. Vitale and remove her as Co-Executor.

Relief Requested

29. This Petition seeks to dissolve EGA (a) pursuant to New York Business Corporation Law ("BCL") §1104-a (a) (1) and (2), because those in control of the corporation have been guilty of illegal, fraudulent and oppressive actions toward the complaining shareholder who holds more than 20% of all the outstanding shares of the corporation and because the property and assets of the corporation are being looted, wasted or diverted for non-corporate purposes by those who control the corporation; and (b) pursuant to §1104 (a) (1), (2) and (3), because the two legitimate directors (as described below) are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained, the shareholders are so divided that the votes required to elect a third director cannot be obtained, and there is internal dissention and two factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Grounds for Relief Requested

30. Mrs. Vitale, in addition to being a Co-Executor, is in her individual capacity the Vice President of EGA and FAV, in each of which Decedent was a shareholder and in which the Estate of Decedent has an interest. As Vice President, Mrs. Vitale has the power to and is acting as President of each of the Corporations because Decedent was President and his death left that office vacant.

The Abusive and Defective Notice of Shareholders' Meeting

31. During May and June 2007, in conversations between Petitioner and Mrs. Vitale and in conversations and letters between Petitioner's counsel and Mrs. Vitale's counsel, Ms. Vitale was informed several times that Petitioner and his family would be going abroad for vacation for the first 3 weeks of July. (See, e.g., letter dated June 13 2007, annexed hereto as Exhibit 5, in which Robert Hirsch, Esq. or Arent Fox wrote to, among other things, schedule a meeting for June 21 and advised: "Please bear in mind that Robert Giaimo is only in town for a week after the proposed date, after which he will be out of the country.")

32. Indeed, counsel for Petitioner and Mrs. Vitale discussed a standstill agreement for at least the period that Petitioner was going to be away. (A proposed standstill agreement that was sent to counsel for Mrs. Vitale is annexed hereto as Exhibit 6.)

33. By letter dated July 12, 2007 (Exhibit 7 hereto), counsel for Mrs. Vitale rejected the standstill agreement. On July 18, Petitioner's counsel sent a letter via e-mail to Mrs. Vitale's counsel asking that he be sent a copy of any notice of a shareholders' meeting of either of the Corporations. See Exhibit 8 hereto.

34. Knowing that no one would be at Petitioner's home before Monday, July 23, 2007, Mrs. Vitale nevertheless sent a notice certified mail to Petitioner's home in Virginia. Petitioner and his family arrived home around midnight on July 22. The next day Petitioner found a "Sorry We Missed You" notice from the United States Postal Service that a delivery attempt had been made on July 16.

35. The certified mail envelope turned out to contain a notice of a meeting scheduled for New York at 4:00 pm on July 23. By the time Petitioner was able to retrieve the certified mail envelope from the Post Office, the meeting had already been conducted. See Exhibit 9 hereto.

36. At no time had Mrs. Vitale or her counsel informed any of my counsel of the meeting.

37. The purpose of the shareholders' meeting per the notice was to elect a director to fill the vacancy caused by the death of decedent. Prior to Decedent's death, there had been three directors, Decedent, Mrs. Vitale and Petitioner. Thus, after Decedent's death, Petitioner and Mrs. Vitale were the directors.

38. EGA's by-laws are annexed hereto as Exhibit 10. Paragraph 5 of the by-laws provides that written notice of any meeting must be given personally or by mail "upon each shareholder entitled to vote at such meeting..." No notice was given to the Estate or to Petitioner as Co-Executor.

39. Also as set forth in paragraph 5 of the by-laws, the notice must be given not less than ten days before the meeting. The notice is dated July 12, so even if mailed that day, by sending the notice by *certified* mail, Mrs. Vitale ensured that it could not possibly have given Robert Giaimo 10-days' notice as required by the by-laws.

40. Mrs. Vitale's total bad faith is evident from her knowing and intentional attempt to notice and conduct the meeting while Robert Giaimo was out of the country and without giving notice to his attorney. Indeed, Mrs. Vitale knows the home, mobile and business telephone numbers of Petitioner, yet neither she nor her counsel made any effort to contact Petitioner or any of his attorneys.

41. Thus, for each of these reasons, the notice of shareholders' meeting was defective and the meeting on July 23 a nullity.

No Business Could Have Legally Been Conducted at the Shareholders' Meeting

42. Paragraph 8 of the by-laws requires the holders of a majority of the issued and outstanding stock of the corporation be present in person or by proxy to have a quorum sufficient to act.

43. Because neither Robert Giaimo's nor the Estate's stock were present in person or by proxy, there was no quorum and any business transacted, including the purported election of Mrs. Vitale's lawyer as a director, are illegal, invalid, null and void.

44. The EPTL § 10-10.7 requires, I am informed by counsel, that when there are two fiduciaries, as here, they must act jointly. "The law is clear that where there are two executors they must act unanimously but that a majority may act when there are more than two...." *In re Duell*, N.Y.L.J. July 23, 1996, p. 23, col. 1 (Surr. Ct. N.Y. Co., Surrogate Roth).

45. Mrs. Vitale had previously represented that she would not consider the shares of Decedent at the meeting. Petitioner had previously received a letter dated June 18, 2007, from Mrs. Vitale (Exhibit 11 hereto) in which she stated, among other things, that as Vice President of the Corporations she intended to send a notice of a meeting for "a special election to fill the vacancy created by Edward's death." She stated she

intended to send the notice “by the end of this week and will hold a meeting voting [her] majority shares to elect a director, Joe, to fill Edward’s seat on the Board. This action will take place irrespective of whether Edward’s shares are actually distributed to us or voted at the meeting. Obviously, you [Petitioner] will not agree to Joe’s election so the Estate shares will not be considered at the meeting.”

46. Mrs. Vitale did not send such a meeting notice in June when Petitioner would have been available to attend, but rather intentionally waited until Petitioner was out of the country. Thus, if Mrs. Vitale now claims to have counted or voted the shares of Decedent that now belong to the Estate for the benefit of the creditors and beneficiaries of the Estate, she has committed a fraud, invalidating any action and giving the court yet another basis for dissolving the corporation.

The Defective Notice of Directors’ Meeting

47. Petitioner received by mail in the afternoon of Friday, July 27, 2007, a purported notice of an EGA board of directors’ meeting to be held at 4:00 pm on Monday, July 30, 2007. See Exhibit 12 hereto.

48. Paragraph 18 of the EGA by-laws requires 5 days’ notice, so once again, the notice is defective.

49. The notice is signed by Mrs. Vitale and her lawyer, Joseph O. Giaimo (a distant relative) as directors, thus demonstrating that Mrs. Vitale is proceeding as if the July 23 shareholders’ meeting and the actions taken at it were legal and effective.

The July 12 Joseph Giaimo Letter

50. On July 12, 2007, Petitioner’s counsel received a facsimile transmission from Joseph Giaimo of his letter dated July 12, 2007, and attachments referring to “legal”

and “illegal” tenants and “legal” and “illegal” rent. Joseph Giaimo’s letter and attachments are annexed hereto as Exhibit 7.

51. The July 12 letter from Joseph Giaimo and its attachments demonstrate the division and dissension among shareholders and directors and between factions, the intention of Mrs. Vitale and Joseph Giaimo to continue their illegal, fraudulent and oppressive actions, and the looting and diverting of corporate assets for non-corporate purposes..

Respondents’ Threats to Transfer Four Buildings

52. Joseph Giaimo threatens in his July 12 letter that Mrs. Vitale is going to transfer four parcels of real estate from FAV to Antoinette Giaimo. Joseph Giaimo states that he has concluded, again unilaterally, that four buildings owned by FAV were “fraudulently transferred to FAV” by Decedent “who forged Antoinette and/or Senior’s signature on the three deeds which cover the four properties.” He presents no expert evidence concerning these alleged forgeries and ignores the fact that these deeds were signed in 1999 and that the Statute of Limitations may have run on the assertion of any claim to these properties against FAV. Based on statements previously made by Joseph Giaimo to Petitioner’s counsel, it is apparent that the conveyances of the properties to FAV were made by the father, Edward Giaimo, Sr., and no claims to any of these properties were ever made during his or Decedent’s lifetime.

53. Joseph Giaimo states in his letter that Mrs. Vitale intends to transfer these properties “back” to Antoinette Giaimo, an action inconsistent with her fiduciary responsibilities as an officer and director of FAV. Such an act with respect to a sister corporation of EGA raises the specter of similar improper diverting of EGA assets.

Mrs. Vitale Managed the Buildings with “Illegal” Rents and Tenants

54. As a Co-Executor, director and shareholder, Petitioner is deeply concerned with the information contained in the attachments to Joseph Giaimo's letter referring to "legal" and "illegal" rents and tenants. At a meeting between Petitioner's attorneys and Joseph Giaimo, Mrs. Vitale's attorney, Joseph Giaimo explained that "illegal" rents referred to rents that were "under-reported" and confirmed that this issue of "illegal" rents extended to every one of the 18 properties owned by the Corporations. Mrs. Vitale has been managing these properties since before Decedent's death. Thus, these notations raise serious questions regarding the management of *all* the properties in the Corporations that were managed by Mrs. Vitale and Decedent and in which the Estate and Petitioner each has a one-third interest.

Respondents' Interference with Petitioner's Performance of his Duties

55. Despite several requests, Joseph Giaimo has refused to allow Petitioner or the attorneys representing him as Co-Executor access to the Giaimo real estate office (the "Offices") where the corporate and real estate records of Decedent and the Corporations are maintained; nor has he permitted access to the employees, at least one of whom, Donna Kamali, Petitioner is informed, has significant knowledge as to the collection and recording of rent, including cash payments and distribution of such cash payments, both before and after Mrs. Vitale began managing the properties and supervising the office.

56. Plainly, the directors in control of the corporation are guilty of oppressive, fraudulent and illegal actions and there is internal dissension sufficient to require dissolution of the corporation.

**Grounds for Preliminary Injunction and
Temporary Restraining Order**

Irreparable Injury

57. As demonstrated above, the actions of Mrs. Vitale as a shareholder, director and officer have been illegal and fraudulent and she is threatening to continue her improper and illegal actions at a directors' meeting called for 4pm on Monday, July 30. The Estate owns one-third of the stock in EGA, and such stock may be needed to satisfy the claims of creditors of the Estate which claims may be substantial.

58. Further, if Mrs. Vitale and Joseph Giaimo are not enjoined from conducting a meeting of the board of directors that she claims to have (illegally) reconstituted, the board can take corporate actions that would be irreversible as to third parties and, therefore, cause immediate and irreparable damage to the Estate, that Petitioner represents as a one-third shareholder, and its creditors.

59. Joseph Giaimo has stated that he has already transferred more than \$3 million to Antoinette Giaimo. These may have been moneys belonging to EGA. There is no way to know whether these assets can be recovered, if there is a determination that they are property of EGA. Further, Joseph Giaimo has indicated that there are bearer bonds at the Offices that are also valued in excess of \$3 million. Again, these may be property of EGA. If the board of directors is permitted to transfer these bonds or other assets, it may ultimately become impossible to recover them.

60. Plainly, Petitioner and the Estate will suffer immediate and irreparable injury should a temporary restraining order and preliminary injunction not issue.

The Balance of the Equities Favors Petitioner

61. Respondents will suffer no prejudice by the entry of a temporary restraining order and preliminary injunction in that the injunctive relief sought will

simply maintain the status quo until the issues raised herein can be determined. For these reasons, the balance of equities lies in favor of Petitioner.

62. No prior application for the relief requested herein, in the Order to Show Cause, or in the Petition has been made to this or any other court, except in connection with Petitioner's Petitions to the Westchester Surrogate's Court pursuant to SCPA 2103 for discovery and an inquiry and SCPA 711 to revoke the Letters Testamentary to Mrs. Vitale.

WHEREFORE, Petitioner respectfully requests:

- A. that the Court enter an order and judgment of dissolution pursuant to BCL §1104 (a) (1), (2) and/or (3), and/or §1104-a (a) (1) and/or (2); and that
- B. that pending the determination of this Petition and pending further order of the Court, Respondents Janet Giaimo Vitale, as a shareholder, director and officer, and Joseph O. Giaimo, as a director and, if already elected, an officer, and each of them be preliminarily enjoined (a) from denying Petitioner and his representatives access to all records and all premises which may contain records or other documents of Decedent or of the Corporations, i.e., the Offices; (b) from transferring any property, whether real property, securities, cash, physical property, personal property or property of any other kind or description, including cash, out of the corporation; (c) from destroying or removing any records of the corporation from the Offices or any other place in which they may be kept; and (d) from conducting any shareholder or directors' meetings; and
- C. that pending the hearing of this Petition and pending further order of the Court, Respondents Janet Giaimo Vitale, as a shareholder, director and officer, and Joseph O. Giaimo, as a director and, if already elected, an officer, and each of them be

temporarily restrained (a) from denying Petitioner and his representatives access to all records and all premises which may contain records or other documents of Decedent or of the Corporations, i.e., the Offices; (b) from transferring any property, whether real property, securities, cash, physical property, personal property or property of any other kind or description, including cash, out of the corporation; (c) from destroying or removing any records of the corporation from the Offices or any other place in which they may be kept; and (d) from conducting any shareholder or directors' meetings; and

D. that this Court grant Petitioner such further relief as is just.



Robert T. Giaino, Petitioner

PUTNEY, TWOMBLY, HALL & HIRSON LLP
Attorneys for Petitioner

By:



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

Petition of ROBERT T. GIAIMO, as Co-Executor of
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**PETITION TO DISSOLVE
EGA ASSOCIATES, INC. PURSUANT TO
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**NEW YORK
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