

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
 Justice Supreme Court

Original Motion Date: 09-30-2008
Motion Submit Date: 10-16-2008
Motion Sequence No.: 001 MD

 DAVID WENGER, X

Petitioner,

-against-

L. A. WENGER CONTRACTING CO.,
 INC. and LOUIS WENGER,

Respondents.

X

Attorney for Plaintiff

Milber Makris Plousadis & Seiden, LLP
 1000 Woodbury Road
 Suite 402
 Woodbury, New York 11797

Attorney for Defendant

Elliot Bloom, Esq.
 114 Old Country Road
 Suite 308
 Mineola, New York 11501

Petitioner, David Wenger, moves, by Order to Show Cause (motion sequence number 001) for an Order 1) dissolving the corporation "L. A. Wenger Contracting Co," (the Corporation), in which he is a minority shareholder, pursuant to BCL § 1104-a; and 2) appointing a Receiver to manage corporate assets following dissolution pursuant to BCL § 1113. In order to preserve the status quo pendente lite, Petitioner also seeks preliminarily to enjoin the Corporation as well as its directors and officers from disbursing corporate funds or property in favor of any shareholder, officer or director except in the ordinary course of business.

The Petitioner asserts that he is a 31% shareholder in the Defendant construction corporation in which his father, individual Respondent, Louis Wenger, is 69% shareholder. According to Petitioner, the majority shareholder has been engaged over the past several years in a series of oppressive and fraudulent acts inuring to Petitioner's detriment as a minority shareholder including: 1) transfer of real property owned by the Corporation for no consideration to Petitioner's sister;

2) transfer of real property owned by the Corporation to Respondent Louis Wenger without consideration being paid; 3) failure to respond to Petitioner's legitimate requests to provide Petitioner with financial information; 4) failure of the Corporation to prepare tax returns and supporting documentation therefore for the 2005, 2006 and 2007 tax years; 5) failure to account for and distribute settlement proceeds from an action settled by the Corporation; 6) breach of fiduciary duty owed to the Petitioner by the Respondents failing to settle a claim against the Corporation resulting in ultimate financial damage; 7) improper transfer of real property by Respondents in violation of the Debtor- Creditor Law; 8) conversion of corporate property by Louis Wenger for personal use; and 9) failure to pay business income to Petitioner as reflected on K-1's filed by the Corporation.

Respondents, by the majority shareholder, Louis Wenger, deny the allegations set forth in the Petition, stating that neither he nor the Corporation have wasted nor improperly diverted any corporate assets; that no corporate assets have been dissipated and that Petitioner has never been frozen out of corporate governance. In Louis Wenger's Affidavit, he asserts that the transfers of property discussed in the Petition were accomplished properly for the benefit of the Corporation. Further, Respondent Louis Wenger states that after having deliberately removed himself from a family business for over seven years, Petitioner is utilizing this proceeding in an improper attempt to take over a business run properly by the majority shareholder for over fifty nine years. Based on the foregoing, Respondents also set forth an objection to the Court's limited Restraining Order.

In Reply, Petitioner's counsel argues that Respondents fail to dispute the specifics of the Petition and argues that by virtue of the Court having signed an Order to Show Cause, the Court has already stated its determination that the Petition sets forth a prima facie case of entitlement to dissolution under BCL § 1104-a.

Section 1104-a (f) the Business Corporation Law provides the minority

shareholders with protection from oppressive conduct by those holding majority interests. The appropriateness of an order of dissolution or other related remedy pursuant to the above section is in each case vested in the sound discretion of the court considering the application. **Matter of Kemp & Beatley v Gardstein**, 64 NY 2d 63, 484 NYS 2d 799, 473 NE 2d 1173 (1984).

Where the allegations in a Petition by a minority shareholder to dissolve a closely held corporation pursuant to BCL § 1104-a are disputed, the courts of this State have held that a hearing is mandatory both to determine whether the oppressive conduct set forth by the statute exists and to decide the appropriate remedy. **In re WTB Properties, Inc.**, 291 AD 2d 566, 737 NYS 2d 654 (2d Dep't 2002); **Matter of Steinberg v Cross Country Paper Products Corp**, 249 A2d 341, 671 NYS 2d 341 (2d Dep't 1998). In addition, appointment of a Receiver to manage the business of such corporation is inappropriate at the early stages of such proceeding unless and until the Petitioner can demonstrate to the Court that such remedy is necessary to preserve the assets of the corporation. **BCL § 1113**; **Matter of Hessert v Brooklyn Home Dialysis Training Ctr.**, 231 AD 2d 719, 647 NYS 2d 1000 (2d Dep't 1996).

In this case, the minority and majority shareholders have set forth far differing versions of the facts. When contested as they are here, the Court must, through a full record, including the testimony of the parties, determine whether the majority shareholder has, in fact, been engaged in improper transfers, self dealing, or whether, as stated by the individual Respondent, all actions have been appropriate under the circumstances. Nor is the Court supplied with sufficient information at this stage to determine that appointment a Receiver is necessary. However, the Court does believe, in view of the seriousness of the allegations, that a Temporary Restraining Order at this early stage of the litigation serves the salutary purpose of preserving the status quo pendent lite. **See, CPLR, Art. 63, Gambar Enterprises, Inc., v Kelly Servs., Inc.**, 69 AD 2d 297, 418 NYS 2d 818 (4th Dep't 1979).

Accordingly, based on the above, the Petition to dissolve the Respondent Corporation is held in abeyance pending a hearing, during which the Court will also determine whether the appointment of a Receiver is justified. The limited TRO, issued by the Court on August 22, 2008 is extended until the next Court conference, scheduled for February 4, 2009 at 10 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 12, 2008
Riverhead, New York



EMILY PINES
J. S. C.