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NO. 19366-02

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 12-16-02

Submission Date: 1-31-03

Motion Sequence No.: 001,002,003/

MOT D

In the Matter of the Petition of
CYNTHIA KUSHNER, INDIVIDUALLY
AND AS THE HOLDER OF 33 1/3% of
the outstanding shares of stock of
SMILES CANDY CORP.,

Petitioner,

- against -

For the JUDICIAL DISSOLUTION OF
SMILES CANDY CORP., a domestic
corporation, pursuant to Article 11 of
the Business Corporation Law.

Respondent.

COUNSEL FOR Petitioner

Jay L. Yackow, Esq.

One Old Country Road

Carle Place, New York 11514

COUNSEL FOR Respondent

Blank Rome LLP

The Chrysler Building

405 Lexington Avenue

New York, New York 10174

ORDER

The following papers were read on Petitioner's petition to dissolve Smiles Candy Corp., and Respondent's cross-motion to dismiss the petition:

- Order to Show Cause dated December 5, 2002;
- Affidavit of Cynthia Kushner sworn to on December 3, 2002;
- Affidavit of Stephen Dilbert sworn to on December 12, 2002;
- Affirmation of Stanley P. Salzman, Esq. dated December 12, 2002;
- Notice of Cross-motion dated December 23, 2002;
- Amended Notice of Cross-motion dated January 2, 2003;
- Affidavit of Stephen Dilbert sworn to on January 2, 2003;
- Affirmation of Stanley P. Salzman, Esq. Dated December 23, 2002;
- Respondent's Memorandum of Law;

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Affidavit of Cynthia Kushner sworn to on January 24, 2003;
Petitioner's Reply Memorandum of Law.

This is a proceeding pursuant to Article 11 of the Business Corporation Law by the Petitioner Cynthia Kushner, individually and as the holder of 33 1/3 % of the outstanding stock shares of the Smiles Candy Corp., for an order (a) dissolving Smiles Candy Corp; (b) imposing a surcharge on the controlling shareholders pursuant to § 1104-a[d] of the Business Corporation Law; (c) appointing a receiver; (d) granting an accounting; and (e) awarding injunctive relief restraining Smiles Candy Corp. and its directors, agents or anyone acting in concert therewith from alienating, transferring, removing, dissipating and encumbering any corporate stock or assets.

Respondent cross-moves for an order dismissing the petition and ostensibly to compel arbitration.

BACKGROUND

Petitioner Cynthia Kushner ("Kushner"), is an officer, director and minority shareholder in the Respondent Smiles Candy Corporation ("Smiles"), a closely held family business which has been managed by Kushner's brother and Smiles president, Stephen J. Dilbert ("Dilbert"), (Pet., ¶ 3). Dilbert is the other shareholder in Smiles.

After a dispute arose between Kushner and Dilbert, Kushner commenced the subject dissolution proceeding pursuant to Business Corporation Law, § 1104-a, alleging, in pertinent part, that Dilbert committed fraudulent, illegal and oppressive acts; looted the corporation; wasted corporate assets; failed to comply with corporate

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formalities; denied her access to corporate books; and excluded her from participating in the affairs of the business.

The Respondent corporation now moves pre-answer, pursuant to CPLR 404 (a) to dismiss the verified petition, arguing that the Petitioner's allegations fail to state a claim for dissolution. Further, while the Respondent's notice of motion is not styled as an application to compel arbitration pursuant to CPLR 7503, the Respondent alternatively contends that the proceeding must be dismissed in light of an arbitration clause contained in the parties' 1979 shareholder's agreement (Agreement ¶ 8).

Respondent's motion to dismiss should be denied without prejudice and its motion to compel arbitration should be granted for the reasons herein set forth.

DISCUSSION

Upon an application pursuant to Business Corporation Law § 1104-a, a Court may dissolve a corporation upon a showing by 20% or more of all outstanding shares that the "directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" Business Corporation Law § 1104-a (a) (1). See, Matter of Seagroatt Floral Co. [Riccardi], 78 N.Y. 2d 439, 444 (1991); and Matter of Kemp & Beatley [Gardstein], 64 N.Y. 2d 63, 69-72 (1984).

Oppressive conduct within the meaning of the statute exists when "the majority['s] conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and * * * central to the Petitioner's decision to

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join the venture". Matter of Kemp & Beatley [Gardstein], *supra*; and Matter of Upstate Med. Assoc., 292 A.D. 2d 732 (3rd Dept. 2002). See also, In re Charleston Square, Inc., 295 A.D. 2d 425 (2nd Dept. 2002); In re Miescher, 288 A.D. 2d 129 (1st Dept. 2001); Cunningham v. 344 6th Ave. Owners Corp., 256 A.D. 2d 406 (2nd Dept. 1998); and Matter of Fancy Windows & Doors Mfg. Corp., 244 A.D. 2d 484 (2nd Dept. 1997).

The appropriateness of an order of dissolution pursuant to Business Corporation Law § 1104-a "is in every case vested in the sound discretion of the court considering the application". Matter of Kemp & Beatley [Gardstein], *supra* at 73. Here, Kushner alleges that Dilbert committed oppressive, illegal and fraudulent acts; wasted and/or looted corporate assets; engaged in unauthorized stock transactions; and denied the Petitioner access to the corporation's books and affairs.

At this early, pre-answer juncture of the proceeding, the Court finds that these allegations of wrongdoing suffice to make out a cause of action for involuntary dissolution. See, Matter of Steinberg, 249 A.D. 2d 551 (2nd Dept. 1998); Matter of HGK Asset Mgt., Inc. [Greenhouse], 228 A.D. 2d 246 (1st Dept. 1996). See also, In re Can Plant Maintenance, Inc., 270 A.D. 2d 829 (4th Dept. 2000); Cunningham v. 344 6th Ave. Owners Corp., *supra*; and LaBarbera v. D'Amico, 240 A.D. 2d 640, (2nd Dept. 1997).

To the extent that Dilbert denies any wrongdoing or asserts factual claims with respect to the nature of Kushner's reasonable expectations under the circumstances presented (See e.g., In re Charleston Square, Inc., *supra*; Brickman v. Brickman Estate

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at Point, Inc., 253 A.D.2d 812 [2nd Dept.1998]), those contentions create issues of fact which cannot be summarily resolved on the papers before the Court. See, In re WTB Properties, Inc., 291 A.D. 2d 566 (2nd Dept. 2002); and Matter of Steinberg, *supra*. It bears noting that in both the cases cited by Respondent to support of the claim that the Petitioner's reasonable expectations were not defeated, trials were conducted on the respective petitions at issue. See, Brickman v. Brickman Estate at Point, Inc., *supra*; and Matter of Farega Realty Corp., 132 A.D. 2d 797 (1st Dept. 1987).

However, to the extent that the Respondent's notice of cross-motion can be viewed as seeking an order compelling arbitration of the Petitioner's claims (CPLR 7503 [a]) that relief must be granted.

Paragraph 8 of the Shareholder Agreement provides, "Any controversy or claim arising out of, or relating to, this Agreement, or the claimed breach thereof, shall be settled by arbitration * * *." A clause such as this is sufficiently broad to include a claim for dissolution of the corporation based upon claims of oppressive conduct towards a minority shareholder and/or breach of fiduciary duty. See, Matter of Ehrlich v. Stein, 143 A.D. 2d 908 (2nd Dept. 1988); and Matter of Levy, 79 A.D. 2d 684 (2nd Dept. 1980).

The fact that Respondent did not affirmatively move to stay this proceeding and to compel arbitration does not prevent the Court from granting such relief. Ordinarily, a party must affirmatively move to stay a proceeding and to compel arbitration. A notice of motion or cross-motion seeking such relief should specify the relief requested and the grounds for seeking such relief. CPLR 2214 (b), 2215, 7503 (a).

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However, where, as in this case, the Respondent makes clear its position that the matter should be stayed and arbitration compelled, the Court may grant such relief despite the procedural defect where the issue has been fully presented to the Court. Plateis v. Flax, 54 A.D. 2d 813 (3rd Dept. 1976). See also, 5 NY Jur. 2d *Arbitration and Award* § 54. In this case, the issue of whether this proceeding should be submitted to arbitration has been fully presented and argued before this Court at various points. Respondent's answer raises, by way of affirmative defense, the arbitration provisions of the Shareholder Agreement. Indeed, the various papers and memoranda of law submitted by Respondent and Petitioner alike fully discuss and brief whether the issues raised in this proceeding are arbitrable.

Furthermore, Respondent's participation in this proceeding does not constitute a waiver of its right to have this matter submitted to arbitration. Respondent's participation has always been understood to be without prejudice to its right to seek arbitration. Finally, the discovery which was directed by the Court is discovery which would have been required and directed whether this matter was heard by the Court or by an arbitrator. See, Plateis v. Flax, *supra*.

Therefore, it is,

ORDERED, that the Respondent's cross-motion is **granted** to the extent of staying these proceedings and directing the parties to proceed to arbitration in accordance with the provision of Paragraph 8 of the Shareholder Agreement. Other than this ruling to compel arbitration, no other rulings or findings should be deemed as

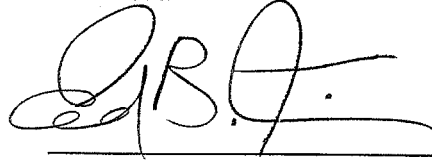
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binding on the arbitrator. All other applications are respectfully referred to the arbitrator;
and it is further,

ORDERED, that Respondent shall proceed with arbitration forthwith.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
April 22, 2003



Hon. LEONARD B. AUSTIN, J.S.C.

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ENTERED

APR 29 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE