

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 1347/07

MOTION DATE: July 13, 2007
Motion Sequence #001, 002, 003

In the Matter of the Application of
BRENDAN M. SCHNECK individually
and as 50% shareholder of
R & J COMPONENTS CORP., B & T
SCHNECK, INC., FEDERAL CONNECTORS,
INC. S & S ELECTRONICS CORP. and
STANDARD RADIO & ELECTRICAL
PRODUCTS CORPORATION, and SCHNECK
PROPERTIES OF SC, LLC,

Petitioner-Plaintiff,

For the Judicial Dissolution of
R & J COMPONENTS CORP., B & T SCHNECK,
INC., FEDERAL CONNECTORS, INC., S & S
ELECTRONICS CORP., STANDARD RADIO &
ELECTRICAL PRODUCTS CORPORATION,
SCHNECK PROPERTIES OF SC, LLC,

-against-

TYREL C. SCHNECK and NEW YORK STATE
TAX COMMISSION,

Respondents-Defendants.

The following papers read on this motion:

Order to Show Cause..... XX
 Notice of Motion..... X
 Affirmation in Opposition..... X
 Reply Affirmation XXXX
 Memorandum of Law..... XXXXXXXX

This application, brought on by Order to show cause, by the petitioner Brendan M. Schneck, individually and as 50% shareholder of R & J Components Corp., B & T Schneck, Inc., Federal Connectors, Inc., Standard Radio & Electrical Products Corporation; Schneck Radio & Electrical Products Corp; Schneck Properties of SC, LLC [sometimes collectively the "companies"], for an order: (1) judicially dissolving the foregoing corporate entities pursuant to BCL § 1104[a]; (2) restraining and enjoining the companies and their principals from taking stated actions except in the ordinary course of business; (3) directing the companies to produce all of their books and records; and (4) requiring respondent Tyrel C. Schneck to produce "all of his records which reflect payments received by him from the Companies"; and a motion, by the respondent Tyrel C. Schneck, for an order pursuant to CPLR 3212: (1) dismissing the petition in its entirety; (2) directing the petitioner to transfer his interests in R & J Components Corp; Federal Connectors, Inc. and Schneck Properties SC, LLC, to Tyrel C. Schneck, as allegedly required by those entities' shareholders' agreements; or (3) in the alternative, staying the instant proceeding in favor of arbitration with respect to R & J Components Corp and Federal Connectors, Inc., pursuant to a demand dated May 22, 2007; and an Order to show cause, by the petitioner Brendan M. Schneck, for an order pursuant to CPLR 7503[b] staying arbitration sought by the respondents, are all determined as hereinafter set forth.

The petitioner Brendan M. Schneck, and the respondent Tyrel C. Schneck – who are brothers – each own 50% of the outstanding stock in several of the respondent corporations, *i.e.*, R & J Components Corp; B & T Schneck, Inc., Federal Connectors, Inc., Schneck Radio & Electrical Products Corp; and Schneck Properties of SC, LLC [collectively the "companies"].

The record indicates that some fifty years ago, the parties' late father, Raymond Schneck, entered into the business of selling new and surplus electronic parts (T. Schneck Aff., ¶¶ 5-8).

Tyrel and Brendan began working with their father full-time in, respectively, the late 1970's and early 1980's.

Raymond passed away in 1990, and Tyrel – who currently serves as president of the respondent companies – claims that he "ended up running the Companies" (T. Schneck Aff., ¶¶ 9, 28).

According to Tyrel, under his leadership the business has "grown exponentially" and evolved into a highly profitable enterprise (T. Schneck Aff., ¶ 8).

Tyrel also claims that he has managed the company and that Brendan was primarily a salesperson (T. Schneck Aff., ¶ 7) – although Brendan disputes this and contends that he has performed a wide variety of important functions in the company – none of which was any less valuable than the jobs performed by Tyrel (B. Schneck Aff., ¶¶ 13-14, 36).

The business, as presently constituted, is allegedly conducted through several of the entities which have been named as respondents herein.

With respect to these entities, Tyrel asserts that the original company run by Raymond "was later folded into what is today known as R & J Components Corp." ["R & J"] (T. Schneck Aff., ¶ 12).

Tyrel is apparently responsible for distributing the salaries and profits generated by the companies, and allegedly assured Brendan that each was receiving "the same, equal 50-50 share" (B. Schneck Aff., ¶¶ 20-21).

Although Brendan initially and over the years trusted that Tyrel's distributions were made equally, he later allegedly discovered, among other things, that the distributions were not equal; that Tyrel had been taking "hundreds of thousands of dollars more each year" than he was paying out to Brendan (B. Schneck Aff., ¶¶ 31-33); that commencing in late 2005 and thereafter, Tyrel adopted a dictatorial management style; froze him out from participating in the management of the companies; barred access to the companies' books and records; and engaged in self-dealing, diversions and other questionable and improper business practices (B. Schneck Aff., ¶¶ 23-26).

According to Tyrel, however, the differential in salary – which he has conceded – was never hidden, but rather, was something instituted long ago by the parties' father in recognition of Tyrel's executive position and managerial responsibilities with the

companies (T. Schneck [Aug 2] Aff., ¶¶ 17-21). Nor was the salary disparity a secret since it was openly reflected on the companies' tax returns – to which Brendan purportedly had access (T. Schneck Reply [April 2] Aff., ¶¶ 20-21). In any event, Tyrel claims that he never promised Brendan that Brendan's salary would be equal to his own (T. Schneck Reply [Aug 2] Aff., ¶¶ 16-17).

By verified petition and complaint dated January 2007, Brendan commenced the within hybrid proceeding and action pursuant to BCL § 1104[a] for judicial dissolution of the foregoing corporate entities.

The respondents have answered and interposed various affirmative defenses.

After the original petition was served in January of 2007, the petitioner moved by order to show cause for stated interim relief, which application was granted to the extent that the respondents were temporarily: (1) restrained and enjoining from taking stated actions except in the ordinary course of business; and (2) directed to produce "all of their books and records", and the Court also directed Tyrel to produce "all of his records which reflect payments received by him from the Companies, * * *". In a handwritten decretal paragraph, the Court further ordered that the respondents, upon reasonable notice, were to "permit immediate access to all books and records of the respondent corporations whether maintained by the respondents' accountants or the respondents and to produce same within 45 days of the initial return date" (Petitioner's OSC dated Jan. 25, 2007 at 4).

Shortly thereafter, the respondents moved for summary judgment: (1) dismissing the petition in its entirety; and/or (2) for a further order holding that the commencement of the subject dissolution proceeding triggered certain buy-out provisions in the R & J, Federal Connectors, Inc ["Federal"] and Schneck Properties SC, LLC ["Properties of SC"] shareholders agreements.

Alternatively, the respondents sought a stay of the instant Court proceeding in favor of arbitration, as supported by the presence arbitration clauses contained in the R & J and Federal shareholder agreements.

By stipulation dated March, 2007, the parties agreed, *inter alia*, that Brendan would be permitted to serve an amended petition-complaint, which pleading is now before the Court.

Among other things, the amended pleading alleges that Brendan is a 50% shareholder in the named respondent entities; that Tyrel has diverted substantial funds to himself and failed to pay Brendan his proper salary and 50% share of the profits in accordance with his equal ownership interest; that Tyrel has completely frozen him out of the management of the business and denied him access to various company records; and that as a result, irreconcilable dissension and deadlock currently exists between him and Tyrel – all of which allegedly establish Brendan's entitlement to dissolution of the respondent companies (*see*, BCL § 1104[a][1]-[3]).

The amended petition also includes separate causes of action for an accounting and breach of fiduciary duty (Pet., ¶¶ 67-75).

In May of 2007 – and prior to resolution of their pending summary judgment application – the respondents served a formal demand for arbitration with respect to R & J and Federal.

In response, the petitioner has moved by order to show cause for a permanent stay of the requested arbitration; for an order dissolving the various respondent entities; and for additional relief directing the respondents to, *inter alia*, produce various books and records.

Turning first to the dispute involving the respondents' arbitration notices, it is settled that while "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate" (**Sherrill v. Grayco Builders, Inc.**, 64 NY2d 261, 273 [1985]; **De Sapio v. Kohlmeyer**, 35 NY2d 402, 405 [1974]), "where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory" (**De Sapio v. Kohlmeyer**, *supra*, at 405; *see also*, **Sherrill v. Grayco Builders, Inc.**, *supra*; **Cunningham v. Horning Const.**, 309 AD2d 1187, 1188; **Import Alley of Sunrise Mall, Inc. v. Sunrise Mall**, 120 AD2d 708).

Here, while the respondents' summary judgment application does contain a claim based upon the arbitration clauses – albeit one appended as a final point heading in their supporting briefs – the primary relief sought is based on substantive dismissal grounds unrelated to the arbitration clauses at issue; that is, the relief sought is predicated upon a variety of legal theories made expressly applicable on the merits to all the claims and

corporate entities named by the petitioner – including the entities to which the arbitration clauses are allegedly applicable (see generally, **Board of Ed., Utica School Dist. No. 1 v. Delle Cese**, 65 Misc.2d 473, 479-480 [Supreme Court, Oneida County 1971][motion for summary judgment "directed to the merits" * * * considered * * * determinative of an election to proceed at law and not to depend on the arbitration agreement"]; **Board of Educ. v. Mancuso Bros.**, 25 Misc.2d 122, 125 [Supreme Court, Madison County 1960] accord, **De Sapio v. Kohlmeyer**, *supra*, 35 NY2d at 405 *cf.*, **Application of Rose Barrack, Inc.**, ___Misc___, 65 NYS2d 808 [Supreme Court, New York County 1946]).

Although arbitration is favored in New York (e.g., **Matter of Smith Barney Shearson v. Sacharow**, 91 NY2d 39, 49 [1997]), it is also the case that "[t]he courtroom * * * may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration" (**De Sapio v. Kohlmeyer**, *supra*, at 406; **Import Alley of Sunrise Mall, Inc. v. Sunrise Mall**, *supra* *cf.*, **Roggio v. Nationwide Mut. Ins. Co.**, 66 NY2d 260, 263 [1985]).

Under the circumstances presented, the respondents have waived any right they may have possessed to proceed in accord with the subject, arbitration clauses.

However, the causes of action for dissolution with respect to the two foreign corporations – Properties SC and Federal – should be dismissed since it has been held that "a New York court may not dissolve a foreign corporation, even if the corporation's principal place of business is New York" (**In re Dissolution of Chris Kole Enterprises**, 188 Misc.2d 207, 209 [Supreme Court, New York County 2001] see, **Matter of Warde-McCann v. Commex, Ltd.**, 135 AD2d 541, 542, 2nd Dept., 1987).

The respondents further assert that, as a matter of law, Brendan has triggered the buy-out provisions contained in the R & J, Schneck Properties and Federal shareholders agreements by instituting the foregoing proceeding (Resps' Brief at 6 *see*, Mot., Exhs., "C," "D," "F").

While Courts have held that a dissolution proceeding can trigger a buy-out provision – where a shareholder's agreement is very inclusively framed with respect to what constitutes a qualifying transfer (**Johnsen v. ACP Distribution, Inc.**, 31 AD3d 172, 177; **Doniger v. Rye Psychiatric Hosp. Center, Inc.**, 122 AD2d 873, 877-878 *cf.*, **Matter of Pace Photographers, Ltd.**, 71 NY2d 737, 747 [1988]) – the language at issue

here lacks the broad scope and breadth present in the two leading cases relied on by the respondents (see, **Johnsen v. ACP Distribution, Inc.**, *supra*; **Doniger v. Rye Psychiatric Hosp. Center, Inc.**, *supra*).

Determinative in those cases was language to the effect that, "the shares must be offered following "any proposed passage or disposition of shares whatsoever, *including but not limited to* * * * sale, delivery, assignment, gift, exchange, transfer [or] distribution"**(Doniger v. Rye Psychiatric Hosp. Center, Inc., supra**, at 875, 877(emphasis in original) – and language no less inclusively framed in **Johnsen**, where the parties similarly "chose the expansive language '*in any manner whatsoever*' to define "the circumstances that would trigger a sale of shares under the terms of the stockholders agreement" (**Johnsen v. ACP Distribution, Inc., supra**, at 178 [emphasis added] see also, **In re Shimmer**, 14 Misc.3d 1212(A), 2007 WL 15084 [Supreme Court, Onondaga County 2007]).

In contrast, the relevant language in the R & J and Federal shareholders agreements at issue here provide that no shareholder shall "sell assign mortgage, hypothecate, transfer, pledge create a security interest on lien encumber, give *or otherwise dispose* of any of the Shares * * * except as expressly provided in this Agreement * * *"(Resps' Mot., Exh., "C" [R & J SH Agreement] ¶ 2.1.1; Exh., "D" [Federal SH Agreement], ¶ 2.1.1)[emphasis added].

The remedy sought by the respondents is relatively drastic and was granted in **Johnsen** and **Doniger** only upon a finding that the expansive language and accompanying contract provisions employed, left no doubt that, as a matter of law, the "parties clearly intended to cover the broadest spectrum of events that would trigger the buyout provisions of their agreement" (**Johnsen v. ACP Distribution, Inc., supra**, at 178).

Here, however, the language relied on falls qualitatively short of the definitive phrasing contained in **Doniger** and **Johnsen** and, in the Court's view, does not establish the respondents' entitlement to judgment as a matter of law see, **Matter of Cohen (Safe Coach, Inc.)**, ___ Misc2d ___ [NOR], NYLJ December 22, 1994, at 30, col. 3 [Supreme Court, Queens County 1994]"it is a far cry to conclude that the **Doniger** court established a broad, all-encompassing rule, to be applied in any dissolution proceeding").

Notably, in **Johnsen v. ACP Distribution, Inc.**, (*supra*, at 174), the buy-out provision also contained the phrase relied on by the respondents here, *i.e.*, "or otherwise

dispose...". It is significant, however, that the First Department made no reference to this language as pertinent by itself, but instead relied on the immediately ensuing phrase as the determinative; namely the phrase, "*in any manner whatsoever*."

The language contained in the Schneck Properties shareholders' agreement, to which the respondents have referred the Court (Brief at 9; Reply Brief at 6), is equivocal and does not even contain the language set forth in the R & J and Federal agreements – much less terminology similar to that deemed determinative in Doniger and Johnsen (Resps' Exh., "F," SH Agreement, ¶ 12.1[b]).

Finally, the Court finds that issues of fact exist with respect to the remaining causes of action which seek dissolution pursuant to BCL § 1104[a].

In order to obtain judicial dissolution pursuant to Business Corporation Law 1104, the petitioner must establish, *inter alia*, that internal dissension has resulted in a management deadlock (see, Matter of Fazio Realty Corp., 10 AD3d 363, 364-465; Matter of Parveen, 259 AD2d 389, 391), as evidenced by conduct resulting in "an irreconcilable barrier to the continued functioning and prosperity of the corporation" (Matter of Kaufmann, 225 AD2d 775 see, Application of Sheridan Const. Corp., 22 AD2d 390, *affd*, 16 NY2d 680 [1965]).

Notably, "[d]issolution is not to be denied merely because the dissension has not yet had an appreciable impact on the corporation's profitability" (Patti v. Fusco, 10 Misc 3d 1058 A, S. Ct., Nassau County, 2000; see also, Neville v. Martin, 29 AD3d 444, 445).

Whether "the extraordinary step of judicial dissolution" is warranted rests within the discretion of the court (Application of Glamorise Foundations, Inc., 228 AD2d 187, 189).

When factual issues have been presented with respect to whether the alleged internal dissension is "genuinely irreconcilable or terminal" to the well-being of the corporation, summary judgment will be denied (Application of Glamorise Foundations, Inc., *supra*, at 189; Myers v. Gold, 77 AD2d 652).

With these principles in mind, and upon viewing the hotly disputed allegations made "in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (Fundamental Portfolio Advisors, Inc. v.

