

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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In the Matter of the Application of
ANGELO VASSILAKIS HOLDER OF
TWENTY PERCENT OF ALL OUTSTANDING
SHARES OF 150-11 CORP.,

Petitioner,

For the Dissolution of 150-11 Corp., a
Domestic Corporation.

Index No. 21248/08
Motion Date: 5/13/09
Cal. No. 63 & 64

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The following papers numbered 1 to 18 read on this application by Petitioner for an order pursuant to Business Corporation Law (“BCL”) § 1104(a)(1) dissolving **150-11 Corp.**, and application by Petitioner for an order enjoining **150-11 Corp.** from selling the corporation, or in the alternative, sequestering the proceeds of any sale of the corporation. The applications under Calendar numbers 63 and 64 have been consolidated for purposes of disposition.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affirmation-Exhibits.....	1-3
Opposing Affidavit-Affirmation-Exhibits.....	4-7
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Upon the foregoing papers, the application by Petitioner for an order pursuant to Business Corporation Law (“BCL”) § 1104(a)(1) dissolving **150-11 Corp.**, and application by Petitioner for an order enjoining **150-11 Corp.** from selling the corporation, or in the alternative, sequestering the proceeds of any sale of the corporation are decided as follows:

Petitioner claims, *inter alia*, that he is a 20% owner of the outstanding shares of the Pizza/Delicatessen business known as 150-11 Inc., a domestic corporation and the corporation has acted in an oppressive manner including systematically expelling him from the day to day operation and management of the company and terminating his relationship with the corporation. Petitioner also claims that dissolution of the corporation is the only way he may receive a fair return on his investment and is necessary to protect his rights and interests in the corporation. The corporation and its President, George Mirmigos oppose these applications and essentially claim that Petitioner is not a shareholder of the corporation and has no standing to

maintain this action. According to Mr. Mirmigos, Petitioner failed to pay his portion of the amount invested in the corporation, did not sign any closing documents for the purchase of the business, and worked as an employee only at the corporation. In his reply papers, Petitioner has submitted various tax documents that indicate his status as a shareholder.

In pertinent part, Business Corporation Law § 1104-a, reads as follows:

Petition for judicial dissolution under special circumstances

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, . . . entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders.

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" In the present case, in view of the parties' conflicting assertions, the Supreme Court should have held an evidentiary hearing. In re Fancy Windows & Doors Mfg. Corp., 244 A.D.2d 484 (N.Y. App. Div. 2d Dep't 1997) (citations omitted.) In his petition Angelo Vassilakis has sufficiently pleaded a cause of action for dissolution under Business Corporation Law § 1104-a (a) (1) the allegations of which, if borne out, would entitle him to relief. He has also submitted sufficient evidence that raises an issue of fact as to his standing to bring this petition. However, this evidence is not sufficient to entitle him to the granting of his Petition. The various tax documents and his affidavit indicate that he made a substantial investment in this corporation and although he was not issued stock certificates, he was a shareholder. Capizola v. Vantage Int'l, Ltd., 2 A.D.3d 843 (N.Y. App. Div. 2d Dep't 2003) The Court notes that the evidence submitted in Petitioner's Reply Papers is properly before this Court since they were in direct response to allegations made in the opposition papers. *See*, Conte v Frelen Associates, LLC., 51 AD3d 620 (2d Dept 2008.) In light of the above and in the face of the Corporation's denial that Vassilakis held any interest in the corporation, the court orders a hearing to determine whether the Petitioner was a shareholder and held the requisite amount of shares (20% or more) to bring a proceeding pursuant to Business Corporation Law § 1104-a LaBarbera v. D'Amico, 240 A.D.2d 640 (N.Y. App. Div. 2d Dep't 1997.) The Parties shall appear in Part 17, on June 12, 2009 at 9:30 a.m. for a conference to discuss the need for discovery and scheduling this hearing.

The application for an order enjoining **150-11 Corp.** from selling the corporation, or in the alternative, sequestering the proceeds of any sale of the corporation is denied in its entirety. A preliminary injunction may issue only if the moving party can demonstrate (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in its favor. (Doe v Axelrod, 73 NY2d 748; Preston Corp. v

Fabrication Enters., 68 NY2d 397; W.T. Grant Co. v Srogi, 52 NY2d 496.) "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law . . . and the burden of showing an undisputed right rests upon the movant." (Zanghi v State of New York, 204 AD2d 313, 314.)

As noted, this action is primarily one for the dissolution of a pizza/delicatessen and there is conflicting evidence regarding Petitioner being an owner of the corporation. While the mere existence of an issue of fact does not preclude a finding of the likelihood of success on the merits, this Court finds that the submitted evidence suggests that the resolution of this matter is likely to be resolved without the dissolution of the corporation. Consequently, Petitioner has not established the first element in procuring injunction relief, likelihood of success on the merits.

Regarding the second element in procuring injunctive relief, establishing irreparable injury, in the instant case, Petitioner seeks to recoup money invested and payments for the sale of his shares of ownership in the corporation when it is sold. This clearly is not an instance of recovery for a unique property and thus granting an injunction is precluded. *See*, Schrager v. Klein, 267 AD2d 296. This is especially so since there is nothing to suggest that the award to which plaintiff may be entitled would be rendered ineffectual without injunctive relief. Moreover, Petitioner's mere apprehension and speculation that the corporation and Mr. Mirmigos will sell or convey the corporation and thereafter hide the proceeds, is an insufficient basis upon which to grant an injunction. (*See*, Holdsworth v. Doherty, 231 AD2d 930.) As such, Petitioner has not established element two, irreparable injury.

In regard to the third element, the weight of the equities, Petitioner has not demonstrated that the alleged irreparable injury to be sustained by him is more burdensome to him than the harm that will be caused to the corporation through imposition of the injunction. *See*, Reuschenberg v Town of Huntington, 16 AD3d 568 (2d Dept 2005.) As pointed out above, Petitioner has not alleged an irreparable injury. In any event, Petitioner's allegations involve, in essence, an investment in a restaurant and the corporation and its President claims that such investment was not made. Under these circumstances, to enjoin the corporation from a potential sale would be unduly burdensome to the corporation. As such, Petitioner has not established the third element, the balance of equities in their favor.

Consequently, Petitioner's submissions have not established the necessary elements for obtaining the requested injunctive relief and the instant application is denied. For the same reasons as outlined above, there is no basis to have the proceeds from any sale sequestered in any way. A copy of this order is being sent to the parties by means of facsimile transmission on May 19, 2009.

Dated: May 19, 2009.

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ORIN R. KITZES, J.S.C.