SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER TRIAL
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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DIVANEA COVEN, Personal Representative of the Estate of Walter I. Coven a/k/a Walter Irving Coven, a/k/a Walter Coven, Deceased,	**NASSAU COUNTY**
	Index No. 601706/2017
Petitioner,	
-against-	
NEPTUNE EQUITIES, INC. and STACI BRODER,	
Respondents,	
For Judgment Dissolving Respondent NEPTUNE EQUITIES, INC. Pursuant to BCL §1104-a.	
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The Court held a bench trial on May 21 and 22, 2019 on the claims by Petitioner Divanea Coven ("Divanea") that Respondent Neptune Equities, Inc. ("Neptune") should be dissolved pursuant to Business Corporation Law §§ 1104 and 1104-a, and that Respondent Staci Broder ("Staci') breached her fiduciary duty to Divanea.[1] The parties submitted post-trial memoranda in August 2019. As set forth in more detail below, the Court concludes that the credible evidence at trial did not establish Petitioner's entitlement to any of the relief that she seeks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Neptune owns commercial property located at 1711 Neptune Avenue, Brooklyn (the "Property"). The Property is Neptune's sole asset. Neptune was owned entirely by Dorothy Coven ("Dorothy") until her death on October 2, 1993. Dorothy was married to Stanley Coven

[1]Petitioner also asserted a claim for an accounting pursuant to Business Corporation Law § 720, but withdrew that claim in her August 2019 post-trial submission.

("Stanley"), who died on February 12, 2011. Dorothy and Stanley were the parents of two children: respondent Staci, and Walter Coven ("Walter"), who died on May 30, 2016. At the time of his death, Walter was married to Divanea. Walter also has two children from his first marriage, Ross Coven ("Ross") and Alex Coven ("Alex").

As the Court concluded in its February 2018 Decision, the shares in Neptune passed to a credit shelter trust upon Dorothy's death, and then to Dorothy's children, Walter and Staci, upon Stanley's death. Walter thus owned 50% of the shares of Neptune at the time of his death. Walter died without a will, and Divanea is the personal representative of Walter's Estate. Because she is the personal representative, the Court determined in the February 2018 Decision that she has standing to maintain this action.

Under Florida intestacy law, Divanea is ultimately entitled to a 50% share of Walter's Estate as his surviving spouse. Ross and Alex are each ultimately entitled to 25% as Walter's children. The Estate has not, however, been distributed because, at the time of his death, Walter owed over $800,000 to a judgment creditor arising from a judgment initially entered in June 2000. The remaining funds in Walter's Estate are insufficient to satisfy this judgment.

In the days following Walter's death, Divanea told Staci, Alex, and Ross that she considered Neptune "cursed" and thus wanted "nothing to do with the business" because it "killed her husband." Divanea then ceased communicating with Staci, Alex, and Ross, and rebuffed any attempt by them to communicate with her. Divanea claimed that she did so on the advice of her Florida-based estate attorney. There was no evidence before the Court that Staci, Alex, and/or Ross did not wish to communicate with Divanea.

Divanea now claims that Neptune should be dissolved, and the Property sold. She has not, however, presented the factual predicate necessary to dissolve the company under either Business Corporation Law §§ 1104(a) or 1104-a.

First, Divanea failed to prove that Neptune should be dissolved pursuant to Business Corporation Law § 1104(a). That statute permits dissolution upon proof that:

> (1) 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) The shareholders are so divided that the votes required for the election of directors cannot be obtained;

(3) There is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Here, the only "division" and "dissension" between the shareholders is due to Divanea's lack of desire to communicate with Staci, Alex and Ross. Divanea never attempted to call a meeting of the directors of Neptune or to call a meeting to elect directors of Neptune. This is fatal to her claims. *See Matter of Parveen*, 259 A.D.2d 389 (1st Dept. 1999) (deadlock not established when parties have not attempted to elect directors); *see also Skoler v. For the Judicial Dissolution of County Group*, No. 650108/2015, 2016 WL 5958115, at *9 (Sup. Ct. N.Y. Cty. Oct. 11, 2016). Indeed, she never spoke with Staci, Alex or Ross after Walter's death about Neptune other than to say that it was "cursed." While Divanea may not wish to communicate with Staci (or Alex or Ross) because of the estate litigation, that does not justify her, on the one hand, failing to communicate with Staci who is the other shareholder in Neptune, and then at the same time claiming that there is dissension between her and Staci. To the extent that Divanea wishes to participate in the affairs of Neptune, she may do so. To the extent that Divanea believes that her participation in Neptune's affairs will affect the estate litigation, she is free to take any steps she believes appropriate to protect her interest in that litigation while she participates in the affairs of Neptune.

Nor would dissolution be "beneficial" to Staci and Divanea, as shareholders of Neptune, to justify dissolution under Business Corporation Law § 1104(a)(3). Notably, Neptune is profitable and Divanea is benefitting from its operation. There is no mortgage on the Premises, and it is fully rented with a gross rent roll of nearly $500,000 per year. Divanea and Staci have received equal distributions since the Court's determination in February 2018 that Divanea is a 50% shareholder of Neptune. In sum, Neptune is functioning as it always has, and is doing so for the benefit of its shareholders.

Divanea claims that Neptune should be dissolved because, at the time of his death, Walter owed over $800,000 to a judgment creditor arising from a judgment initially entered in June 2000. While Divanea's desire to obtain funds to pay off her late husband's creditor may be

understandable, and even noble, it is of no moment to the question whether Neptune should be dissolved. Indeed, any judgments entered against Walter — much less a judgment such as this entered years before Walter died – are entirely unrelated to the affairs of Neptune, and cannot be the basis for dissolution. *See, e.g., Application of Dubonnet Scarfs, Inc.*, 105 A.D.2d 339, 343 (1st Dept. 1985) ("Needless to say, the mere fact that a closely held corporation may have substantial liquid assets, and a stockholder has personal financial problems totally unrelated to the corporation do not, in and of themselves, state grounds for judicial dissolution within the meaning of the Business Corporation Law")

The Court rejects Divanea's claim that dissolution is somehow justified under Business Corporation Law § 1104(a) because, as Divanea asserts, Walter and Staci had agreed to sell the Property prior to Walter's death, and were actively trying to sell the property. At the outset, the credible evidence did not support Divanea's factual assertions. Rather, Staci testified credibly that several unsolicited offers were made for the Property, which were rejected. The Property was never placed on the market for sale. Staci further testified credibly that there were various reasons not to sell the Property, including tax implications, environmental concerns, and the profitability of the business. The Court fully credits that testimony. In sum, there is no proof that there was any agreement between Staci and Walter to sell the Property, much less any proof on the specifics of any such agreement.

Dissolution is also not proper under Business Corporation Law § 1104-a. That statute provides that:

> The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . 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; [or]
>
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

Here, there is no proof that Divanea has been "oppressed." Rather, she has affirmatively decided, since Walter's death, not to engage in any conversation with Staci regarding Neptune.

Nor was there proof before the Court that Neptune's assets were being looted or wasted. Rather, Neptune has made appropriate distributions since Walter's death — including a distribution for his own funeral expenses – and Staci and Divanea have received equal distributions.

For similar reasons, Divanea's claim for breach of fiduciary duty is without merit. Simply put, Staci has worked assiduously to keep Neptune operating, and has been successful. Staci has ensured that Neptune made equal distributions to its shareholders, and Neptune's expenditures under Staci's leadership were incurred in the ordinary course of business. Divanea did not adduce proof of any self-dealing by Staci to justify any claim that Staci breached any fiduciary duty to Divanea. To the extent that Divanea believes, in the future, that she is not receiving appropriate distributions, she can commence a plenary action seeking appropriate relief.

In sum, Divanea has not demonstrated that she is entitled to judgment on any of the claims presented at trial.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit Judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY
September 26, 2019

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 03 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE