SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

DAVID CARASSO, HELAINE FRASER, HOWARD GOLDBERG, ROBERT GOLDBERG, ARTHUR ISRAEL, RICHARD ISRAEL, SOL ISRAEL, LORRAINE LEVY, BETH CARASSO SPECTOR and SANDRA C. WEIN REVOCABLE TRUST,

Decision and Order

Shareholder-Petitioners,

MOTION SEQUENCE:01, 03

-against-

INDEX NO.: 606702-14

PAULINE J. PERAHIA REVOCABLE TRUST, MILDRED S. QUAIN TRUST and SOLOMON SEVY,

Shareholder-Repondents,

for an order granting judicial dissolution of

CATALINA OPERATING CORP. and SEA ISLE REALTY CORPORATION,

Corporate-Respondents.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause (including Verified Petition)	1
Verified Answer	2
Affidavit in Opposition	3
Affidavit in Opposition	4
Memorandum of Law in Opposition	5

Verified Reply (to Verified Answer)	6
Affirmation in Opposition	7
Memorandum of Law in Opposition	8
Affidavit in Further Support	9
Memorandum of Law in Reply	10
Notice of Motion	11
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Memorandum of Law in Opposition	15
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Reply Memorandum of Law	17
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Shareholder-Petitioners, David Carasso, Helaine Fraser, Howard Goldberg, Robert Goldberg, Arthur Israel, Richard Israel, Sol Israel, Lorraine Levy, Beth Carasso Spector, and Sandra C. Wein Revocable Trust ("Petitioners"), move, *inter alia*, for an order pursuant to Business Corporation Law §§ 1104(a)(1), (2), and (3), and 1104(c) dissolving Corporate-Respondents Catalina Operating Corp. ("Catalina") and Sea Isle Realty Corporation ("Sea Isle") (collectively referred to as the "Corporate-Respondents" or "Corporations") (Motion Seq. No. 1).

By subsequent motion, Petitioners moved for an order pursuant to Business Corporation Law § 1116 dismissing the Verified Petition on the ground that the cause for judicial dissolution no longer exists. The Shareholder-Respondents ("Respondents") oppose dissolution (Motion Seq. No. 3).

The instant proceeding and motions present an anomalous situation, to wit: the Petitioners and Respondents have changed their initial positions regarding dissolution in that the Petitioners, who initially sought dissolution, now move to discontinue the dissolution proceeding; and, the Respondents, who initially opposed dissolution by filing objections in law, now oppose discontinuance of the dissolution proceeding and, in fact, seek dissolution.[1]

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[1] The court also notes that on the return date of the order to show cause, wherein Petitioners sought dissolution and the appointment of a receiver, Petitioners withdrew the branch of their motion seeking the appointment of a receiver and the Respondents withdrew their opposition to the appointment of a receiver and made a recommendation as to the appointment.

Background

Catalina operates and maintains a beach club located at 2045 Ocean Boulevard, Atlantic Beach. Sea Isle owns and manages the real property on which the beach club is located (Petition at ¶¶ 2, 16).

At the time this proceeding was commenced, the Petitioners and Respondents each collectively owned 50% of the outstanding shares of the corporate stock for both Corporations.[2]

Catalina's by-laws provide for a three-member Board of Directors. The bylaws for Sea Isle provide for a four-member Board of Directors. Notwithstanding, Catalina and Sea Isle have each operated with a four-member Board of Directors since the 1940s.

At a joint meeting of the Board of Directors of the Corporations held on December 15, 2014, a motion was made by Pauline Perahia to approve the commencement of legal proceedings against Sandra Wein based on Wein's purportedly unauthorized compensation for the years 2009

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[2] Directorship and stock ownership was, for the most part, shared equally amongst the Carasso Family and the Sevy Family (the Petitioners and Respondents, respectively). Specifically, according to the Petition, Lorraine Levy, Sandra Wein, Mildred Quain and Pauline Perahia each served as directors of both Catalina and Sea Isle. Similarly, the shareholders' respective ownership interests in both Catalina and Sea Isle were the same (Petition at ¶¶ 6-12, 18-23).

The court notes that the Petition fails to distinguish between the two Corporations for purposes of dissolution. In this regard, the Petition states that the "directors are so divided respecting the management of the corporate-respondents' affairs [the corporate-respondents are both Catalina and Sea Isle] that the votes required for action by the board cannot be obtained"; the "four directors of the corporate-respondents serve as holdovers" and that the shareholders are so divided that the votes for the election of directors of the Corporations cannot be obtained. The court further notes that meetings of the Boards of Directors for both Corporations were held jointly and annual shareholders' meetings for both Corporations were also held jointly (Petition at ¶¶ 32, 34, 39, 42-46, 54).

Further evidence of the lack of 'separation' between the Corporations is the beach club's valuation performed by Empire Valuation Consultants. Inasmuch as the "two entities are operationally interrelated, they have been valued on a combined basis". (The Empire Valuation did not separately appraise the real estate) (Ex. "4" to Affidavit in Opposition [Motion Seq. No. 1]). Rosen Seymour Shapss Martin & Company LLP was similarly engaged to estimate the fair value of ownership interests in the beach club. For purposes of that valuation, the beach club represented "the combined operations of Catalina Operating Corp. and its sister company, Sea Isle Realty Corp" (Ex. "3" to Affidavit in Opposition [Motion Seq. No. 1]).

through 2014.[3] While directors Perahia and Mildred Quain voted in favor of the motion, directors Lorraine Levy and Sandra Wein voted against the motion. Given the "tie" in votes, the motion failed to carry. At that same Board meeting, a motion was made by Lorraine Levy to reappoint Wein as the manager of the beach club for the year 2015 and to fix her compensation at $90,000. While Levy and Wein voted in favor of the motion, directors Perahia and Quain voted against it.

Wein, thereafter, resigned as manager of the beach club.

Procedural History

In December 2014, Petitioners commenced the instant proceeding seeking a judicial dissolution of the Corporations and the appointment of a receiver. According to the Petition, the directors are so divided respecting the management of the beach club's affairs that the votes required for action by the Board cannot be obtained.[4]

In addition, at the joint annual meeting of shareholders of the Corporations held on September 27, 2013, and then again on October 29, 2014, the shareholders failed to elect directors to replace the four directors (Perahia, Quain, Levy, and Wein) whose terms expired prior to September 27, 2013 and who now serve as holdovers.

Further, Petitioners claim that the shareholders are so divided that they have failed, for a period which includes two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors.

In February 2015, Respondents Pauline J. Perahia Revocable Trust ("Pauline Trust") and Mildred S. Quain Trust ("Mildred Trust")[5] answered the Petition with general denials, an

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[3] Sandra Wein served as the manager of both Catalina and Sea Isle for approximately 20 years.

[4] Petitioners claim that the directors were unable to appoint a replacement for Wein as the manager of the beach club.

[5] Shareholder Solomon Sevy has not appeared in this proceeding.

affirmative defense and various objections in law.[6]

On December 15, 2014, the date this proceeding was commenced, there were four directors of the Corporations: Mildred Quain,[7] Pauline J. Perahia[8], and Petitioners Wein and Levy, who are sisters.

On March 2, 2015, Mildred Quain died, leaving the Boards of each of the Corporations with three remaining members. According to the Petitioners, as a result of Quain's passing, the Board of Directors of Catalina is no longer deadlocked (because Catalina's by-laws provide for a three-member Board of Directors) but the deadlock among the shareholders of both Corporations remains (Affirmation in Opposition to Appointment of a Receiver at ¶¶ 5, 14 [Motion Seq. No. 1]).

On March 12, 2015, counsel for Petitioners and Respondents appeared before the court for a conference and agreed to dissolution of the Corporations but disagreed as to whether a receiver should be appointed pending the dissolution. At that conference, after Respondents requested that the court appoint a particular receiver, the Petitioners withdrew that branch of their motion for the appointment of a receiver.

At the next court conference on March 24, 2015, counsel for the Respondents presented a written offer by non–party Vincent Tomasino, Jr. to purchase the beach club for $10 million (the "Tomasino Transaction"). According to Respondents, the court "assured the parties that they would have their 'divorce'" (Respondents' Affirmation in Opposition at ¶ 15 [Motion Seq. No.

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[6] Specifically, Respondents assert the following objections in law: 1) the Petitioners lack standing under Business Corporation Law ("BCL") § 1104(a) to bring their petition since they only held 40% of the beach club's stock when the petition was filed on December 15, 2014; 2) based on the beach club's ability to function as it has since October 2012, there is no basis to appoint a receiver; 3) the Petitioners have not established a sufficient case for dissolution under BCL 1104(a)(1) since the beach club's board and the business has functioned and continues to function; 4) the Petitioners have not provided detailed facts demonstrating that the requirements of BCL 1104(a)(3) have been met; 5) the Respondents should have been able to elect directors at the 2014 annual shareholders meeting, 50% to 40% and thus there was no deadlock in electing directors under BCL1104(a)(2) and 1104(c); and 6) Petitioners have acted in bad faith in bringing this Petition and, thus, dissolution cannot be granted

[7] Quain had been a shareholder in the beach club and had contributed her 16 2/3% interest in the beach club to the Mildred Trust; she remained trustee of the Mildred Trust until her death on March 2, 2015.

[8] Perahia had also been a shareholder in the beach club and had contributed her 16 2/3% interest in the beach club to the Pauline Trust; she remains a co-trustee of the Trust with her daughter, Joann Perahia.

3]).

On April 27, 2015, while conferencing with the court and each other, Petitioners' counsel explained that there were potential problems with the Tomasino Transaction. Respondents' counsel expressed that his clients wanted to end the litigation quickly and that if the Tomasino Transaction did not close by September 15, 2015, they wanted the beach club and real property to be marketed and sold. The Repondents assert that the Petitioners were prepared to agree, in principle, to the sale of the beach club and real property if the Tomasino Transaction did not close by September 15, 2015. Thus, on May 3, 2015, counsel for Respondents provided to Petitioners' counsel a proposed stipulation and order of settlement and dissolution of the Corporations.

Petitioners did not respond or comment on the proposed stipulation but, instead, on May 12, 2015, moved, pursuant to BCL 1116, for an order dismissing their Petition on the ground that the cause for dissolution of the Corporations no longer exists as one of the four *de facto* members of the Board of Directors of Catalina, Mildred Quain, died leaving a three-member Board of Directors for Catalina. With a three-member Board, the Petitioners contend, the Board of Directors of Catalina is no longer deadlocked, is functioning and is free of the paralysis that resulted from the previous deadlock among directors.[9] Further, in support of their motion to dismiss, the Petitioners submit that at a meeting of the Board of Directors on March 23, 2015, the Board of Catalina, by a vote of two to one, adopted a resolution reappointing Wein as manager for the 2015 season.[10] With respect to the deadlock amongst the shareholders, Petitioners argued that such deadlock "does not provide grounds for dissolution of a corporation, in the absence of any interference with the necessary management of the corporation" (Petitioners' Memorandum of Law in Support at p 4 [Motion Seq. No. 3]).

After the motion to dismiss was served, there was a change in ownership of the Corporations. Specifically, on July 6, 2015, various Petitioners and Stephen Carasso[11] purchased the shares in each corporation that were previously held by Respondent Mildred Trust. Petitioners now submit that the interests of Stephen Carasso are aligned with those of the

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[9] Petitioners claim that Sea Isle "is a real estate holding company, and as such, its board of directors does not make any operational decisions. Therefore, it has not experienced deadlock or interference with its management" (Levy Affidavit in Support of Motion at ¶ 11 [Motion Seq. No. 3]; Petitioners' Memorandum of Law in Support of Motion at p 3 [Motion Seq. No. 3]).

[10] In addition, the Petitioners submit that at a Board of Directors meeting held on May 1, 2015, the Board of Catalina ratified and approved all prior compensation paid to Wein for her services as manager of the beach club.

[11] Stephen Carasso is the father of Petitioners David Carasso and Beth Carasso Spector.

Petitioners and that as a result of the transfer of the Mildred Trust shares to the Carasso shareholders, the new alignment of interests in each corporation between the Petitioners and Stephen Carasso and the Respondents is such that the Petitioners and Stephen Carasso collectively hold 66 2/3% of the shares and the Respondents, Pauline Perahia Trust and Solomon Sevy, collectively hold 33 1/3%.

In opposition to the motion to dismiss, Respondents initially argue that Petitioners disregard their stipulation in "open court" to the dissolution of the Corporations, made at a time with full knowledge of Mildred Quain's death ten days earlier - knowing, at the time they agreed to dissolution, of the very facts which they now claim establish that there are no grounds for dissolution.

Further, Respondents maintain that the grounds for dissolution under BCL 1104 still exist and require dissolution of the Corporations. These grounds include that: the present directors are holdovers from 2012; directors were not elected at the two previous annual shareholders meetings held on September 27, 2013 and October 29, 2014; and the Corporations are not functioning effectively (Respondents' Memorandum of Law in Opposition at p 11 [Motion Seq. No. 3]).

In addition, Respondents maintain that the current Boards of Directors of the Corporations are not "legally constituted" and are thus making illegal decisions to break the deadlock (Respondents' Memorandum of Law in Opposition at p 14 [Motion Seq. No. 3]).

Last, Respondents maintain that the internal dissension amongst the shareholders is so divisive and corrosive that a dissolution will be beneficial for all the shareholders and is, in any event, mandated by the BCL1104(a)(3) (Respondents' Memorandum of Law in Opposition at p 16 [Motion Seq. No. 3]).

In their reply, the Petitioners maintain that there was never any stipulated "Plan of Dissolution"; instead, there were only "fluid settlement discussions" wherein "the Court and counsel explored how the parties might proceed in the likely event that a sale to Mr. Tommasino failed to materialize" (Petitioners' Reply Memorandum of Law in Support at p 6 [Motion Seq. No. 3]). Finally, the Petitioners maintain that the Catalina Board of Directors is properly constituted with three members.

For the reasons that follow, the Petitioners' motion seeking dissolution is denied and the Petitioners' motion seeking discontinuance of the proceeding is granted.

The Court's Determination

Initially, the court rejects Respondents' contention that the parties stipulated in "open court" to dissolution. CPLR 2104 reads: "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered." The agreement between counsel to dissolve the Corporations was not made in "open court" inasmuch as it was made at a court conference in the absence of a court reporter (*see In re Dolgin Eldert Corporation v Dolgin*, 31 NY2d 1 [1972]).

The crux of Petitioners' claim is that circumstances changed as a result of Mildred Quain's death in March 2015 (which event left three members of the Board of Directors consisting of Pauline Perahia, Sandra Wein, and Lorraine Levy) such that their original petition for dissolution should be dismissed pursuant to BCL 1116.

Pursuant to BCL 1116, entitled "Discontinuance of action or special proceeding":

> An action or special proceeding for the dissolution of a corporation may be discontinued at any stage when it is established that the cause for dissolution did not exist or no longer exists. In such event, the court shall dismiss the action or special proceeding and direct any receiver to redeliver to the corporation all its remaining property.

Petitioners' application for dissolution was made pursuant to BCL 1104(a)(1), (2), (3) and 1104(c). These sections provide as follows:

> 1104. Petition in case of deadlock among directors or shareholders
>
> (a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:
>
> (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
>
> (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
>
> (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

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> (c) Notwithstanding any provision in the certificate of incorporation, any holder of shares entitled to vote at an election of directors of a corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors.

In this regard, the court notes the circumstances set forth in the Petition which form the basis for the grounds for dissolution under BCL 1104(a)(2), (a)(3) and (c):

> At the joint annual meeting of shareholders of the corporate respondents held on September 27, 2013, the shareholders failed to elect directors to replace the four holdovers.
>
> At the next joint annual meeting of shareholders of the corporate respondents held on October 29, 2014, the shareholders again failed to elect directors to replace the four holdovers.
>
> The shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification and their successors.

In addition, the Petitioners also sought dissolution under BCL 1104(a)(1) because, according to Petitioners, "at the time the dissolution proceeding was initiated in December 2014, [Catalina] had a deadlocked board of directors which failed to appoint a manager to repair the [beach club] for the summer 2015 season." The Petitioners maintain, however, that the Catalina Board of Directors is no longer deadlocked and Sandra Wein had been reappointed as manager for the 2015 season. The Petitioners further argue that "the corporate by-laws of [Catalina] provide for a three member board of directors" despite the fact "that, prior to March 20, 2015, the board of directors of [Catalina] functioned informally with four *de facto* members."[12]

Here, the dissension between the Carasso Family and Sevy Family shareholders has existed since at least December 2012. Nevertheless, there is no evidence that the dissension

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[12] Prior to Mildred Quain's death, and since its founding in the 1940s, the beach club had a Board of Directors with an equal number of members of the Carasso Family (Petitioner) and the Sevy Family (Respondent). This agreement to a shared Board of Directors was memorialized by the Carasso Family and the Sevy Family in voting trust agreements.

among these shareholders has had any appreciable impact on the management or profitability of the Corporations. As such, the dissolution remedy conferred by BCL 1104(a)(3) would not, in this court's view, be "beneficial to the shareholders" (*compare* BCL 1111(a)(3) ["In a special proceeding brought under section 1104 . . . dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit"]).

Furthermore, with respect to BCL 1104(a)(2) and (c), while grounds for dissolution may continue to exist under BCL 1104(a)(2) and (c) - that Sandra Wein, Lorraine Levy and Pauline Perahia are holdover directors from 2012 and the shareholders have failed to elect directors at two consecutive annual shareholder meetings held on September 27, 2013 and October 29, 2014 - the court in the exercise of its discretion, nevertheless denies the Petition to the extent it seeks dissolution pursuant to these sections (BCL 1111(a); *In the Matter of Century 21 Metalios Rental Real Estate, Inc.*, 185 AD2d 315 [2d Dept 1992]). In this regard, the court notes that as of July 6, 2015, after service of the instant motion, there was a change in ownership of shares of the beach club such that Petitioners and Stephen Carasso collectively hold 66 2/3% of the shares and the Respondents Pauline Perahia Trust and Solomon Sevy collectively hold 33 1/3%. Given the change in shareholder ownership, dissolution predicated upon BCL 1104(a)(2) and (c) is not warranted.

Moreover, the three-member Board of Directors of Catalina has voted to reinstate Wein as manager of the beach club, a position she held for approximately 20 years. Thus, the grounds set forth in 1104(a)(1) are no longer present inasmuch as the directors are not "so divided" with respect to the management of the beach club.

Notwithstanding the fact that the Corporations, since the 1940s, have had a Board of Directors with an equal number of members in both the Carasso and Sevy families, the by-laws for Catalina, the company which operates and maintains the beach club, provides that the "affairs and business of [Catalina] shall be managed by a Board of three (3) Directors, who need not be

stockholders" (Ex. "6" to Motion Seq. No. 3 at p 15).[13] However, the Second Department's decision *Hamill v Elmwood Park Homeowners Association, Inc.* (96 AD3d 1009 [2d Dept 2012] [internal citations omitted]) is particularly instructive on this point:

> The plaintiffs established their prima facie entitlement to judgment as a matter of law by showing that the [homeowners association] bylaws were never properly amended to change the procedure for electing its board of directors. Bylaws cannot be amended to effect a change in the composition of the board of directors without complying with the requirements established by those bylaws. As the bylaws are clear, they must be followed unless properly amended.

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[13] Following submission of the motions, Respondents' counsel wrote in a correspondence addressed to the court dated September 25, 2015:

> [W]e respectfully submit that all the actions taken by Petitioners from Mildred Quain's death (a long-standing shareholder and director of Respondent Catalina Operating Corp. ("Catalina")) on March 2, 2015, through September 17, 2015, are illegal. There should have been four directors of Catalina, two of which were to be elected by the Sevy Family shareholders. In this regard, we direct your attention to Pomeroy v Westaway, 189 Misc. 307, 310, 70 N.Y.S.2d 449, 451 (Sup. Ct. N.Y. Co. 1947), affir., 273 App. Div. 760, 75 N.Y.S.2d 654 (1st Dept. 1947), where the court said that:
>
> The rule is recognized that stockholders may by consent or by acts and conduct repeal or accomplish the modification or abrogation of a by-law, as fully and effectively as if done by them by formal action, and the by-law is deemed to have been repealed or modified, as the case may be; likewise, nonusage of a by-law, continuing for a considerable length of time, and acquiesced therein, will work its abrogation. See also, Venigalla v. Nori, 11 N.Y.3d 55, 62, 862 N.Y.S.2d 457, 460 (2008) in which the Court of Appeals affirmatively cited Pomeroy concerning conduct effecting corporate by-laws.

Importantly, the entity at issue in *Venigalla v Nori* (*supra*) was a Hindu Temple formed under Article 9 of the Religious Corporations Law. The Court held that the provisions in the Temple's bylaws that called for the election of trustees contradicted article 9 and were invalid from their inception. The Court, upon continuing to examine the status of the 1970 bylaws as whole, stated that the 1970s bylaws had fallen "into complete desuetude" and had been forgotten about, and, thus, "[t]o allow petitioners to resuscitate the 1970 bylaws when they finally rediscovered them would be unwise and unfair" (*Id.* at 62). Notwithstanding the fact that the *Venigalla* Court cited *Pomeroy* in stating that "nonusage of a by-law, continuing for a considerable length of time, and acquiesced therein, will work its abrogation", this court finds that *Venigalla* does not warrant a finding at bar that the Catalina by-law requiring a three-member board of directors has been modified to a four-member board by virtue of the fact that Catalina has been operating with a four-member board since the 1940s. Unlike *Venigalla*, the instant case is governed under the Business Corporation Law which contains a statutory mandate with respect to the amendment of by-laws (*see* discussion *infra* at p 11).

> In opposition, the [homeowners association] and the defendant Staten Island Condo Management Corp. failed to raise a triable issue of fact as to whether the bylaws were properly amended pursuant to the article XIII requirement of a three-fourths majority vote of each class of membership at a duly called meeting of [homeowners association]. The custom and practice of the [homeowners association] board is not sufficient to override the bylaws.[14]

Moreover, the statutory mandate set forth in BCL 702 specifying particular requirements for setting the numbers of directors on the board of a corporation must be strictly complied with (*Rye Psychiatric Center, Inc. v Schoenholtz*, 66 NY2d 333 [1985]).

Pursuant to BCL 702:

> (a) The board of directors shall consist of one or more members. The number of directors constituting the board may be fixed by the by-laws, or by action of the shareholders or of the board under the specific provisions of a by-law adopted by the shareholders. If not otherwise fixed under this paragraph, the number shall be one. As used in this article, "entire board" means the total number of directors which the corporation would have if there were no vacancies.
>
> (b) The number of directors may be increased or decreased by amendment of the by-laws, or by action of the shareholders or of the board under the specific provisions of a by-law adopted by the shareholders, subject to the following limitations:
>
> (1) If the board is authorized by the by-laws to change the number of directors, whether by amending the by-laws or by taking action under the specific provisions of a by-law adopted by the shareholders, such amendment or action shall require the vote of a majority of the entire board.

Therefore, alteration of the minimum required number of directors must be effected by virtue of a change in the by-laws (*Model, Roland & Co. v Industrial Acoustics Co.*, 16 NY2d 703 [1965]).

Further, Respondents' argument that the Carasso and Sevy shareholders "memorialized their agreement to a shared Board of Directors in voting trust agreements" does not undermine the statutory requirement that a by-law or amendment to a by-law is necessary to effectuate a

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[14] The record in *Hamill* indicated that the meeting held for the election of directors was conducted in accordance with tradition and customs of the homeowners' association.

change in the number of directors sitting on a corporate board (*Id.* [shareholders' resolution increasing the number of directors from four to five was neither valid nor effective in absence of any change in the bylaws]).

In any event, the Respondents have failed to demonstrate how the change in the number of directors of Catalina's Board (from 4 to 3) undermines Respondents' objections in law raised in their answer.[15]

Conclusion

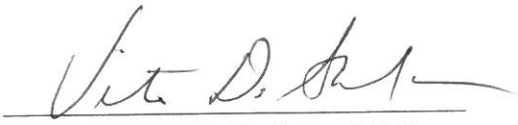
Based on the foregoing, it is hereby

Ordered that the motion of Petitioners for an order: appointing a receiver to manage the business and property of Catalina Operating Corp. and Sea Isle Realty Corporation; and dissolving Catalina Operating Corp. and Sea Isle Realty Corporation is denied (Motion Seq. No. 1); and it is further

Ordered that the motion of Petitioners for an order pursuant to Business Corporation Law § 1116 is granted and the dissolution proceeding is discontinued (Motion Seq. No. 3).

This constitutes the decision and order of the court.

Dated: December 28, 2015



Hon. Vito M. DeStefano, J.S.C.

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[15] In this regard, the court notes that the Respondents, in their answer, stated that the Beach Club has been functioning, and continues to function, and, thus, Petitioners had not established a sufficient cause for dissolution under BCL 1104(a)(1).