

**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

In the Matter of the Application of

EFRAIM LERMAN,

Individually and as holder of fifty  
percent of the outstanding shares of

TIVE CLOTHING, INC.,

Petitioner

INDEX NO.: 002947/2009  
MOTION DATE: 05/08/09  
MOTION SEQUENCE: 001

For the Dissolution of TIVE CLOTHING, INC.,  
a Domestic Corporation, Under Article 11 of  
the Business Corporation Law.

The following papers read on this motion:

Order to Show Cause & Supporting Affirmation .....	1
Affidavit in Opposition of Fredy Knaffo & Exhibits Annexed .....	2
Reply Affirmation of Efraim Lerman, Reply Affirmation of Michael J. Spithogiannis & Exhibits Annexed .....	3

**PRELIMINARY STATEMENT**

The Petitioner moves by Order to Show Cause for dissolution of TIVE CLOTHING, INC. ("TIVE") on the ground that the two equal shareholders are deadlocked, and it is impractical for them to continue in the operation of the corporation, and, to the contrary, it would be beneficial that TIVE be dissolved , and its business and affairs liquidated in accordance with Business Corporation Law § 1104.

The other 50% shareholder, Fredy Knaffo, opposes the motion on the ground that the movant, Efraim Lerman, has perpetrated a fraud upon him, and breached his fiduciary duties, which is stated to be the subject of another action pending in the Court. He requests that the motion to dissolve the corporation and appoint a receiver to wind up the affairs of TIVE be denied.

#### BACKGROUND

In 1986 the parties began operating a men's clothing store, known as Effie's, at 351 South Oyster Bay Road, Plainview. Petitioner had managed a store at that location known as Lewis & Clark, which was succeeded by Effie's. TIVE was incorporated in 1988, with each party owning 50% of the shares. The corporation signed a 10-year lease for the store.

There was considerable friction between the shareholders, and by 2006 there were discussions of terminating the business, or a sale of one or the others shares to the other. There is considerable dispute as to whether or not the business was actually profitable, or the income adequate for both of the parties.

After negotiations and mediation failed, the parties signed a Stockholders' Agreement on June 22, 2007. The Agreement provided a method for either to sell their shares to the other at an agreed-upon price. There is disagreement as to whether or not Lerman agreed to purchase Knaffo's shares, but no writing was ever executed.

The Agreement provided that if one party offered his shares to the other at the stated price, the party to whom the shares was offered had 60 days within which to accept the offer in writing. Upon the failure of a shareholder to exercise the option to purchase, the Corporation was to be dissolved, and the inventory liquidated within 6 months of the end of the 60-day period. In the months following the Agreement, the parties continued to operate the store, but the lack of income required each of them to each make approximately \$30,000 in contributions to the business to cover operating expenses.

As the lease was expiring on August 31, 2008, the landlord agreed to extend the

lease for three months, with a three-month option. This is another issue of conflict, in that Knaffo contends that Lerman intentionally failed to submit the lease to the landlord for the purpose of allowing it to lapse, and enter into an agreement on his own behalf, in violation of his fiduciary duty to him. In any event, the lease did expire, the parties vacated the store, and placed unsold inventory in storage. The parties conducted a “going out of business sale”, and liquidated as much inventory as possible.

After Efie’s closing, Lerman signed a lease for the same premises, and opened a men’s and boy’s clothing store named Ler Man’s. Knaffo claims that this was a plan that Lerman had in mind all along, and the negotiations to effectuate a buy-out were simply a ploy to push him out of the business. Lerman, on the other hand, contends that this is precisely the purpose of the Shareholders’ Agreement, and that dissolution was the intended result of the refusal of one shareholder to buy out the other.

There is some confusion in that the Agreement refers to Ofnah Clothing, Inc., although this was not the corporate name under which they operated Effie’s. It seems clear that it was the stated intention of the parties to arrange for an organized winding down, and ultimate dissolution of the business they were operating if the offer of one of the shareholders to purchase the shares of the other was declined.

#### DISCUSSION

The court concludes that Tive Clothing, Inc. be, and the same is hereby dissolved. It is clear that there was an impasse which precluded the parties from operating together in the operation of Efie’s Clothing Store. It appears that the parties have, for the most part, distributed and secured the unsold inventory of the store. There remains a claim by Knaffo that the racks and shelving left in the store was personal property for which he is entitled to be reimbursed for his 50% share. This claim is disputed by Lerman, who takes the position that everything that could have been removed, was at the termination of the lease. The fixtures were, he claims, affixed to the structure and constitute fixtures, the ownership of which passed to the landlord.

The value of the inventory remaining in storage, and the issue as to whether or not the racks and shelving constitute personal property or fixtures, are the only issues left unresolved. In this respect, the Court concludes that the operation of Ler Man's is separate and distinct from Effie's, and that Knaffo has no legitimate interest in the operation of that business. Once the offer to sell his shares to Lerman was rejected, the Agreement specifically provided for the dissolution of the corporation. Under these circumstances Lerman had no obligation to continue to operate in business with Knaffo, and either of them could have taken the opportunity to start a new business in the premises at the expiration of the lease.

It would be inappropriate, under these circumstances, to impose the cost of a private Referee on the parties. (*Mitchell v. A.J. Medical Supply, Inc.*, 141 A.D.2d 732 [2d Dept. 1988]). The issues are the disposition of the stored inventory at the best price obtainable, and the question of whether or not the shelves and racks left behind at the termination of the lease constituted fixtures, which became the property of the landlord, or personalty, which could have been readily removed without damage to the structure. If the former, Knaffo has no entitlement to a share of their value; if the latter, he is entitled to 50% of their value.

The parties are directed to communicate with Thomas Dana, Esq., Court Attorney/Referee, 100 Supreme Court Drive, 2<sup>nd</sup> Floor, Mineola, New York 11501, Telephone No.: (516) 571-1476 for the purpose of scheduling a hearing date. The issues to be heard and determined are limited to the arrangements for the disposition of the remaining inventory, and the determination as to whether the shelves and racks constitute personalty or fixtures which are the property of the landlord. If the former, the Referee is to determine the value as of August 31, 2008 and award 50% of the value to Knaffo.

This constitutes the Decision and Order of the Court.

Dated: July 8, 2009

  
**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE