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To Be Argued By:
Stephen D. Haber
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New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2025-04900

In the Matter of

DIVANEA COVEN, Personal Representative of the Estate of WALTER I. COVEN, a/k/a Walter Irving Coven, a/k/a Walter Coven, Deceased,

Petitioner-Appellant,

against

NEPTUNE EQUITIES INC.,

Respondent,

and

STACI BRODER,

Respondent-Respondent.

BRIEF FOR RESPONDENT-RESPONDENT

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PRELIMINARY STATEMENT

In a proceeding seeking the dissolution of Neptune Equities, Inc. ("Neptune") under the provisions of Business Corporation Law §§ 1104(a)(2), Appellant appeals from the Decision and Order of the Supreme Court of the State of New York, County of Nassau (Murphy, J.) dated April 7, 2025, ("Order") after trial which denied and dismissed the Petition. The Petition, in reliance on a single purported meeting of shareholders held on March 30, 2022, sought dissolution on the grounds that the shareholders are so divided that the votes required for the election of directors cannot be obtained.

A trial was conducted by the Court on January 7, 2025 and January 8, 2025. It is submitted that the Petition was properly dismissed as Appellant failed to meet her burden of establishing that deadlock exists under BCL§1104(a)(2) since the purported meeting upon which Appellant relies was called and held in violation of the provisions of BCL §§ 602(a) and 603(a) and is therefore void. The evidence at trial established that Neptune continues to operate as a prosperous and profitable entity. Further, no true deadlock exists as any perceived deadlock can be simply alleviated if the Appellant distributes any or all of the shares owned by the Estate to the beneficiaries of the Estate. Walter Coven's children, who are 50% beneficiaries of the Appellant-Estate, testified that they would break any perceived deadlock by voting to elect a board and are against the dissolution of Neptune or the sale of the subject premises.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question:

Whether Appellant had authority under the Business Corporation Law or Bylaws of Neptune to schedule a special meeting of the shareholders of Neptune by Zoom?

Answer: No.

Question:

Is Staci Broder an officer and director of Neptune?

Answer: Yes

Question:

Whether Neptune has a sufficient number of directors to conduct its business?

Answer: Yes

Question:

Whether the Court below had discretion to determine whether Neptune should be dissolved

Answer: Yes

Question:

Whether the Court below providently exercised its discretion to deny the petition to dissolve Neptune?

Answer: Yes

COUNTER-STATEMENT OF FACTS

Neptune is the owner of the commercial property located at 1711 Neptune Avenue, Brooklyn, New York ("Premises"). Neptune owns no other property and its sole business is managing the Premises. The Premises has been owned by members of Respondent Staci Broder's family since the early 1960s (R275)[1].

This is Appellant's second attempt to dissolve Neptune. Appellant filed a proceeding which was ultimately dismissed by the Court entitled Divanea Coven, Personal Representative of the Estate of Walter I. Coven, et al. v. Neptune Equities Inc. and Staci Broder, in the Supreme Court, Nassau County, Index No. 601706/2017 ("Prior Proceeding") (R683 & R697).

Staci Broder is the owner of a 50% interest in Neptune (R276:11-12). The Estate of Walter I. Coven, through Appellant Divanea Coven, as personal representative ("Estate") is owner of the remaining 50% interest in Neptune (R192:15-19).

Walter Coven died without a Will on May 30, 2016, a resident of the State of Florida (R210). Walter Coven was survived by his wife, the Appellant, Divanea Coven, and two (2) children from a prior marriage: Ross Coven and Alex Coven, who are both over the age of 18 years and testified at the trial. Under Florida's Intestacy Statute, Divanea Coven is entitled to a 50% interest in the Estate and Ross

[1] The numbers in parenthesis refer to the corresponding page of the Record on Appeal.

Coven and Alex Coven are each entitled to a 25% interest in the Estate. This issue is not in dispute (R210). See Florida Statute 732.103(1) and 732.102(3). Accordingly, Divanea Coven effectively owns a 25% percent beneficial interest in Neptune and Ross Coven and Alex Coven each own a 12.5% beneficial interest in Neptune.

Neptune was previously operated by Stanley Coven, who was the father of Walter Coven and Staci Broder. Stanley Coven died in February, 2011 (R274). After Stanley Coven's death, Neptune was managed and operated together by Staci Broder and Walter Coven (R224:5-7). The evidence established at trial that Staci Broder and Walter Coven were both officers of the company. This arrangement continued until Walter's death on May 30, 2016 (R274:22-23). After the death of Stanley Coven, Staci Broder and Walter Coven also acted as the directors of Neptune and upon Walter's death, Staci Broder became the sole remaining officer and director of Neptune (R279:11-280:12).

The corporate book for Neptune was located after the death of Stanley Coven. The book contains standard pre-printed by-laws which contain a number of blanks and old stock transfer certificate acknowledgments that were completed (R439). The stock certificates were not located. The corporate book was not updated after the death of Stanley Coven and there are no minutes of the meetings between Staci Broder and Walter Coven. Nor were new stock certificates issued. However, the

evidence established that Walter and Staci, in a manner not atypical for small family-owned corporations, conducted informal meetings and acted as officers and directors of Neptune (R279:11-280:12). Walter and Staci's actions and authority as officers and directors of Neptune is further demonstrated by the filing of tax returns (R716, R764, R825 & R834), the issuance of bank resolutions (R1053) and execution of leases (R579, R606 & R927). Indeed, this Court, in the Prior Proceeding, relied upon the electronic authorization by Staci Broder, as a corporate officer of Neptune to file the tax returns, as a basis for affirming the decision of the Supreme Court holding that Walter was a shareholder of Neptune (R423 at p. 3).

In the days after Walter's death, Divanea Coven advised Staci Broder, Alex Coven and Ross Coven that she wanted nothing to do with Neptune and considered it "cursed" (R262:11-14 & 299:17-24). Shortly after Divanea's appointment as personal representative for the Estate, she changed her position and demanded that the Premises be sold (R365:21-25 & 300:2-4). A week after Walter passed away Divanea Coven retained Erik Shuman, Esq. of Gray Robinson, in Florida, to represent her in connection with the Estate of Walter Coven (R260:8-13). Divanea testified that she did not speak with Ross, Alex or Staci at any time after Walter's funeral (R210-211). Ross Coven and Alex Coven each testified that they enjoyed a close relationship with Divanea Coven while their father was alive, but as soon as he died she completely cut them off (R214, R260 & 270) (R682). Letters of

Administration were issued to Divanea Coven in the Florida Probate Court to act as personal representative of Walter's Estate on June 27, 2016 (R413).

Appellant advanced two reasons for wanting to dissolve Neptune and sell the Premises. Firstly, Appellant claimed that she wanted to sell the Premises because it was what Walter wanted (R228:17-22). Appellant made the same claim at the trial in the Prior Proceeding and the Court soundly rejected it as a basis for dissolving Neptune (R427 at p.4).

Appellant also claimed that she wants to dissolve Neptune and sell the Premises because the Estate has a creditor that is owed in excess of $1,000,000.00 and that dissolving the company is the only way to pay him (R229) (R235). This, too, was proffered as a basis for dissolving Neptune in the Prior Proceeding and was likewise rejected by the Court (R427 at pp. 3-4). The creditor referenced by Appellant, Walter Embry, entered a judgment against Walter Coven in the sum of $300,000.00 on June 12, 2000, which judgment bears interest under Florida Law (R190) (R507).

Appellant sought the sale of the Premises and commenced this proceeding to dissolve Neptune without ever having discussed either issue with Ross Coven or Alex Coven, who are each entitled to a 25% interest in the Estate (R210-211).

By Decision and Order dated October 21, 2021, this Court affirmed the holding of the lower court in the Prior Proceeding that Walter, individually, was a

50% owner of Neptune, rather than a trust for the benefit of Walter Coven established by his father, Stanley Coven (R423). Shortly thereafter, on January 20, 2022, Divanea Coven forwarded a letter dated January 19, 2022, which was e-mailed and sent by overnight delivery to Staci Broder. Contained within this letter was a purported notice to schedule a special shareholder's meeting for the election of directors under §603(a) of the New York Business Corporation Law for March 30, 2022 (R434). The January 19, 2022 letter, in claimed reliance upon Section 602(a) of the BCL, sought to schedule a meeting by means of electronic communications using the Zoom platform/service. In the January 19, 2022 Letter, Divanea Coven unilaterally decided that attorneys were permitted to be present at the special meeting of shareholders, as "observers" (R435).

The alleged special meeting of shareholders was recorded and the recording was admitted in evidence (R506). This video recording demonstrates that Staci Broder and Stephen Haber, as counsel, appeared at the meeting via a Zoom invitation provided by Divanea Coven's counsel, and objected, on behalf of Ms. Broder, to the meeting, the manner in which it was held and the manner in which it was noticed. Staci Broder also wanted her nephews, Ross Coven and Alex Coven, to attend the meeting with her as observers. Ms. Coven's attorney, Joseph Cuomo, who was allegedly an "observer", in reality ran the meeting and controlled entrance through

the Zoom platform. Mr. Cuomo refused to permit Ross Coven or Alex Coven entry into the meeting (R344-345).

The meeting was a setup contrived to create a deadlock in electing directors as a predicate for filing this proceeding. At the meeting Divanea Coven read from a prepared script (R506). Divanea Coven proposed that there be a board consisting of only one person and that she be the only director. There were no discussions about any issues relating to Neptune. Not surprisingly, Staci Broder did not agree to elect Divanea Coven as the sole board member. Staci Broder thereafter nominated herself as a board member, which was rejected by Divanea Coven. Staci Broder then nominated her nephew Ross Coven as board member, which was also rejected by Divanea Coven. Evidencing the fact that this was all pre-planned, Divanea Coven read again from her prepared script referencing various sections of the Business Corporation Law and unilaterally declaring that there was deadlock. Appellant thereafter filed the subject proceeding seeking the dissolution of Neptune under the provisions of Business Corporation Law § 1104(a)(2)[2].

Both Ross Coven and Alex Coven testified at trial that had shares been issued to them they would break any perceived deadlock by voting to elect a board of

[2] The Petition also sought dissolution under BCL § 1104(a)(3) and contained causes of action for an accounting, the appointment of a temporary receiver and sought shareholder derivative relief. Appellant's cause of action for shareholder derivative relief was discontinued, without prejudice on July 9, 2023. The balance of Appellant's causes of action, with the exception of her claims under BCL §1104(a)(2), were also discontinued, without prejudice, by Stipulation dated December 30, 2024.

directors and also testified that they are against the dissolution of Neptune and the sale of the Premises (R265 & 268) (R271-273). Despite the fact that her husband died on May 31, 2016, Appellant has not distributed any of the shares of Neptune to the beneficiaries of Walter's estate. Appellant testified that the reason she has not distributed the shares is because of the creditor's claim of Walter Embry and that she believed she was not allowed to distribute any shares under Florida law as long as his claim was pending (R192:18-193:6). Appellant offered no testimony of any substantive efforts to resolve the claim with Walter Embry or any efforts to engage with Ms. Broder to attempt to have Neptune assist in alleviating the issue. The Premises has no mortgage filed against it (R265:16-17). Appellant has received distributions from Neptune totaling approximately $550,000.00 (R:337:5-9 & (R950, R960, R970 & R1044). None of the funds comprising the distributions were used to pay Mr. Embry (R223). The proceeds of the distributions were instead used to fund the litigation against the Respondents[3].

Appellant offered testimony of perfunctory efforts to sell Neptune stock to two individuals who were allegedly interested in the Premises before her husband died. However, Appellant never hired a broker or advertised the stock as being for

[3] Appellant's Interim Accountings filed in the Circuit Court for Palm Beach County, Florida (R950, R960, R970 & R1044) reflect total distributions to the Estate of $539,050.00 through October 21, 2024, with attorney fees to New York counsel for the Prior Proceeding (DiPinto Law Office) and this proceeding (Forchelli Deegan), totaling in excess of $375,000.00.

sale (R229:11-230:5). Further, when Mr. Embry filed a motion in the Florida Probate Court to compel satisfaction of his claim, Appellant opposed it (R1053). Therein, Mr. Embry requested that the Florida Court take action to satisfy his claim and suggested alternatives, including assigning to him the amount of Neptune stock, based on its fair market value, required to satisfy his claim (R1053 at ¶10(a)). Appellant testified that she believed the Premises was worth approximately $7,400,000.00 based upon an appraisal she had performed (R236:5-8). Accordingly, Appellant's fifty (50%) percent interest in Neptune is worth well in excess of $1,100,000.00. Appellant offered no explanation at trial for the reason she would not give Mr. Embry a portion of the Estate's stock instead of seeking the dissolution of Neptune to raise the cash to satisfy his judgment (R235-239).

By Decision and Order dated April 7, 2025, the Court below denied the Petition. The Court held that the meeting relied upon by Petitioner as a basis to dissolve Neptune under BCL § 1104(a)(2) was improperly held. The Court found that Petitioner, who is not a director of Neptune, improperly scheduled the shareholder's meeting to be held by Zoom and since Staci Broder protested the meeting, actions taken at the meeting could not serve as basis to dissolve Neptune.

> Since §602 of the BCL only allows directors to hold meetings by electronic communication, the petitioner, who is not a director had no right to set up this meeting to be held by Zoom. It is also noted that the petitioner has not shown the Court that the by-laws would allow for a Zoom meeting either. Therefore, any actions that are claimed to

> have taken place at that meeting are void, and that protested meeting can not serve as a basis to dissolve the corporation. For this reason the petitioner's petition to dissolve the corporation must be denied. (R 5)

The Court also found that based upon its discretionary powers relating to the dissolution of a corporation and the particular facts of the case that dissolution was not warranted. The Court observed that there was a "less dramatic remedy then to utilize dissolution" and "plenty of value available to the estate" from Neptune's stock to resolve its debts. Once resolved, Petitioner could then distribute the shares of Neptune to the beneficiaries thereby resolving any "directorship issues".

POINT I

THE COURT BELOW PROPERLY HELD THAT APPELLANT FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT DEADLOCK EXISTS AND THAT THE SHAREHOLDERS ARE SO DIVIDED THAT THE VOTES REQUIRED FOR THE ELECTION OF DIRECTORS CANNOT BE OBTAINED AS REQUIRED UNDER BCL§1104(a)(2)

The Court below properly held that Appellant failed to meet her burden of establishing that there is deadlock between shareholders, which prevents the election of directors as required under BCL §1104(a)(2).

Business Corporation Law §1104(a)(2) provides as follows:

> (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:
>
> * * *
>
> (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

Appellant's reliance upon the disputed meeting of the shareholders held on March 30, 2022 as a basis to dissolve Neptune pursuant to BCL §1104(a)(2) is misplaced. Appellant alleges deadlock exists in electing directors resulting from this single special meeting of shareholders which she attempted to call pursuant to BCL §603(a). However, as the Court correctly determined below, since both the notice of special meeting and the purported meeting itself failed to comply with either the by-laws of Neptune (R466) or the Business Corporation Law, any claimed action taken at such meeting is void. Respondent Staci Broder, by counsel, voiced objection to the notice and the meeting itself, prior to the commencement of the meeting and again at its conclusion (R 506). See BCL §606; Goldfield Corp. v. Gen. Host Corp., 29 NY2d 264, 269, 327 N.Y.S.2d 330, 334-35 (1971). Herein, not only was the notice defective, but the method of conducting the meeting (by Zoom) was defective. Further, the conduct of the meeting was defective in that Petitioner unilaterally decided to permit attorneys to attend the meeting, Petitioner's attorney improperly controlled attendance at the meeting and barred Alex Coven and Ross Coven from attending the meeting as observers invited by Staci Broder (R344-345). It should also be stressed that the video recording of the meeting (R506) was played

in its entirety at the trial. Accordingly, the Court below was able to observe the nature of what occurred at the meeting, the behavior of the attendees and took this into account as part of the basis for the Order.

There can be no dissolution on the grounds of deadlock in electing directors under BCL §1104(a)(2) unless the contending parties have held a meeting attempting to elect directors. See Nelkin v H. J. R. Realty Corp., 25 N.Y.2d 543, 550, 307 N.Y.S.2d 454, 459 (1969); In re Parveen, 259 A.D.2d 389, 391, 687 N.Y.S.2d 90, 92-93 (1st Dept. 1999); In re Kagan and Hazelkorn, 7 Misc.3d 1009 (A), 801 N.Y.S.2d 235 (Sup. Ct. Nassau Co. 2005).

A. ***The Scheduling of The Meeting By The Appellant to Be Held By Electronic Communication Was Not Permitted Under the BCL***

On January 20, 2022, Divanea Coven forwarded a letter dated January 19, 2022, which contained a purported notice to schedule a special shareholder's meeting for the election of directors under §603(a) of the New York Business Corporation Law for March 30, 2022 (R434). The January 19, 2022 letter, in claimed reliance upon Section 602(a) of the BCL, sought to hold the meeting by means of electronic communications using the Zoom platform/service.

Section 602(a) of the Business Corporation Law provides as follows:

> Meetings of shareholders may be held at such place, within or without this state, as may be fixed by or under the by-laws, or if not so fixed, as determined by the board of directors. If, pursuant to this paragraph or the by-laws of the corporation, the board of directors is authorized to

> determine the place of a meeting of shareholders, the board of directors may, in its sole discretion, determine that the meeting be held solely by means of electronic communication, the platform/service of which shall be the place of the meeting for purpose of this article (emphasis supplied).

Section 602(a) of the BCL clearly provides that the board of directors "in its sole discretion" may determine that a meeting be held solely by means of electronic communication. A corporation may hold a meeting of shareholders by electronic communications if and only if it is authorized by the board of directors and the by-laws of the corporation. Section 602(a) of the BCL does not authorize a shareholder to unilaterally schedule an electronic communications meeting. Herein, Divanea Coven has never been a member of the board of directors of Neptune and was not authorized to unilaterally decide to schedule a special meeting of the shareholders via the Zoom platform. Further, even if Neptune did not have a validly elected board of directors, as claimed by Appellant, the Appellant still did not have the unilateral authority under the statute to schedule a meeting to be held by the Zoom platform.

Ms. Coven did not make any requests on the board of directors, Staci Broder or the corporation to hold the special meeting by Zoom (R241-242). Staci Broder testified that she wanted an in-person meeting (R344:8-25).

In the January 19, 2022 letter, Divanea Coven unilaterally decided that attorneys were permitted to be present at the special meeting of shareholders, as "observers" (R434). This was never discussed with Ms. Broder (R242:12-15).

Further, as demonstrated by the video recording of the meeting (R506), Appellant's attorney, Joseph Cuomo, was not a mere observer. Rather, Mr. Cuomo took it upon himself to run the meeting (R345). Staci Broder testified that the presence of attorneys impeded any real discussions that the parties could have had concerning the business (R345-346).

Ms. Broder and counsel appeared at the special meeting via a Zoom invitation provided by Divanea Coven's counsel, and objections were made, on behalf of Ms. Broder, to the meeting, the manner in which it was held and the manner in which it was noticed (R506). Ms. Broder testified that she only felt the need to have her attorney present because Appellant's attorney was going to be present (R345:24-346:3). Staci Broder also wanted her nephews, Ross Coven and Alex Coven, to attend the meeting with her as observers (R345). Ms. Broder testified that she wanted her nephews present because as heirs they are effectively beneficial owners and that Ross Coven was privy to what is going on with the corporation. Essentially, for the same reasons, Ms. Broder nominated Ross Coven to be a member of the board of directors (R345:10-23 & 346:19-347:3). However, Ms. Coven's attorney, Joseph Cuomo, who controlled entrance through the Zoom platform, refused to permit Ross Coven entry into the meeting. Mr. Cuomo unilaterally acted a gatekeeper, even though he was not granted such authority by Neptune or its board. Mr. Cuomo would not have had such unilateral authority if the meeting was held in-person rather than

by electronic communication which he controlled. The improper scheduling of the special meeting of the shareholders by Zoom and the heavy-handed conduct of Divanea Coven and her attorney in impeding access to the meeting as gatekeeper renders any claimed action taken at such meeting void.

Since Appellant failed to properly give notice in accordance with the statute any action taken at the alleged meeting is rendered void – even without establishing that the results of the election would have been different.

> Generally, failure to give notice in accord with the statute and the corporate by-laws would have rendered the election void, and, if void, a new election would have been required even without a showing that the results of the election would, or might have been different (Matter of Empire State Supreme Lodge, 118 App.Div. 616, 103 N.Y.S. 1124; Matter of Keller, 116 App.Div. 58, 60, 101 N.Y.S. 133, 135; Matter of Melloh v. Beattie, 17 Misc.2d 902, 903, 187 N.Y.S.2d 203, 204; Matter of M. & O. Realty Corp., 16 Misc.2d 562, 182 N.Y.S.2d 186; Matter of 74 Tremont Ave. Corp., 10 Misc.2d 662, 663, 173 N.Y.S.2d 154, 155; Matter of Janaug, Inc. v. Szlapka, 6 Misc.2d 84, 85, 162 N.Y.S.2d 668, 669; Matter of Green Bus Lines (Turner), 166 Misc. 800, 804, 2 N.Y.S.2d 556, 560; Matter of Maurer, Inc., Sup., 77 N.Y.S.2d 159, 161; E. Aranow & H. Einhorn, Proxy Contests For Corporate Control (2d ed. 1968), pp. 500, 509; Ann., Stockholders' Meeting—Informality, 51 A.L.R. 941, esp. p. 954; 3 White, New York Corporations, Shareholders, par. 619.04, subd. (1); 20 Carmody-Wait 2d New York Practice, Action by and Against Corporations, s 121:438; 11 N.Y.Jur., Corporations, ss 407, 410).

Goldfield Corp. v. General Host Corp., 29 N.Y.2d 264, 269-70, 327 N.Y.S.2d 330, 334-35 (1971); See Trustees of Gallilee Pentecostal Church, Inc. v. Williams, 65 A.D.3d 1221, 885 N.Y.S.2d 525 (2d Dept. 2009).

The Court below therefore correctly determined that Appellant did not have the right to set up the shareholders meeting to be held by Zoom thereby rendering any actions claimed to have taken place at such meeting void as a matter of law.

B. ***The Notice of Special Meeting Failed to Comply with the Provisions of BCL §603(a)***

Although not addressed by the Court below, the purported notice of the special meeting also violated §603(a) of the Business Corporation Law and is a separate basis to deny the Petition. Section 603(a) of the Business Corporation Law provides as follows:

> If, for a period of one month after the date fixed by or under the by-laws for the annual meeting of shareholders, or if no date has been so fixed, for a period of thirteen months after the formation of the corporation or the last annual meeting, there is a failure to elect a sufficient number of directors to conduct the business of the corporation, the board shall call a special meeting for the election of directors. If such special meeting is not called by the board within two weeks after the expiration of such period or if it is so called but there is a failure to elect such directors for a period of two months after the expiration of such period, holders of ten percent of the votes of the shares entitled to vote in an election of directors may, in writing, demand the call of a special meeting for the election of directors specifying the date and month thereof, which shall not be less than sixty nor more than ninety days from the date of such written demand. The secretary

> of the corporation upon receiving the written demand shall promptly give notice of such meeting, or if he fails to do so within five business days thereafter, any shareholder signing such demand may give such notice. The meeting shall be held at the place fixed in the by-laws or, if not so fixed, at the office of the corporation.

Section 603 specifically provides that the meeting shall be held at the place fixed in the by-laws, or if not so fixed, at the office of the corporation, which for many years has been the residence of Staci Broder located at 3078 Ira Road, Bellmore, NY 11710 (R1042; R340:16-342:7). In order to call a special meeting for the election of directors under Section 603 of the BCL, Ms. Coven was first required to make a written demand upon Neptune to call such special meeting. If, and only if, upon receipt of the demand from a shareholder, the secretary of a corporation fails to give notice of the special meeting within five (5) business days may the shareholder signing such demand give the notice herself.

Herein, Appellant never made a demand upon the corporation or board of directors to call a special meeting under §603(a) of the Business Corporation Law, which deprived Ms. Broder, who was the remaining officer of Neptune, the right to schedule the meeting herself and in person (R240-241). Since Appellant failed to comply with Section 603 of the BCL and properly give notice in accordance with the statute, any action taken at the alleged meeting is rendered void. See Goldfield Corp. v. General Host Corp., supra; Trustees of Gallilee Pentecostal Church, Inc. v. Williams, supra.

C. ***Appellant Lacked Authority to Call a Special Meeting Under BCL §603(a) Since Neptune Already Had a Sufficient Number of Directors***

Further, Section 603(a) of the Business Corporation Law is inapplicable herein since a special meeting may only be called under BCL §603(a) if there is a failure to elect a sufficient number of directors to conduct the business of the corporation. Herein, the by-laws of Neptune contained within its corporate book (R466) does not specify the number of directors. Appellant disputes the validity of the by-laws contained within the corporate book as not being duly adopted or completed. However, regardless of whether the by-laws are valid, the minimum number of directors for Neptune would still be one, as set forth in Section 702(a) of the Business Corporation Law.

The evidence established at trial demonstrates that after the death of her brother Walter, Staci Broder was the one remaining director for Neptune, and therefore there was a sufficient number of directors to conduct the business of Neptune. See Tower Owners Inc. v Loev, 2022 WL 10085815 (N.Y. Sup Ct, Kings Co. 2022) ("Defendants' argument that BCL § 603 applies when there is a failure to elect directors for more than thirteen months after the last annual meeting is misplaced, as the provision applies to instances where there has been a failure to elect a *sufficient* number of directors to conduct business").

Staci Broder testified that while her father was alive, he was the president of Neptune and the director of Neptune (R278:2-6). Concededly, Ms. Broder was not

able to locate any formal minutes appointing Stanley Coven as an officer or director. However, Ms. Broder explained that it was a small company at the time run by one person and that her father signed tax returns for Neptune, took out multiple mortgages against the property owned by Neptune and made all decisions for Neptune (R278-279). Staci Broder further testified that after the death of her father in 2011 she and her brother Walter became the owners of Neptune and ran the company together. Ms. Broder testified that she and Walter held informal meetings and agreed that Staci would be president and Walter secretary of Neptune[4], with both acting as directors (R279:11-280:12). Appellant recognized this fact and forwarded an email to Staci Broder on December 9, 2021 threatening legal action against Ms. Broder "…personally, as CEO, DIRECTOR, Secretary and EQUAL 50% shareholder… (R1043). Appellant also alleged in Paragraphs "5" and "7" of her amended petition in the Prior Proceeding (R683) that Walter was the Secretary of Neptune and Staci was, upon information and belief, President. Admitted in evidence were the following documents created during the period that Staci Broder and Walter Coven operated Neptune together:

1) (R579) – Lease dated 12/1/13 with Mandalay Bay Auto Repair Inc. (R281:16-283:8) signed by Walter as President (R595, 596 & 598);

[4] Ms. Broder testified that the titles of the corporate officers were often used interchangeably and that if the lawyer or accountant listed their titles incorrectly on leases or tax returns they would often sign them anyway, without correction R353:2-16). Ms. Broder also testified that she was Secretary of Neptune before her father died and signed documents as Secretary (R277:17-278:1).

2) (R606) – Lease dated 1/1/13 with Nut-Partners, Inc. (R283:9-284:4) signed by Staci as Secretary (R619 & 620);

3) (R927) – Lease dated 5/1/14 with Abba Builders Inc. (R284:5-284:23) signed by Staci as President (R941);

4) (R716) – Neptune's 2012 Income Tax Returns (R285-288:3) electronically signed by Staci as Secretary, and listing Staci as Secretary and Walter as President in Statement 2 (R718, 726 & 763);

5) (R764) – Neptune's 2013 Income Tax Returns (R288:4-289:19) electronically signed by Staci as Secretary, and listing Staci as Secretary and Walter as President in Statement 2 (R789 & 823);

6) (R825) – Neptune's 2014 NYC Tax Returns (R290:21-291) electronically signed by Staci as Secretary, and listing Staci as Secretary and Walter as President in Statement 2 (R833);

7) (R834) – Neptune's 2015 Income Tax Returns (R292:1-12) electronically signed by Staci as Secretary, and listing Staci as Secretary and Walter as President in Statement 2 (R897 & 909];

8) (R1053) – Neptune's Signature Cards dated 10/11/2011 signed by Walter and Staci and listing Staci as President and Walter as authorized signer; and Neptune's Bank Resolutions dated 10/11/2011 listing Staci as President and Walter as authorized signer and signed by Staci as Secretary (R1061 & R1073) (R294:2-296:23).

It is submitted that the evidence establishes that upon the death of Stanley Coven in February 2011, Walter and Staci became the officers and directors of Neptune. The evidence also establishes that upon the death of Walter Coven on May 30, 2016, Staci Broder became the sole remaining officer and director of Neptune. Accordingly, under both the by-laws and BCL §703(b), Staci Broder had the right to serve as director until such time as she was replaced (See By-Laws at Art. II Section 3 – (R468). See Matter of Brenner v. Hart Sys., Inc., 114 A.D.2d 363, 366, 493 N.Y.S.2d 881, 883 (2d Dept. 1985) (director continues to function with all rights

and obligations until properly replaced); Griffin v. Varflex Corp., 79 A.D.2d 857, 434 N.Y.S.2d 488 (4th Dept. 1980).

Based upon the foregoing, since Staci Broder remained the sole officer and director of Neptune on January 19, 2022 (R434), Section 603(a) of the Business Corporation Law is inapplicable. There were a sufficient number of directors to conduct the business of the Neptune under Section 702(a) of the Business Corporation Law and therefore Appellant did not have the unilateral right to schedule the purported meeting held on March 30, 2022. Accordingly, although not addressed by the Court below in the Order, the foregoing would serve as another basis to deny the Petition.

POINT II

THE COURT BELOW PROPERLY EXERCISED ITS DISCRETION TO DENY THE PETITION GIVEN THE TOTALITY OF THE CIRCUMSTANCES AS DISSOLUTION IS NOT NECESSARY TO PROTECT THE RIGHTS OF THE SHAREHOLDERS OF NEPTUNE

There is no absolute right to the dissolution of a corporation and ultimately, the determination whether a corporation should be dissolved, regardless of the grounds, is within the discretion of the Court. See Matter of Kemp & Beatley Inc., 64 N.Y.2d 63, 484 N.Y.S.2d 799 (1984); In re Radom & Neidorff, Inc., 307 N.Y. 1, 7 (1954); Matter of Fancy Windows & Doors Mfg. Corp., 244 A.D.2d 484, 664

N.Y.S.2d 113 (2d Dept. 1997); Matter of Wiedy's Furniture Clearance Ctr. Co., Inc., 108 A.D.2d 81, 84, 487 N.Y.S.2d 901, 904 (3d Dept 1985); BCL §1111(a).

Section 1111 of the Business Corporation Law provides, in relevant part, as follows:

> (a) In an action or special proceeding under this article if, in the court's discretion, it shall appear that the corporation should be dissolved, it shall make a judgment or final order dissolving the corporation.
>
> (b) In making its decision, the court shall take into consideration the following criteria:
>
> (1) In an action brought by the attorney-general, the interest of the public is of paramount importance.
>
> (2) In a special proceeding brought by directors or shareholders, the benefit to the shareholders of a dissolution is of paramount importance.
>
> (3) In a special proceeding brought under section 1104 (Petition in case of deadlock among directors or shareholders) or section 1104-a (Petition for judicial dissolution under special circumstances) dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit. (emphasis supplied)

The ultimate remedy of dissolution should only be applied as a last resort. See Matter of Klein Law Group P.C., 134 A.D.3d 450, 19 N.Y.S.3d 748 (Mem) (1st Dept. 2015); Application of Ng, 174 A.D.2d 523, 526, 572 N.Y.S.2d 295 (1st Dept. 1991).

> Once a petitioner has established a prima facie showing of entitlement to dissolution, it is entirely within the court's discretion whether to issue an order granting dissolution,

> see BCL § 1111(a), and "[t]he ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort." Matter of Klein Law Group, P.C., 134 AD3d at 450 quoting Application of Ng, 174 AD2d 523, 526 (1st Dept 1991) (internal citations omitted).

Ades v A&E Stores, Inc., 2018 N.Y. Slip Op. 30128[U], 6-7 (Sup. Ct. NY Co. 2018).

The Court below recognized that under the particular facts of this case dissolution was not warranted even if the disputed meeting of shareholders was properly noticed and held. Petitioner has failed to distribute any of the shares owned by the estate to the beneficiaries of the estate despite the fact that her husband died on May 31, 2016. It is submitted that in exercising its discretion, the Court below recognized that Petitioner has been using the fact that there is a creditor of the estate as an excuse not to distribute the shares so that she will remain in a position to try and force a deadlock.

As pointed out by the Supreme Court in its Order dismissing the Petition (R4), it is particularly relevant that any perceived deadlock can be simply alleviated if the Appellant distributes any of the shares owned by the estate to the beneficiaries of the estate. Walter Coven's children are fifty (50%) percent beneficiaries of the Estate and would therefore be entitled to a twenty-five (25%) percent interest in Neptune. Both Ross Coven and Alex Coven testified that they would break any perceived deadlock by voting to elect a board of directors and also testified that they are against the dissolution of Neptune and the sale of the Premises (R265 & 268) (R271-273).

Although it is conceded that final distributions cannot be made and the estate cannot be closed while there are still unpaid creditors, interim distributions are permitted so long as such assets will not be required for the payment of debts. Florida Statute 733.802 specifically contemplates such distributions and permits a beneficiary to bring a proceeding to compel a personal representative to make interim distributions provided the beneficiary can establish that the property is not required for payment of debts, taxes or other administration expenses. As noted by the Court below, the value of Appellant's 50% interest in Neptune is well in excess of any claim by Mr. Embry or any other creditors or administration expenses. Ms. Coven testified that an appraisal she obtained valued the property at $7,400,00.00 (R205). Under Florida Statute 733.802 Appellant can make a very small distribution of an interest in Neptune to the beneficiaries of the estate to break any perceived voting deadlock or at a minimum, seek the Florida Court's permission to do so before dissolving a profitable and thriving corporation.

Indeed, the mere distribution of a one (1%) percent interest by the Estate to the beneficiaries would break any alleged deadlock. In Petition of Williamson, 85 N.Y.S.2d 93 (Sup Ct N.Y. Co.1948), the Court addressed the issue of the issuance of additional stock to break a perceived deadlock in denying a petition for dissolution. The Court ultimately denied the application for dissolution until it could

be shown that the shareholders could not elect a board of directors after the issuance of the additional stock.

> It does not follow, however, that the present motion for dissolution should be granted. The application is addressed to the court's discretion. It appears that the issuance of additional stock is imminent and that the inability of the stockholders to elect a Board of Directors may cease to exist upon the issuance of the additional stock.

Petition of Williamson, 85 N.Y.S.2d at 95.

Appellant is well aware of this fact and has strategically elected not to distribute any interest in Neptune to the beneficiaries of the Estate. Appellant has instead used her fiduciary position as personal representative of the Estate to further her individual interest and desire to dissolve Neptune and sell the Premises. A party whose own acts were made in bad faith in a view towards forcing a dissolution may not seek redress under the statute. See Cassata v. Brewster-Allen-Wichert, Inc., 248 A.D.2d 710, 670 N.Y.S.2d 552 (2d Dept. 1998); Myers v. Gold, 77 A.D.2d 652, 430 N.Y.S.2d 144 (2d Dept. 1980); Application of Clemente Bros., Inc., 19 A.D.2d 568, 568, 239 N.Y.S.2d 703 (3d Dept 1963), affd, 13 N.Y.2d 963, 244 N.Y.S.2d 641 (Mem) (1963); Ades v. A&E Stores, Inc., 2018 WL 513205, 2018 N.Y. Slip Op. 30128(U) (Sup. Ct. NY Co. 2018).

The video recording of the alleged special meeting of shareholders, as well as the overall conduct of Appellant in connection with this proceeding and the Prior

Proceeding, demonstrates that any perceived deadlock was manufactured by Divanea Coven to enable Divanea Coven to receive a lump sum payment she believes will result from the sale of the Premises. This has been Ms. Coven's clear intent since the death of her husband on May 30, 2016 (R228:17-23).

The facts of the within proceeding need to be distinguished from a case where business associates who are actively conducting the business of a corporation have a genuine dispute regarding the direction of a business or its operations, resulting in the failure to elect directors. Appellant is a fifty (50%) precent shareholder in a fiduciary capacity for what should have been a moment in time. Since the death of Walter Coven, Appellant has wanted nothing to do with Neptune, the Premises or its other shareholders, other than compelling its sale (R260-262; 299). Appellant admitted that immediately after the death of her husband she made a determination to sell the Premises (R228:17-23).

At the trial, Appellant claimed that she must dissolve Neptune in order to pay a large creditor of the Estate – Walter Embry. Appellant testified that Mr. Embry's claim, with interest, is now approximately $1,100,000.00 (R235:15-21). Appellant offered no testimony of any substantive efforts to resolve the claim with Walter Embry or any efforts to engage with Ms. Broder to attempt to have Neptune assist in alleviating the issue. The Premises has no mortgage filed against it (R265:16-17) and could easily be used as a source to borrow money to pay Mr. Embry – either

through a distribution or loan to the eventual shareholders through the Estate. Ms. Coven is not interested in such arrangements as it will spoil her efforts to force a dissolution. Ms. Coven testified that she has not spoken with Staci Broder or her stepchildren Ross and Alex Coven since shortly after Walter's death (R210-211). Appellant offered testimony of perfunctory efforts to sell Neptune stock to two individuals who were allegedly interested in the Premises before her husband died. However, Appellant never hired a broker or advertised the stock as being for sale (R229:11-230:5). At the time of trial, Appellant had received distributions from Neptune totaling approximately $550,000.00 (R:337:5-9 & (R950, R960, R970 & R1044), not one dollar of which was paid to Mr. Embry (R223). Rather than pay Mr. Embry, Appellant has instead used the proceeds of the distributions to fund litigation against the Respondents in her efforts to dissolve Neptune and receive her lump sum payment (R950, R960, R970 & R1044).

The embodiment of Appellant's intent and bad faith is illustrated by her opposition to the motion filed by Mr. Embry to compel satisfaction of his claim in the Florida Probate Court (R1053). Therein, Mr. Embry requested that the Florida Court take action to satisfy his claim and suggested alternatives, including assigning to him the amount of Neptune stock, based on its fair market value, required to satisfy his claim (R1053 at ¶10(a)). Mr. Embry's claim, according to Appellant is now $1,100,000.00 (R235:15-21). Appellant also stated that she believed the

Premises was worth approximately $7,400,000.00 based upon an appraisal she had performed (R236:5-8). Accordingly, Appellant's fifty (50%) percent interest in Neptune is worth well in excess of $1,100,000.00. Rather than agreeing to simply give Mr. Embry $1,100,000.00 worth of Neptune stock and ending this ordeal, Appellant opposed the motion. At trial, Appellant offered no rational explanation for the reason she would not give Mr. Embry enough Neptune stock to satisfy his judgment, instead of seeking the dissolution of Neptune to raise cash to satisfy his judgment (R235-239). However, examining Appellant's conduct dating all the way back to shortly after her husband death, the reason becomes clear. Appellant wants Neptune dissolved so she can receive a lump sum payment. If Appellant satisfied Mr. Embry's judgment with Neptune stock she would no longer control fifty (50%) percent of its stock. Accordingly, Appellant would lose the ability to singlehandedly contrive a deadlock, as attempted herein.

Permitting involuntary dissolution under such circumstances runs contrary to the purpose of the Business Corporation Law, as the Court of Appeals has recognized in similar circumstances:

> Therefore, the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection. [referring to a petition to dissolve a corporation under BCL § 1104-a, but equally applicable here]

In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 74, 484 N.Y.S.2d 799, 806 (1984) (internal citations omitted).

It is undisputed that Neptune is a thriving and profitable company. The Premises is fully rented, with five tenants and annual operating income of approximately $275,000.00 (R330-331) (R561). Neptune has made regular distributions to its shareholders, as detailed above, and has accumulated approximately $535,000.00 in cash in its bank accounts (R331-338) (R553). Although the fact that Neptune continues to prosper does not in and of itself preclude dissolution, it clearly undermines any argument that dissolution is in the best interests of the shareholders. See In re Seamerlin Operating Co., 307 N.Y. 407, 417 (1954); In re Radom & Neidorff, Inc., 307 N.Y. 1 (1954).

The dissolution of Neptune only benefits Divanea Coven, and solely in her individual capacity. A bad-faith dissolution that benefits one shareholder at the expense of the others is not permitted.

> The determination whether a corporation should be dissolved is within the discretion of the court (see Business Corporation Law § 1111[a]; Matter of Kemp & Beatley [Gardstein], 64 N.Y.2d 63, 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173 [1984]), and "the benefit to the shareholders of a dissolution is of paramount importance" in making that determination (§ 1111[b][2]).

Cellino v Cellino & Barnes, P.C., 175 A.D.3d 1120, 1121, 107 N.Y.S.3d 216, 218 (4th Dept. 2019).

Nor can Appellant's personal financial problems with a judgment creditor unrelated to the corporation be a basis for dissolution. The creditor of the Estate, Walter Embry, is wholly unrelated to Neptune or its operation. The fact that Appellant believes she needs liquid assets to satisfy this judgment will not support the dissolution of Neptune. This was also the conclusion of the Court in the Prior Proceeding (R697 at pp. 3-4).

> 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 BCL sections, cited *supra,* or at Common Law (see, *Matter of Kemp & Beatley, Inc. [Gardstein],* 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, which contains in the majority opinion the historical background in New York State of judicial dissolution of close corporations).
>
> The petitioners present no legal authority that holds that a shareholder in a close corporation, who is in personal financial difficulty, which is unrelated to that corporation, can demand to be bought out, because he or she needs the cash to satisfy personal creditors, and that if such demand is not complied with, then such shareholder can seek the dissolution of that corporation.

Application of Dubonnet Scarfs, Inc., 105 A.D.2d 339, 343, 484 N.Y.S.2d 541, 544 (1st Dept. 1985); See Matter of Murphy, 120 A.D.2d 733, 735, 502 N.Y.S.2d 518, 520 (2d Dept. 1986); Wagner v. Dombrowsky, 6 Misc. 3d 1041(A), 800 N.Y.S.2d 359 (Sup. Ct. Nassau Co. 2004).

Appellant has failed to establish entitlement as a matter of law to the extraordinary remedy of dissolution of Neptune. The Court below, after a two day trial, in which Justice Murphy had the opportunity to evaluate the demeanor and testimony of the witnesses, determined that dissolution was not warranted. The Court reasoned that even if the disputed shareholders meeting was properly constituted there was a strong probability that dissolution still would have been denied based upon the facts of the case as detailed above. The dissolution of Neptune is not required to satisfy the estate's debts and there are numerous options that the estate could have taken to fund the satisfaction of Mr. Embry's debt, including selling some of the stock, borrowing against the stock or as requested in Mr. Embry's motion in the Florida Probate Court, transferring to him the amount of Neptune stock required to satisfy his claim (R1053 at ¶10(a)).

The Court below retained discretionary power whether to grant a petition for dissolution, with dissolution only allowed as a last resort. See Matter of Kemp & Beatley Inc., 64 N.Y.2d at 73, 484 N.Y.S.2d at 805 (1984) ("the appropriateness of an order of dissolution is in every case vested in the sound discretion of the court"); Matter of Klein Law Group, P.C., 134 A.D.3d 450, 19 N.Y.S.3d 748 (Mem) (1st Dept. 2015). Inzer v W. Brighton Fire Dept., Inc., 173 A.D.3d 1826, 1827, 105 N.Y.S.3d 655, 658 (4th Dept. 2019) (a determination of the trial court in a dissolution proceeding should not be disturbed absent a clear abuse of discretion).

While this Court retains the power as broad as the trial court, the court below had the advantage of seeing and hearing the witnesses testify.

> In reviewing a determination made after a non-jury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses and hearing the testimony" (Winston v. Reichenbaum, 209 A.D.3d 801, 804, 176 N.Y.S.3d 672 [internal quotation marks omitted]). Nonetheless, "[w]here the court's findings of fact rest in large measure on considerations relating to the credibility of witnesses, ... deference is owed to the trial court's credibility determinations" (id. at 804, 176 N.Y.S.3d 672 [internal quotation marks omitted]).

Stagg, Terenzi, Confusione & Wabnik, LLP v. Clark Dodge Holding, LLC, 225 A.D.3d 919, 920, 209 N.Y.S.3d 54, 56 (2d Dept. 2024); See Dennis v Cerrone, 229 A.D.3d 1116, 1118, 214 N.Y.S.3d 850, 852 (4th Dept 2024).

The Court below did not abuse its exercise its discretion in denying and dismissing the petition, which was supported by ample evidence in the record.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the decision and order of the lower Court denying and dismissing the petition should be affirmed in all respects.

The Court below correctly determined that Appellant did not have the right, under BCL §602, to unilaterally schedule the special shareholder's meeting for the

election of directors to be held by Zoom, thereby rendering any actions claimed to have taken place at such meeting void as a matter of law.

Although not addressed by the Court below, the purported notice of the special meeting also violated BCL §603(a) and is a separate basis to deny the petition as Petitioner was first required to make a written demand upon Neptune to call the special meeting for the election of directors before attempting to schedule such a meeting herself. Further, Petitioner did not have the right to schedule a special meeting in reliance upon BCL §603(a), since a special meeting may only be called under BCL §603(a) if there is a failure to elect a sufficient number of directors to conduct the business of the corporation. As established at trial, under the BCL and its Bylaws Neptune was only required to have one director, which in this case was Staci Broder.

The Court below also providently exercised its discretion in denying and dismissing the petition. Neptune continues to operate as a prosperous and profitable entity and no true deadlock exists. Any perceived deadlock can be simply alleviated if the Appellant distributes any or all of the shares owned by the Estate to the beneficiaries of the Estate. Walter Coven's children, who are 50% beneficiaries of the Estate, each testified that they would break any perceived deadlock by voting to elect a board and are against the dissolution of Neptune or the sale of the subject premises.

Dated: Garden City, New York
December 1, 2025

Respectfully submitted,

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2018 WL 513205 (N.Y.Sup.), 2018 N.Y. Slip Op. 30128(U) (Trial Order)
Supreme Court of New York.
New York County

****1** In the Matter of the Application of Alan ADES, Petitioner,
v.
For the Dissolution of A&E STORES, INC., a Domestic Corporation, Pursuant to Section 1104 of the New York Business Corporation Law, Respondent.

No. 650267/2017.
January 23, 2018.

Decision and Order

Hon. Saliann Scarpulla.

MOTION DATE _____

MOTION SEQ. NO. *001*

***1** The following e-filed documents, listed by NYSCEF document number 12, 18, 19, 20, 22, 25, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this application to/for Dissolution

Petitioner Alan Ades ("Ades") commenced this special proceeding by Verified Petition and Order to Show Cause (motion seq. no. 001) seeking the dissolution of A&E Stores, Inc. ("A&E") pursuant to Business Corporation Law ("BCL") § 1104(a)(1), (2), and (3) and for the appointment of a permanent receiver to wind up A&E's affairs.

Background

A&E was incorporated in 1973. Ades is a 50% shareholder of A&E, Albert Erani ("Erani") is a 25% shareholder, and Erani's brother, Dennis Erani, is a 25% shareholder. A&E's Board of Directors has four members: Ades, Robert Ades (Ades's son), Erani, and Dennis Erani (collectively, "Directors"). A&E's by-laws provide that, if either Ades ****2** or Robert Ades are no longer able or willing to serve on the Board of Directors, the vacancy would be filled by and Ades's nominee, and if either Erani or Dennis Erani are no longer able or willing to serve on the Board of Directors, that vacancy would be filled by and Erani nominee. A&E's bylaws do not provide any mechanism for avoiding deadlock or for dissolution.

Through the operation of A&E, the shareholders developed and operated three retail clothing chain stores, "Strawberry," Bolton's," and "Pay Half."[1] Currently, A&E's day-to-day operations are performed by three senior executives, and Ades and Erani no longer work at A&E fulltime.

In or around October 2014, Ades and Erani adopted a shareholders' resolution permitting either Ades or Erani to unilaterally close all non-Bolton's A&E stores by March 31, 2016. On or about November 10, 2015, Ades and Erani modified the

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October 2014 resolution ("Store-Closing Plan"), in part to extend deadline for the closing of non-Bolton's stores to August 31, 2016 and to extend the deadline for converting one of the stores to a Bolton's to April 16, 2016.

Ades contends that, in or around 2015, he decided that he no longer wished to continue operating A&E because it has become increasingly less profitable. Erani disputes Ades's contention regarding the profitability of A&E, and claims that A&E has continued to operate at a profit.

****3** Ades acknowledges that the shareholders disagree with him and wish to continue operating A&E, but nevertheless concludes that A&E should be sold or liquidated so that he may get the best return on his investment. Ades asserts that various disputes have arisen between himself and Erani and Dennis Erani throughout 2016. The disputes specifically regarded whether to close A&E or whether to continue operating and investing in A&E by updating the computer systems, opening additional stores, extending stores' leases, hiring employees, and maintaining its trademark. Ades also asserts that Erani and Dennis Erani have countermanded Ades's instructions given to various executives and employees, which Erani denies.

***2** On or around November 29, 2016, Ades sent a notice to Erani and Dennis Erani proposing a joint meeting of the Board of Directors and shareholders. The notice proposed a resolution to sell or liquidate A&E within 180 days. On or around December 15, 2016, the Directors met for the joint meeting of the Board of Directors and shareholders. This joint meeting ended early and Ades's resolution was not discussed because Erani and Dennis Erani refused to continue the meeting unless it was tape recorded, to which Ades refused to consent.[2]

Ades asserts that he withheld consent to tape record the meeting because he thought that Erani and Dennis Erani "would simply make self-serving statements and engage in posturing, rather than participate in a meaningful dialogue," Pet. ¶ 22, and no prior meeting had ever been tape recorded. Ades concludes that the tape recording ****4** demand demonstrates that the relationship between shareholders has completely broken down and that they are no longer able to work together. Erani, however, disputes Ades's assertions and claims that he insisted on tape recording the meeting because Ades was becoming increasingly forgetful and would often revoke consent for business decisions that he previously consented to or approved.

Also on or around December 15, 2016, Ades unilaterally entered into an agreement with the landlord for the Strawberry store on 42nd Street ("42nd Street Strawberry"), whereby he arranged to close the store and surrender the lease by February 2017. Ades had been negotiating this lease since October 19, 2016, and claims that these actions were taken pursuant to the Store-Closing Plan. Erani - insisting that Ades did not have the authority to act unilaterally here because it was after August 31, 2016, the Store-Closing Plan's deadline - then sent a letter to the landlord in a failed attempt to impede the lease surrender and closing of the 42nd Street Strawberry.

Based on the foregoing, Ades commenced this proceeding by Verified Petition and Order to Show Cause seeking the dissolution of A&E pursuant to BCL § 1104(a)(1), (2), and (3) and for the appointment of a permanent receiver to wind up A&E's affairs.[3]

Erani opposes dissolution and asserts that a hearing is required. Erani contends that, once he refused to consent to Ades's suggestion that they cease A&E's operations, ****5** Ades deliberately caused disputes in 2016 by acting and taking positions that were directly aimed at harming A&E financially and forcing it out of business. Erani posits that these manufactured disputes are what Ades cites to justify dissolution. Erani also alleges Ades created disputes by voting for resolutions but later revoking his consent once substantial time, effort, and/or money was expended to execute them.[4] Therefore, Erani concludes that any alleged deadlock or dissension was manufactured by Ades in bad faith to force dissolution of A&E.

***3** Further, Erani disputes the existence of dissension or deadlock. He argues that the decision of whether to continue operating A&E or to sell or liquidate the business does not constitute deadlock; while Ades's practice of unilaterally revoking his consent for certain business decisions may have possibly resulted in deadlock, no deadlock occurred and A&E continued to function because Erani yielded to Ades regarding most disputed business decisions. Erani also argues that, regardless of any alleged deadlock or dissension, A&E continues to function because three senior executives manage A&E's day-to-day operations. Any disagreement between himself and Ades has not prevented A&E from functioning.

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****6 *Discussion***

A shareholder owning at least "one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors" may petition the court for dissolution based on at least one 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.

BCL § 1104(a).[5] The petition for dissolution may be granted summarily - "[a] hearing is only required where there is some contested issue determinative of the validity of the application." *Weiss v. Gordon*, 32 AD2d 279, 280 (1st Dept 1969) (internal citations omitted); *Matter of Klein Law Group, P.C.*, 134 AD3d 450 (1st Dept 2015).

Once a petitioner has established a prima facie showing of entitlement to dissolution, it is entirely within the court's discretion whether to issue an order granting dissolution, *see* BCL § 1111(a), and "[t]he ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort." *Matter of Klein Law Group,* ****7** *P.C.*, 134 AD3d at 450 quoting *Application of Ng*, 174 AD2d 523, 526 (1st Dept 1991) (internal citations omitted).

Dissolution is generally appropriate where the complained of internal dissension and/or deadlock impedes the daily functioning of the corporation, *see generally Hayes v Festa*, 202 AD2d 277, 277 (1st Dept 1994), thereby "pos[ing] an irreconcilable barrier to the continued functioning and prosperity of the corporation," *Matter of T.J. Ronan Paint Corp.*, 98 AD2d 413, 421 (1st Dept 1984).

Where the undisputed facts show that genuine dissension and/or deadlock exists, it is irrelevant who is at fault for the underlying conflict, and a hearing is not required. *Id.* at 422. "Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs." *Id.* (finding that "deadlock [was] harmful to the continued success of the corporation, such clearly established by four years of 'corporate warfare', during which [petitioner] was accused of theft, allegedly beaten, denied his salary, and locked out of the corporate offices, which, as a result were exclusively presided over by [respondent]"). *See also Neville v. Martin*, 29 AD3d 444 (1st Dept 2006); *Application of Glamorise Foundations, Inc.*, 228 AD2d 187, 189 (1st Dept 1996); *Matter of Dream Weaver Realty*, 70 AD3d 941, 942 (2d Dept 2010); *Matter of Eklund Farm Machinery, Inc.*, 40 AD3d 1325, 1326-27 (3d Dept 2007).

***4** However, even if dissension and/or deadlock do exist, allegations that a petitioner acted in bad faith by creating the underlying disputes to justify dissolution "constitute a defense to a dissolution proceeding," and a hearing is required. ****8** *Myers v Gold*, 77 AD2d 652, 653 (2d Dept 1980) (internal citations omitted); *see Application of Glamorise Foundations, Inc.*, 228 AD2d at 189; *Feinberg v Silverberg*, Index No. 3120-2011 (Sup Ct, Nassau County 2013) (citing *Kavanaugh v. Kavanaugh Knitting Co.*, 226 NY 185 [1919] and concluding that the "manufactured creation of the dissension ... is the *sine qua non* of bad faith" and petitioner's "[intent] for creating dissension and deadlock is nevertheless relevant"); *Matter of Rappaport*, 110 AD2d 639, 641 (2d Dept 1985). *But see Matter of Eklund Farm Machinery*, 40 AD3d at 1326-27 (summarily granting dissolution despite allegations that petitioner acted in bad faith by "creat[ing] dissension to obtain dissolution" where the record clearly established that the petitioner was completely excluded from control and operation of the corporation by respondent).

Here, there is no dispute that Ades and Erani disagree as to whether A&E should be dissolved or whether it should continue to operate. However, A&E is not a service corporation,[6] and because neither Ades nor Erani are responsible for A&E's day-to-day operations, this disagreement "is not dispositive of the fundamental issue of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted." *Application of Glamorise Foundations, Inc.*, 228 AD2d at 189; *Wagner v Dombrowsky, 6* Misc 3d 1041(A) (Sup Ct, Nassau County 2004) ("the internal dissension does not arise from the day-to-day operation of the properties but rather, ****9** principally derives from a philosophical business disagreement with respect to whether the parties should continue to operate the business in light of the alleged financial difficulties"). *Cf. Weiss*, 32 AD2d at 281.

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Further, Ades contends that he wants to either sell or liquidate A&E while it is still profitable so that he may recoup his investments and avoid any personal financial loss. This alone, however, is not a basis for dissolution under BCL § 1104.[7] *See Application of Dubonnet Scarfs, Inc.*, 105 AD2d 339, 343 (1st Dept 1985) (denying dissolution because the petitioner failed to allege "a single instance of internal dissension, which resulted in a deadlock over a management decision," thereby deducing that the petitioners sought dissolution solely as a pretext for obtaining funds to satisfy personal debts); *Wagner*, 6 Misc 3d 1041(A).

Despite Ades's contention that no hearing is required and that this application should be summarily granted because there is no dispute that Ades and Erani cannot work together, I cannot determined whether dissolution is appropriate on the papers alone because of the parties's conflicting submissions and allegations. Material issues of fact exist as to whether the dissension and deadlock alleged by Ades exists and whether Ades acted in bad faith by manufacturing the complained-of disputes and dissension to financially harm A&E and justify dissolution.

***5 **10** If dissension and/or deadlock do exist - and dissolution is not barred by Ades's alleged bad faith - material issues of fact also exist as to the profitability and financial viability of A&E and whether the proposed dissolution would benefit the shareholders. *See* BCL § 1111(b)(2). *See also Wagner*, 6 Misc 3d 1041(A) ("conflicting allegations with respect to the corporation's financial prospects and the significance of the [current] market and financial conditions ... require that a hearing be held to determine if dissolution would, in fact, be beneficial to the stockholders within the meaning of BCL § 1104(a)(3)"). Accordingly, I order an evidentiary hearing to resolve these material issues of fact. BCL § 1109.

In accordance with the foregoing, it is

ORDERED that an evidentiary hearing be held before a Special Referee to determine:

(1) Whether the alleged dissension and deadlock exists;

(2) Whether Ades acted in bad faith to manufacture dissension to obtain dissolution; and

(3) The financial benefit to shareholders if dissolution is ordered.

The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues; and it is further

ORDERED that Ades's petition for judicial dissolution and for the appointment of a permanent receiver to wind up A&E's affairs (motion seq. no. 001) is held in abeyance ****11** pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the Petitioner shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that upon receipt of the Special Referee's report, Petitioner's petition for judicial dissolution and for the appointment of a permanent receiver to wind up A&E's affairs shall be disposed of in accordance with the results of the Special Referee's report as to service and this decision.

This constitutes the decision and order of the Court.

1/22/18

DATE

<<signature>>

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SALIANN SCARPULLA, J.S.C.

Footnotes

1 "Each store in the chain has been represented by a separate entity that holds the lease to the store's premises. The store-level entities are owned 50/50 by the same shareholders as A&E stores, and have an identical Board composition." Pet. ¶ 6.

2 Ades does not specify whether the December 15, 2016 meeting was the only meeting where the Directors were not able to achieve the votes required for A&E action.

3 On January 20, 2017, I signed Ades's proposed order to show cause and issued a TRO which, in part, limited monthly distributions to shareholders and enjoined shareholders from making any material changes to A&E's business or operations or entering into any transaction outside of the ordinary course of business without Ades's written approval.

4 For example, while Ades contends that A&E is not able to function effectively because of outdated technology, Erani alleges that the parties voted and agreed to update its operating software. After A&E expended numerous resources and almost a year researching finding adequate software and signed the purchasing contract, Ades unilaterally changed his mind and reversed his decision. Another example that Erani cites is that the parties voted and agreed to convert two of their stores to Bolton's. Ades then changed his mind and rescinded consent for these conversions shortly before the stores were scheduled to open, after the merchandise was purchased and stored in a warehouse.

5 While Ades is seeking dissolution pursuant to BCL § 1104(a)(1), (2), and (3), he has not made any showing under BCL § 1104(a)(2) that "the shareholders are so divided that the votes required for the election of directors cannot be obtained." The November 21, 2012 Unanimous Written Consent between the shareholders obviates any need for a shareholder election to replace a vacant seat on the Board of Directors. Thus, Ades is not entitled to dissolution of A&E pursuant BCL § 1104(a)(2) and the discussion and analysis below are only pursuant to BCL § 1104(a)(1) and (3).

6 In service-oriented close corporations, courts have found that a petitioner seeking dissolution based on the desire not to continue the business does not constitute bad faith and may be sufficient to justify dissolution. *See, e.g., Weiss*, 32 AD2d at 280-81; *Petition of Petters*, 117 Misc. 2d 21, 24 (Sup Ct, NY Count 1982) ("In a service corporation, where the services to the clients are performed by the parties to the proceedings who are not working together, where there is a deadlock and consequent loss of profits, the act of one party in seeking to discontinue the business is not in bad faith.").

7 *Cf.* BCL § 1104-a(b)(1) (In actions under BCL § 1104-a, one of the factors that the court considers in deciding whether dissolution is appropriate is "[w]hether liquidation of the corporation is the only feasible means whereby petitioners may reasonably expect to obtain a fair return on their investment.").

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19 A.D.2d 568
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the Application for the Dissolution of CLEMENTE BROS., INC., a Corporation.

May 7, 1963.

Synopsis

Voluntary dissolution proceeding by one of two equal owners of its shares of capital stock entitled to vote at election of directors. From order of the Supreme Court, Special Term, Roscoe V. Elsworth, J., to show cause, William Deckelman, J., granting cross-motion to strike the corporation's answer and appearance, William Deckelman, J., granting motion to vacate the corporation's demand for bill of particulars and notice to take deposition, Lawrence H. Cooke, J., denying a mition, and William Deckelman, J., granting motion to strike a defense from the contesting stockholder's answer, appeals were taken. The Supreme Court, Appellate Division, held that the subject corporation was a proper jural party to the proceeding only for the limited and passive purpose of rendering it amenable to orders of court, and it was not entitled to file an answer aligning itself militantly on the side of one of two equal, discordant stockholders.

Disposition in accordance with opinion.

See also 324 Misc.2d 665, 228 N.Y.S.2d 320.

Attorneys and Law Firms

****705** Raymond T. Finnan, Troy, for respondent-appellant Clemente Bros, Inc.

Edward M. Murray, Troy, for respondent-appellant Miria Clemente.

Mackrell, Ranney & Rommel, Charles J. Ranney, Troy, for petitioner-respondent.

Louis J. Lefkowitz, Atty. Gen., Albany, for the People.

Before ***569** BERGAN, P. J., and GIBSON, HERLIHY, REYNOLDS and TAYLOR, JJ.

MEMORANDUM DECISION.

***568** In a voluntary dissolution proceeding instituted pursuant to article 9 of the General Corporation Law upon the petition of Salvatore F. Clemente, one of two equal owners of its shares of capital stock entitled to vote at an election of directors, Clemente Bros., Inc., the entity sought to be dissolved, and the individual respondent therein, Maria Clemente, who owns the remainder of such stock, appeal from orders of the Supreme Court at Special Term which disposed of various motions by the parties.

(1) The corporation and the individual stockholder appeal from an order (Elsworth, J.) entered in the Rensselaer County Clerk's office on November 3, 1961 which required all persons interested in the corporation to show cause before a nonofficial referee therein designated why the corporation should not be dissolved and directed the publication and service of the order. In the light of the circumstances of this case we think that the discretion exercised by Special Term ought not to be

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disturbed. Order affirmed, without costs. Settle order which will fix the date for the reconvention of the hearing before the referee.

(2) The corporate respondent appeals also: (a) from an order (Deckelman, J.) entered August 14, 1962 granting petitioner's cross motion to strike its appearance in the proceeding and the answer filed with the referee; we conclude that the appellant corporation is a proper jural party to the proceeding for the limited and passive purpose of rendering it amenable to the orders of the court (Business Corporation Law, § 1106, as renum. by L.1962, ch. 834, § 82, eff. Sept. 1, 1963, Revisers' Notes & Comment [p. 219]; Matter of Industrial Psychology v. Simon, 16 A.D.2d 114, 226 N.Y.S.2d 148; General Corporation Law, §§ 106, 110, 111); in case of a deadlock of its stockholders ****706** section 103 of the General Corporation Law grants the corporation as a separate entity no authority to determine whether a proceeding shall be initiated to dissolve itself; nor does the exercise by a qualified stockholder of his statutory prerogative to seek dissolution give it standing to litigate the issue of an asserted privilege to remain undissolved; '[t]he prime inquiry is, always, as to necessity for dissolution, that is, whether judicially-imposed death '*will be beneficial to the stockholders* or members *and not injurious to the public*', General Corporation Law, § 117'; (Matter of Radom & Neidorff, 307 N.Y. 1, 7, 119 N.E.2d 563, 565; emphasis supplied); reliance by the appellant corporation upon our prior decision (12 A.D.2d 694, 207 N.Y.S.2d 821) as the basis for its militant alignment on the said of one of two equal, discordant stockholders is unwarranted; order modified by permitting the respondent corporation to file a notice of appearance with the referee and, as so modified, affirmed, without costs; (b) from so much of separate orders (Deckelman, J.) entered on August 14, 1962 as granted petitioner's motion to vacate its demand for a bill of particulars and a notice to take the deposition of petitioner before trial; our view of the nominal status and function of the corporate entity in the proceeding precludes recourse to these pretrial remedies; orders, insofar as appealed from, affirmed, without costs; (c) from an order (Cooke, J.) entered November 5, 1962 denying its motion, the purport of which was to review the decision of a court of coordinate jurisdiction; order affirmed, without costs. (Mount Sinal Hosp. v. David, 8 A.D.2d 361, 188 N.Y.S.2d 298, motion for leave to appeal denied 9 A.D.2d 641, 191 N.Y.S.2d 546.)

(3) The individual stockholder further appeals from an order (Deckelman, J.) entered on August 14, 1962 which granted in part petitioner's motion to strike the separate defenses alleged in her answer. The stricken SIXTH defense alleged in substance that the dissolution is sought in bad faith and constitutes a conspiratorial effort on the part of petitioner to injure and destroy the corporation to the financial enhancement of a competing one created and operated by members of his immediate family. As between contesting stockholders the good faith of petitioner is an issue in the proceeding. (Matter of Seamerlin Operating Co. [Searing-Merlino], 307 N.Y. 407, 413, 121 N.E.2d 392, 394; Matter of Rateau Sales Co., 201 N.Y. 420, 424–425, 94 N.E. 869, 870–871; Matter of Whitehall Art Co., 6 A.D.2d 399, 400, 178 N.Y.S.2d 338, 340, 341.) Thus it was error to eliminate this defense. Order modified, on the law and the facts, by reinstating the SIXTH separate defense alleged in the answer and, as so modified, affirmed, without costs.

All Citations

19 A.D.2d 568, 239 N.Y.S.2d 703

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13 N.Y.2d 963
Court of Appeals of New York.

Application for the Dissolution of CLEMENTE BROS, INC., a Corporation. Salvatore F. Clemente, Petitioner-Respondent, Clemente Bros., Inc., Appellant, Maria Clemente et al., Respondents.

Oct. 31, 1963.

Synopsis
Appeal from Supreme Court, Appellate Division, Third Department, 19 A.D.2d 568, 239 N.Y.S.2d 703.

Voluntary dissolution proceeding was instituted pursuant to the General Corporation Law, Consol.Laws, c. 23, s 100 et seq., on the petition of one of two equal owners of corporation's capital stock who were entitled to vote at election of directors.

A Special Term of the Supreme Court held in Ulster County, William Deckelman, J., rendered an order, which was entered in Rensselaer County, striking out the appearance and answer of the corporation, and the corporation appealed.

The Appellate Division modified and affirmed the order as modified and held that the corporation was a proper jural party to the proceeding for the limited and passive purpose of rendering it amenable to the orders of the court.

The corporation appealed to the Court of Appeals, contending that it was a proper and necessary party to the proceeding with all the rights of the true adversary.

Opinion

***964** Order affirmed, without costs.

All concur.

All Citations

13 N.Y.2d 963, 194 N.E.2d 602, 244 N.Y.S.2d 641 (Mem)

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105 A.D.2d 339
Supreme Court, Appellate Division, First Department, New York.

In the Matter of the Application of DUBONNET SCARFS, INC., Fred Thomases (as Debtor and Debtor-in-Possession), and Florence Thomases, Holders of One-Half of All Outstanding Shares Entitled to Vote in an Election of Directors of Arkwright Mfg., Inc., Petitioners-Appellants, For the Dissolution of Arkwright Mfg., Inc., a Domestic corporation, Respondent-Respondent.

Jan. 22, 1985.

Synopsis

Holders of 50% of the outstanding shares of a closely held corporation petitioned for judicial dissolution of corporation. The Supreme Court, New York County, Robert White, J., denied the petition, and holders appealed. The Supreme Court, Appellate Division, Ross, J., held that petition alleging the corporation's president and chief executive officer refused to buy out holders outstanding shares, as needed by holders to satisfy their personal creditors, and that he had formerly misrepresented value of corporation's assets to holders, failed to state a cause of action justifying judicial foreclosure.

Affirmed.

Asch, J., filed dissenting opinion.

Attorneys and Law Firms

****542 *339** Stephen Greiner, New York City, of counsel (David G. Trachtenberg, New York City, with him on brief, Willkie Farr & Gallagher, New York City, attorneys), for petitioners-appellants.

Michael L. Allen, Newark, N.J., of counsel (Robert Alvin Adler, Newark, N.J., with him on brief, Simon & Allen, Newark, N.J., attorneys) for respondent and Arthur Olshan.

Before MURPHY, P.J., and SULLIVAN, ROSS, ASCH and KASSAL, JJ.

Opinion

ROSS, Justice.

This case involves an appeal from a denial of a petition to judicially dissolve a closely held corporation.

In 1952, Arkwright Accessories, Inc. was incorporated in New York State. Subsequently, in 1959, there was a certificate filed ***340** changing the name of this Corporation to Arkwright Mfg., Inc., (Arkwright). Then in 1960, an amended Certificate of Incorporation was filed, reflecting this name change.

Arkwright is affiliated with Wright Manufacturing Co., Inc. (Wright), which is a New Jersey Corporation. Besides its affiliation with Wright, Arkwright also has three wholly-owned subsidiaries, whose names are: Parknell Corporation (Parknell), Knitwear Building Corporation (Knitwear), Park Sewing Corporation (Park); and, while Parknell is a New York Corporation, Knitwear and Park are New Jersey Corporations. The affiliated Corporations, Arkwright and Wright, as well as the three subsidiaries, are engaged principally in the manufacture and sale of knitwear. Although the manufacturing facilities

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for these corporations are located in New Jersey, their sales offices are situated in Manhattan. Collectively, it appears that these firms employ sixty-one (61) persons.

Arthur Olshan (Olshan) is the President of Arkwright. It is undisputed that since the 1952 incorporation of Arkwright, Olshan has been its Chief Executive Officer and has had sole responsibility for all design, manufacture and sales. From the time of Arkwright's formation, Olshan has held 50% of the stock and the other 50% has been held by Dubonnet Scarfs, Inc., (Dubonnet), which is a New Jersey corporation.

Fred Thomases (Fred) and Florence Thomases (Florence) are husband and wife, and each of them owns 50% of the issued and outstanding capital stock of Dubonnet. Florence holds her Dubonnet stock in part as nominee for Fred and in part as nominee ****543** for a person named Harry Gordon (Gordon), who has allegedly been Fred's business partner for over forty years.

In recent years Arkwright has operated profitably and its creditors have all been paid on a current basis.

Fred and Gordon personally guaranteed, to various financial institutions, the indebtedness of Brucol Industries, Inc. (Brucol) and certain of its subsidiaries and affiliates. Thereafter, on August 7, 1981, Brucol and these companies associated with it, filed for reorganization, pursuant to Chapter 11 of the Federal Bankruptcy Code (U.S.Code, tit. 11). On July 2, 1982, as a result of the Brucol bankruptcy, Fred and Gordon were compelled, themselves, due to their guarantees, mentioned *supra,* to file for reorganization, pursuant to Chapter 11 in the United States Bankruptcy Court for the Southern District of New York.

By Order to Show Cause, brought in February 1984, petitioners Dubonnet, Fred and Florence, as holders of 50% of the ***341** outstanding shares of Arkwright, moved for its judicial dissolution, upon the basis of the Business Corporation Law (BCL) sections 1104 and 1104–a as well as the Common Law of the State of New York. In substance, the petitioners allege in their petition that the refusal of Olshan to buy them out, since Fred and Gordon need the cash to satisfy their personal creditors, justifies dissolution.

Respondent Arkwright cross-moved to, *inter alia,* dismiss the petition.

Special Term denied the petitioners' application, upon the basis that the petition does not state a cause of action, and, therefore, it granted the cross-motion to dismiss. We agree.

BCL section 1104(a) sets forth the three reasons upon which *holders of one-half of the outstanding shares* of a corporation can seek dissolution of the corporation and these shareholders can move on one or more of those grounds. The grounds are:

> "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."

In 1979, BCL section 1104–a became law and it expanded the availability of judicial dissolution. Under BCL section 1104–a, *holders of 20% or more of all outstanding shares* may petition for dissolution on one or both of two grounds. They are:

> "1. The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> 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." (BCL section 1104–a ([a]).

Besides the statutory grounds for judicial dissolution, set forth *supra,* there is also a Common Law ground. Thus, the Court of Appeals has held, in *Leibert v. Clapp,* 13 N.Y.2d 313, 317, 247 N.Y.S.2d 102, 196 N.E.2d 540, that there is a Common Law right of dissolution, when management breaches its fiduciary duty to the minority shareholders.

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***342** We find that the instant Petition fails to state a cause of action since this petition does not allege any facts that would justify a judicial dissolution on any of the grounds set forth either in BCL sections 1104 or 1104–a, cited *supra,* or at Common Law.

Even though for over three decades, from Arkwright's 1952 formation to date, Olshan has exercised daily management control, nowhere in the petition do the petitioners allege that such control by Olshan has led to a single instance of internal dissension, which resulted in a deadlock ****544** over a management decision and/or a stalemate in the election of a director or directors and/or a performance of duty by Olshan that was either oppressive or illegal or fraudulent or breached a fiduciary responsibility.

It is evident from our analysis of the petition that the only reason that the petitioners initiated this dissolution proceeding was to satisfy Fred's and Gordon's personal creditors. The Creditors' Committee (Committee) in Fred's and Gordon's bankruptcy proceedings has demanded that, in order for Fred and Gordon to receive their final discharge from bankruptcy, they must each divest themselves, through their Dubonnet shares, of their ownership interest in Arkwright, by liquidating it and turning the proceeds over to these creditors. Furthermore, the Committee has advised Fred and Gordon that, if they do not comply with this demand, then the Committee will move against *other* assets of Fred and Gordon.

In the record before us is a copy of an affidavit, dated March 20, 1984, of Robert A. Wiener (Wiener), who is a Certified Public Accountant and the accountant for the Committee. In his affidavit, Wiener states that he has audited the books of Arkwright on behalf of the Committee and "found that these companies had substantial liquid assets. Specifically, Arkwright and its affiliated companies had close to two million dollars in cash or cash equivalents ... [and] this money ... [is] being held in interest-bearing certificates of deposit. In addition, the companies had over one million dollars in near liquid receivables" [material in brackets added].

The only specific allegation leveled against Olshan in the petition alleges that sometime in September 1981 Olshan and Fred agreed that, *inter alia,* Arkwright would acquire Dubonnet's 50% ownership interest in Arkwright at fair value, and at the time of this agreement Olshan allegedly misrepresented the value of Arkwright's assets. Although the petitioners charge Olshan with this misrepresentation, they do not set forth any facts that would justify the conclusion that, even if Olshan made ***343** such a misrepresentation, it has in any manner interfered with the management of Arkwright. Incidentally, Olshan, in an affidavit, dated March 15, 1984, which was submitted in support of Arkwright's cross-motion, denied that he ever made such a misrepresentation. 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 BCL sections, cited*supra,* or at Common Law (see, *Matter of Kemp & Beatley, Inc. [Gardstein],* 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, which contains in the majority opinion the historical background in New York State of judicial dissolution of close corporations).

The petitioners present no legal authority that holds that a shareholder in a close corporation, who is in personal financial difficulty, which is unrelated to that corporation, can demand to be bought out, because he or she needs the cash to satisfy personal creditors, and that if such demand is not complied with, then such shareholder can seek the dissolution of that corporation.

We disagree with the dissent's contention that Olshan's alleged refusal to cause Arkwright to buy out the petitioners sets forth a ground for judicial dissolution under the BCL sections, cited *supra.* None of the facts or legal authority cited by the dissent supports the conclusion that the management of Arkwright has in any way been affected by this alleged refusal.

The allegations that Fred and Gordon are in their late seventies and have a pressing need for cash arouses our sympathy as it arouses the sympathy of the dissent. However, neither sympathy nor a shareholder's need for cash qualify as either a statutory or Common Law ground for judicial dissolution.

Accordingly, the order and judgment (one paper), Supreme Court, New York ****545** County, entered May 1, 1984, which, denied the petitioners' application for dissolution and granted the respondent's cross-motion to dismiss the petition, should be affirmed, with costs.

***347** Order and judgment (one paper), Supreme Court, New York County, entered on May 1, 1984, affirmed. Respondent

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shall recover of appellants $75 costs and disbursements of this appeal.

MURPHY, P.J., SULLIVAN, and KASSAL, JJ., concur with ROSS, J.

All concur except ASCH, J., who dissents.

ASCH, Justice (dissenting).

This proceeding seeks the judicial dissolution of Arkwright Mfg., Inc., a domestic corporation, pursuant to Sections 1104 and 1104–a of the Business Corporation Law and the common law of the State of New York.

Arkwright is a privately held corporation which is owned by two groups of shareholders. Fifty percent of the stock of Arkwright is owned by respondent Arthur Olshan. The other ***344** fifty percent is owned by petitioner Dubonnet Scarfs, Inc. ("Dubonnet"), a New York corporation. Petitioner Fred Thomases, who is in his late 70's, and his wife, petitioner Florence Thomases, each own fifty percent of the issued and outstanding capital stock of Dubonnet. Florence Thomases owns her stock in Dubonnet in part as nominee for her husband and in part as nominee for Harry Gordon.

The proceeding was necessitated by the urgent need of Fred Thomases and Gordon to convert their interests in Arkwright to cash. They are presently engaged in the final stages of approval of reorganization plans in connection with their personal bankruptcy proceedings. The Thomases seek to liquidate their Arkwright interest to satisfy the creditors' demands in the bankruptcy reorganization plan. If this is not done, other property belonging to them would be sold for that purpose.

The verified petition makes it clear that it is essential to the Thomases-Gordon group of shareholders to convert their interests in the corporations into cash. In addition, evidence submitted in support of the petition establishes that the corporations currently have substantial cash and other liquid assets which respondent Olshan could use, as an alternative to dissolution, to purchase the interests of petitioners in the corporations. Robert Wiener, a certified public accountant retained to analyze the value of Thomases' assets, has concluded that the Arkwright group has close to $2,000,000 in cash and cash equivalents. These liquid assets are being held in interest-bearing certificates of deposit and are not being used in the operation of the business. In addition, the companies allegedly have more than $1,000,000 in near liquid receivables.

Despite these facts, Olshan has refused to have the corporations purchase petitioners' interests at fair value. He has also refused to agree to the dissolution of the corporations so as to enable petitioners to realize value from their interests. Clearly, the petition adequately alleges that two factions of shareholders are divided concerning the fundamental questions of whether the corporations should be dissolved and what should be done with their substantial liquid assets. Plainly, also, it is alleged that dissolution would be beneficial to shareholders under the circumstances of this case. These allegations, if proven, would warrant dissolution under B.C.L. § 1104(a).

The petition also seeks dissolution pursuant to Section 1104–a of the B.C.L. and the common law of New York by reason of Olshan's alleged oppressive and fraudulent ***345** conduct and his breach of fiduciary duty. In or about September 1981, Olshan and Fred Thomases discussed the purchase of Dubonnet's fifty percent record ownership interest in Arkwright and Florence Thomases' fifty percent record ownership interest in Wright, an affiliated corporation under common ownership, including the fair value of the corporations. At that time, ****546** Olshan advised Fred Thomases that the book value of the Arkwright group was $4,000,000, which included a loan of $1,500,000 of doubtful collectability due from certain corporations owned by or affiliated with Brucol Industries, Inc., which itself has filed for reorganization under the Bankruptcy Code. Fred Thomases subsequently learned that the $4,000,000 book value figure did not, in fact, include the indebtedness from Brucol, and that the $4,000,000 book value figure had been otherwise understated. He now allegedly believes that the fair value of the Arkwright group at the time of these discussions in September 1981, and today, was and is approximately $6,000,000. In short, petitioners assert that Olshan, who was then running the day to day operations of the companies, materially understated the value of the Arkwright group to Fred Thomases. Such conduct, if true, allege

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petitioners, was oppressive and fraudulent and constituted a breach of fiduciary duty.

On the return date of the petition, respondents moved to dismiss. Without allowing petitioners to conduct discovery and without ordering an evidentiary hearing, the Court below denied the petition and granted respondents' motion to dismiss. This summary dismissal was in error.

Petitioners are entitled to judicial dissolution pursuant to B.C.L. § 1104(a)(3) because there is internal dissension and two or more factions of the shareholders are so divided that dissolution would be beneficial to the shareholders. Thus, B.C.L. 1104(a)(3) provides that "... the holders of one-half of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on ... the ... ground ... (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders."

While Section 103 of the General Corporation Law (the predecessor to B.C.L. § 1104[a]) authorized dissolution when the directors were divided "respecting the management of [the corporation's] affairs" (similar to ***346** B.C.L. § 1104[a][1]) and when the stockholders could "not elect a board of directors" (similar to B.C.L. § 1104[a][2]), the Business Corporation Law added a new ground. Thus, B.C.L. § 1104(a)(3) authorizes judicial dissolution upon a showing that there is shareholder dissension as to matters *other* than the inability to elect a board of directors, as long as dissolution would be beneficial to the shareholders. It is not limited by its terms to dissension respecting "the management of the corporation's affairs," as held by Special Term.

The continued making of a profit by the corporation is not a complete bar to its dissolution (B.C.L. § 1111[b][3]).

A cause of action, therefore, for dissolution pursuant to B.C.L. § 1104(a)(3) was stated by petitioners. The petition sufficiently alleged internal dissension on the use of corporate assets (the certificates of deposit). There also was evidence that money was available to buy out petitioner Dubonnet. This would be without respondent corporation Arkwright actually going out of business (cf. B.C.L § 1118). As Dubonnet is simply the alter ego of the Thomases, it would be beneficial to the shareholder that the buy out take place. At the very least, a hearing should have been held on the petition's allegations. This is the usual procedure in B.C.L. dissolution matters where there are contested facts (see *Myers v. Gold,* 77 A.D.2d 652, 430 N.Y.S.2d 144).

The respondent Arkwright's, and Olshan's objections to dissolution created questions of fact, and Special Term erred in dismissing the petition simply on the papers and affidavits submitted (see *Wollman v. Littman,* 35 A.D.2d 935, 316 N.Y.S.2d 526). Even under the former law, General Corporation Law § 103 (with more narrow grounds, and restrictions on dissolution), evidentiary hearings were generally required on benefit to the stockholders from dissolution (see *In re Seamerlin Operating* ****547** *Co. [Searing—Merlino],* 307 N.Y. 407, 417, 121 N.E.2d 392).

Even if reversal was not indicated under B.C.L. § 1104(a), another ground asserted in the petition was B.C.L. § 1104–a, which reads in relevant part:

> (a) The holders of twenty percent or more of all outstanding shares of a corporation ... may present a petition for dissolution on one or more of the following grounds:
>
> ***347** (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders ....

The petition tracked the statute. Thus, it alleged that Olshan was trying to "freeze out" the passive "partner," the Thomases, and prevent them from getting the fruits of their investment, and obtaining the cash to fund reorganization in family bankruptcy. This is a ground for Section 1104–a relief (see *Matter of Kemp & Beatley, Inc. [Gardstein],* 64 N.Y.2d 63, 484N.Y.S.2d 799, 473 N.E.2d 1173, decided Nov. 29, 1984, Slip Op. No. 549; *Application of Topper v. Park-Sheraton Pharmacy, Inc.,* 107 Misc.2d 25, 433 N.Y.S.2d 359). Certainly there was a factual question with respect to Olshan's alleged fraud (or oppressive conduct) raised by his refusal to allow dissolution of the corporation, or buy out, when the Thomases were in such financial trouble.

The matter of what is "oppressive conduct" is normally a factual determination (see *Application of Topper, supra*). Relief to Olshan and buying out the Dubonnet interest at a fair price was available, if desired by him (see BCL § 1118; *Matter of Kemp*

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& Beatley, Inc. [Gardstein], supra; Matter of Delinko [Sunshine Temporary Office Personnel, Inc.], 85 A.D.2d 561, 445 N.Y.S.2d 706).

It was not proper for Special Term to dismiss the petition without a hearing. I would therefore reverse, on the law, reinstate the petition and remand for such a hearing.

All Citations

105 A.D.2d 339, 484 N.Y.S.2d 541

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174 A.D.2d 523
Supreme Court, Appellate Division, First Department, New York.

Application of Yoet Ngor NG, etc., Petitioner–Respondent, For the Judicial Dissolution of 168 ½ Delancey Corporation, William Sang, et al., Respondents–Appellants. Application of Yoet Ngor NG, etc., Petitioner–Respondent, For the Judicial Dissolution of Moca Realty, Inc., William Sang, et al., Respondents–Appellants.

June 25, 1991.

Synopsis

Shareholder petitioned for dissolution of two closely held corporations that owned adjacent buildings. The Supreme Court, New York County, Davis, J., granted the petitions, dissolved the corporations, appointed permanent receiver, and denied cross motions to dismiss petitions. After consolidation of the appeals, the Supreme Court, Appellate Division, held that motion court acted precipitously in granting petitions without conducting hearing to determine disputed factual issues presented on the record.

Vacated in part and remanded.

****296** Before MURPHY, P.J., and SULLIVAN, ASCH and RUBIN, JJ.

Opinion

***523** MEMORANDUM DECISION.

Order of the Supreme Court, New York County (William Davis, J.), entered on November 28, 1990, which, *inter alia,* granted the petition of Yoet Ngor Ng for dissolution of 168 ½ Delancey Corp., dissolved the corporation, appointed a permanent receiver, and denied the cross-motion to dismiss the petition, unanimously modified, on the law, to the extent of vacating those parts of said order granting the petition, and appointing a receiver (decretal paragraphs 1 through 8 and 10), and the matter is remanded ***524** for an evidentiary hearing to determine disputed issues of fact, and otherwise affirmed, without costs.

Order of the Supreme Court, New York County (William Davis, J.), entered on November 28, 1990, which, *inter alia,* granted the petition of Yoet Ngor Ng for dissolution of Moca Realty, Inc., dissolved the corporation, appointed a receiver, and denied the cross-motion to dismiss the petition, unanimously modified, on the law, to the extent of vacating those parts of said order granting the petition and appointing a receiver (decretal paragraphs 1 through 8 and 10), and the matter is remanded for an evidentiary hearing to determine disputed issues of fact, and otherwise affirmed, without costs.

These consolidated appeals involve a dispute among family members over two closely-held corporations that own two adjacent buildings at 168–168 ½ Delancey Street in Manhattan. The building at 168 ½ Delancey has six stories with a restaurant on the ground floor operated by Vincent Sang, and ten apartments above, which have been occupied over the years mainly by family members allegedly without payment of rent. The adjacent building owned by Moca Realty at 168 Delancey is a one story commercial building occupied by one commercial tenant which has no ties to the family. We are advised that since the determination of the motion, the corporate tenant has vacated.

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The 168 ½ Delancey Street Corporation was formed in 1975. Its capital structure consisted of fifty shares of common stock distributed in five blocks of ten shares each to Vincent Sang, Wai–Ling Sang (his wife), Manolo Ng (Vincent's father-in-law), Shum Yuk Fu (Vincent's wife's uncle), and Shum Chu Wig (Vincent's wife's cousin). The corporation was allegedly formed on the advice of Jack Chin, an accountant. Chin, Wai–Ling Sang, and Vincent Sang assert that all the money for the renovation of the building was contributed by Vincent Sang and that the shares were to be held in trust for him as beneficial owner.

****297** In 1985, Manolo Ng died, and petitioner Yoet Ngor Ng, his wife, became record owner of Manolo Ng's ten shares. In February 1988, Shum Yuk Fu and Shum Chu Wig transferred their combined total of twenty shares to Vincent's wife, respondent Wai–Ling Sang. Petitioner's position is that this transfer was accomplished by fraud. The present dispute arose after this twenty share transfer, and after petitioner loaned $20,000 to pay corporate debts in 1988.

Appellants allege that petitioner prevailed upon her daughter ***525** by threats and telephone harassment to convey to petitioner 15 shares out of the 20 that were conveyed by the Shums, giving petitioner control of 25 out of the 50 authorized shares in 168 ½ Delancey Corporation. The validity of the transfer of the fifteen shares is contested by appellants. William Sang, the Secretary of the corporation refused to sign the certificates for the transfer of the fifteen shares to his grandmother. In January 1990, one year after the alleged transfer, Wai–Ling Sang wrote to the corporation's attorney John Murff, at whose office the transfer had been negotiated, stating that the transfer was void, and without consideration, and that her signature had been procured by improper means.

In May 1990, Yoet Ngor Ng petitioned for the dissolution of 168 ½ Delancey Corp. on the grounds that directors and shareholders meetings had not been held in two years; shareholders were hopelessly deadlocked; payment of dividends had ceased in 1989; and that rent, primarily from the Apollo Restaurant, was either not being collected by the corporation or was being diverted. In the papers submitted, petitioner did not deny that neither she nor her husband ever contributed any funds to the corporation other than the $20,000 loan in 1988. Nor did petitioner deny that the transfer of the fifteen shares was made without consideration.

Moca Realty Inc. was formed in 1977 with its shares divided equally among petitioner, her husband Manolo Ng (now deceased), Wai–Ling Sang and Vincent Sang. Petitioner now owns 50% of the corporation having acceded to her husband's shares. The petition in Moca Realty contains similar allegations of deadlock and failure to observe corporate formalities. It alleges further that the rent from the corporate tenant has either not been collected or has been diverted. Respondents cross-moved to dismiss the petition for failure to state a cause of action, and stated that because the corporate tenant had been experiencing financial difficulties, they decided eviction would not be prudent in light of the weak market for commercial space.

The Motion Court granted both petitions pursuant to BCL §§ 1104 and 1104–a, finding, without elaboration, that the shareholders were irreconcilably deadlocked with respect to management of the corporate affairs, and that due to internal dissension, dissolution would be in the best interests of shareholders.

The Motion Court also granted petitioner's application for the appointment of a receiver for each corporation on the ***526** ground that there had been an "extended failure to collect rent from the tenants." This court granted appellants' motion for a stay of the orders pending appeal.

We agree with appellants that the Motion Court acted precipitously in granting the petitions without conducting a hearing to determine the disputed factual issues presented on this record. *See Matter of MacDougall,* 150 A.D.2d 160, 540 N.Y.S.2d 245.

With respect to 168 ½ Delancey Corp., the order directs the sale of corporate property, including the Apollo Restaurant, despite Vincent Sang's *prima facie* showing of the elements of a constructive trust: the existence of a confidential relation, an express promise, a transfer in reliance on that promise, and unjust enrichment. *See Sharp v. Kosmalski,* 40 N.Y.2d 119, 386 N.Y.S.2d 72, 351 N.E.2d 721; *Simonds v. Simonds,* 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189.

The ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort. *Muller v. Silverstein,* 92 A.D.2d 455, 458 N.Y.S.2d 597. On this record it appears that the financial management of the corporations had been conducted somewhat loosely from the inception. In addition to failure to observe ****298** corporate formalities,

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failure to collect rents or pay dividends is the gravamen of the petition. Yet family members had from time to time occupied many of the apartments without paying rent. Indeed, even petitioner enjoyed this perquisite until she moved out when relations soured, and her son continues to reside there. Factual issues of waiver and estoppel are thus present. *Matter of Nelkin v. H.J.R. Realty Corp.,* 25 N.Y.2d 543, 307 N.Y.S.2d 454, 255 N.E.2d 713. It is doubtful against this factual background that appellants' actions can be considered oppressive under BCL § 1104–a.

With respect to Moca Realty, the case for dissolution is even weaker. The principal allegation is failure to collect rent from the single commercial tenant, and respondents submitted a business justification for their action. This petition should also be the subject of an evidentiary hearing on remand.

With respect to the receiver appointed by the Motion Court, her appointment has never become effective due to this court's issuance of an order staying enforcement pending appeal. Therefore, on remand, the Motion Court has discretion to determine whether the appointment should be renewed pending the outcome of the evidentiary hearing.

All Citations

174 A.D.2d 523, 572 N.Y.S.2d 295

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248 A.D.2d 710
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Frank CASSATA, Respondent,
v.
BREWSTER–ALLEN–WICHERT, INC., et al., Appellants.

March 30, 1998.

Synopsis
Petition for judicial dissolution of corporation was brought. The Supreme Court, Suffolk County, Jones, J., granted dissolution and appeal was taken. The Supreme Court, Appellate Division, held that there was fact question whether minority shareholder provoked oppressive conduct by majority shareholders forming basis of grant of dissolution, in order to remove competitor for another corporation in which he held interest and by which his son was employed.

Affirmed.

Attorneys and Law Firms

****552** Scheyer & Jellenik, Smithtown (Richard I. Scheyer, of counsel), for appellants.

Ryan & Henderson, P.C., Carle Place (William V. Alesi, of counsel), for respondent.

Before BRACKEN, J.P., and O'BRIEN, COPERTINO and PIZZUTO, JJ.

Opinion

MEMORANDUM BY THE COURT.

***710** In a proceeding pursuant to Business Corporation Law § 1104–a for judicial dissolution, the appeal is from an order of the Supreme Court, Suffolk County (Jones, J.), dated September 16, 1997, which, *inter alia*, granted, in part, that branch of the petitioner's motion which was for judicial dissolution of the appellant Brewster–Allen–Wichert, Inc., and granted that branch of the petitioner's ****553** motion which was for summary judgment dismissing the appellants' counterclaims.

ORDERED that the order is modified by (1) deleting the provision in the first decretal paragraph granting, in part, that ***711** branch of the petitioner's motion which was for judicial dissolution of Brewster–Allen–Wichert, Inc., and substituting therefor a provision denying that branch of the motion, (2) deleting the provision in the second decretal paragraph granting that branch of the petitioner's motion which was for summary judgment dismissing the appellants' first and second counterclaims and substituting therefor a provision denying that branch of the motion, and otherwise denying the motion, and (3) deleting the third, fourth, fifth, sixth, seventh, and eighth decretal paragraphs; as so modified, the order is affirmed, with costs to the appellants.

The petitioner, Frank Cassata, purchased 20% of the shares of Brewster–Allen–Wichert, Inc. (hereinafter BAW), a close corporation, in December 1990. A disagreement arose between Cassata and the majority shareholders (the appellants Anthony Pace, Frank Pace, Jr., John Pace, and Steve Etimos) in late 1994 regarding Cassata's purchase of an interest in a competing insurance agency which employed his son. The disagreement ultimately led to the commencement of this proceeding by Cassata for judicial dissolution of BAW pursuant to Business Corporation Law § 1104–a.

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In his motion for summary judgment, Cassata made a prima facie showing of oppressive conduct, in that the majority shareholders discontinued their practice of issuing dividends to shareholders, refused to reinstate his salary, and removed his authority to sign checks on BAW's bank account (*see*, *Matter of Kemp & Beatley [Gardstein]*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173; *Matter of Imperatore*, 128 A.D.2d 707, 512 N.Y.S.2d 904; *Matter* of *Topper [Park Sheraton Pharmacy]*, 107 Misc.2d 25, 433 N.Y.S.2d 359). We conclude, however, that it was error to grant Cassata's motion without a hearing as there are issues of fact with respect to the majority shareholders' defense of bad faith. A minority shareholder "whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression" is not entitled to redress under the statute (*Matter of Kemp & Beatley*, *supra*, at 74, 484 N.Y.S.2d 799, 473 N.E.2d 1173; see also, *Matter of Burack [I. Burack, Inc.]*, 137 A.D.2d 523, 524 N.Y.S.2d 457). The shareholders of a close corporation owe each other a duty to act in good faith (*see*, *Fender v. Prescott*, 101 A.D.2d 418, 476 N.Y.S.2d 128, *affd.* 64 N.Y.2d 1079, 489 N.Y.S.2d 904, 479 N.E.2d 249; *Matter of Ronan Paint Corp.*, 98 A.D.2d 413, 469 N.Y.S.2d 931; *see also*, *Matter of Validation Review Assocs.*, 223 A.D.2d 134, 646 N.Y.S.2d 149). The parties' affidavits present disputed issues of fact with respect to the claim by the majority shareholders that Cassata's actions were undertaken with a view toward forcing a judicial dissolution of BAW in order to aid the competing insurance agency in which he had a financial ***712** interest (*see*, *Matter of Myers v. Gold*, 77 A.D.2d 652, 430 N.Y.S.2d 144; *Matter of Clemente Bros.*, 19 A.D.2d 568, 239 N.Y.S.2d 703, *affd.* 13 N.Y.2d 963, 244 N.Y.S.2d 641, 194 N.E.2d 602).

Contrary to the Supreme Court's determination, we conclude that there are issues of fact precluding summary judgment dismissing the first and second counterclaims asserted in the answer, as they are essentially based on the claim that Cassata violated his duty to act in good faith toward the majority shareholders. However, that branch of Cassata's motion which was for summary judgment dismissing the third and fourth counterclaims was properly granted as those counterclaims are legally and factually without merit.

All Citations

248 A.D.2d 710, 670 N.Y.S.2d 552, 1998 N.Y. Slip Op. 02943

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175 A.D.3d 1120
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Ross M. CELLINO, Jr., Petitioner–Respondent, v. CELLINO & BARNES, P.C., and Stephen E. Barnes, Respondents-Appellants. (Appeal No. 1.)

1418
|
CA 18–00669
|
Entered: August 22, 2019

Synopsis

Background: Director and shareholder of a corporation filed for dissolution of the corporation. The Supreme Court, Erie County, Deborah A. Chimes, J., denied corporation and other director's motion for summary judgment and granted plaintiff director's motion to appoint temporary receiver. Corporation and respondent director appealed.

Holdings: The Supreme Court, Appellate Division, held that:

genuine issue of material fact existed as to whether dissolution of a corporation would benefit shareholders, precluding summary judgment, and

appointment of a temporary receiver was warranted.

Affirmed.

****217** Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered February 6, 2018. The order, insofar as appealed from, granted in part the cross motion of petitioner for the appointment of a temporary receiver.

Attorneys and Law Firms

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (GREGORY P. PHOTIADIS OF COUNSEL), AND LIPSITZ GREEN SCIME CAMBRIA LLP, FOR RESPONDENTS–APPELLANTS.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), AND HODGSON RUSS LLP, FOR PETITIONER–RESPONDENT.

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

MEMORANDUM AND ORDER

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***1120** It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner, one of the two directors and 50% shareholders of respondent corporation Cellino & Barnes, P.C. (PC), brought this special proceeding against the PC and petitioner's co-shareholder ****218** Stephen E. Barnes (collectively, respondents) seeking, inter alia, judicial dissolution of the PC pursuant to Business Corporation Law § 1104(a)(1) and (3). Formed in 1998 by petitioner and Barnes, the PC began as a regional law firm with offices in Buffalo and Rochester. In 2008, the PC began its expansion into the downstate market, and in 2013, Barnes approached petitioner about opening an office in California. Petitioner declined but, according to petitioner, by ***1121** that time Barnes and the chief operating officer (COO) of the PC had already made preparations to open an office in Los Angeles. Barnes thereafter formed Cellino & Barnes, L.C. (LC), a California corporation that was separate from the PC and in which Barnes had a 99.9% interest. Petitioner became a minority owner with a .1% ownership in the LC.

In 2017, petitioner filed an initial petition for dissolution of the PC and also withdrew from and divested himself of his interest in the LC. Petitioner subsequently filed an amended petition for dissolution alleging, among other things, that there had been a breakdown in communication between himself and Barnes with respect to the management and direction of the PC. In particular, petitioner alleged that Barnes had favored the LC to the detriment of the PC by allowing the LC to utilize the PC's computer network, telephone number, and employees without adequate compensation. Petitioner further alleged, inter alia, that Barnes had directed to the LC mass tort cases solicited by the PC in the Northeast; paid a bonus to the PC's COO from the PC's account for work that the COO did on behalf of the LC; refused petitioner's request to terminate the COO as a PC employee and hire him as an LC employee; and rejected petitioner's request to restrict the COO's access to the PC's bank account. Respondents moved, inter alia, for summary judgment dismissing the amended petition, and petitioner cross-moved for the appointment of a temporary receiver pursuant to Business Corporation Law § 1202(a)(1). In appeal No. 1, respondents appeal from an order that granted in part petitioner's cross motion for the appointment of a temporary receiver. In appeal No. 2, respondents appeal, as limited by their brief, from that part of an order of Supreme Court denying respondents' motion insofar as it sought summary judgment dismissing the amended petition. We affirm in both appeals.

Addressing first appeal No. 2, we reject respondents' contention that the court erred in denying their motion insofar as it sought summary dismissal of the amended petition on the ground that dissolution would not benefit the shareholders because the PC has continued to function effectively and prosperously. The determination whether a corporation should be dissolved is within the discretion of the court (*see* Business Corporation Law § 1111[a]; *Matter of Kemp & Beatley [Gardstein]*, 64 N.Y.2d 63, 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173 [1984]), and "the benefit to the shareholders of a dissolution is of paramount importance" in making that determination (§ 1111[b][2]). Although respondents submitted evidence demonstrating that the PC has continued ***1122** to conduct business at a profit, dissolution is not to be denied in a proceeding brought pursuant to Business Corporation Law § 1104 simply because the corporate business has been conducted at a profit (*see* § 1111[b][3]) or because the dissension has not yet had an appreciable impact on the profitability of the corporation (*see Molod v. Berkowitz*, 233 A.D.2d 149, 150, 649 N.Y.S.2d 438 [1st Dept. 1996], *lv dismissed* 89 N.Y.2d 1029, 658 N.Y.S.2d 244, 680 N.E.2d 618 [1997]).

****219** Here, the record contains ample evidence of dissension and deadlock between petitioner and Barnes, and we conclude that, in opposition to respondents' showing that the PC continues to operate profitably, petitioner raised issues of fact whether dissension and deadlock have so impeded the ability of the PC to function effectively that dissolution would benefit the shareholders. In a close corporation like the PC, "the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation" (*Greer v. Greer*, 124 A.D.2d 707, 708, 508 N.Y.S.2d 217 [2d Dept. 1986], *appeal dismissed* 69 N.Y.2d 947, 516 N.Y.S.2d 1029, 509 N.E.2d 364 [1987]). When a point is reached at which the shareholders who are actively conducting the business of the corporation cannot agree, dissolution may be in the best interests of those shareholders (*see Matter of Gordon & Weiss*, 32 A.D.2d 279, 281, 301 N.Y.S.2d 839 [1st Dept. 1969]), and we agree with the court's determination that a hearing should be held to give the parties an opportunity to present their evidence on this controverted issue (*see Matter of Ricci v. First Time Around*, 112 A.D.2d 794, 794, 492 N.Y.S.2d 295 [4th Dept. 1985]; *Matter of Pivot Punch & Die Corp.*, 9 A.D.2d 861, 861, 193 N.Y.S.2d 34 [4th Dept. 1959]; *see also Matter of Giordano v. Stark*, 229 A.D.2d 493, 494, 645 N.Y.S.2d 517 [2d Dept. 1996]; *Matter of Kournianos [H.M.G., Inc.]*, 175 A.D.2d 129, 129–130, 571 N.Y.S.2d 823 [2d Dept. 1991]).

Contrary to respondents' contention in appeal No. 1, we conclude that the court did not abuse its discretion in appointing a temporary receiver (*see generally Greer*, 124 A.D.2d at 708, 508 N.Y.S.2d 217; *Nelson v. Nelson*, 99 A.D.2d 917, 918, 473

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N.Y.S.2d 40 [3d Dept. 1984]) for the limited purposes of "oversee[ing] the separation of the LC and the PC; ... assess[ing] the appropriate amounts due and owing from the LC to the PC, if any; and ... oversee[ing] the separation of clients between the two entities." In a proceeding for judicial dissolution brought under article 11 of the Business Corporation Law, the court has discretion to "make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment ... of a receiver under article 12 (Receivership)" (Business Corporation Law § 1113; *see* ***1123** § 1202[a][1]), and petitioner's submissions in support of his application for the appointment of a temporary receiver demonstrated that the entanglement of the PC and the LC created a danger of irreparable loss and that a receivership is necessary for the protection of the interests of the parties (*see generally Matter of Armienti*, 309 A.D.2d 659, 661, 767 N.Y.S.2d 2 [1st Dept. 2003]; *Matter of Harrison Realty Corp.*, 295 A.D.2d 220, 220, 744 N.Y.S.2d 23 [1st Dept. 2002]). Specifically, the affidavits of petitioner, a licensed certified public accountant (CPA) and certified valuation analyst retained by petitioner, a former CPA for the PC, and an office manager for the PC supported petitioner's allegations of economic improprieties in the form of inadequate reimbursement by the LC to the PC for cross-charges. Those affidavits also raised issues of fact whether the LC was taking mass tort cases that otherwise would have been handled by the PC and whether it was using web addresses owned by the PC to redirect clients to the LC's new website. Inasmuch as it likely will be difficult to quantify what, if any, economic harm the PC has suffered as a result of clients being shepherded from the PC to the LC and inasmuch as respondents have refused to allow petitioner's CPA to speak with the COO of the PC, we ****220** conclude that the court did not abuse its discretion in appointing a temporary receiver (*see generally Greer*, 124 A.D.2d at 708, 508 N.Y.S.2d 217; *Nelson*, 99 A.D.2d at 918, 473 N.Y.S.2d 40) to determine what if any amount the LC owes the PC, rather than ordering an accounting.

All Citations

175 A.D.3d 1120, 107 N.Y.S.3d 216, 2019 N.Y. Slip Op. 06365

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229 A.D.3d 1116
Supreme Court, Appellate Division, Fourth Department, New York.

Joseph DENNIS, Plaintiff-Appellant,
v.
Vincent CERRONE, Defendant,
and
Mark Cerrone, Inc., Defendant-Respondent.

363
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CA 23-00263
|
Entered: July 3, 2024

Synopsis
Background: Worker who was injured while working for framing subcontractor on residential construction project brought action against contracting business partially owned by property owner, asserting claims for common-law negligence and Labor Law violations. Following nonjury trial, the Supreme Court, Niagara County, Frank A. Sedita, III, J., rendered verdict in favor of contracting business. Worker appealed.

The Supreme Court, Appellate Division, held that verdict in favor of contracting business was not against weight of evidence.

Affirmed.

****851** Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 5, 2023. The order dismissed the amended complaint after a nonjury trial.

Attorneys and Law Firms

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MAGAVERN MAGAVERN GRIMM, LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

MEMORANDUM AND ORDER

***1116** It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

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***1117** Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while working for a framing subcontractor on a residential construction project. The property owner, defendant Vincent Cerrone, served as his own general contractor on the project, which involved building a 900-square-foot addition to his home. The accident occurred when plaintiff fell through an unguarded hole in the first floor decking that was cut to accommodate a basement stairwell that had yet to be installed. Plaintiff landed on the cement basement floor approximately nine feet below.

The amended complaint asserted causes of action against Cerrone and defendant Mark Cerrone, Inc. (MCI), a contracting business partially owned by Cerrone, for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Following discovery, Supreme Court (Boniello, III, J.) issued an order that, inter alia, granted Cerrone's cross-motion for summary judgment dismissing the amended complaint against him and granted MCI's cross-motion insofar as it sought summary judgment dismissing the Labor Law § 240 (1) cause of action against it. We modified the order by denying MCI's cross-motion in its entirety and reinstating the section 240 (1) cause of action against it, and otherwise affirmed (*Dennis v. Cerrone*, 167 A.D.3d 1475, 1477, 90 N.Y.S.3d 755 [4th Dept. 2018]).

Upon remittal, the matter proceeded to a nonjury trial on all four causes of action against MCI, the only remaining defendant. At the close of plaintiff's case, the court granted a directed verdict to MCI, but on appeal we reinstated the amended complaint against MCI and granted a new trial (*Dennis v. Cerrone*, 192 A.D.3d 1572, 1573, 145 N.Y.S.3d 243 [4th Dept. 2021]). Viewing the evidence in the light most favorable to plaintiff, we concluded that there was "a rational process by which a factfinder could find that MCI had either the power to enforce safety standards and choose responsible contractors or the power to coordinate and supervise the overall project as required for liability under Labor Law §§ 240 (1) and 241 (6)" (*id.* at 1573, 145 N.Y.S.3d 243). With respect to the other causes of action, we concluded that there was "a rational process by which a factfinder could determine that MCI is liable under Labor Law § 200 or the common law, i.e., that it had the ability ****852** to supervise and control the method and manner of work of plaintiff's employer ..., and that MCI actually exercised such authority" (*id.*).

At the retrial, Supreme Court (Sedita, III, J.), sitting as the trier of fact, rendered a verdict in favor of MCI. Plaintiff now appeals from an order dismissing the amended complaint against MCI based upon that verdict, contending that he met his burden of proof on all causes of action. We affirm.

***1118** It is well settled that a verdict in a nonjury civil trial "should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v. Penthouse Intl.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978, 606 N.E.2d 1369 [1993], *rearg denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298 [1993] [internal quotation marks omitted]; *see Tarsel v. Trombino*, 196 A.D.3d 1100, 1101, 151 N.Y.S.3d 755 [4th Dept. 2021]; *Livingston v. State of New York*, 129 A.D.3d 1660, 1660, 12 N.Y.S.3d 467 [4th Dept. 2015], *lv denied* 26 N.Y.3d 903, 2015 WL 5150696 [2015]). When conducting our factual review power in a "close case," we must take into account " 'the fact that the trial judge had the advantage of seeing the witnesses' " (*Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350, 458 N.E.2d 809 [1983]), and we must view the evidence "in the light most favorable to sustain the [order or] judgment" (*A&M Global Mgt. Corp. v. Northtown Urology Assoc., P.C.*, 115 A.D.3d 1283, 1287, 983 N.Y.S.2d 368 [4th Dept. 2014]).

Here, plaintiff introduced evidence at trial, as he had done in opposition to MCI's cross-motion for summary judgment, supporting his claim that MCI acted as a contractor, or the agent of a contractor, on the construction project. For instance, the evidence established that a site superintendent for MCI recommended contractors for Cerrone to hire, met with some of the contractors at the worksite, solicited a bid for lumber on Cerrone's behalf, and, upon seeing the unguarded hole in the floor through which plaintiff later fell, told framing workers that it should be covered. Plaintiff further established that a laborer employed by MCI was occasionally at the worksite and performed various tasks for Cerrone, such as cleaning debris, using an excavator owned by MCI to demolish the garage, and spreading stone on the driveway. There was also evidence that MCI provided a flatbed trailer and driver to deliver the driveway stones and certain equipment to the worksite, and that Cerrone used MCI's corporate account to purchase lumber and concrete.

On the other hand, however, there was ample evidence militating against a finding that MCI, as opposed to Cerrone himself, had the power to enforce safety standards and hire responsible contractors. For instance, MCI had never performed residential construction work; it was a general site contractor that primarily performed road and sewer work for municipalities. MCI did not hire or pay any of the contractors who worked on the construction project at Cerrone's home, and

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Cerrone, who owned only 34% of MCI, did not have authority to bind ***1119** MCI without the consent of the majority owner. In fact, the majority owner had no idea that Cerrone was doing construction work at his residence; she learned about the project after plaintiff's accident. MCI was a union shop, meaning that it used only union workers on its projects, and the contractors who worked on the construction project at Cerrone's ****853** residence used nonunion labor. More importantly, the two MCI employees who appeared periodically at the worksite testified that they did not have authority to enforce safety standards or to direct or supervise any of the work, and their testimony was not contradicted by plaintiff, his employer or any other witness who performed work on the construction project. Not a single person who performed work on the project testified that he or she believed that MCI had authority to enforce safety standards or to direct or control the work.

Viewing the record in the light most favorable to sustain the order and giving deference to the trial court's credibility determinations (*see Howard v. Pooler*, 184 A.D.3d 1160, 1163, 126 N.Y.S.3d 824 [4th Dept. 2020]), we conclude that there is "a fair interpretation of the evidence" supporting the court's verdict (*Meyers v. Berl*, 213 A.D.3d 1233, 1234, 184 N.Y.S.3d 239 [4th Dept. 2023]), and that the verdict is therefore not against the weight of the evidence (*see generally Tarsel*, 196 A.D.3d at 1101, 151 N.Y.S.3d 755; *Livingston*, 129 A.D.3d at 1660, 12 N.Y.S.3d 467).

All Citations

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29 N.Y.2d 264
Court of Appeals of New York.

In the Matter of the GOLDFIELD CORPORATION, Appellant,
v.
GENERAL HOST CORPORATION et al., Respondents.

Nov. 18, 1971.

Synopsis
Petition by corporate shareholder to annul annual shareholders' meeting and to set aside election of directors and other resolutions adopted at the meeting. The Supreme Court, Special Term, Jawn A. Sandifer, J., denied the motion to dismiss the petition, the Appellate Division, Nunez, J., 36 A.D.2d 125, 318 N.Y.S.2d 378, reversed and granted the cross motion to dismiss, and the plaintiff appealed. The Court of Appeals, Breitel, J., held, inter alia, that the annual meeting could not be annulled and election of directors and adoption of resolutions set aside because beneficial owner of 16.7% Of outstanding common stock was deprived of an opportunity to request a proxy and to vote, and other shareholders were incorrectly informed that such shares could not be voted, where there was no misrepresentation in proxy materials circulated which, under the circumstances, could have misled a substantial number of other shareholders, the wrong involved was only an individual wrong, not affecting shareholders at large, and there was no showing that results of the election would have been different because of the individual wrong.

Affirmed.

Attorneys and Law Firms

***332 **389 *265** Sheila L. Birnbaum, Emile Z. Berman, A. Harold Frost, Howard Lester and Michael N. Block, New York City, for appellant.

***266** Edwin E. McAmis and Douglas Foster, New York City, for respondents.

Opinion

***267** BREITEL, Judge.

The issue summary motion is whether an annual corporate meeting may be annulled and the election of directors and adoption of resolutions set aside where the beneficial owner of 16.7% Of the outstanding common stock was deprived of an opportunity to request a proxy and to vote, and other shareholders were incorrectly informed that these shares could not be voted.
The election, it is concluded, was valid. No notice to the beneficial owner, Goldfield, of the meeting was required; and there was no misrepresentation in the proxy materials circulated which, ***333** under the circumstances, could have misled a substantial number of other shareholders. Although General Host, the corporation concerned, may have breached a duty it owed as Goldfield's pledgee, in effect depriving Goldfield of a proxy vote at the shareholders' meeting, the wrong involved was only an individual wrong, not affecting shareholders at large. Since there was no showing that the results of the election would have been different because of the individual wrong, the election may not be annulled.

Section 619 of the Business Corporation Law, under which the proceeding was brought, provides: 'Upon the petition of any shareholder aggrieved by an election, and upon notice to the persons declared elected thereat, the corporation and such other

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persons as the court may direct, the supreme court at a special term held within the judicial district where the officer of the corporation is located shall forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require.' Since only the validity of elections may be challenged by summary proceeding under the statute, the validity of other action taken at the meeting will not be considered (see, for examples of plenary actions to void resolutions adopted at corporate meetings: United Hotels Co. of Amer v. Mealey, 2 Cir., 147 F.2d 816, 819; ***268** Lewis v. Matthews, 161 App.Div. 107, 108, 146 N.Y.S. 424, 425; Davison v. Parke Austin & Lipscomb, Inc., 165 Misc. 32, 33, 299 N.Y.S. 960, 962; see, also, 5 Fletcher's Cyclopedia Corporations (Perm. ed.), s 2073, pp. 350—351; 20 Carmody-Wait 2d New York Practice, Actions by and Against Shareholders, s 121:435).

Host, a New York corporation, had 2,610,336 common shares outstanding on July 10, 1970, of which 437,700 were beneficially owned by Goldfield. The Goldfield shares had been pledged to the Union Bank ****390** of Los Angeles to secure certain notes. These notes were sold to Host, and on April 8, 1970 Host pursuant to the security agreement transferred the collateral shares into its own name as pledgee. Host now claims, and Goldfield disputes, that by that date Goldfield was in default for failure to pay interest. It is undisputed, however, that Host had given no contemporaneous notice either of the default or the transfer.

Because of the transfer of record, Goldfield did not receive the July 13, 1970 notice of the annual meeting to be held August 13, 1970. The proxy materials stated that: 'As of July 10, 1970, the Goldfield Corporation ('Goldfield'), New York, N.Y. owned 437,700 shares of Common Stock * * * These shares are pledged to secure notes of Goldfield held by the Company and are subject to an option by the Company to purchase them at market value at any time prior to ****334** January 31, 1970. In the event that prior to the annual meeting, the option is exercised or a default is called under the notes, the 437,700 shares will then be held by the Company and will not be outstanding for purposes of the annual meeting.' Later, on July 20, 1970, Host sent a notice of default to Goldfield but made no mention of the earlier April 8 transfer of record title. On July 23, 1970 a letter was mailed to shareholders stating that a default had been called, and that Goldfield's shares could not be voted, again without mention of the April 8 record transfer. On July 28, 1970 Goldfield wrote the transfer agents of Host denying the default, and refusing to authorize a transfer of record title to Host. This letter went unanswered.

Goldfield concededly had actual notice of the meeting, the proxy materials, and the July 23 letter to shareholders. It made no attempt, however, to communicate with other shareholders, to solicit proxies, or to propose an alternative slate of ***269** directors. A resolution of Goldfield authorized its president to vote its shares against the management nominees, but did not offer an alternative slate. The resolution also directed its president to vote against management proposals, but again no attempt was made to communicate with other shareholders in advance of the meeting.

Six persons connected with Goldfield, including its president and counsel, attended the meeting. They were refused admission as representatives of Goldfiled, but were allowed to participate as shareholders or proxyholders in their individual capacities. On each issue, except the selection of an accountant, Goldfield's counsel stated Goldfield's position contrary to that of management.

At the meeting management held proxies for 1,591,372 shares, or 60% Of the total, if Goldfield's shares are considered outstanding. Each management nominee for the three director positions received 1,685.627 favorable votes. Under Host's system of cumulative voting, Goldfield could have cast 1,313,100 votes for one nominee of its own choosing, still not enough to elect a single director.

There are basic rules. First, if Goldfield had been the record owner on July 10, 1970 it would have been entitled to receive notice of the meeting. Although persons connected with Goldfield attended the meeting and presented Goldfield's views, there was no waiver since these persons were not allowed to participate by voice or vote as Goldfield's representatives (Business Corporation Law, s 606). Generally, failure to give notice in accord with the statute and the corporate by-laws would have rendered the election void, and, if void, a new election would have been required even without a showing that the results of the election would, or might have been different (Matter of Empire State Supreme Lodge, 118 App.Div. 616, 103 N.Y.S. 1124; ****335** Matter of Keller, 116 App.Div. 58, 60, 101 N.Y.S. 133, 135; Matter of Melloh v. Beattie, 17 Misc.2d 902, 903, 187 N.Y.S.2d 203, 204; Matter of M. & O. Realty Corp., 16 Misc.2d 562, 182 N.Y.S.2d 186; Matter of 74 Tremont Ave. Corp., 10 Misc.2d 662, 663, 173 N.Y.S.2d 154, 155; ****391** Matter of Janaug, Inc. v. Szlapka, 6 Misc.2d 84, 85, 162 N.Y.S.2d 668, 669; Matter of Green Bus Lines (Turner), 166 Misc. 800, 804, 2 N.Y.S.2d 556, 560; Matter of Maurer, Inc., Sup., 77 N.Y.S.2d 159, 161; E. Aranow & H. Einhorn, Proxy Contests For Corporate Control (2d ed. 1968), pp. 500, 509; Ann., ***270** Stockholders' Meeting—Informality, 51 A.L.R. 941, esp. p. 954; 3 White, New York Corporations, Shareholders,

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par. 619.04, subd. (1); 20 Carmody-Wait 2d New York Practice, Action by and Against Corporations, s 121:438; 11 N.Y.Jur., Corporations, ss 407, 410). But since Goldfield was not the owner of record on the record date, it was not, without more, entitled to notice of the election, and thus, at least on this ground, the election is invulnerable.

In a proper case, it may be that the courts would look beyond record ownership in favor of beneficial ownership to uphold or overturn an election, but this is not such a case (cf. Andrews v. Precision Apparatus, D.C., 217 F.Supp. 679, 685—686; Benintendi v. Kenton Hotel, 181 Misc. 897, 899, 45 N.Y.S.2d 705, 707, affd. 268, App.Div. 857, 50 N.Y.S.2d 843 mod. on other grounds, 294 N.Y. 112, 60 N.E.2d 829; Aranow & Einhorn, Op. cit. supra, pp. 506—508). So, too, on the other side of the problem, an issue also not necessary to decide is whether the court in its discretion may abstain from undoing the election where there is an inadvertent or insignificant failure to give proper notice of meeting to holders of very few shares who have actual, adequate notice. The point is that the statute provides a discretionary alternative for the hearing court, namely, 'to take such other action as justice may require.' In this context it is relevant that a defect in notice of a meeting may be waived before or after the meeting (Business Corporation Law, s 606).
Second, if there had been material misrepresentations to shareholders at large, the election could be overturned. Again, there is no necessity to show that without the misrepresentations a different result would have ensued. Elections, however, will not be overturned for just any misrepresentation. The materiality of the misrepresentation, the completeness of other information from which shareholders could determine the truth, and the likelihood, given the circumstances of the election, that some shareholder might have voted differently as a result of the misrepresentation, without going so far as to show an entirely different result on the tallied vote, should all be considered (see Matter of Hoe & Co., 14 Misc.2d 500, 505, 137 N.Y.S.2d 142, affd. 285 App.Div. 927, 139 N.Y.S.2d 883, affd. 309 N.Y. 719, 128 N.E.2d 420; ***336** General Time Corp. v. Talley Ind., 2 Cir., 403 F.2d 159, 162, cert. den. 393 U.S. 1026, 89 S.Ct. 631, 21 L.Ed.2d 570; Matter of Scheuer, Sup., 59 N.Y.S.2d 500, 501; ***271** General Inv. Co. v. American Hide & Leather Co., 97 N.J.Eq. 230, 235, 127 A. 659; cf. Matter of Doeskin Prods., 7 A.D.2d 42, 46, 180 N.Y.S.2d 760, 764; Aranow & Einhorn, Op. cit. supra, pp. 503—506, 510; see, generally, 11 N.Y.Jur., Corporations, s 442).

A supplemental letter to shareholders dated July 23, 1970 stated that Goldfield had no right to vote. In fact, even at this date, Goldfield could have compelled Host to grant it a proxy. This representation, if false, was not unimportant. With Goldfield out, the election boiled down to a simple vote of confidence for management; with Goldfield in, shareholders, at least potentially, had a palpable choice.

Nevertheless, the election was valid because other shareholders could not have been misled by the alleged misrepresentation. Thus, it has been said: 'Even assuming there were misstatements or concealments, the election may not be set aside unless the court concludes further that the result would have been different had no such improprieties been injected into the proxy campaign, or that an inequitable result has been thereby produced (Matter of Green Bus Lines (Turner), 166 Misc. 800, 2 N.Y.S.2d 556). Of course, it is not necessary to show that a substantial number **392 of stockholders was actually deceived * * *; petitioner is entitled to the court's interposition upon a reasonable showing that they might have been.' (Matter of Hoe & Co., 14 Misc.2d 500, 505, 137 N.Y.S.2d 142, 148, affd. 285 App.Div. 927, 139 N.Y.S.2d 883, affd. 309 N.Y. 719, 128 N.E.2d 420, Supra). And, again: 'The test * * * is whether * * * there is a substantial likelihood that the misstatement * * * may have led a stockholder to grant a proxy to the solicitor or to withhold (it) * * * whereas in the absence of this he would have taken a contrary course.' (General Time Corp. v. Talley Ind., 2 Cir., 403 F.2d 159, 162, cert. den. 393 U.S. 1026, 89 S.Ct. 631, 21 L.Ed.2d 570, Supra).

Prior to the meeting, Goldfield made no attempt to communicate with other shareholders or to solicit proxies despite the fact that Goldfield urges it always believed that it was entitled to vote as the owner of record. Since Goldfield offered no alternative to management's slate of directors, other shareholders were not misled to take action they would not have taken otherwise.

At the meeting Goldfield's views were presented. Goldfield argues that it would have had much more influence had its representatives been permitted to speak in a representative capacity. But, in any event, it would have had little influence, since by then *272 management ***337** controlled an overwhelming 60% Of the vote as a result of proxies obtained in advance. The solicitation of proxies by Host and the abstention from like solicitation by Goldfield had cast the die irretrievably in favor of management.

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It is concluded, therefore, that the election may not be annulled for lack of notice or misrepresentation to shareholders at large. In the usual case that would be the end of the matter, but here Host committed a wrong in its capacity as pledgee when it failed to notify goldfield of the April 8 record transfer. It is relevant then whether the individual wrong warrants undoing the election.

If Goldfield had had notice of the record transfer it would have been entitled to demand a proxy from Host in Goldfield's favor. The pledgee of stock held as security must issue a proxy to the pledgor upon demand (Business Corporation Law, s 609, subd. (d); Matter of Flagg-Utica Corp. v. Baselice, 14 Misc.2d 476, 482, 178 N.Y.S.2d 860, 866; 11 N.Y.Jur., Corporations, s 423). The rule applies even where the pledgee is the issuing corporation. True, treasury shares may not be voted (Business Corporation Law, s 102, (a), subd. (14); s 612, subd. (b); comment, The Corporate Fiduciary's Power to Vote Its Own Stock, 68 Col.L.Rev. 116; 1 Hornstein, Corporation Law and Practice, s 311). Similarly, the issuing corporation cannot vote shares held in its own name (5 Fletcher's Cyclopedia Corporations (Perm. ed.), ss 2034, 2041, pp. 177, 197; Fletcher Cyc. Corp., 1970 Cum.Supp., s 2041, pp. 11—12; First Mtge. Bond Homestead Assn. v. Baker, 157 Md. 309, 315, 145 A. 876; Cleveland Trust Co. v. Eaton, 11 Ohio Misc. 151, 160, 229 N.E.2d 850; Aranow & Einhorn, Proxy Contests For Corporate Control (2d ed. 1968), Supra, p. 398). Nevertheless, the fact that Host could not vote the pledge shares held in its own name should not bar Goldfield from voting by proxy. (See comment, The Corporate Fiduciary's Power to Vote Its Own Stock, 68 Col.L.Rev. 116, 128.)

The security agreement does not provide for notice, it is silent on this issue. On the other hand, in a number of particulars the agreement meticulously requires notice and in others, with equal meticulousness, dispenses with notice. Since the security agreement was on a Union Bank form, any ambiguity should be construed to favor Goldfield (Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 348, 126 N.E.2d 271, 273; 10 N.Y.Jur., Contracts, s 223). The record transfer of title would ****393** obviously involve important consequences to the debtor. The ambiguity created by silence ***273** on this critical issue may be resolved, arguably, to require the bank, and, therefore, its successor, Host, to give notice of such transfer.

*****338** Host argues in avoidance that Goldfield lost all rights when Host declared a default on the underlying note. However, default, if there was one, gave Host only the right to give notice and sell the pledged security or to bring a suit to foreclose the pledge and obtain a judicial sale (Markham v. Jaudon, 41 N.Y. 235, 243; First Trust & Deposit Co. v. Potter, 155 Misc. 106, 110, 278 N.Y.S. 847, 853; 53 N.Y.Jur., Secured Transactions, s 80, p. 337). Hence, neither Goldfield's default nor Host's notice of default had any determinative effect for voting purposes on Goldfield's beneficial ownership of the pledged shares.

Concluding that Goldfield was wronged, it is significant whether it ever intended or essayed to be a factor in the election. Although Goldfield now claims that it did, the evidence, as noted earlier on the issue of notice of the meeting, is to the contrary. Up to the day of the election Goldfield urges that it believed it was the owner of record and entitled to vote its 437,700 shares. Despite this fact, Goldfield neither solicited proxies, nor made any attempt to communicate with other shareholders. At no point did Goldfield propose an alternative slate of directors. The Goldfield resolution authorizing its president to vote its shares directs him to vote against management nominees for directorships but offered no alternative. To reiterate, while Goldfield was inactive, management acquired proxies, assuring for itself 60% Of the vote by meeting time. There being no possibility of a different result, whatever wrong was done to Goldfield as an individual shareholder does not justify holding a new election, with all the practical problems entailed.

Accordingly, the order of the Appellate Division, 36 A.D.2d 125, 318 N.Y.S.2d 378 should be affirmed, without costs.

FULD, C.J., and BURKE, SCILEPPI, BERGAN, JASEN and GIBSON, JJ., concur.

Order affirmed.

All Citations

29 N.Y.2d 264, 277 N.E.2d 387, 327 N.Y.S.2d 330

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277 N.E.2d 387, 327 N.Y.S.2d 330

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79 A.D.2d 857
Supreme Court, Appellate Division, Fourth Department, New York.

Matter of Gerald E. GRIFFIN, Respondent-Appellant,
v.
VARFLEX CORPORATION, Appellant-Respondent.

Dec. 12, 1980.

Synopsis
Director and shareholder of corporation petitioned to inspect books and records of corporation. The Oneida Supreme Court, Special Term, Inglehart, J., granted petition, and corporation appealed. The Supreme Court, Appellate Division, held that director and shareholder of one-third of shares of close corporation was entitled to inspect books and records of corporation and to make photocopies of specified records and documents in accordance with petition.

Affirmed as modified.

Attorneys and Law Firms

****488** Hancock, Estabrook, Ryan, Shove & Hust, Syracuse by Donald Kemple, Syracuse, for appellant-respondent.

Dunn & Dunn, Oneida by Richard Vindigni, Oneida, for respondent-appellant.

Before SCHNEPP, J. P., and CALLAHAN, DOERR and WITMER, JJ.

Opinion

MEMORANDUM:

In the absence of a showing in behalf of respondent corporation that a successor ****489** to petitioner as a director thereof has been elected, petitioner continues as such director (Business Corporation Law, s 703, subd. (b)). As such he has an absolute right to inspect the books and records of the corporation (***858** Matter of Cohen v. Cocoline Products, Inc., 309 N.Y. 119, 123, 127 N.E.2d 906), barring a claim of circumstance that his action is inimical to the interests of the corporation. Moreover, this is a close corporation of which petitioner is owner of one-third of the shares. As such he is entitled, in the circumstances of this case, to inspect the books and records of the corporation, in the absence of a showing that his application is inimical to the interests of the corporation (Matter of Waldman v. Eldorado Towers, 25 A.D.2d 836, 270 N.Y.S.2d 216; Application of Pearson, 223 N.Y.S.2d 15, n. o. r., Bernard S. Meyer, J.; Hughey v. Du Bois Press, 37 N.Y.S.2d 343, n. o. r., Lapham, Official Referee).

We agree with Special Term that there is no merit to respondent's allegation that petitioner's application is contrary to the interests of the corporation. Moreover, we find no reason why petitioner should not be permitted to make photocopies of the specified records and documents in accordance with his petition, in which respect Special Term denied the application.

Special Term's judgment is modified to permit such photocopying and, as modified, is affirmed.

Judgment unanimously modified, and as modified affirmed with costs to petitioner.

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434 N.Y.S.2d 488

All Citations

79 A.D.2d 857, 434 N.Y.S.2d 488

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7 Misc.3d 1009(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

In the Matter of Pollina KAGAN AND Joan HAZELKORN, the holders of two-thirds of the Outstanding Shares of Long Island Women's Health Care, M.D., P.C., Petitioners, for the Judicial Dissolution of Long Island Women's Health Care, M.D., P.C., pursuant to Sections 1104 and 1104(a) of the Business Corporation Law.

No. 13333/04.
|
April 6, 2005.

Attorneys and Law Firms

Myra G. Sencer, P.C., Mineola, for Petitioner.

Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP, Lake Success, Eliot Spitzer, Esq., Attorney General of the State of NY, New York, for Respondents.

Opinion

LEONARD B. AUSTIN, J.

***1** Petitioners, Pollina Kagan ("Kagan") and Joan Hazelkorn ("Hazelkorn"), commenced this special proceeding seeking the judicial dissolution of Long Island Women's Health Care, M.D., P.C. ("Health Care") pursuant to Business Corporation Law §§ 1104 and 1104–a.

Health Care has cross-moved to dismiss this proceeding pursuant to CPLR 3211(a)(1) and (3).

BACKGROUND

Health Care is a professional corporation incorporated in 1990. When Health Care was incorporated, it had five shareholders, Steven Milim, M.D. ("Milim"), Douglas Phillips, M.D. ("Phillips"), Howard Nathanson, M.D. ("Nathanson"), Steven Meltzer, M.D. ("Meltzer") and Hazelkorn. Each of the shareholders owned 20% of the shares of Health Care.

In 1998, as a result of the death of Dr. Meltzer, the decision to make Kagan a shareholder in Health Care and the decision of Nathanson and Phillips to terminate their status as shareholders in Health Care, Milim, Kagan and Hazelkorn entered into a new Shareholder Agreement ("Agreement"). Pursuant to the terms of the Agreement, Milim, Kagan and Hazelkorn became equal shareholders in Health Care with each doctor owning one-third of the shares in Health Care.

From August 1, 1998 through August 5, 2004, Nathanson and Phillips continued to practice with Health Care as independent contractors.

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Paragraph 26 of the Agreement provides that at any time during there respective lifetimes, Nathanson and Phillips had the right to become equal shareholders in Health Care with Milim, Hazelkorn and Kagan upon execution of a Joinder Agreement and payment of nominal consideration for the shares within 30 days of the exercise of the option.

Petitioners allege in connection with their application for dissolution of Health Care pursuant to Business Corporation Law § 1104 that they are the owners of two-thirds of the outstanding shares and that the directors are so divided regarding the management of Health Care that the votes required for action by the board cannot be obtained.

Petitioners allege in connection with their application for dissolution of Health Care pursuant to Business Corporation Law § 1104–a that the assets and property of the corporation are being looted, wasted or diverted by Milim for non-corporate purposes. Additionally, although not pleaded, it appears that Petitioners are alleging that those in control of the corporation are engaging in oppressive conduct towards the complaining shareholders.

Petitioners' application is based primarily upon their allegations that Milim has dominated the operation of Health Care, has not consulted with Petitioners in making business decisions and has exercised poor business judgment in making those decisions.

This proceeding is an outgrowth of a long term deterioration in the relationship between Petitioners and Milim. The relationship between the parties had deteriorated to the point that, on July 7, 2004, Hazelkorn and Kagan advised Milim that they were terminating their employment with Health Care. Petitioners assert Milim indicated that Health Care should be voluntarily dissolved and that they should work towards that goal to assure continuity of patient care and an orderly transition for their patients.

***2** Petitioners assert that rather than working towards the dissolution of Health Care and the smooth transition of patient care, Milim changed the security code on the office alarm system and computers thereby denying Petitioners access to the office and their patients records. This prevented Petitioners from see patients and scheduling future appointments.

Petitioners assert that, after they told Milim that they were terminating their employment with Health Care, Health Care stopped booking appointments for Petitioners' patients. Alternatively, Petitioners' patients are being examined and treated by the other doctors or physicians assistants employed by Health Care even if those doctors and/or physicians assistants were unfamiliar with the patient or the patient has had a long standing physician-patient relationship with Petitioners.

Office staff had been instructed not to cooperate with or assist Petitioners. Potential new patients were told that Petitioners were unavailable or had no available appointments. Petitioners allege that they are not getting patient inquiries, lab or test results or correspondence. Petitioners claim that office staff is not taking or giving them telephone messages.

Hazelkorn asserts that Milim does not maintain medical malpractice insurance for his obstetrical practice. Despite Milim's failure to maintain such insurance, he continues to see obstetrical patients including those with high risk pregnancies which exposes Health Care to significant financial risk.

Petitioners claim that they have not been paid their salary and have been denied access to the financial records of the corporation.

Petitioners have significant complaints regarding Milim's management of Health Care's pension plan. Petitioners allege that Milim managed Health Care's pension plan for five years prior to 2003 and, during that time, the plan had zero growth. Upon learning of this, Petitioners consulted with a financial advisor and suggested to Milim that he transfer management of the pension plan to a professional financial advisor. Although Milim agreed to transfer management of the pension plan to a financial advisor, he failed or refused to sign the paperwork necessary to transfer the administration of the pension plan to an investment professional for nearly one year.

Petitioners further allege that Milim unilaterally decided not to make a contribution to Health Care's pension plan in 2003 causing all of the doctors to pay taxes on the money the Petitioners believed had been contributed to the pension plan.

Petitioners also question the sagacity of Milim's decision to open a Health Care office in Bellmore. In 2002, Health Care opened an office on Merrick Road in Bellmore. Health Care leased the Bellmore office for a period of ten years. Milim,

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Kagan, Hazelkorn, Phillips and Nathanson all signed the lease and personally guaranteed Health Care's obligations under the lease for the Bellmore office.

Petitioners infer that the decision to open a Bellmore office was made by Milim without consulting with them. They further infer that Milim negotiated the lease. They claim that the lease saddled Health Care with a financial obligation that it could not and cannot afford.

***3** Petitioners assert that Milim paid himself significant sums to manage Health Care's business even though he lacked the business acumen to do so.

Petitioners are also concerned about Health Care's line of credit. Health Care has a rather substantial line of credit. Petitioners and Milim have personally guaranteed Health Care's obligations on Health Care's line of credit. Phillips and Nathanson were not shareholders in Health Care when it obtained the line of credit and have not personally guaranteed Health Care's obligation. Petitioners are concerned that Milim, Phillips and Nathanson will "max out" the line of credit and default of Health Care's obligations causing Petitioners to incur substantial expense.

Health Care asserts that Petitioners cannot obtain dissolution pursuant to Business Corporation Law § 1104 since the statute requires that the Petitioners in such a proceeding own 50% or more the shares of the corporation when the proceeding is commenced. Health Care asserts that when Phillips and Nathanson exercised their option in August 2004 to become shareholders in Health Care, that Hazelkorn and Kagan became owners of 20% of the shares of health Care. Since Hazelkorn and Kagan collectively only 40% of the shares of Health Care, they lack standing to commence a proceeding under Business Corporation Law § 1104.

Health Care further asserts that Petitioners' Business Corporation Law § 1104–a claim must be dismissed. Health Care claims that Hazelkorn and Kagan voluntarily resigned from Health Care. Paragraphs 4 and 8 of the Agreement provide a procedure for the purchase and valuation of the shares of shareholders who voluntarily resign from the corporation. These provisions of the Agreement provide Hazelkorn and Kagan with appropriate redress.

DISCUSSION

A. *Business Corporation Law § 1104*

Health Care claims that the documentary evidence requires the dismissal of this claim since the documentary evidence establishes that Petitioners own less than 50% of the shares of the corporation.

In order to obtain dismissal pursuant to CPLR 3211(a)(1), the documentary evidence must conclusively establish a defense to the action as a matter of law. *Arnav Industries, Inc. v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.,* 96 N.Y.2d 300 (2001); and *Leon v. Martinez,* 84 N.Y.2d 83 (1994).

Business Corporation Law 1104(1) permits the owners of 50% of the shares of a corporation entitled to vote for the election of directors to commence a special proceeding to obtain the judicial dissolution of the corporation if the directors are so divided in regard to the management of the company that the votes required for action of the board cannot be obtained. If the Petitioners do not own 50% of the shares of the corporation at the time the special proceeding is commenced, they lack standing to maintain the action mandating dismissal. *Matter of Sakow,* 297 A.D.2d 229 (1st Dept.2002); and *Rust v. Turgeon,* 295 A.D.2d 962 (4th Dept., 2002).

***4** Paragraph 26 of the Amended Shareholder Agreement permits Phillips and Nathanson to become equal shareholders in Health Care with Milim, Hazelkorn and Kagan at any time upon the execution of a Joinder Agreement and payment of a nominal fee for shares. Health Care asserts that Nathanson and Phillips exercised that right on August 5, 2004. A copy of the

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letters by which Nathanson and Phillips exercised their option and the Joinder Agreement are annexed as exhibits. Kagan and Hazelkorn do not deny receipt of the notice from Nathanson and Kagan exercising their option or that the Joinder Agreement is insufficient. Therefore, as of August 5, 2004, Health Care had five shareholders each of whom owned 20% of the outstanding shares instead of three shareholders each of whom owned one-third of the outstanding shares.

Since the documentary evidence, establishes conclusively that Hazelkorn and Kagan cumulative own only 40% of the share and not the two-thirds as alleged, Health Care asserts they lack standing to bring the proceeding and the proceeding must be dismissed.

Hazelkorn and Kagan assert that despite the Phillips and Nathanson did not properly exercise this right because there is no evidence that either paid the nominal consideration required for the issuance of shares and because they have not agreed to personally guarantee Health Care's obligations under the line of credit. However, this argument is without merit. The Agreement requires Phillips and Nathanson upon the exercise of the option to undertake the obligations of the shareholders as provided for the Agreement. The Agreement does not obligate Health Care's shareholders to personally guarantee Health Care's obligations.

Even assuming that Hazelkorn and Kagan are correct in their assertion that they own two-thirds of the shares, their petition suffers from more fundamental and fatal flaws.

Paragraph 12 of the Amended Shareholders Agreement provides that the Health Care shall have three directors, that two-thirds of the directors must be present at a meeting of the board to constitute a quorum and that except for certain situation which are not relevant to this proceeding, the directors may act through majority vote.

Petitioners have failed to allege or prove that a meeting of the directors of Health Care has ever been called at which they were unable to transact corporate business because of a deadlock. In order to obtain judicial dissolution pursuant to Business Corporation Law 1104(1), Petitioners must establish that internal dissension has resulted in a management deadlock. *Matter of Parveen,* 259 A.D.2d 389 (1st Dept.1999); and *Matter of Dubonnet Scarfs, Inc.,* 105 A.D.2d 339 (1st Dept.1985). There are no allegations in the petition of a management deadlock.

Similarly, Petitioners fail to allege that a meeting of the shareholders had been called at which directors could not be elected. In fact, Petitioners concede that a shareholders meeting has not been held since Phillips and Nathanson became shareholders in the corporation. Thus, dissolution cannot be granted pursuant to Business Corporation Law § 1104(2). See, *Matter of Parveen, supra* .

***5** In order to obtain dissolution pursuant to Business Corporation Law § 1104(3), the Petitioners must establish that the disagreements between the Petitioners and the Respondent create "... an irreconcilable barrier to the continued functioning and prosperity of the corporation." *Matter of Kaufmann,* 225 A.D.2d 775, (2nd Dept.1996). See also, *Matter of Goodman v. Lovett,* 200 A.D.2d 670 (2nd Dept.1994); and *Matter of Ronan Paint Corp.,* 98 A.D.2d 413 (1st Dept.1984). Petitioners have failed to plead the existence of such a deadlock. Petitioners have significant disagreement with Milim regarding his management of the Health Care, the decisions he has made regarding the future of the practice such as the opening of a Bellmore office and his management of the pension plan. However, none of these decisions appears to have created irreconcilable barriers regarding the functioning and prosperity of the corporation. Health Care has continued to function in spite of these disputes.

For the foregoing reasons, Respondent's application to dismiss Petitioners' application to dissolve Health Care pursuant to Business Corporation Law § 1104 must be granted.

B. *Business Corporation Law § 1104–a*

Business Corporation Law permits the owner of 20% of the shares of a corporation to seek judicial dissolution of a corporation if the directors or those in charge engage in illegal, fraudulent or oppressive acts towards the complaining shareholders or if the directors, officers or those in charge loot or waste corporate assets or divert corporate assets for non-corporate purposes.

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Petitioners have standing to maintain a proceeding pursuant to this provision in that they each own 20% of the shares of the corporation.

Petitioners seek dissolution pursuant to Business Corporation Law § 1104–a(2).

This section requires that Petitioners establish that the officers, directors or those in control of the corporation have looted, wasted or diverted corporate assets for non-corporate purposes. However, Petitioners have failed to advance a single factual allegation or instance of Milim having taken or misused any corporate assets for his personal use or his own enrichment. Thus, beyond conclusory allegations, Petitioners have failed to establish the basic requirements for maintaining such an action. See, *Matter of Brach,* 135 A.D.2d 711 (2nd Dept.1987).

Although not alleged, Petitioners have, in the papers submitted on Respondent's cross-motion, set forth sufficient evidence to establish a claim under Business Corporation Law § 1104(1) which permits the court to dissolve a corporation when the directors or those in control have engaged in illegal, fraudulent or oppressive actions towards the complaining shareholders.

The conduct of the majority or those in control of the corporation is oppressive, "... when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the Petitioner's decision to join the venture." *Matter of Kemp & Beatley, Inc. [Gardstein],* 64 N.Y.2d 63, 73 (1984).

***6** Oppressive conduct is generally found when a minority shareholder has been excluded for participation in corporate management for no legitimate business reason or personal animus, where the shareholder/employee has been discharged without cause and thus deprived of salary or where there has been a change in corporate policy which prevents the minority shareholder from receiving a reasonable return on their investment. See, *In re Dissolution of Upstate Medical Associates, P.C.,* 292 A.D.2d 732 (3rd Dept.2002); *Gunzberg v. Art–Lloyd Metal Products Corp.,* 112 A.D.2d 423 (2nd Dept.1985); and *Matter of Weidy's Furniture Clearance Center Co., Inc.,* 108 A.D.2d 81 (2nd Dept.1985).

Petitioners have alleged sufficient facts sufficient to support a claim of oppressive conduct pursuant to Business Corporation Law § 1104–a(1).

After Petitioners advised Milim of their intent to leave the practice, Milim had the code changed on the office alarm and computer systems preventing Petitioners from obtaining access to the office or their patients records. Milim is alleged to have told the office staff not to cooperate with Petitioners. Petitioners allege that they have not been given lab or test results, that the office staff, a Milim's direction, has refused to book appointments for their patients, that they do not receive phone messages, that patients have been diverted from Petitioners to other doctors or physicians assistants, that office staff has advised prospective new patients that Petitioners do not have any available office hours. Petitioners have not been paid salary. If these allegations are proven true, such conduct would constitute oppressive conduct for the purposes of the statute.

Ordinarily, given these circumstances, the Court would grant Petitioners leave to replead. CPLR 3211(e). However, dissolution should be granted only as last resort. *Matter of Parveen, supra;* and *Matter of Imperatore,* 128 A.D.2d 707 (2nd Dept.1987). Where a shareholder agreement contains a buyout provision which will provide the shareholder with a reasonable return on investment, dissolution is inappropriate. *Matter of Gold,* 229 A.D.2d 495 (2nd Dept.1996); and *Matter of Brach, supra;* and *Matter of Harris,* 118 A.D.2d 646 (2nd Dept.1986).

The Health Care Shareholder Agreement contains specific provisions regarding the valuation of a shareholder's interest in the corporation upon the shareholder's voluntary resignation as an corporate employee. Section 4 of the Amended Shareholder Agreement specifically provides that if a shareholder terminates employment with Health Care by voluntary resignation for reasons other than physical or mental disability or retirement, the shareholder shall be deemed to have offered his or her shares for sale to Health Care for the purchase price as established by Paragraph 8(a) of the Amended Shareholder Agreement. Health Care specifically states that it is willing to comply these terms of the Amended Shareholder Agreement. Petitioners must avail themselves of this contractual provision before seeking dissolution. If Health Care fails or refuses to comply with these provisions, then Petitioners' appropriate remedy is to sue for breach of contract.

***7** Since Petitioners have an appropriate means for obtaining a fair and contractually agreed upon return on their investment short of dissolution of the corporation, dissolution, pursuant to Business Corporation Law § 1104–a, must be denied.

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The dismissal of this petition is without prejudice to Petitioner's rights with regard to obtaining all of their patient records (see, *Lewis v. Clement,* 1 Misc.3d 464 [Sup.Ct. Monroe Co.2004]) and seeking damages, if any, arising from the withholding of such records and/or the misdirecting of patient inquiries. It is also without prejudice to Petitioners' claims for adjustment in the distribution/buyout of their respective shares based upon claims of alleged mismanagement, breach of fiduciary duty, breach of the Health Shareholder Agreement or any other theory which negatively affects the value of their shares.

Accordingly, it is,

ORDERED, that Petitioners' application to judicially dissolve Long Island Women's Health Care, M.D., P.C. is **denied;** and it is further,

ORDERED, that Respondent's cross-motion to dismiss the petition for dissolution is **granted** and the petition is hereby dismissed.

Settle judgment on notice.

All Citations

7 Misc.3d 1009(A), 801 N.Y.S.2d 235 (Table), 2005 WL 856007, 2005 N.Y. Slip Op. 50519(U)

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259 A.D.2d 389
Supreme Court, Appellate Division, First Department, New York.

In re Application of Aisha S. PARVEEN, etc., Petitioner–Respondent, For the Dissolution of Hina Pharmacy Health & Beauty Aids, Inc., etc., Respondent–Appellant, Pursuant to § 1104 of the BCL.

March 23, 1999.

Synopsis

Assignee of one of corporation's organizers filed application seeking corporation's dissolution on grounds its directors were deadlocked. The Supreme Court, New York County, Stephen Crane, J., granted application, and appeal was taken. The Supreme Court, Appellate Division, held that: (1) evidence was sufficient to establish that assignee was a 50% shareholder entitled to seek dissolution; (2) assignee's allegations were insufficient to warrant dissolution on grounds corporation's directors were deadlocked; but (3) assignee was entitled to seek relief under statute permitting dissolution on grounds directors have committed illegal, fraudulent or oppressive actions.

Reversed.

Attorneys and Law Firms

****91** Edward S. Sawchuk, for petitioner-respondent.

Robert G. Del Grosso, for respondent-appellant.

****92** SULLIVAN, J.P., ROSENBERGER, TOM and LERNER, JJ.

Opinion

MEMORANDUM DECISION.

***389** Judgment, Supreme Court, New York County (Stephen Crane, J., upon the decision of Stuart Cohen, J., rendered after a non-jury trial), entered February 6, 1998, granting petitioner's application for judicial dissolution of the respondent corporation pursuant to Business Corporation Law § 1104(a)(1) and (3), unanimously reversed, on the law, without costs, the application denied and the petition dismissed without prejudice to commencement of a new proceeding under Business Corporation Law § 1104–a.

Respondent Hina Pharmacy, Health & Beauty Aids, Inc. ("the Corporation") operates a pharmacy at 1974 Second Avenue. ***390** Petitioner Aisha S. Parveen ("Aisha")[1] claims to own 50% of the outstanding shares as assignee of her husband Syed Parveen ("Syed"). Majid Mohammed ("Majid") claims to own 100% of the shares as assignee of his brother Azam Mohammed ("Azam"). The trial court credited Aisha's ownership claim, which we find to have been fully supported by the record. However, respondent is correct that the petition did not satisfy the conditions for dissolution set forth in Business Corporation Law § 1104(a)(1) and (3).

The following facts were adduced at trial. According to Syed, Farad Mohammed ("Farad"), the brother of Azam and Majid, approached Syed in 1988 about opening a pharmacy together. Syed, an experienced pharmacist, would mainly contribute his expertise, while the other party would make the major capital contribution, and each would have a 50% ownership interest.

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The Parveens contributed $7,000 to the business and the Mohammeds $120,000. Farad assigned his shares to Azam and Syed assigned his to Aisha. Majid purchased Azam's interest in 1996.

The relationship between the parties eventually broke down over the issue of Syed's obligation to make more capital contributions to the business. Syed claimed that the Mohammed brothers refused to pay him 50% of the profits, as they had allegedly agreed, and only gave him and his wife 20%. Azam testified that the parties renegotiated Syed's compensation in 1990. Syed purportedly agreed to work for 20% of the profits plus a salary, on condition that he stayed for three years. Syed eventually left in 1994, after being paid according to this system for three years.

Petitioner submitted various documents that supported her claim of 50% ownership, including a 1996 Medicaid Provider Application and three stock certificates issued to Majid, Azam and Aisha. In addition, the 1996 purchase agreement, whereby Majid bought out Azam's interest, stated that he was buying a 50% interest in the Corporation, not 100% as he claimed at trial. Based on this evidence, the trial court properly deemed Aisha a 50% owner who was entitled to bring a Business Corporation Law § 1104 action for dissolution.

Nevertheless, the court erred in granting the petition. BCL § 1104 is designed to allow dissolution of a corporation where the directors are deadlocked. Permissible grounds are:

> ***391** (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. (§ 1104[a].)

This section is inapplicable to the Corporation in the case at bar. Aisha's petition merely alleged that there was only one shareholders' meeting since the inception of the venture and that financial information was not regularly disseminated by Azam to the Parveens. However, mere failure to hold shareholders' meetings is not sufficient ****93** grounds for dissolution (*Nelkin v. H.J.R. Realty Corp.,* 25 N.Y.2d 543, 549, 307 N.Y.S.2d 454, 255 N.E.2d 713). Business Corporation Law § 1104 requires a showing of deadlock, but there can be no deadlock where, as here, the contending factions have not even attempted to elect directors (*Nelkin, supra,* at 550, 307 N.Y.S.2d 454, 255 N.E.2d 713). Similarly, Aisha's claim that one 50% shareholder, Azam, exercised sole control over the daily management of the Corporation does not create a cause of action for dissolution, because there are no allegations that Azam's control gave rise to deadlock over a management decision (*In re Dubonnet Scarfs, Inc.,* 105 A.D.2d 339, 342, 484 N.Y.S.2d 541).

Petitioner's action should have been brought under Business Corporation Law § 1104–a(a)(1). Pursuant to this section, the holders of 20% of the voting shares of a non-public, non-investment company may petition for dissolution on the grounds that "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders." A claim for dissolution under Business Corporation Law § 1104–a(a)(1) may be based on the complaining shareholder's frustrated expectations in such matters as continued employment or a share in the profits and management of the corporation, such that she feels that the other shareholders have deprived her of a reasonable return on her investment (*see, e.g., Matter of Kemp & Beatley, Inc.,* 64 N.Y.2d 63, 72–73, 484 N.Y.S.2d 799, 473 N.E.2d 1173).

Moreover, by contrast to actions under Business Corporation Law § 1104, the court has discretion to fashion a less drastic alternative remedy (*compare, Greer v. Greer,* 124 A.D.2d 707, 708, 508 N.Y.S.2d 217, *appeal dismissed* 69 N.Y.2d 900, 514 N.Y.S.2d 1028, 507 N.E.2d 1091). For instance, rather than dissolve a viable ongoing business, the court may order the other shareholders to buy out the petitioner's ownership interest ***392** pursuant to Business Corporation Law § 1118 (*Wolff v. Wolff,* 112 A.D.2d 850, 492 N.Y.S.2d 763, *affd. as mod* 67 N.Y.2d 638, 499 N.Y.S.2d 665, 490 N.E.2d 532). As this appears to be the relief petitioner is seeking, an action under Business Corporation Law § 1104–a seems most appropriate.

All Citations

259 A.D.2d 389, 687 N.Y.S.2d 90, 1999 N.Y. Slip Op. 02569

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Footnotes

[1] Because several parties have the same last name, we refer to them by their first names for convenience only, and mean no disrespect.

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307 N.Y. 1
Court of Appeals of New York.

In re RADOM & NEIDORFF, Inc.

April 22, 1954.

Synopsis

Proceeding on petition by stockholder, who was also president of corporation, for an order of voluntary dissolution. The Supreme Court, Special Term, Samuel Dickstein, J., directed a reference to hear and report on whether or not dissolution should be had, and an appeal was taken. The Supreme Court, Appellate Division, 282 App.Div. 854, 124 N.Y.S. 424, as resettled by the same court, 282 App.Div. 873, 124 N.Y.S. 922, reversed the order and dismissed the petition and petitioner appealed. The Court of Appeals, Desmond, J., held that where, although corporate stock was equally divided between two hostile stockholders, there was no stalemate as to corporate policies, the corporation was flourishing, dissolution was not necessary for corporation or for either stockholder, and president-stockholder's only cognizable grivance was his co-stockholder's refusal to sign president-stockholder's salary checks, dismissal of petition for dissolution was not an abuse of discretion.

Order affirmed.

Fuld, J., Lewis, C. J., and Froessel, J., dissented.

Attorneys and Law Firms

****563 *2** Stanley N. Ohlbaum, New York City, for appellant.

***3** Charles H. Tuttle, Milton M. Eisenberg and Robert P. Knapp, Jr., New York City, for respondent.

Opinion

***4** DESMOND, Judge.

Radom & Neidorff, Inc., the proposed dissolution of which is before us here, is a domestic corporation which has for many years, conducted, with great success, the business of lithographing or printing musical compositions. For some thirty years prior to February 18, 1950, Henry Neidorff, ***5** now deceased, husband of respondent Anna Neidorff, and David Radom, brother-in-law of Neidorff and brother of Mrs. Neidorff, were the sole stockholders, each holding eighty shares. Henry Neidorff's will made his wife his executrix and bequeathed her the stock, so that, ever since his death, petitioner-appellant David Radom and Anna Neidorff, brother and sister, have been the sole and equal stockholders. Although brother and sister, they ****564** were unfriendly before Neidorff's death and their estrangement continues. On July 17, 1950, five months after Neidorff's death, Radom brought this proceeding, praying that the corporation be dissolved under section 103 of the General Corporation Law, Consol.Laws, c. 23, the applicable part of which is as follows:

's 103. Petition in case of deadlock

'Unless otherwise provided in the certificate of incorporation, if a corporation has an even number of directors who are

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equally divided respecting the management of its affairs, or if the votes of its stockholders are so divided that they cannot elect a board of directors, the holders of one-half of the stock entitled to vote at an election of directors may present a verified petition for dissolution of the corporation as prescribed in this article.'
That statute, like others in article 9 of the General Corporation Law, describes the situations in which dissolution may be petitioned for, but, as we shall show later, it does not mandate the granting of the relief in every such case.

The petition here stated to the court that the corporation is solvent and its operations successful, but that, since Henry Neidorff's death, his widow (respondent here) has refused to co-operate with petitioner as president, and that she refuses to sign his salary checks, leaving him without salary, although he has the sole burden of running the business. It was alleged, too, that, because of 'unresolved disagreements' between petitioner and respondent, election of any directors, at a stockholders' meeting held for that purpose in June, 1950, had proved impossible. A schedule attached to the petition showed corporate assets consisting of machinery and supplies worth about $9,500, cash about $82,000, and no indebtedness except about $17,000 owed to petitioner (plus his salary claim). Mrs Neidorff's answering papers alleged that, while her husband ***6** was alive, the two owners had each drawn about $25,000 per year from the corporation, that, shortly after her husband's death, petitioner had asked her to allow him alone to sign all checks, which request she refused, that he had then offered her $75,000 for her stock, and, on her rejection thereof, had threatened to have the corporation dissolved and to buy it in at a low price or, if she should be the purchaser, that he would start a competing business. She further alleged that she has not, since her husband's death, interfered with Radom's conduct of the business and has signed all corporate checks sent her by him except checks for his own salary which, she says, she declined to sign because of a stockholder's derivative suit brought by her against Radom, and still pending, charging him with enriching himself at this corporation's expense.

Because of other litigation now concluded, see Matter of Radom's Estate, 305 N.Y. 679, 112 N.E.2d 768, to which Mrs. Neidorff was not a party, but which had to do with a contest as to the ownership of the Radom stock, respondent's answering papers in this dissolution proceeding were not filed until three years after the petition was entered. From the answering papers it appears, without dispute, that for those three years, the corporation's profits before taxes had totaled about $242,000, or an annual average of about $71,000, on a gross annual business of about $250,000, and that the corporation had, in 1953, about $300,000 on deposit in banks. There are many other accusations and counteraccusations in these wordy papers, but the only material facts are undisputed: first, that these two equal stockholders dislike and distrust each other; second, that, despite the feuding and backbiting, there is no stalemate or impasse as to corporate policies; third, that the corporation is not sick but flourishing; fourth, that dissolution is not necessary for the corporation or for either stockholders; and, fifth, that petitioner, though he is in an uncomfortable and disagreeable situation for which he may or may not be at fault, has no grievance cognizable by a court except as to the nonpayment of his salary, hardly a ground for dissolving the corporation.

****565** Special Term held that these papers showed a basic and irreconcilable conflict between the two stockholders requiring dissolution, for the protection of both of them, if the petition's ***7** allegations should be proven. An order for a reference was, accordingly, made, but respondent appealed therefrom, and no hearings were held by the Referee. The Appellate Division reversed the order and dismissed the petition, pointing out, among other things, that not only have the corporation's activities not been paralyzed but that its profits have increased and its assets trebled during the pendency of this proceeding, that the failure of petitioner to receive his salary did not frustrate the corporate business and was remediable by means other than dissolution. The dismissal of the proceeding was 'without prejudice, however, to the bringing of another proceeding should deadlock in fact arise in the selection of a board of directors, at a meeting of stockholders to be duly called, or if other deadlock should occur threatening impairment or in fact impairing the economic operations of the corporation.' 282 App.Div. 854, 124 N.Y.S.2d 424, 425. Petitioner then appealed to this court.

It is worthy of passing mention, at least, that respondent has, in her papers, formally offered, and repeated the offer on the argument of the appeal before us, 'to have the third director named by the American Arbitration Association, any Bar Association or any recognized and respected public body'.
Clearly, the dismissal of this petition was within the discretion of the Appellate Division. General Corporation Law, s 106; Matter of Cantelmo (Brewer), 275 App.Div. 231, 88 N.Y.S.2d 604; Myer v. Myer, 272 App.Div. 888, 71 N.Y.S.2d 923, motion for leave to appeal denied 297 N.Y. 1038, 76 N.E.2d 333. There is no absolute right to dissolution under such circumstances. Even when majority stockholders file a petition because of internal corporate conflicts, the order is granted only when the competing interests 'are so discordant as to prevent efficient management' and the 'object of its corporate existence cannot be attained.' Hitch v. Hawley, 132 N.Y. 212, 221, 30 N.E. 401, 404, see Matter of Niagara Ins. Co., 1 Paige Ch. 258. The prime inquiry is, always, as to necessity for dissolution, that is, whether judiciallyimposed death 'will be

beneficial to the stockholders or members and not injurious to the public', General Corporation Law, s 117; Hitch v. Hawley, supra; 1944 Report of N. Y. Law Revision Commission, p. 354, also cases from other jurisdictions cited in that report in the footnotes to p. 363; ***8** Matter of Pyrolusite Manganese Co., 29 Hun 429; Matter of George W. Anderson, Inc., Sup., 104 N.Y.S.2d 184, affirmed 279 App.Div. 594, 107 N.Y.S.2d 556. Taking everything in the petition as true, this was not such a case, and so there was no need for a reference, or for the taking of proof, under sections 106 and 113 of the General Corporation Law.

The order should be affirmed, with costs.

FULD, Judge (dissenting).

Section 103 of the General Corporation Law, insofar as here relevant, permits a petition for dissolution of a corporation by the holders of one half of the shares of stock entitled to vote for directors 'if the votes of its stockholders are so divided that they cannot elect a board of directors'. That is the precise situation in the case before us, for the petition explicitly recites that petitioner Radom and respondent Neidorff 'are hopelessly deadlocked with respect to the management and operation of the corporation' and that serious disputes have developed between them with the result that 'the votes of the two stockholders are so divided that they cannot elect a Board of Directors.'

The court is given discretion, by section 106 of the General Corporation Law, to 'entertain or dismiss the application' for dissolution. And, the statute continues, 'Where it entertains the application * * * the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee ****566** designated in the order * * * why the corporation should not be dissolved.' (Italics supplied.) In this case, the court (per Greenberg, J.) did, in its discretion, 'entertain' the application, and it did, on July 18, 1950, make the specified order requiring all parties interested to show cause why the corporation should not be dissolved. No motion was then made to dismiss the petition for insufficiency in law or for any other reason, and neither at that time nor at any other did respondent object to the order to show cause or seek to set it aside on the ground that the facts alleged were legally insufficient. The petition having been filed, s 103, and the application having been entertained, s 106, the legislature prescribed in section 113 that the court or the referee 'must hear the allegations and proofs of the parties, and determine the facts.' (Emphasis supplied.) And on June 15, 1953 following stipulated adjournments ***9** another justice at Special Term (Dickstein, J.), in accordance with the statutory mandate of section 113, appointed a referee to hear and report.

That reference was obligatory and should have gone forward. True, once a hearing has been had, the petition may, in the discretion of the court, be dismissed. See Matter of Cantelmo (Brewer), 275 App.Div. 231, 88 N.Y.S.2d 604; Myer v. Myer, 272 App.Div. 888, 71 N.Y.S.2d 923, motion for leave to appeal denied, 297 N.Y. 1038, 76 N.E.2d 333. But, if the jurisdictional requirements of section 103 are satisfied and a show cause order under section 106 has issued, then, the legislature has made it clear, the court is powerless to order a dismissal until the facts have been heard and the issues decided. General Corporation Law, s 113; see Matter of Quicksilver Min. Co., 186 App.Div. 347, 349, 174 N.Y.S. 338, 339; Petition of Acker (Matter of Acker & Jablow, Inc.,) Sup., 124 N.Y.S.2d 298, affirmed 282 App.Div. 941, 126 N.Y.S.2d 194. And no case, in the Court of Appeals or in any Appellate Division, has held otherwise. See for example, cases cited by court, supra, 306 N.Y. 7, 119 N.E.2d 565; Matter of Cantelmo (Brewer), supra, 275 App.Div. 231, 88 N.Y.S.2d 604; Myer v. Myer, supra, 272 App.Div. 888, 71 N.Y.S.2d 923, motion for leave to appeal denied 297 N.Y. 1038, 76 N.E.2d 333, where hearings were held. For that reason, the order under review should be reversed.

I would not, however, rest decision on that ground alone. Even if, however, the Appellate Division possessed the power to dismiss the petition without a hearing, its decision in this case constitutes a gross abuse of discretion. Whether petitioner will be able to sustain his claims, I do not know, but it seems exceeding plain that he has alleged more than enough to entitle him to a hearing and to an opportunity to present his proofs. See, e. g., Petition of Acker (Matter of Acker & Jablow, Inc.), supra, 124 N.Y.S.2d 298, affirmed 282 App.Div. 941, 126 N.Y.S.2d 194; Matter of Numode Realty Co., 278 App.Div. 979, 105 N.Y.S.2d 588; Matter of Lynch, Sup., 54 N.Y.S.2d 111.

For upwards of thirty years, petitioner Radom and Henry Neidorff, respondent's husband, shared equally in the ownership

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and management of Radom & Neidorff, Inc. Through all that time, their relationship was harmonious as well as profitable. Neidorff died in 1950, at which time respondent, through inheritance, acquired her present 50% stock interest in the ***10** business. Since then, all has been discord and conflict. The parties, brother and sister, are at complete loggerheads; they have been unable to elect a board of directors; dividends have neither been declared nor distributed, although the corporation has earned profits; debts of the corporation have gone unpaid, although the corporation is solvent; petitioner, who since Neidorff's death has been the sole manager of the business, has not received a penny of his salary amounting to $25,000 a year because respondent has refused to sign any corporate check to his order. More, petitioner's business judgment and integrity, never before questioned, have been directly attacked in the stockholder's derivative suit, instituted by respondent, charging that he has falsified the corporation's ****567** records, converted its assets and otherwise enriched himself at its expense. Negotiations looking to the purchase by one stockholder of the other's interest were begun in an effort to end the impasse but they, too, have failed.

In very truth, as petitioner states in his papers, 'a corporation of this type, with only two stockholders in it cannot continue to operate with incessant litigation and feuding between the two stockholders, and with differences as fundamental and wholly irreconcilable as are those of Mrs. Neidorff and myself. * * * settlement of these differences cannot be effected, while continuance on the present basis is impossible, so that there is no alternative to judicial dissolution.' Indeed, petitioner avers, in view of the unceasing discord and the fact that he has had to work without salary and advance his own money to the corporation, he does not, whether or no dissolution be granted, 'propose to continue to labor in and operate this business'.

It is, then, undisputed and indisputable that the stockholders are not able to elect a board of directors. In addition, it is manifest, on the facts alleged, that the Supreme Court could find that the stockholders are hopelessly deadlocked vis-a -vis the management of the corporation; that the corporation cannot long continue to function effectively or profitably under such conditions; that petitioner's resignation as president and manager which he contemplates will be highly detrimental to the interests of both corporation and stockholders and cannot ***11** help but result in substantial loss; and that petitioner is not responsible for the deadlock that exists. In such circumstances, the requisite statutory hearing may well establish that dissolution is indispensable, the only remedy available. As the high court of New Jersey recently declared in applying to somewhat comparable facts a statute similar to section 103 of our Gneral Corporation Law Matter of Collins-Doan Co., 3 N.J. 382, 396, 70 A.2d 159, 166, 13 A.L.R.2d 1250, 'In the case at hand, there is a want of that community of interest essential to corporate operation. Dissolution will serve the interests of the shareholders as well as public policy. * * * And, if the statutory authority be deemed discretionary in essence, there is no ground for withholding its affirmative exercise here, for there is no alternative corrective remedy. * * * The dissention is such as to defeat the end for which the corporation was organized.' (Emphasis supplied.)

Here, too, the asserted dissension, the court could find, permits of no real or effective remedy but a section 103 dissolution. And that is confirmed by a consideration of the alternatives seemingly open to petitioner. He could remain as president and manager of the corporation, without compensation, completely at odds with his embittered sister certainly neither a natural nor a satisfying way in which to conduct a business. Or he could carry out his present plan to quit the enterprise and thereby risk a loss, to corporation and stockholders, far greater than that involved in terminating the business. Or he could, without quitting, set up a competing enterprise and thereby expose himself to suit for breach of fiduciary duty to the corporation. Cf. Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237. It is difficult to believe that the legislature could have intended to put one in petitioner's position to such a choice. Reason plainly indicates, and the law allows, the reasonable course of orderly dissolution pursuant to section 103.

Respondent, however, suggests that, in view of the fact that petitioner is managing the business profitabley, he should continue to do so, defend against the stockholder's suit which she brought attacking his honor and integrity and himself start an action for the compensation denied him for more than three ***12** years. But, it seems self-evident, more and further litigation would only aggravate, not cure, the underlying deadlock of which petitioner complains. See Saltz v. Saltz Bros., 65 App.D.C. 393, 84 F.2d 246, certiorari denied 299 U.S. 567, 57 S.Ct. 31, 81 L.Ed. 418. And, if he were to bring the ****568** suggested suit for salary due him, the question arises, whom should he sue, and who is to defend?[1] The mere proposal that petitioner embark on a series of actions against the corporation, of which he is president and half owner, indicates the extent of the present impasse, as well as the futility of perpetuating it. The same is true of the other alternative suggested by respondent, namely, that the third of the three directors, required by section 5 of the Stock Corporation Law, Consol.Laws, c. 59, be appointed by an impartial party. The deadlock of which petitioner complains is between the stockholders, not the directors, and, when stockholders are deadlocked, section 103 calls for dissolution, not arbitration. Beyond that, and even if the offer to elect an impartial director were relevant, it would still be necessary to inquire when it was made and under what

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circumstances. It does not justify, alone or in conjunction with the other facts, a summary dismissal of the proceeding without a hearing.

Although respondent relies on the fact that the corporation is now solvent and operating at a profit, it is manifest that, if petitioner carries out his plan to resign as president and quits the business, there may be irreparable loss, not alone to him and respondent, as the owners of the corporation, but also to the corporation's creditors. Quite apart from that, however, the sole issue under section 103 is whether there is a deadlock as to the management of the corporation, not whether business is being conducted at a profit or loss. See Benintendi v. Kenton Hotel, 294 N.Y. 112, 118, 60 N.E.2d 829, 831, 159 A.L.R. 280; Petition of Acker (Matter of Acker & Jablow, Inc.), supra, Sup., 124 N.Y.S.2d 298, affirmed 282 App.Div. 941, 126 N.Y.S.2d 194; Matter of Gotham Tissue Corp., 269 App.Div. 922, 57 N.Y.S.2d 550; Matter of Bob's Fashion Furrier's, Sup., 52 N.Y.S.2d 279; Saltz v. Saltz Bors., supra, 65 App.D.C. 393, 84 F.2d 246, certiorari denied 299 U.S. 567, 57 S.Ct. 31, 81 L.Ed. 418; Bowen v. Bowen-Romer Flour Mills Corp., 114 Kan. 95, 217 P. 301, 43 A.L.R. 238; ***13** Matter of Collins-Doan Co., supra, 3 N.J. 382, 70 A.2d 159; Post-Standard Co. v. Evening Journal Ass'n, 15 ,N.J.Super. 58, 67, 83 A.2d 38; Nashville Packet Co. v. Neville, 144 Tenn. 698, 235 S.W. 64; Boothe v. Summit Coal Min. Co., 55 Wash. 167, 104 P. 207; Matter of Yenidje Tobacco Co., Ltd., 1916, 2 Ch. 426; see, also, Israels, 'The Sacred Cow of Corporate Existence Problems of Deadlock and Dissolution', 19 U. of Chi.L.Rev. 778; Note, 50 Col.L.Rev. 100. Whether the petition should or should not be entertained surely cannot be made to turn on proof that the corporation is on the verge of ruin or insolvency.

Insolvency may be a predicate for dissolution, but not under section 103. By virtue of other provisions of Article 9 of the General Corporation Law sections 101 and 102 directors and stockholders may seek dissolution, when the corporation is insolvent, in order to prevent further loss to the owners and creditors. Section 103, however which bears the title, 'Petition in case of deadlock' was designed to serve a far different purpose. As amended in 1944, upon the recommendation of the Law Revision Commission, that section provides for dissolution 'if the votes of its stockholders are so divided that they cannot elect a board of directors'. Nothing in the statute itself or in its legislative history suggests that a 'Petition in case of deadlock' must wait until the corporation's profits have dried up and financial reverses set in. Had the commission or the legislature intended to incorporate such a qualification into section 103, it could readily have done so. The only test envisaged by the commission, however, was that which the legislature enacted, see 1944 Report of N. Y. Law Revision Commission, N.Y.Legis.Doc., 1944, No. 65(K), pp. 5-7, and a court may not import any other.

****569** Nor does section 117 require or suggest any contrary conclusion. That section provides that if after a hearing, s 116, it shall appear 'that a dissolution will be beneficial to the stockholders * * * and not injurious to the public, the court must make a final order dissolving the corporation'. It would certainly be 'beneficial' to dissolve the corporation if the court were to find that there is a continuing, irreparable stalemate in the corporate management, for which petitioner is not primarily at fault. Indeed, in ***14** Benintendi v. Kenton Hotel, supra, 294 N.Y. 112, 118, 60 N.E.2d 829, 831, this court did not even impose those limitations, when it declared that 'The Legislature has decided that a vote of a majority of the shares or half of them in case of a deadlock, is sufficient to force a dissolution.' (Emphasis supplied.) Be that as is may, though, the issue here is, not the propriety of dissolution, but petitioner's right to be heard on that question. See, e. g., Petition of Acker (Matter of Acker & Jablow, Inc.,) supra, 124 N.Y.S.2d 298, affirmed 282 App.Div. 941, 126 N.Y.S.2d 194; Matter of Gotham Tissue Corp., supra, 269 App.Div. 922, 57 N.Y.S.2d 550. In advance of that hearing and in the light of the plain language of section 103, we may not say that dissolution could, under no conceivable set of circumstances, be 'beneficial to the stockholders', unless it also appears that it would enable the corporation to avoid pecuniary loss.

Until there has been a hearing, it is impossible to decide that 'dissolution is not necessary' or that 'there is no stalemate or impasse as to corporate policies.' Opinion, 306 N.Y. 6, 119 N.E.2d 564. In point of fact, petitioner expressly denies both of these allegations; and, despite respondent's protestations, it is significant that she has not pointed to even one matter on which she and petitioner have agreed. Nor may we take at face value respondent's claim that she is willing to defer to petitioner's business judgment in the future. It is, to say the least, highly implausible that she is willing and even anxious to have her affairs managed by a person whom she has charged with deliberate fraud, conversion and mismanagement. As the court said in Matter of Yenidje Tobacco Co., Ltd., supra, 1916, 2 Ch. 426, 431 which also involved the dissolution of a deadlocked two-man corporation 'when one of the two partners has commenced, and has not discontinued, an action charging his co-partner with fraud * * * is it likely, is it reasonable, is it common sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the * * * business?'
And, even if it is 'likely' that these two persons, petitioner and respondent, can work together, the issue should not, and may not, be resolved before it has even been heard. The court's decision seems to compel petitioner to abandon the management of the enterprise as a condition to his seeking ***15** dissolution. I find no basis in the statute or elsewhere for requiring that

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irreparable injury must occur before resort may be had to the remedy designed to avert it.

The order of the Appellate Division should be reversed and that at Special Term affirmed.

CONWAY, DYE and VAN VOORHIS, JJ., concur with DESMOND, J.

FULD, J., dissents in opinion in which LEWIS, C. J., and FROESSEL, J., concur.

Order affirmed.

All Citations

307 N.Y. 1, 119 N.E.2d 563

Footnotes

[1] In this connection, it is, perhaps, of some moment that, according to petitioner, he is the sole officer and director of the corporation, cf. Civ.Practice Act, s 228.

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307 N.Y. 407
Court of Appeals of New York.

In re SEAMERLIN OPERATING CO., Inc. et al.

July 14, 1954.

Synopsis
Special proceeding for voluntary dissolution of domestic corporation. The Supreme Court, Appellate Division, First Judicial Department, 283 App.Div. 858, 130 N.Y.S.2d 865, April 13, 1954, entered order which affirmed, by a divided court, an order of Surreme Court, Special Term, New York County, Eder, J., 131 N.Y.S.2d 174, denying motion by committee of a director, who had been declared incompetent, for order confirming report of referee who had recommended that the corporation should not be dissolved, and directing that the corporation be dissolved. The committee appealed. The Court of Appeals, Conway, J., held that evidence supported referee's finding that dissolution of the corporation would not benefit the stockholders, and that such finding was conclusive upon Special Term.

Order of Appellate Division and of Special Term reversed, and matter remitted.

Desmond, Fuld and Froessel, JJ., dissented.

Attorneys and Law Firms

****392 *408** Sidney S. Bobbe, Louis George Rudd, New York City, for appellant.

***409** Bernard Lefkowitz, New York City, for respondent.

Opinion

***410** CONWAY, Judge.

By an agreement dated August 22, 1947, T. Victor Searing and Anthony T. Merlino agreed, inter alia, (a) to organize the Seamerlin corporation; (b) to execute in the name of, or assign to, said corporation a lease for certain premises at 244-248 West 42nd Street in the city of New York; (c) ****393** that each would vote his stock for election of Searing as president, and Merlino as secretary and treasurer of Seamerlin; (d) that each of the parties would vote his stock so that at all times each should elect an equal number of the members of the board of directors; (e) that the stock of each of the parties should not be assigned, sold or transferred or pledged without the prior written consent of the other; (f) that Merlino was to be supervisor of any business which the parties might decide to conduct in the legased premises; (g) that the stock of Seamerlin when issued would be indorsed with a statement indicating that it was subject to the conditions and terms of this agreement; and (h) that in case of any dispute between the parties with respect to this agreement or its interpretation, the same should be submitted to arbitration.

***411** Later in August, 1947, the petitioner-respondent T. Victor Searing, and Anthony T. Merlino organized Seamerlin as a real estate operating company with an authorized capital of 100 shares of no par value common stock. Petitioner Searing holds 55 of those shares, and is and has been president of the corporation and one of its directors. Merlino is and has been the secretary and treasurer as well as the other director of the corporation, and holds the remaining 45 shares of its stock. The certificate of incorporation of Seamerlin and its by-laws provide for a board of directors of four, but only two Searing and Merlino have been elected.

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The respondent Merlino was admitted to Brooklyn State Hospital in August of 1952 and judicially declared incompetent in October of the same year. He is thus now a ward of the court and his brother, his committee, is subject to the court's direction along the lines of reasonable conduct.

The petitioner, Searing, and his wife are part owners of the premises on 42nd Street. Searing himself has been the landlord of these premises since late 1949 or early 1950 by virtue of a sublease to him of the entire building. The premises leased by the Seamerlin company for a period expiring in June, 1957, comprise the ground floor and all of the basement, except the boiler room and the elevator shaft, together with a small portion of the fifth floor of the building on West 42nd Street. In addition, the lease included a small parking lot in the rear of the building. In one front corner portion of the building, facing out on West 42nd Street, there has been a 'Milk Bar' owned and operated by Merlin Enterprises, Inc., in which Merlino and Searing had been partners until May, 1949, when Searing sold out his interest to Merlino. That 'Milk Bar' was a sublessee of Seamerlin, and occupied a ground floor space of about fourteen by forty-five feet, together with some space in the basement of the building. All of the remainder of the ground floor in the premises leased by Seamerlin was sublet to and occupied by 42nd Street Enterprises, Inc., which used them for the operation of an amusement arcade. The premises occupied by such amusement arcade on the ground floor, therefore, were in the shape of an 'L' which ran back from the street, alongside the milk bar, and then back and around the rear of that milk bar. There was no dividing partition between Merlin Enterprises, Inc., and the ***412** amusement arcase, and no demarcation in the premises to indicate the boundary line between those two independent businesses and, consequently, patrons could walk from one of the businesses to the other without any hindrance or indication that there were different owners.

The entire income of the Seamerlin Operating Company, Inc., is derived from the rentals received from its sublessees or statutory tenants, which include 42nd Street Enterprises, Inc., and Merlin Enterprises, Inc. The rent paid by Seamerlin is $44,500 per annum plus certain amounts toward real estate taxes and fuel costs of the building. Its income from rentals, as found by the Referee, is between $60,000 and $65,000 per annum. The Referee further found: 'Seamerlin Operating Co., Inc., was organized with an investment of $10,000.00 * * * and the corporation ****394** had been earning approximately $15,000.00 a year. Searing, the petitioner, has been getting a salary of $2,750.00 a year, and $5,000.00 a year in dividends * * * and Merlino, until he became an incompetent received a salary of $2,250.00 plus dividends * * *.

'The business of the corporation as is apparent from the above is the management of its sub-tenancies, the active management from its inception has been carried out by T. Victor Searing'.

By petition verified on December 18, 1952, two and one-half months after the adjudication of incompetency, Searing prayed for a dissolution of the Seamerlin corporation on the ground that the directors of that company '* * * are hopelessly deadlocked with respect to the management and conduct of the business of the corporation and will never be able to reach any accord of judgment and opinion with respect to such management and conduct, or even with respect to the election of a Board of Directors'. The petition further alleged (1) that Merlino the sole other director of Seamerlin is the president and sole stockholder of Merlin Enterprises, Inc., and that he has used his position as director of Seamerlin to the disadvantage and detriment of that corporation and in order to protect Merlin Enterprises, Inc., which, it was alleged, had frequently defaulted in the payment of its rent, and had allowed its business premises to be operated and maintained in such a fashion and condition (a matter largely of cleanliness and lighting) that 42nd Street ***413** Enterprises, Inc. which pays annual rentals of approximately $46,900 is threatened with a loss of customers and income which will compel it to abandon its business on the premises leased from Seamerlin; (2) that Merlino had frequently absented himself when his presence was necessary for the transaction of Seamerlin's business; (3) that he had attempted to borrow money from Seamerline for personal uses despite the lack of any authorization for such withdrawals in the bylaws of the corporation, and had threatened the petitioner when the latter objected to those withdrawals; (4) that Merlino had refused to have a director's meeting of Seamerline to discuss the alleged difficulties caused by Merlin Enterprises, Inc.; (5) that on their last meeting in May, 1952, and over the telephone Merlino had used vile and abusive language and had threatened bodily harm to the petitioner; (6) that Merlino had been confined to a hospital for the mentally ill since June, 1952, and had been adjudicated an incompetent and Bartolo Merlino had been appointed his committee on October 1, 1952; and (7) that the committee is likewise unable to agree with the petitioner, and thus the deadlock between the directors will and does continue.

The answer, after denying upon information and belief the pertinent portions of the petition, alleges, in substance, that the dissolution is sought in bad faith in order that Merlino may be ousted from Seamerlin and that Merlin Enterprises, Inc., may be evicted and the space rented to the amusement arcade at a substantial profit.
The case came on before a learned Justice at Special Term, who referred the 'issues as to the dissolution of this corporation'

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to a nonofficial Referee 'to hear the facts and make his report to the Court * * *.' After hearings which extended over a period of more than two months, the Referee filed his report in which he found, among other findings, that: 'The facts do not disclose such discordant interests and irreconcilable difference resulting in a paralyzing failure of management necessary to a dissolution.' The Referee further found that 'dissolution would not be beneficial to the stockholders' of Seamerlin. He therefore reported that the petition for dissolution should be denied. On the basis of that report and pursuant to section 116 of the General Corporation Law, Consol.Laws, c. 23, a motion was made by the committee, and opposed by the petitioner-respondent, ***414** for a final order denying dissolution. The learned appointing Justice, however, disagreed with the ****395** Referee's finding that the dissolution would not be beneficial to the stockholders. He therefore denied the committee's motion, and entered a final order granting dissolution, writing an opinion in which he said: 'The referee has no power to make findings of fact on a reference merely to take testimony nor may conclusions of law be stated by the referee in such a reference, 76 C.J.S., References, s 137, p. 259. Where the referee in a reference to hear and report facts exceeds his authority by reporting conclusions in addition to the facts, the court may reject the former and find the issues on the facts reported, 76 C.J.S., References, s 132, p. 258.' (131 N.Y.S.2d 178.)

The major issue presented by this appeal is whether Special Term could properly deny the motion of the committee for a final order denying dissolution, in light of the findings of fact made by the Referee that dissolution would not benefit the stockholders, and that there was no 'paralyzing failure of management'.

Section 103 of the General Corporation Law, pursuant to which this proceeding was commenced, reads as follows: 'Unless otherwise provided in the certificate of incorporation, if a corporation has an even number of directors who are equally divided respecting the management of its affairs, or if the votes of its stockholders are so divided that they cannot elect a board of directors, the holders of one-half of the stock entitled to vote at an election of directors may present a verified petition for dissolution of the corporation as prescribed in this article.' (As amd. by L.1944, ch. 176, s 2; L.1951, ch. 717, s 3, eff. Sept. 1, 1951.)

In the present case there were but two directors on the board of Seamerlin. It should be noted, however, that the Referee found that '* * * the contention that the votes of the stockholders are so divided that they cannot elect a Board of Directors falls in view of the fact that a formal meeting and attempt to elect a full Board of Directors was never called by the president although he had the power to call such a meeting'.

The Special Term Justice had the power to make an order under section 106 of the General Corporation Law if in his discretion a hearing on the facts was required under the circumstances ***415** presented to him.

At the time under the statute he could hear and determine the facts himself or he could send the matter to a referee to hear and determine the fact. The statute in plain words says just that. It reads as follows: 's 113. Hearing. At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.'

Whether the court hears and determines the facts, or the referee does, made no difference to the Legislature because in either event the legislators in protecting their creature-corporation from extinction through dissolution, made certain that the parties must have a Supreme Court Justice determine the law question of whether the facts as found whether by judge or referee justified dissolution as a matter of law. Determination of facts the legislators were willing to permit a referee to make, but when it came to a legal determination as to whether the facts found justified dissolution, that was another matter and the legislators required that that be done by a court.

The way the Legislature set this proceeding up makes this so clear. It does not matter whether the court finds the facts or the Referee finds the facts under section 114. They stand equal as the Legislature provided for this proceeding. Thus section 114 reads: 's 114. Decision. The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. * * *' Even though the court finds the facts itself, it must file its decision; but even them it may not sign an order based upon its own decision until a motion therefor has been made.

****396** Then we come to section 116, where again the Legislature provided for a motion for a final order to be made whether upon the report of the referee or the decision of the court. In either case, it must be upon motion. This is unusual. Quite clearly this is not a situation where as part of a motion the court uses a referee to hear some facts for the court's enlightenment and as a timesaver. Section 116 in its entirety reads as follows: 's 116. Application for order. Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each party to the proceedings,

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who has appeared therein. The notice of motion may be served as prescribed in ***416** the civil practice act and the rules of civil practice for the service of papers upon an attorney. Where the hearing is before the court, a motion for a final order may be made immediately, or at such time and upon such notice, as the court prescribes.'
The court made its order pursuant to the authority granted to it by section 106 and the Special Term Justice could not rewrite the statute nor construe his own order as he might wish regardless of the limitations put upon his act by statute. This was an appointment of a referee to hear and determine facts under a special statute regardless of what words Special Term may have used in its order. The General Term laid down that rule in McCleary v. McCleary, 30 Hun. 154, Learned, P. J. The pertinent statute, and not the form of the order controls. Cartier v. Spooner, 118 App.Div. 342, 103 N.Y.S. 505; Matter of Ney Co., 114 App.Div. 467, 99 N.Y.S. 982; Matter of Ginsburg (Adelson), 191 Misc. 188, 52 N.Y.S.2d 416; Wacenske v. Merchants Despatch Transp. Co., 237 App.Div. 868, 261 N.Y.S. 954.

In other words, the Special Term Justice could decide whether he would determine the facts or whether he would have a referee pass upon them within the terms of the statutory grant of power and authority in the premises. When he did that and signed an order, as provided is section 11, that was a judicial act and he could not later review that act, change his mind and then determine that he was going to be the fact-finder. He was functus officio as to that judicial act and determination. Review of his act and of the findings of the Referee must be by the Appellate Division. Matter of Kling, 60 App.Div. 512, 69 N.Y.S. 962; and see annotations in 10 A.L.R. 526; 67 A.L.R. 828; 126 A.L.R. 956; People ex rel. Hirschberg v. Orange County Ct., 271 N.Y. 151, 2 N.E.2d 521.

We may not construe the act of the Special Term Justice appointing the Referee as an ordinary appointment to hear and report when the legislative authority for the appointment was one to hear and determine facts under section 113. The appointment of the Referee was a judicial act provided for with limitations by the Legislature. The Referee, if one were appointed, was to have certain functions and powers. So was the court, and each was to function accordingly. Since that is so, then the review of the facts as found by the Referee and of the law as pronounced by the court upon those facts is for the Appellate ***417** Division, the court of review for Special Term's judicial actions. Herpe v. Herpre, 225 N.Y. 323, 122 N.E. 204; see, also, Ring & Son v. Winola Worsted Yarn Co., 228 N.Y. 127, 126 N.E. 514; Corr v. Hoffman, 256 N.Y. 254, 176 N.E. 383; Schenectady Trust Co. v. Emmons, 290 N.Y. 225, 48 N.E.2d 497.
There were three questions of fact presented in the present case: (1) were the directors of Seamerlin unable to agree on a matter of corporate management; (2) would dissolution be noninjurious to the public, and (3) would dissolution be beneficial to the shareholders, see Matter of Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563; Matter of Cantelmo (Brewer), 275 App.Div. 231, 88 N.Y.S.2d 604. All three questions must be answered in the affirmative before a dissolution will be warranted or may be ordered. See General Corporation Law, ss 103, 117. ****397** Two of them were decided adversely to petitioner by the Referee.

It is unneceesary at this time, however, to consider the first two questions which the Referee was called upon to decide, inasmuch as there was error of law on the part of both Special Term and the Appellate Division with regard to the third question whether or not dissolution would be beneficial to the shareholders.

On that issue of fact the Referee wrote the following: 'The business of the corporation has been carried on. Even after Merlino became incompetent the business was carried on by Searing, as agent. Dissolution would involve losing the profits of the sub-leases since a sale of the leases might bring in little, if anything. On the whole, therefore, dissolution would not be beneficial to the stockholders.' (Emphasis supplied.)

There was, therefore, an express finding that the incompetent and the petitioner would not be benefited by dissolution of Seamerlin. The Special Term Justice, however, wrote in his opinion that: '* * * it is the considered opinion and judgment of the court that it is in the best interests of the corporation, the stockholders and the creditors the such dissolution be decreed.'

Whether or not the stockholders would be benefited by dissolution was, as stated above, a question of fact to be determined by the Referee upon evidence before him. There was evidence from which the Referee could make a finding that the stockholders would not be benefited, viz., that the corporation was making a profit and that a sale of Seamerlin's lease at public auction would probably not produce much cash, if any. Real ***418** estate appraisers were called by petitioner and respondent to testify to what the lease of Seamerlin 'would bring in if the leases were offered for sale at public auction in the event of dissolution'. The respondent's appraisers testified 'that only a man who knew nothing about real estate would buy

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the lease'. The petitioner's appraiser fixed a possible figure of between $5,000 and $10,000 net profit but said that the purchaser would be a speculator, and not an investor, who would have to deposit $10,000 as security. Since there was this evidenc upon which the Referee could properly make a finding that dissolution would not benefit the stockholders, Special Term could not reverse that finding as a matter of law; nor could that court review it as a question of fact because this was properly a reference to hear and determine issues of fact. The Referee's finding of nonbeneficial results of dissolution to shareholders was conclusive upon Special Term, and the only order that that court could properly make in such a case was a final order denying dissolution as a matter of law in view of that finding of fact by the Referee. A reversal upon the facts was for the Appellate Division if there was to be such a reversal.

Special Term, however, reversed that negative finding of fact by the Referee and substituted therefor a new positive one, viz., that dissolution would benefit the shareholders. Upon that new finding of fact the Special Term ordered dissolution. The Appellate Division has affirmed the order of Special Term, without opinion. Both courts below, therefore, were incorrect inasmuch as one of the essential elements for a dissolution under section 103 of the General Corporation Law i. e., a finding that the stockholders would be benefited thereby, General Corporation Law, s 117, was lacking since there was no power in the Special Term to make that finding in the face of a contrary finding by the Referee. The Appellate Division should have remitted the matter to Special Term for the entry of an appropriate order. After that had been done an appeal to the Appellate Division on the facts would have been proper.

The order of the Appellate Division and that of Special Term should be reversed, with costs in all courts, and the matter remitted to Special Term for further proceedings not inconsistent with this opinion.

****398 *419** DESMOND, Judge (dissenting).

We cannot agree to this decision since it means no less than this: that, in corporation dissolution proceedings, the court is forbidden, as in no other special proceeding or motion practice, to use the services of a referee to take and report the facts only, without making any binding determination thereon. Even if the various provisions of article 9 of the General Corporation Law can, possibly, be read to require that all references in such proceedings be to hear and determine, that is not the only possible reading of those statutes. We should not so read them as to produce a result the Legislature could not reasonably have intended.

The order should be affirmed, with costs.

LEWIS, C. J., and DYE and VAN VOORHIS, JJ., concur with CONWAY, J.; DESMOND, J., dissents in an opinion in which FULD and FROESSEL, JJ., concur.

Orders reversed, etc.

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307 N.Y. 407, 121 N.E.2d 392

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173 A.D.3d 1826
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Pat A. INZER, Bruce Hall, Dean C. Marshall, III, Kevin Hall, James Quinn, for Judicial Dissolution of West Brighton Fire Department, Inc., Pursuant to Not–for–Profit Corporation Law § 1102, and Town of Brighton, Petitioners–Respondents,
v.
WEST BRIGHTON FIRE DEPARTMENT, INC., Respondent–Appellant,
and
Eric T. Schneiderman, as Attorney General of the State of New York, Respondent.

285
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CA 18–00329
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Entered: June 28, 2019

Synopsis

Background: Members of not-for-profit corporation petitioned for judicial dissolution of corporation. After denial of motion to dismiss and following nonjury trial, the Supreme Court, Monroe County, John J. Ark, J., granted petition. Corporation appealed, arguing that petition had not been filed by requisite 10% of its members and therefore should have been dismissed.

Holdings: The Supreme Court, Appellate Division, held that:

petition had been filed by requisite 10% of corporation's members due to amendment of petition which had added additional members as petitioners;

grant of amendment of petition had been proper;

weight given to opinion of Attorney General had been proper; and

determination that dissolution would benefit members had been proper.

Affirmed.

****657** Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered May 5, 2017. The order granted the petition for judicial dissolution of respondent West Brighton Fire Department, Inc.

Attorneys and Law Firms

PINSKY LAW GROUP, PLLC, SYRACUSE (DAVID B. GARWOOD OF COUNSEL), FOR RESPONDENT–APPELLANT.

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PETITIONERS–RESPONDENTS PAT A. INZER, BRUCE HALL, DEAN C. MARSHALL, III, KEVIN HALL, JAMES QUINN, FOR JUDICIAL DISSOLUTION OF WEST BRIGHTON FIRE DEPARTMENT, INC., PURSUANT TO NOT–FOR–PROFIT CORPORATION LAW § 1102.

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

MEMORANDUM AND ORDER

***1826** It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent West Brighton Fire Department, Inc. (WBFD) appeals from an order that granted pursuant to N–PCL 1102(a)(2)(E) a petition seeking judicial dissolution of WBFD. We affirm.

WBFD contends that, inasmuch as the petition was not filed by the requisite 10% of WBFD's members (*see* N–PCL 1102[a][2]), Supreme Court erred in denying WBFD's motion to dismiss the petition. We reject that contention. The court granted an amendment of the petition to add two additional members of WBFD as petitioners and, pursuant to N–PCL 1105, such an amendment is deemed nunc pro tunc, i.e., as if the petition were originally filed as amended (*see generally La Sorsa v. Algen Press Corp.*, 105 A.D.2d 771, 772, 481 N.Y.S.2d 716 [2d Dept. 1984]). Following the trial, WBFD contended for the first time that the court had lacked the authority to add the two additional members as petitioners because there was never any formal motion to do so and that courts cannot sua sponte add petitioners. Even assuming, arguendo, that WBFD's contention is properly before this Court, we conclude that it lacks merit.

****658** It is well settled that oral motions, including oral motions to add petitioners, are not prohibited (*see Matter of Kirsch v. Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 A.D.3d 1218, 1219, 57 N.Y.S.3d 870 [4th Dept. 2017], *lv denied* 31 N.Y.3d 904, 78 N.Y.S.3d 710, 103 N.E.3d 781 [2018]; *see generally Matter of Shanty Hollow Corp. v. Poladian*, 23 A.D.2d 132, 133–134, 259 N.Y.S.2d 541 [3d Dept. 1965], *affd* 17 N.Y.2d 536, 267 N.Y.S.2d 912, 215 N.E.2d 168 [1966]). Here, petitioners ***1827** "present[ed] affidavits or other competent evidence in support of [their]" request to add two additional members of WBFD as petitioners (*Kaiser v. J & S Realty*, 173 A.D.2d 920, 921, 569 N.Y.S.2d 787 [3d Dept. 1991]), and we conclude that the court granted an amendment of the petition to add those members in the "proper exercise of discretion" (*Shanty Hollow Corp.*, 23 A.D.2d at 134, 259 N.Y.S.2d 541). Contrary to WBFD's contention, this is not a situation where a court added a petitioner "on its own initiative," i.e., independently of any request to do so (*New Medico Assoc. v. Empire Blue Cross & Blue Shield*, 267 A.D.2d 757, 758, 701 N.Y.S.2d 142 [3d Dept. 1999]).

Additionally, WBFD contends in its main brief that petitioner Town of Brighton (Town) could not serve as a petitioner and should not have been permitted to present and cross-examine witnesses. In its reply brief, however, WBFD correctly concedes that the Town is a necessary party (*see* N–PCL 1402[e][1]; *Matter of Cloe v. Attorney Gen. of the State of N.Y.*, 70 A.D.3d 1348, 1349, 895 N.Y.S.2d 626 [4th Dept. 2010]), but nevertheless contends that the Town was not empowered to commence a dissolution proceeding. That latter contention, although raised on the motion to dismiss the petition, was improperly raised on this appeal for the first time in WBFD's reply brief (*see Turner v. Canale*, 15 A.D.3d 960, 961, 790 N.Y.S.2d 347 [4th Dept. 2005], *lv denied* 5 N.Y.3d 702, 799 N.Y.S.2d 773, 832 N.E.2d 1189 [2005]). We therefore do not address it.

WBFD further contends that the court erred in according any weight to the opinion of respondent Eric T. Schneiderman, as Attorney General of the State of New York (Attorney General). We reject that contention. The Attorney General is a necessary party to judicial dissolution proceedings (*see* N–PCL 1102[b]) and, as such, had the right to oppose or to support the petition (*see generally Cloe*, 70 A.D.3d at 1348, 895 N.Y.S.2d 626).

Finally, we have reviewed WBFD's challenges to the ultimate determination of the court to grant the petition for dissolution

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on the ground that WBFD was "no longer able to carry out its purposes" (N–PCL 1102[a][2][E]), and we conclude that they lack merit. WBFD correctly contends that petitioners had the burden to establish that WBFD was incapable of fulfilling its purposes (*see generally Matter of Cusato v. Glen at Great Kills Homeowners Assn.*, 23 A.D.3d 464, 464, 808 N.Y.S.2d 99 [2d Dept. 2005]), but "[i]n the absence of a clear abuse of discretion" by the court, we will not disturb its determination in a dissolution proceeding (*Matter of John Luther & Sons Co. v. Geneva Bldrs. & Trade Assn.*, 52 A.D.2d 737, 738, 381 N.Y.S.2d 934 [4th Dept. 1976]; *see also Matter of Kemp & Beatley [Gardstein]*, 64 N.Y.2d 63, 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173 [1984]; *but see Matter of Singh v. Baba Makhan Shah Lobana Sikh Ctr., Inc.*, 115 A.D.3d 962, 962, 982 N.Y.S.2d 390 [2d Dept. 2014]). The determination of the court in ***1828** this nonjury trial that WBFD was no longer able to carry out "the purpose or purposes *for which it [was] formed*" (N–PCL 402[a][2–a] [emphasis added]; *see* N–PCL 1102[a][2][E]), ****659** as opposed to its ability to carry out ancillary activities "in furtherance of such purpose or purposes" (N–PCL 402[a][2–a]), is based on a fair interpretation of the evidence and, therefore, should not be disturbed (*see Cianchetti v. Burgio*, 145 A.D.3d 1539, 1540–1541, 44 N.Y.S.3d 293 [4th Dept. 2016], *lv. denied* 29 N.Y.3d 908, 57 N.Y.S.3d 713, 80 N.E.3d 406 [2017]; *see generally Thoreson v. Penthouse Intl.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978, 606 N.E.2d 1369 [1992], *rearg. denied* 81 N.Y.2d 835, 595 N.Y.S.2d 397, 611 N.E.2d 298 [1993]). Contrary to WBFD's contention, the court properly considered the "paramount" issue of the benefit of dissolution to the members of WBFD (N–PCL 1109[b][2]), and its determination that dissolution would benefit the members is supported by the evidence and also should not be disturbed (*see generally Cusato*, 23 A.D.3d at 464, 808 N.Y.S.2d 99; *John Luther & Sons Co.*, 52 A.D.2d at 738, 381 N.Y.S.2d 934).

All Citations

173 A.D.3d 1826, 105 N.Y.S.3d 655, 2019 N.Y. Slip Op. 05279

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114 A.D.2d 363
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Henry BRENNER, Respondent, v. HART SYSTEMS, INC., Appellant (Matter No. 1). In the Matter of Henry BRENNER, Respondent, v. Harvey GOLDSMITH, et al., Appellants (Matter No. 2).

Oct. 7, 1985.

Synopsis
Corporate director filed proceeding to compel corporation to submit to examination of its corporate books and records, and director sought injunctive relief. The Supreme Court, Nassau County, Berman, J., granted director's petition, and granted director's motion for preliminary injunction, and appeal was brought. The Supreme Court, Appellate Division, held that: (1) director was not properly removed from his position; (2) director had absolute and unqualified right to inspect and examine corporate books and records; and (3) trial court did not abuse its discretion in granting preliminary injunction temporarily enjoining majority shareholders from proceeding with any meeting to elect corporate directors unless done so in accordance with terms of shareholder agreement.

Affirmed.

Attorneys and Law Firms

****882** Joseph F. Carlino, P.C., Mineola (Julian Jawitz, of counsel), for all appellants.

Irving A. Conn, P.C., Mineola (Allan D. Goldstein, of counsel), for respondent.

Before LAZER, J.P., and O'CONNOR, NIEHOFF and KOOPER, JJ.

Opinion

MEMORANDUM BY THE COURT.

(1) In a proceeding pursuant to CPLR article 78, *inter alia,* to compel Hart Systems Inc. to submit to an examination of its corporate books and records, Hart Systems, Inc. appeals from a judgment of the Supreme Court, Nassau County, dated July 16, 1984, which, *inter alia,* granted the petition in its entirety and ordered appellant to produce said records for petitioner's examination, and (2) in a related action for injunctive relief and specific performance of a shareholder agreement, defendants Harvey Goldsmith, Morris Kaufman and Hart Systems, Inc. appeal from an order of the same court, dated June 21, ***364** 1984, which granted plaintiff's motion for a preliminary injunction temporarily enjoining them from proceeding with any meeting to elect corporate directors unless done so in accordance with the terms of the aforesaid agreement.

Judgment dated July 16, 1984, and order dated June 21, 1984, affirmed, with one bill of costs.

Hart Systems, Inc. (Hart) is a domestic corporation created in 1973. The sole shareholders of Hart are Henry Brenner (Brenner), Harvey Goldsmith (Goldsmith) and Morris Kaufman (Kaufman). The three men entered into a shareholder agreement on October 1, 1974, which provided, in part, as follows:

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"2. *Directors of the Corporation*

"(a) Each of the Shareholders shall vote at each meeting of Shareholders of the Corporation at which directors are elected, all of the Shares owned by him for the election of the following persons as directors of the Corporation: Kaufman, Brenner, and Goldsmith".

Pursuant to the above provision, the three principals of the corporation acknowledged each other's status as a corporate director. However, disagreements soon arose between Brenner, on the one hand, and Goldsmith and Kaufman, on the other, concerning the management and finances of the corporation. In response to Brenner's informal criticisms, Goldsmith sent to Brenner a letter dated May 23, 1977, which contained, *inter alia,* the following statements;

"I must now tell you that because of your attitudes and what I consider disruptive practices you shall be entitled to ****883** that which the law permits a minority stockholder

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"From this point forward all business you have with the Company should be presented at formal meetings of the Board of Directors. I further wish to remind you that all business will be conducted by majority vote and you will be given full opportunity to present your point of view".

The letter was signed by Goldsmith in his capacity as president of Hart.

Subsequently, the accounting firm which had previously provided accounting services for the corporation resigned from the Hart account in 1982, suggesting in a letter to Brenner's counsel that some irregularities existed in the books kept for the corporation. Thereafter, on November 18, 1983, Brenner made a formal written request to fully inspect and examine all the financial documents and records of the Hart corporation. This request was denied in a letter dated February 23, 1984. Brenner then commenced on March 7, 1984, a CPLR ***365** article 78 proceeding (Matter No. 1) against the corporation, seeking to compel it to submit to an inspection of its books and records.

On April 9, 1984, while that proceeding was still pending before Special Term, Goldsmith and Kaufman sent a notice to Brenner that a shareholders' meeting would be conducted 10 days hence for the purpose of electing a board of directors for Hart. Fearing that Goldsmith and Kaufman, who owned a majority of the corporate stock, would attempt to oust him from his position as a corporate director, Brenner commenced an action (Matter No. 2) seeking specific performance of the 1974 shareholder agreement and an injunction against the election of anyone as a director in Brenner's stead. Brenner also moved for a preliminary injunction to enjoin Goldsmith and Kaufman from exercising their voting rights in contravention of the aforesaid agreement. He obtained a temporary restraining order to this effect.

By an order dated June 21, 1984, the motion for a preliminary injunction was granted. Likewise, Brenner's petition to compel an inspection of the corporate books and records was granted by a judgment dated July 16, 1984. We now affirm both the order and the judgment.

Hart's contention that Brenner was removed as a director of the corporation by virtue of the letter dated May 23, 1977 is without merit. While the letter did make reference to the treatment of Brenner as a minority stockholder for some purposes, it also stated that any business Brenner had with the corporation "*should be presented at formal meetings of the Board of Directors* " (emphasis supplied). The clear import of this statement is that Brenner remained a director of Hart. Therefore, the 1977 letter authored by Goldsmith did not constitute, as a matter of law, a proper removal of Brenner, for its language is contradictory and ambiguous. Moreover, a closer examination of the text discloses that, even if the letter was an unequivocal attempt to remove Brenner, it was an unauthorized attempt to do so and was thus invalid as a matter of law. This is so because the letter contained only personal comments from Goldsmith to Brenner and was signed only by Goldsmith in his capacity as corporate president. Conspicuously absent from the document was any reference to any action taken by either the shareholders or the board of directors to remove Brenner. Therefore, we reject any contention that this letter from a corporate officer constituted a valid removal of Brenner by the shareholders or board of directors of Hart. We also note that, in any event, since no ***366** election was ever held to replace Brenner after he was purportedly "removed" in 1977, he continued to function as a director of the corporation with all the rights and obligations concomitant with that position (*see,* Business Corporation Law § 703[b]; *Matter of Griffin v. Varflex Corp.,* 79 A.D.2d 857, 434 N.Y.S.2d 488). Therefore, Special Term

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properly issued a judgment in Brenner's favor in the CPLR article 78 proceeding, for, as a director, he has the absolute and unqualified right to ****884** inspect and examine the corporate books and records (*see, Matter of Cohen v. Cocoline Prods.,* 309 N.Y. 119, 127 N.E.2d 906; *Matter of Lau v. DSI Enterprises,* 102 A.D.2d 794, 477 N.Y.S.2d 151). The contention that Brenner is hostile to the Hart corporation does not affect this right of inspection (*see, Matter of Dusel v. Castellani,* 43 A.D.2d 799, 350 N.Y.S.2d 799).

The Statute of Limitations argument advanced by Hart is also without merit because it assumes that Brenner was removed as a director in 1977. Since this is clearly not the case, we find that the commencement of the proceeding some two weeks after Hart refused to permit an inspection of its books was in all respects timely.

Likewise, we find that Special Term did not abuse its discretion in granting Brenner's motion for the preliminary injunction. In order to obtain temporary injunctive relief, the movant must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent a granting of the injunction, and (3) a balancing of the equities in the movant's favor (*Barone v. Frie,* 99 A.D.2d 129, 132, 472 N.Y.S.2d 119; *Albini v. Solork Assoc.,* 37 A.D.2d 835, 326 N.Y.S.2d 150; *see,* CPLR 6301). Brenner has satisfied this three-pronged test by establishing that (1) he has a strong likelihood of success on the merits because both Goldsmith and Kaufman signed the shareholder agreement of 1974 and such agreements are generally viable (*see,* Business Corporation Law § 620[a]; *Clark v. Dodge,* 269 N.Y. 410, 199 N.E. 641; *721 Corp. v. Morgan Guar. Trust Co. of N.Y.,* 40 Misc.2d 395, 243 N.Y.S.2d 198); (2) irreparable injury would result from a denial of the motion because Brenner would then be voted out of office by the other shareholders and thus lose his absolute right to inspect the corporate books; and (3) the equities balance in his favor because the accounting firm's statements as to the inadequacy of the corporate bookkeeping caused Brenner to seek the inspection and because Brenner, as a director, is the only person in a position to discover whether any irregularities and/or improprieties exist in the corporation's record keeping. In light of this showing by Brenner, Special Term properly granted the motion. A prompt trial is necessary to examine the claims of Goldsmith, Kaufman and Hart concerning Brenner's violation ***367** of certain agreements and of the fiduciary duty he owes to the corporation. Until such a trial is held, the preliminary injunction will have the beneficial effect of preserving the status quo (*see, Chrysler Corp. v. Fedders Corp.,* 63 A.D.2d 567, 404 N.Y.S.2d 844; *721 Corp. v. Morgan Guar. Trust Co. of N.Y., supra*). We have examined the remaining contentions of the appellants on both appeals and find them to be without merit.

All Citations

114 A.D.2d 363, 493 N.Y.S.2d 881

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244 A.D.2d 484
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of FANCY WINDOWS & DOORS MFG. CORP., Appellant; Fei Wu, Respondent.

Nov. 17, 1997.

Synopsis
The Supreme Court, Kings County, Kramer, J., issued order dissolving corporation and appeal was taken. The Supreme Court, Appellate Division, held that evidentiary hearing was required prior to dissolution, in view of conflicting assertions of parties.

Reversed and remitted.

Attorneys and Law Firms

****113** Raymond H. Wong, P.C., New York City (Derek S. Jessen and Mario A. Joseph, of counsel), for appellant.

Anthony F. Bellucci, Flushing, for respondent.

Before RITTER, J.P., and COPERTINO, FLORIO, and LUCIANO, JJ.

Opinion

MEMORANDUM BY THE COURT.

***484** In a proceeding pursuant to Business Corporation Law § 1104–a for judicial dissolution of a closely-held corporation, the appeal is from an order of the Supreme Court, Kings County (Kramer, J.), dated June 28, 1996, which, without a hearing, *inter alia,* ordered dissolution.

ORDERED that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Kings County, for a hearing and a new determination in accordance herewith.

"Section 1104–a of the Business Corporation Law, enacted in 1979, provides minority shareholders in close corporations with protection from oppressive conduct by majority interests" (*Matter of Seagroatt Floral Co. [Riccardi],* 78 N.Y.2d 439, 444, 576 N.Y.S.2d 831, 583 N.E.2d 287). 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" (*Matter of Kemp & Beatley [Gardstein],* 64 N.Y.2d 63, 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173). In the present case, in view of the parties' conflicting assertions, the Supreme Court should have held an evidentiary hearing (*see, Matter of Kemp & Beatley [Gardstein], supra,* at 73–75, 484 N.Y.S.2d 799, 473 N.E.2d 1173; *Matter of Rosen [Hofteller Enters.],* 102 A.D.2d 855, 476 N.Y.S.2d 625; *Matter of Kournianos [H.M.G., Inc.],* 175 A.D.2d 129, 571 N.Y.S.2d 823; *see also, LaBarbera v.* ***485** *D'Amico,* 240 A.D.2d 640, 659 N.Y.S.2d 96; *Matter of Singer v. Evergreen Decorators,* 205 A.D.2d 694, 613 N.Y.S.2d 667).

All Citations

244 A.D.2d 484, 664 N.Y.S.2d 113, 1997 N.Y. Slip Op. 09643

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64 N.Y.2d 63
Court of Appeals of New York.

In the Matter of the Judicial Dissolution of KEMP & BEATLEY, INC.
Seymour Gardstein et al., Respondents;
Kemp & Beatley, Inc., Appellant.

Nov. 29, 1984.

Synopsis
Minority shareholders commenced a proceeding seeking dissolution of a corporation on the grounds of "fraudulent and oppressive" conduct by the company's board of directors. The Supreme Court, Special Term, New York County, Francis N. Pecora, J., granted the application for judicial dissolution subject to an opportunity for a buy out of the complaining minority shareholders' shares. On appeal, the Supreme Court, Appellate Division, First Department, 99 A.D.2d 445, 471 N.Y.S.2d 245, affirmed and the corporation appealed. The Court of Appeals, Cooke, C.J., held that: (1) when majority shareholders of close corporation award de facto dividends to all shareholders except class of minority shareholders, such policy may constitute "oppressive actions" and serve as basis for order dissolving the corporation; (2) the provision for involuntary dissolution was properly applied; and (3) change in policy which amounted to nothing less than an attempt to exclude petitioners from regaining any return on their investment through mere recharacterization of distributions of corporate income, constituted oppressive action within meaning of corporate dissolution statute.

Affirmed as modified.

Attorneys and Law Firms

***66 ***801 **1175** Jerome M. Lasky, David B. Eizenman and Ira Schreck, New York City, for appellant.

Arthur H. Sobel and Richard L. Herzfeld, New York City, for respondents.

***67 OPINION OF THE COURT**

COOKE, Chief Judge.

When the majority shareholders of a close corporation award *de facto* dividends to all shareholders except a class of minority shareholders, such a policy may constitute "oppressive actions" and serve as a basis for an order made pursuant to section 1104–a of the Business Corporation Law dissolving the corporation. In the instant matter, there is sufficient evidence to support the lower courts' conclusion that the majority shareholders had altered a *****802** long-standing policy to distribute corporate ****1176** earnings on the basis of stock ownership, as against petitioners only. Moreover, the courts did not abuse their discretion by concluding that dissolution was the only means by which petitioners could gain a fair return on their investment.

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I

The business concern of Kemp & Beatley, incorporated under the laws of New York, designs and manufactures table linens and sundry tabletop items. The company's stock consists of 1,500 outstanding shares held by eight shareholders. Petitioner Dissin had been employed by the company for 42 years when, in June 1979, he resigned. Prior to resignation, Dissin served as vice-president and a director of Kemp & Beatley. Over the course of his employment, Dissin had acquired stock in the company and currently owns 200 shares.

Petitioner Gardstein, like Dissin, had been a long-time employee of the company. Hired in 1944, Gardstein was for the next 35 years involved in various aspects of the business including ***68** material procurement, product design, and plant management. His employment was terminated by the company in December 1980. He currently owns 105 shares of Kemp & Beatley stock.

Apparent unhappiness surrounded petitioners' leaving the employ of the company. Of particular concern was that they no longer received any distribution of the company's earnings. Petitioners considered themselves to be "frozen out" of the company; whereas it had been their experience when with the company to receive a distribution of the company's earnings according to their stockholdings, in the form of either dividends or extra compensation, that distribution was no longer forthcoming.

Gardstein and Dissin, together holding 20.33% of the company's outstanding stock, commenced the instant proceeding in June 1981, seeking dissolution of Kemp & Beatley pursuant to section 1104–a of the Business Corporation Law. Their petition alleged "fraudulent and oppressive" conduct by the company's board of directors such as to render petitioners' stock "a virtually worthless asset." Supreme Court referred the matter for a hearing, which was held in March 1982.

Upon considering the testimony of petitioners and the principals of Kemp & Beatley, the referee concluded that "the corporate management has by its policies effectively rendered petitioners' shares worthless, and * * * the only way petitioners can expect any return is by dissolution". Petitioners were found to have invested capital in the company expecting, among other things, to receive dividends or "bonuses" based upon their stock holdings. Also found was the company's "established buy-out policy" by which it would purchase the stock of employee shareholders upon their leaving its employ.

The involuntary-dissolution statute (Business Corporation Law, § 1104–a) permits dissolution when a corporation's controlling faction is found guilty of "oppressive action" toward the complaining shareholders. The referee considered oppression to arise when "those in control" of the corporation "have acted in such a manner as to defeat those expectations of the minority stockholders which formed the basis of [their] participation in the venture." The expectations of petitioners that they would not be arbitrarily excluded from gaining a return on their investment and that their stock would be purchased by the corporation upon termination of employment, were deemed defeated by prevailing corporate policies. Dissolution was recommended in the referee's report, subject to giving respondent corporation an opportunity to purchase petitioners' stock.

***69** Supreme Court confirmed the referee's report. It, too, concluded that due to the corporation's new dividend policy petitioners had been prevented from receiving any return on their investments. Liquidation of the corporate assets was found the only means by which petitioners would receive a fair return. The court considered judicial dissolution of a corporation to be "a serious and severe remedy." Consequently, the *****803** order of dissolution was conditioned upon ****1177** the corporation's being permitted to purchase petitioners' stock. The Appellate Division affirmed, without opinion. 99 A.D.2d 445, 471 N.Y.S.2d 245.

At issue in this appeal is the scope of section 1104–a of the Business Corporation Law. Specifically, this court must determine whether the provision for involuntary dissolution when the "directors or those in control of the corporation have been guilty of * * * oppressive actions toward the complaining shareholders" was properly applied in the circumstances of this case. We hold that it was, and therefore affirm.

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II

Judicially ordered dissolution of a corporation at the behest of minority interests is a remedy of relatively recent vintage in New York. Historically, this State's courts were considered divested of equity jurisdiction to order dissolution, as statutory prescriptions were deemed exclusive (see *Hitch v. Hawley,* 132 N.Y. 212, 217, 30 N.E. 401). Statutes permitting judicial dissolution of corporations either limited the types of corporations under their purview (see L.1817, ch. 146, §§ 1–4; see, also, *Matter of Niagara Ins. Co.,* 1 Paige Ch. 258) or restricted the parties who could petition for dissolution to the Attorney-General, or the directors, trustees, or majority shareholders of the corporation (see *Hitch v. Hawley,* 132 N.Y., at pp. 218–219, 30 N.E. 401, *supra;* see, generally, Business Corporation Law, §§ 1101–1104).

Minority shareholders were granted standing in the absence of statutory authority to seek dissolution of corporations when controlling shareholders engaged in certain egregious conduct (see *Leibert v. Clapp,* 13 N.Y.2d 313, 247 N.Y.S.2d 102, 196 N.E.2d 540; *Fontheim v. Walker,* 282 App.Div. 373, 122 N.Y.S.2d 642, affd. no opn. 306 N.Y. 926, 119 N.E.2d 605). Predicated on the majority shareholders' fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with "scrupulous good faith," the courts' equitable power can be invoked when "it appears that the directors and majority shareholders 'have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the ***70** exclusive discretion and the dissolution power given to them by statute.' " (*Leibert v. Clapp,* 13 N.Y.2d, at p. 317, 247 N.Y.S.2d 102, 196 N.E.2d 540, *supra,* quoting Hoffman, New Horizons for the Close Corporation, 28 Brooklyn L.Rev. 1, 14.) True to the ancient principle that equity jurisdiction will not lie when there exists a remedy at law (see *Brady v. McCosker,* 1 N.Y. 214, 217), the courts have not entertained a minority's petition in equity when their rights and interests could be adequately protected in a legal action, such as by a shareholder's derivative suit (see *Matter of Nelkin v. H.J.R. Realty Corp.,* 25 N.Y.2d 543, 550, 307 N.Y.S.2d 454, 255 N.E.2d 713; cf. *Leibert v. Clapp,* 13 N.Y.2d, at p. 317, 247 N.Y.S.2d 102, 196 N.E.2d 540, *supra*).

Supplementing this principle of judicially ordered equitable dissolution of a corporation, the Legislature has shown a special solicitude toward the rights of minority shareholders of closely held corporations by enacting section 1104–a of the Business Corporation Law.[1] That statute provides a *****804 **1178** mechanism for the holders of at least 20% of the outstanding shares of a corporation whose stock is not traded on a securities market to petition for its dissolution "under special circumstances" (see Business Corporation Law, § 1104–a, subd. [a]). The circumstances that give rise to dissolution fall into two general classifications: mistreatment of complaining shareholders (subd. [a], par. [1]), or misappropriation of corporate assets (subd. [a], par. [2]) by controlling shareholders, directors or officers.

Section 1104–a (subd. [a], par. [1]) describes three types of proscribed activity: "illegal", "fraudulent", and "oppressive" ***71** conduct. The first two terms are familiar words that are commonly understood at law. The last, however, does not enjoy the same certainty gained through long usage. As no definition is provided by the statute, it falls upon the courts to provide guidance (see *Goncalves v. Regent Int. Hotels,* 58 N.Y.2d 206, 218, 460 N.Y.S.2d 750, 447 N.E.2d 693).

The statutory concept of "oppressive actions" can, perhaps, best be understood by examining the characteristics of close corporations and the Legislature's general purpose in creating this involuntary-dissolution statute. It is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation (O'Neal, Close Corporations [2d ed.], §§ 1.07–1.09; Davidian, Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders, 56 St. John's L.Rev. 24, 26; Note, Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders, 60 Wash.U.L.Q. 1119, 1139–1143; Ann., 56 A.L.R.3d 358, 363–367; see, also, *Matter of Topper v. Park Sheraton Pharmacy,* 107 Misc.2d 25, 433 N.Y.S.2d 359; *Matter of Barry One Hour Photo Process,* 111 Misc.2d 559, 444 N.Y.S.2d 540). The small ownership cluster seeks to "contribute their capital, skills, experience and labor" toward the corporate enterprise (*Kruger v. Gerth,* 16 N.Y.2d 802, 805, 263 N.Y.S.2d 1, 210 N.E.2d 355 [Desmond, Ch. J., dissenting]; see *Matter of Pivot Punch & Die Corp.,* 15 Misc.2d 713, 715–716, 182 N.Y.S.2d 459 [Jasen, J.]; Israels, Close Corporation and the Law, 33 Cornell L.Q. 488).

As a leading commentator in the field has observed: "Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and cares nothing for the responsibilities of management, the shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate

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an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In his capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment, because earnings of a close corporation, as is well known, are distributed in major part in salaries, bonuses and retirement benefits." (O'Neal, Close Corporations [2d ed.], § 1.07, at pp. 21–22 [n. omitted].)

***72** Shareholders enjoy flexibility in memorializing these expectations through agreements setting forth each party's rights and obligations in corporate governance (see, generally, *****805 **1179** Kessler, Shareholder-Managed Close Corporation Under the New York Business Corporation Law, 43 Fordham L.Rev. 197; Davidian, *op. cit.,* 56 St. John's L.Rev. 24, 29–30, and nn. 21–22). In the absence of such an agreement, however, ultimate decision-making power respecting corporate policy will be reposed in the holders of a majority interest in the corporation (see, e.g., Business Corporation Law, §§ 614, 708). A wielding of this power by any group controlling a corporation may serve to destroy a stockholder's vital interests and expectations.

As the stock of closely held corporations generally is not readily salable, a minority shareholder at odds with management policies may be without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment. This predicament may fairly be considered the legislative concern underlying the provision at issue in this case; inclusion of the criteria that the corporation's stock not be traded on securities markets and that the complaining shareholder be subject to oppressive actions supports this conclusion.

Defining oppressive conduct as distinct from illegality in the present context has been considered in other forums. The question has been resolved by considering oppressive actions to refer to conduct that substantially defeats the "reasonable expectations" held by minority shareholders in committing their capital to the particular enterprise (see, e.g., *Mardikos v. Arger,* 116 Misc.2d 1028, 457 N.Y.S.2d 371; *Matter of Barry One Hour Photo Process,* 111 Misc.2d 559, 444 N.Y.S.2d 540, *supra; Matter of Topper v. Park Sheraton Pharmacy,* 107 Misc.2d 25, 433 N.Y.S.2d 359, *supra; Capitol Toyota v. Gervin,* 381 So.2d 1038 [Miss.]; *Exadaktilos v. Cinnaminson Realty Co.,* 167 N.J.Super. 141, 153–156, 400 A.2d 554, affd. 173 N.J.Super. 559, 414 A.2d 994; *Masinter v. Webco Co.,* 262 S.E.2d 433 [West Va.]; O'Neal, Oppression of Minority Shareholders, §§ 3.01–3.11; O'Neal, Close Corporations: Existing Legislation and Recommended Reform, 33 Business Lawyer 873; Afterman, Statutory Protection for Oppressed Minority Shareholders: A Model for Reform, 55 Va.L.Rev. 1043; but cf. *Polikoff v. Dole & Clark Bldg. Corp.,* 37 Ill.App.2d 29, 36, 184 N.E.2d 792; *Baker v. Commercial Body Bldrs.,* 264 Or. 614, 630, 507 P.2d 387). This concept is consistent with the apparent purpose underlying the provision under review. A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others ***73** in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.

Given the nature of close corporations and the remedial purpose of the statute, this court holds that utilizing a complaining shareholder's "reasonable expectations" as a means of identifying and measuring conduct alleged to be oppressive is appropriate. A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.

Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. It would be inappropriate, however, for us in this case to delineate the contours of the courts' consideration in determining whether directors have been guilty of oppressive conduct. As in other areas of the law, much will depend on the circumstances in the individual case.

The appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering *****806** the application (see ****1180** Business Corporation Law, § 1111, subd. [a]). Under the terms of this statute, courts are instructed to consider both whether "liquidation of the corporation is the only feasible means" to protect the complaining shareholder's expectation of a fair return on his or her investment and whether dissolution "is reasonably necessary" to protect "the rights or interests of any substantial number of shareholders" not limited to those complaining (Business Corporation Law, § 1104–a, subd. [b], pars. [1], [2]). Implicit in this direction is that once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to

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determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders (see, also, Business Corporation Law, § 1111, subd. [b], par. [1]).

By invoking the statute, a petitioner has manifested his or her belief that dissolution may be the only appropriate remedy. Assuming the petitioner has set forth a prima facie case of ***74** oppressive conduct, it should be incumbent upon the parties seeking to forestall dissolution to demonstrate to the court the existence of an adequate, alternative remedy (cf. *Baker v. Commercial Body Bldrs.,* 264 Or. 614, 507 P.2d 387, *supra; White v. Perkins,* 213 Va. 129, 189 S.E.2d 315). A court has broad latitude in fashioning alternative relief, but when fulfillment of the oppressed petitioner's expectations by these means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution. Every order of dissolution, however, must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value (see Business Corporation Law, § 1118).

One further observation is in order. The purpose of this involuntary dissolution statute is to provide protection to the minority shareholder whose reasonable expectations in undertaking the venture have been frustrated and who has no adequate means of recovering his or her investment. It would be contrary to this remedial purpose to permit its use by minority shareholders as merely a coercive tool (see Davidian, *op. cit.,* 56 St. John's L.Rev. 24, 59–60, and nn. 159–160). Therefore, the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection (cf. *Mardikos v. Arger,* 116 Misc.2d 1028, 1032, 457 N.Y.S.2d 371, *supra*).

III

There was sufficient evidence presented at the hearing to support the conclusion that Kemp & Beatley had a long-standing policy of awarding *de facto* dividends based on stock ownership in the form of "extra compensation bonuses." Petitioners, both of whom had extensive experience in the management of the company, testified to this effect. Moreover, both related that receipt of this compensation, whether as true dividends or disguised as "extra compensation", was a known incident to ownership of the company's stock understood by all of the company's principals. Finally, there was uncontroverted proof that this policy was changed either shortly before or shortly after petitioners' employment ended. Extra compensation was still awarded by the company. The only difference was that stock ownership was no longer a basis for the payments; it was asserted that the basis became services rendered to the corporation. It was not unreasonable for the fact finder to have determined that this change in policy amounted to nothing less than ***75** an attempt to exclude petitioners from gaining any return on their investment through the mere recharacterization of distributions of corporate income. Under the circumstances of this case, there was no error in determining *****807** that this conduct constituted oppressive ****1181** action within the meaning of section 1104–a of the Business Corporation Law.[2]

Nor may it be said that Supreme Court abused its discretion in ordering Kemp & Beatley's dissolution, subject to an opportunity for a buy-out of petitioners' shares. After the referee had found that the controlling faction of the company was, in effect, attempting to "squeeze-out" petitioners by offering them no return on their investment and increasing other executive compensation, respondents, in opposing the report's confirmation, attempted only to controvert the factual basis of the report. They suggested no feasible, alternative remedy to the forced dissolution. In light of an apparent deterioration in relations between petitioners and the governing shareholders of Kemp & Beatley, it was not unreasonable for the court to have determined that a forced buy-out of petitioners' shares or liquidation of the corporation's assets was the only means by which petitioners could be guaranteed a fair return on their investments.

Accordingly, the order of the Appellate Division should be modified, with costs to petitioners-respondents, by affirming the substantive determination of that court but extending the time for exercising the option to purchase petitioners-respondents' shares to 30 days following this court's determination.

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JASEN, JONES, WACHTLER, MEYER and SIMONS, JJ., concur.

KAYE, J., taking no part.

Order modified, with costs to petitioners-respondents, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

64 N.Y.2d 63, 473 N.E.2d 1173, 484 N.Y.S.2d 799

Footnotes

1 The statute provides:

"§ 1104–a. Petition for judicial dissolution under special circumstances

"(a) The holders of twenty percent or more of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled 'Investment Company Act of 1940', no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, who are 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;

"(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.

"(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

"(1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

"(2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners."

2 Respondent is correct in arguing that there is no basis in the record for the referee's conclusion that the corporation had an established policy to buy-out the shares of employees when they left the company. Although the record reflects that petitioners intended to offer proof on this issue, the referee erroneously concluded that the issue was beyond the scope of the reference. He considered such evidence only as "background." In light of this limitation of the issues under consideration, which neither side objected to, the referee could not then properly ground his decision on a failure by respondent to abide by any buy-out policy. The referee's reliance on this ground is irrelevant for the purposes of this appeal, however, as Supreme Court's confirmation of the report was based solely on the principal ground for the finding of oppression, the company's failure to award dividends.

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134 A.D.3d 450
Supreme Court, Appellate Division, First Department, New York.

In re PROCEEDING FOR JUDICIAL DISSOLUTION UNDER § 1104 OF the BUSINESS CORPORATION LAW
David Klein, Petitioner–Appellant,
v.
The Klein Law Group, P.C., Respondent,
Susan Klein, Respondent–Respondent.

Dec. 3, 2015.

Attorneys and Law Firms

Biancone & Wilinsky, LLP, New York (Louis Biancone of counsel), for appellant.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondent.

Opinion

Orders, Supreme Court, New York County (Lawrence K. Marks, J.), entered March 10, 2015, which, respectively, denied the petition for judicial dissolution of respondent law firm, and granted the motion to deny the petition and denied the remaining issues as moot, unanimously affirmed, without costs.

"The ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort" (*Matter of Yoet Ngor Ng,* 174 A.D.2d 523, 526, 572 N.Y.S.2d 295 [1st Dept.1991]). Accordingly, the motion court providently exercised its discretion when it denied the petition for dissolution of the subject corporation (Business Corporation Law § 1111 [a]). The areas of dissension, as alleged in the petition and affidavits, do not impede the ability of the firm to function effectively (*see Molod v. Berkowitz,* 233 A.D.2d 149, 149, 649 N.Y.S.2d 438 [1st Dept.1996], *appeal dismissed* 89 N.Y.2d 1029, 658 N.Y.S.2d 244, 680 N.E.2d 618 [1997]). Nor did the motion court abuse its discretion when it dismissed ***749** the petition at the pleading stage, as "[a] hearing is only required where there is some contested issue determinative of the validity of the application" (*Matter of Gordon & Weiss,* 32 A.D.2d 279, 280, 301 N.Y.S.2d 839 [1st Dept.1969]).

FRIEDMAN, J.P., RENWICK, SAXE, KAPNICK, JJ., concur.

All Citations

134 A.D.3d 450, 19 N.Y.S.3d 748 (Mem), 2015 N.Y. Slip Op. 08940

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120 A.D.2d 733
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Maraline MURPHY, et al., Appellants; Gallagher Brothers Sand and Gravel Corp., et al., Respondents.

May 27, 1986.

Synopsis
Minority shareholders of two closely held corporations brought actions to dissolve such corporations. The Supreme Court, Nassau County, Berman, J., dismissed after a nonjury trial, and shareholders appealed. The Supreme Court, Appellate Division, held that shareholders failed to establish illegal or oppressive conduct, or waste or diversion of corporate assets so as to justify dissolution.

Affirmed.

Attorneys and Law Firms

****519** Buckley, Kramer, O'Reilly, Pieper, Hoban & Marsh, Mineola (Joseph J. Kearney and Philip J. O'Reilly, of counsel), for appellants.

Emmet, Marvin & Martin, New York City (Wendell Davis, Jr., of counsel), for respondents.

Before BRACKEN, J.P., and BROWN, WEINSTEIN and SPATT, JJ.

Opinion

MEMORANDUM BY THE COURT.

In a proceeding pursuant to Business Corporation Law § 1104–a for the judicial dissolution of two closely-held corporations, the petitioners appeal from a judgment of the Supreme Court, Nassau County (Berman, J.), entered April 11, 1984, which, after a nonjury trial, *inter alia,* dismissed the petition.

Judgment affirmed, with costs.

The respondent corporations were founded by three men in the 1930's. All three founders have since died, but ownership of the stock has remained in the hands of members of their families. The petitioners, two of whom are married to each other, all inherited their stock from their fathers, and collectively hold approximately 25% of the outstanding shares.

The petitioners have rejected an offer to sell their interests in the businesses to the other shareholders and/or the corporations, ***734** and have instituted this proceeding to dissolve the two concerns.

In relevant part, Business Corporation Law § 1104–a provides that:

> "(a) The holders of twenty percent or more of all outstanding shares of a corporation other than a corporation registered as an investment company under an act of congress entitled 'Investment Company Act of 1940', no shares of which are listed on a national securities exchange or regularly quoted in an over-the counter market by one or more members of a national or an affiliated securities association, who are entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

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

"(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".

The petitioners alleged that those in control of the respondent corporations have been guilty of illegal, fraudulent and oppressive actions toward them and have wasted and diverted the corporations' assets for noncorporate purposes. As examples of oppressive and illegal conduct, the petition alleges, *inter alia,* that information about the corporations' operations was withheld from them, that the financial statements were received late and failed to accurately state the value of the corporations' assets, that the petitioners were prevented from exercising their right to purchase additional stock in the corporations, and that the corporations have failed to pay dividends or have paid less than adequate dividends. A review of the record reveals that the petitioners failed to establish any of these allegations.

The petitioners testified that the officers and directors of the corporations did not respond to the questions the petitioners ****520** asked of them at shareholders' meetings, and otherwise ignored them. In reality, though, the officers and directors merely instructed the petitioners to put their questions in writing. The petitioners admitted they never submitted any written requests for information.

The testimony pertaining to the late receipt of the financial statements demonstrates that the petitioners misapprehended the significance on the dates of the accountant's cover letters ***735** to the reports. The date on each of the letters was the date the accountant completed his field work in order to prepare a financial report, not the date each statement itself was completed. Thus, the statements were distributed to the shareholders within a reasonable time.

With respect to the contents of the financial statements, the petitioners objected to the failure to show assets at market value and to disclose expenses such as officers' salaries. The petitioners' own expert, however, conceded that pursuant to generally accepted accounting principles, it is proper to value assets at other than market value, and that there is no requirement that officers' salaries appear on a financial statement.

No evidence was submitted in support of the claim that those in control of the corporation prevented the petitioners from purchasing other shareholders' stock, save testimony that one of the petitioners may have offered to buy stock from her sisters.

As to the allegation that the corporations did not pay dividends, the record discloses that the petitioners themselves opposed the payment of dividends, and did not seek them.

Accordingly, we find that the petitioners have not shown illegal or oppressive conduct within the meaning of Business Corporation Law § 1104–a(a)(1). Nor have they demonstrated a waste or diversion of corporate assets so as to justify dissolution pursuant to section 1104–a(b)(2).

The petitioners claim that those in control of the corporation receive excessive salaries and perquisites. We note, though, that the officers and directors draw only one salary for managing six corporations, and agree with the trial court's finding that the petitioners did not show that the salaries and perquisites were not reasonable. We further concur with the finding that there was no evidence to support the petitioners' allegation that the majority shareholders' children were on the corporate payroll but rendered no services to the corporations.

The petitioners also presented testimony that a boat, which is used to entertain corporate customers, was repaired at corporate expense, even though privately owned by two nonpetitioning shareholders of the corporations. The respondents introduced evidence, however, that corporate moneys were not used to repair the boat.

From the trial testimony it is clear that the petitioners seek the dissolution of the corporations because those corporations ***736** have accumulated a large amount of liquid assets and the petitioners feel they could get a better return on their money elsewhere. But the mere fact that a closely-held corporation may have substantial liquid assets which a shareholder wishes to reach is an insufficient basis for judicial dissolution (*see, Matter of Dubonnet Scarfs,* 105 A.D.2d 339, 343, 484 N.Y.S.2d 541). As the petitioners have failed to establish grounds for dissolution pursuant to Business Corporation Law § 1104–a, their

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petition was properly dismissed.

All Citations

120 A.D.2d 733, 502 N.Y.S.2d 518

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108 A.D.2d 81
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the Dissolution of WIEDY'S FURNITURE CLEARANCE CENTER COMPANY, INC., et al.
Bruce R. Wiederspiel, Respondent-Appellant;
Edward Wiederspiel, Jr., et al., Appellants-Respondents.

April 25, 1985.

Synopsis
Minority shareholder sought judicial dissolution of closely held corporations established by family members for purpose of owning and operating retail furniture stores. The Supreme Court, Ulster County, Lawrence E. Kahn, J., denied the application, and shareholder appealed. The Supreme Court, Appellate Division, Weiss, J., held that: (1) petition was properly dismissed as to corporations in which minority shareholder did not hold statutory prerequisite of 20% voting interest; (2) majority shareholders' conduct in discharging minority shareholder from participation in all family corporations was oppressive, entitling minority shareholder to statutory relief; and (3) order directing majority shareholders to compensate minority shareholder for value of his interest in corporation as determined by an independent appraiser, in lieu of a corporate dissolution, was proper, as remedy accommodated interests of both parties.

Affirmed.

Attorneys and Law Firms

****902 *82** Rusk, Wadlin, Heppner & Martuscello, Kingston (George Rusk, Jr., Kingston, of counsel), for appellants-respondents.

McNamee, Lochner, Titus & Williams, P.C., Albany (George F. Carpinello, Albany, of counsel), for respondent-appellant.

Before MAIN, J.P., and WEISS, MIKOLL, YESAWICH and HARVEY, JJ.

Opinion

WEISS, Justice.

This case involves several closely held New York corporations established by members of the Wiederspiel family for purposes of owning and operating retail furniture stores. The parties are Edward Wiederspiel, Jr., his wife, Marie Wiederspiel, and their two sons, Edward Wiederspiel, III and petitioner, Bruce R. Wiederspiel. Each of the individual stores are operated by Edward, Jr. and Marie and named Wiedy's Furniture Company, Inc., Wiedy's of Poughkeepsie, Inc. and Wiedy's Furniture of Middletown, Inc. A separate corporation, Wiedy's Real Estate Corporation, was formed to manage the real estate upon which the several stores are located.

It is not disputed that petitioner has been actively engaged in the family business for most of his adult life, except for a brief period from May 1973 to March 1974 when he moved to Florida to pursue an independent career. Upon his return in 1974, a new corporation, the Wiedy's Furniture Clearance Center Company, Inc. (Clearance Center) was formed, with two thirds of the voting shares held by Wiedy's Furniture Company, Inc. and the remaining one third held by petitioner, who assumed management duties. Petitioner continued to manage the Clearance Center until July 1983, when, after a dispute with his father over petitioner's hiring of an employee, petitioner was discharged as an officer and employee of all the family

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corporations, was locked out of the Clearance Center and threatened with criminal prosecution if he trespassed upon any of the corporate properties. Respondents also published a notice in local newspapers disassociating petitioner from all the family businesses.

****903** Based upon these allegations and a further contention that the separate corporations were in reality treated as a single entity, petitioner, as a minority shareholder, commenced the instant proceeding pursuant to ***83** Business Corporation Law § 1104–a seeking judicial dissolution of all the family corporations.* Petitioner also sought discovery of all corporate books and records and to impose a receivership upon the assets of all the corporations. Respondents moved to dismiss the petition as to all the corporations, except the Clearance Center, on the ground that petitioner did not own the requisite 20% of the voting stock in the respective corporations. During the pendency of this proceeding, petitioner obtained a temporary restraining order prohibiting the majority shareholders from proceeding with a voluntary dissolution of the Clearance Center. Ultimately, Special Term concluded that the actions toward petitioner constituted oppressive conduct within the scope of § 1104–a. As an alternative to dissolution, Special Term appointed an independent appraiser to determine the fair value of petitioner's one-third share of the Clearance Center, which was to be awarded to him. Special Term dismissed the petition as to the remaining corporations since petitioner failed to demonstrate ownership of the requisite 20% share of voting stock and denied petitioner's motion for discovery. These cross appeals ensued.

Initially, we note that Special Term properly dismissed the petition as against all the corporations other than the Clearance Center. Section 1104–a provides a mechanism by which the holders of at least 20% of the outstanding voting shares of an unlisted close corporation may petition for its dissolution due to mistreatment of the complaining shareholders or misappropriation of corporate assets (§ 1104–a[a][1], [2]). It is undisputed that petitioner did not own 20% of the voting stock in any corporation other than the Clearance Center. Even accepting petitioner's thesis that the corporations constituted a single entity, a review of the record establishes that petitioner owns far less than the necessary 20% of the aggregate voting stock in the corporations. Notwithstanding petitioner's claim that he was deceived by his parents as to his interest in Wiedy's Real Estate Corporation, in which he owns 100 shares of nonvoting common stock, the fact remains that petitioner has met the statutory prerequisite of a 20% voting interest only as to the Clearance Center. Thus, the petition was properly dismissed as to the remaining corporations.

Next, we agree with Special Term's conclusion that petitioner has been subjected to oppressive conduct as delineated in § 1104–a(a)(1). In *Matter of Kemp & Beatley* (*Gardstein*), 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, the Court of Appeals recently examined the nature of oppressive conduct within the context of § 1104–a and ***84** concluded "that utilizing a complaining shareholder's 'reasonable expectations' as a means of identifying and measuring conduct alleged to be oppressive is appropriate" (*id.* at 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173). Mere disappointment in the results of a venture is not sufficient. Rather, the statutory protection is more dramatic, and "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder's] decision to join the venture" (*id.; cf. Matter of Dubonnet Scarfs,* 105 A.D.2d 339, 343, 484 N.Y.S.2d 541).

Applying this standard, we easily conclude that respondents' conduct in discharging petitioner from participation in all the family corporations was oppressive. In 1974, petitioner returned to the family business with a reasonable expectation of being actively involved in the management and operation of the newly formed Clearance Center. Although the exact amount of the capital contribution is disputed, petitioner utilized his own funds in getting this new venture underway, not simply as an investment, but to provide employment and a future for himself. The record shows that ****904** until his discharge, petitioner had turned the Clearance Center into a highly profitable venture. Given this background, petitioner's reasonable expectations as a minority shareholder were clearly frustrated by the discharge. Nor was Special Term obligated to conduct a hearing into the factual allegations of oppression since, as respondents conceded at oral argument, it is undisputed that as a result of the dispute with his father, petitioner was dismissed as an employee and locked out of the Clearance Center, ordered off the remaining corporate premises and publicly disassociated from the family business. Simply stated, petitioner has been "frozen out" (*see Matter of Topper v. Park Sheraton Pharmacy,* 107 Misc.2d 25, 27–28, 433 N.Y.S.2d 359) or "squeezed out" (*see O'Donnel v. Marine Repair Servs.,* 530 F.Supp. 1199, 1205) of the corporation for no legitimate reason other than family animosity. This is precisely the type of situation that § 1104–a(a)(1) was designed to alleviate (*see Matter of Kemp & Beatley* [*Gardstein*], *supra,* 64 N.Y.2d p. 72, 484 N.Y.S.2d 799, 473 N.E.2d 1173).

We turn finally to the remedy propounded by Special Term. Whether dissolution constitutes an appropriate remedy rests within the sound discretion of the court considering the application (*see* § 111[a]). By statute, courts are instructed to

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consider whether "liquidation of the corporation is the only feasible means" to protect the petitioner's interests and whether dissolution "is reasonably necessary" to protect "the rights and interests of any substantial number of shareholders or of the petitioner" (§ 1104–a[b] [1], [2]). Contrary to respondents' interpretation ***85** of an all or nothing approach to dissolution, upon a finding of oppressive conduct, "consideration must be given to the totality of circumstances * * * to determine whether some remedy short of or other than dissolution constitutes a feasible means" of resolving the dispute (*Matter of Kemp & Beatley* [*Gardstein*], *supra,* p. 73, 484 N.Y.S.2d 799, 473 N.E.2d 1173; *see also Muller v. Silverstein,* 92 A.D.2d 455, 456, 458 N.Y.S.2d 597). In essence, "[a] court has broad latitude in fashioning alternative relief" (*Matter of Kemp & Beatley* [*Gardstein*], *supra,* 64 N.Y.2d p. 74, 484 N.Y.S.2d 799, 473 N.E.2d 1173).

This is precisely the authority Special Term has exercised in directing respondents to compensate petitioner for the value of his interest in the Clearance Center as determined by an independent appraiser, in lieu of a corporate dissolution. In our view, this remedy accommodates the interests of both parties by assuring that petitioner receives full credit for his ownership interest in the Clearance Center, and not just one third of the value of the remaining inventory, while respondents will be free to voluntarily dissolve the corporation after compensating petitioner, should they so choose. That respondents have not asserted their right to repurchase petitioner's shares (§ 1118[a]) does not preclude Special Term from directing a buy-out of petitioner's interest in the Clearance Center (*see Matter of Kemp & Beatley* [*Gardstein*], *supra,* p. 75, 484 N.Y.S.2d 799, 473 N.E.2d 1173; *Gimpel v. Bolstein,* 125 Misc.2d 45, 56, n. 11, 477 N.Y.S.2d 1014). In our view, after hearing opposing counsel on the petition, the remedy fashioned by Special Term was in all respects proper.

Order affirmed, without costs.

MAIN, J.P., and MIKOLL, YESAWICH and HARVEY, JJ., concur.

All Citations

108 A.D.2d 81, 487 N.Y.S.2d 901

Footnotes

* All citations to statutes herein are to the Business Corporation Law.

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77 A.D.2d 652
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of George S. MYERS, Respondent,
v.
Harry J. GOLD, Appellant.

July 28, 1980.

Synopsis
Appeal was taken from order of the Supreme Court, Nassau County, Kelly, J., which, inter alia, ordered dissolution of closely held corporation and appointed receiver to collect and distribute corporation's assets. The Supreme Court, Appellate Division, held that new hearing was necessary to determine whether alleged dissension between the parties made continued association unworkable and whether continuance of the corporate business was no longer advantageous to the shareholders; allegations of petitioner's bad faith, which would have constituted a defense to the proceeding, was required to be heard as well.

Orders modified and affirmed; proceeding remitted.

Attorneys and Law Firms

****144** Harold William Suckenik, New York City (Lester M. A. Gulitz, New York City, of counsel), for appellant.

Edward Wooster, P.C., Valley Stream, for respondent.

Before HOPKINS, J. P., and DAMIANI, LAZER and COHALAN, JJ.

Opinion

MEMORANDUM BY THE COURT.

***652** In a proceeding for the judicial dissolution of a domestic corporation, the appeals are from (1) an order of the Supreme Court, Nassau County, dated January 24, 1980, which, inter alia, ordered the dissolution of the corporation and appointed a receiver to collect and distribute the corporation's assets and (2) a further order of the same court, dated January 25, 1980, which "supplemented" the prior order by, inter alia, ****145** striking the "sixth" under "ninth" decretal paragraphs of said order and authorizing the receiver to perform certain acts.

Orders modified, on the law, by deleting therefrom the provisions which granted dissolution. As so modified, orders affirmed, without costs or disbursements, and proceeding remitted to Special Term for a hearing consistent herewith.

The trial of this dissolution proceeding pursuant to section 1104 (subd. (a), par. (3)) of the Business Corporation Law was truncated by a purported stipulation of settlement after the parties and Trial Justice conferred in chambers. However, the stipulation does not suffice to dispose of the case because at the outset of its entry on the record appellant replied in the negative when Special Term inquired whether the parties had admitted they could not work together. Under the circumstances, a new hearing is necessary to determine whether the alleged dissension between the parties within their closely held corporation makes continued association unworkable and whether the continuance of the ***653** corporate business no longer is advantageous to the shareholders (see Business Corporation Law, s 1104, subd. (a), par. (3); Matter of Tavlin v. Munsey Candlelight Corp., 69 A.D.2d 865, 415 N.Y.S.2d 438; see, also, Legislative Studies & Reports,

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McKinney's Cons.Laws of N.Y., Book 6, Business Corporation Law, s 1104, p. 175; 4 White N.Y. Corporations, pars. 1104.01, 1111.01 (3)). Allegations of petitioner's bad faith constitute a defense to a dissolution proceeding and must be heard by Special Term as well (see Matter of Clemente Bros., 19 A.D.2d 568, 239 N.Y.S.2d 703, affd. 13 N.Y.2d 963, 244 N.Y.S.2d 641, 194 N.E.2d 602; Matter of Whitehall Art Co. (Rieman-Stein), 6 A.D.2d 399, 178 N.Y.S.2d 338; Matter of Surchin v. Approved Business Machs. Co., 55 Misc.2d 888, 286 N.Y.S.2d 580; Mares v. Foster, 35 Misc.2d 852, 231 N.Y.S.2d 707, affd. 19 A.D.2d 695, 242 N.Y.S.2d 606).

We have concluded, nevertheless, that the receiver should maintain his position in the interim.

All Citations

77 A.D.2d 652, 430 N.Y.S.2d 144

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25 N.Y.2d 543
Court of Appeals of New York.

In the Matter of Julian NELKIN et al., Appellants,
v.
H.J.R. REALTY CORPORATION, Respondent.

Dec. 11, 1969.

Synopsis
Application of minority shareholders for dissolution of corporation. The Supreme Court at Special Term, Alfred M. Ascione, J., granted application, and majority shareholders appealed. The Supreme Court, Appellate Division, 31 A.D.2d 923, 298 N.Y.S.2d 531, reversed, and appeal was taken. The Court of Appeals, Scileppi, J., held that even if shareholders' agreement, which tenants entered into at time they formed corporation for purpose of managing building, was invalid and rents paid by majority shareholders pursuant thereto were unreasonably low, majority shareholders were not guilty of looting or exploiting corporation to detriment of minority shareholders, nor did their actions constitute a breach of fiduciary duty owed to minority, for which a nonstatutory dissolution could be allowed, where discounted rentals were not set arbitrarily and existence of corporation had been continued for original purpose of operating building in accordance with agreement.

Affirmed.

Fuld, C.J., and Jasen, J., dissented.

Attorneys and Law Firms

***455 **714 *544** Solomon Sidney Goldsmith, New York City, for appellants.

***545** Eward Brodsky, Jay H. Landau and Mel P. Barkan, New York City, for respondent.

Opinion

SCILLEPPI, Judge.

H.J.R. Realty Corporation was organized in 1941 under the laws of the State of New York, by tenants of 128—138 Mott Street in New York City for the sole purpose of owning and managing the property and the building at that address.
***456** The tenants involved in the corporation were Chatham Metal Products, Inc. (hereinafter referred to as Chatham), National ***546** Machinery Exchanges, Inc. (hereinafter referred to as National) and Henry Nelkin, Inc. (hereinafter referred to as Nelkin).[1]

At the time of the incorporation, all of the shareholders entered into an agreement, which, in relevant part, provided:

'That all of the parties to this agreement, are not only shareholders in H.J.R. Realty Corporation, but are also tenants or are financially interested in firms which are tenants in the building owned by the said realty corporation. That in furtherance of the aim to make the building show a profit and so that the building may be **715 kept in good repair, the following have been agreed upon:

'That the rental per square foot shall be decided upon and shall be charged equally to each tenant interested in the corporation owning the building. The charge for other tenants shall be decided by the officers of the corporation.'

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Since 1941 Chatham, National and Nelkin (until 1961) have occupied most of the space in the building at rentals far lower than the property's fair rental value. As a result the corporation has earned little, if any, net profits since its inception.

In 1946 Charles Richter sold his interest in Chatham and in 1961 Nelkin terminated its tenancy in the building. Richter and Nelkin no longer derived any benefit from owning stock in the corporation since neither of them shared in the discounted rentals. In 1968 the Nelkin and Richter interests (who control 4/9ths of the issued stock) began a campaign to convince the shareholders of Chatham and National (who control the other 5/9ths of the stock) to disregard the shareholders' agreement and pay a fair and reasonable rent, to dissolve the corporation and sell the building, or to buy the minority shares at a reasonable price. In February of 1968 the shareholders of National refused to attend a special meeting called by Nelkin and Richter and, instead, an informal meeting was held. It became clear at the meeting that the differences between the majority shareholders (National and Chatham) and the minority shareholders (petitioners Nelkin and Richter) were irreconcilable. For one thing, the majority shareholders declared that the shareholders' agreement ***547** of 1941 authorized the corporation to charge 'interested tenants' discounted rentals and that as the controlling majority they intended to manage the buildings in compliance with the agreement. Moreover, in response to Richter and Nelkin's offer to sell their stock, the majority *****457** offered only what they had paid in 1941. It was also announced by Chatham that it was intending to move into even more space in the building which was to be vacated by another tenant.

In October of 1968 Nelkin and Richter, as minority shareholders, instituted the instant special proceeding in accordance with section 1104 (subd. (c)) of the Business Corporation Law, Consol.Laws c. 4, seeking judicial dissolution of the corporation. The Supreme Court granted the petition and placed the proceeding on the calendar. On appeal, the Appellate Division reversed and dismissed the petition on the ground that it failed to state a cause of action for dissolution.
The sole issue presented on this appeal is whether petitioners, Nelkin and Richter, have made out a cause of action for dissolution of respondent corporation.[2] It is our opinion that they have not.

In our opinion petitioners' contention that the majority shareholders are continuing the existence of the corporation solely for their own benefit and that, therefore, the corporation should be dissolved 'as a matter of judicial sponsorship' in accordance with Leibert v. Clapp, 13 N.Y.2d 313—315, 247 N.Y.S.2d 102—104, 196 N.E.2d 540—541, is without merit (Kruger v. Gerth, 16 N.Y.2d 802, 263 N.Y.S.2d 1, 210 N.E.2d 355).
In Leibert v. Clapp, Supra, a minority shareholder sued to compel the dissolution ****716** of the corporation in which he owned stock. The plaintiff alleged that the majority shareholders of the corporation were maintaining the corporate existence only to enable them to wrongfully divert assets and income to the parent corporation and, furthermore, that the majority shareholders ***548** were attempting to coerce the minority into selling their stock at greatly depreciated prices. This court recognized that there was no statutory authority for judicial dissolution in such a case but stated (p. 315, 247 N.Y.S.2d p. 104, 196 N.E.2d p. 541) that such relief is available 'as a matter of judicial sponsorship' where the majority shareholders or directors: "have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and dissolution power given to them by the statute". (13 N.Y.2d, at p. 317, 247 N.Y.S.2d at p. 105, 196 N.E.2d at p. 543.)
In the instant case, however, the alleged behavior of the majority shareholders could in no event be characterized as a wrongful diversion. *****458** The recent case of Kruger v. Gerth, 16 N.Y.2d 802, 263 N.Y.S.2d 1, 210 N.E.2d 355, Supra, affg. 22 A.D.2d 916, 255 N.Y.S.2d 498, is in point. In Kruger a minority shareholder alleged that for several years a majority shareholder had been taking substantial salaries and bonuses, leaving the corporation with only minimal net income. The plaintiff prayed for nonstatutory judicial dissolution in accordance with our decision in Leibert on the ground that the majority shareholder was continuing the corporate existence solely to 'provide himself with employment, at substantial salaries and bonuses * * * thereby * * * exploiting the corporation to the detriment of the other stockholders'. (22 A.D.2d. at p. 916, 255 N.Y.S.2d at p. 500.)

The Appellate Division, in Kruger, found that the majority shareholder was not looting the corporate assets nor was he maintaining the corporation for his own special benefit and that, therefore, the minority shareholder had not established sufficient facts to warrant nonstatutory dissolution. This court affirmed on the opinion at the Appellate Division.
The case for dissolution in Kruger was even stronger than in the instant case since here the majority shareholders have been acting in compliance with a shareholders' agreement entered into by the minority. Petitioners have alleged only that the shareholders' agreement entered into in 1941 is invalid and that the rents paid by the majority shareholders pursuant thereto are unreasonably low. Even if these allegations are assumed to be true, the majority shareholders have not been guilty of looting or exploiting the corporation to the detriment of the minority shareholders, and their actions clearly do not constitute a

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breach of fiduciary duty owed to the minority. The discounted ***549** rentals that they have been paying since 1941 were not set arbitrarily but in accordance with the shareholders' agreement. Furthermore, although it is true that because of the change in circumstances the majority alone is now benefiting, the existence of the corporation has been continued for the original purpose of operating the building in accordance with the shareholders' agreement.

It must be noted that the actual validity of the shareholders' agreement is not relevent in this proceeding for nonstatutory dissolution. The fact that the controlling majority has paid the lower rents in good faith in accordance with the agreement which was believed to be valid by all shareholders until the minority brought about a change in circumstances, belies the allegation of wrongful diversion even if the agreement was in fact invalid. Moreover, both petitioners enjoyed the benefits of the low rent provision in the agreement while their firms were tenants. The fact that by their own voluntary action they no longer *****459** benefit by the agreement does not of itself entitle them to judicial dissolution.

As an alternative ground for dissolution, the petitioners state that the corporation ****717** failed to hold business meetings between 1952 and 1968 and that, therefore, the minority shareholders are entitled to judicial dissolution according to the terms of section 1104 (subd. (c)) of the Business Corporation Law which authorizes a petition for 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'.

It is our opinion that even if the facts alleged in the petition are taken to be true, dissolution pursuant to section 1104 (subd. (c)) is not warranted since it is not alleged that the shareholders are so divided that they have failed to elect directors but merely that the corporation failed to call a meeting for such purpose until 1968.
In our opinion, the mere failure to hold shareholders' meetings in and of itself, does not constitute sufficient grounds to bring about a dissolution under section 1104 (subd. (c)). As was well stated in Matter of Gliedman (N.Y.L.J., March 5, 1964, p. 15, col. 3): 'Mere failure to hold annual meetings cannot in itself give cause for dissolution of the corporation. In the absence of ***550** a showing of equal division and disagreement among the directors, a petition is insufficient which alleges only that the stockholders are equally divided and cannot elect directors, without showing that an unsuccessful attempt to elect directors has been made'.

Moreover, it should be noted that the majority called a special meeting for the purpose of electing directors, and on November 11, 1968 the meeting was held and directors were elected.

Petitioners' allegations that the 1941 shareholders' agreement is invalid and that Chatham's proposed occupation of additional space within the building is in violation of the agreement, may be adequately adjudicated in a shareholders' derivative action to rescind or reform the agreement. They are not, however, sufficient to justify the exercise of the Supreme Court's inherent power to order nonstatutory judicial dissolution.

Accordingly, the order of the Appellate Division dismissing the complaint should be affirmed.

FULD, Chief Judge (dissenting).

In my view, the petition states a cause of action for dissolution of respondent H.J.R. Realty Corporation and should not have been dismissed without a hearing.

*****460** The petitioners-appellants hold 4/9ths of the outstanding shares of the corporation and the Epstein Estate and the Horowitzes, the remaining 5/9ths. The corporation has as its sole asset a seven-story building in Manhattan. It has no other business. In 1941, the petitioners and the present majority shareholders were tenants, operating their own respective businesses, in the building. They agreed, at that time, to join together and organize a corporation which would purchase the building and operate it for their mutual benefit at a minimum rental for each. More specifically, each was to pay the same artificially low rent per square foot and only the nonshareholder tenants would be charged a normal market price rental.
When, several years later, the petitioners moved out of the building, the nature of the corporation—originally formed, as

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already indicated, for the benefit of all of its stockholders—changed radically. The portion of the premises occupied by the majority shareholders expanded to the point that there was (and is) only one other tenant, occupying less than half of a ***551** single floor in the seven-story building. Although the corporation's assets were worth in excess of $350,000, it showed only negligible profits in 1966 and 1967 and a loss amounting, we are told, to more than $4,800 in the first eight months of 1968. The reason for this, quite obviously, was that the entire profit which the corporation could potentially earn was being siphoned off by the majority group in the form of reduced rent. The minority stockholders, although they had contributed more than ****718** 44% Of the corporation's capital, were realizing no return whatsoever on their investment and there was no prospect of any change.[1]

Implicit in the agreement which the parties signed was the idea that H.J.R. was not to be an ordinary real estate corporation formed to collect rent and distribute or reinvest the proceeds. Rather, it was conceived as a co-operative venture by which several tenants in a building would insure themselves a minimum rental expense by acting as their own landlord. The shareholders' agreement expressly recited that 'all the parties to this agreement, are not only shareholders in H.J.R. Realty Corporation, but are also tenants or are financially interested in firms which are tenants in the building'. (Italics supplied.) The agreement is instinct with the understanding that, should any of those shareholders cease to be (or present) a tenant in the building, the agreement would no longer be applicable to him and he would not be required to maintain his interest in the corporation. Thus, it may well be said, the existence of the corporation in its initial form was conditioned upon each of the stockholders continuing as a tenant in the building.

*****461** The circumstance that majority shareholders may not be 'looting' the corporation or 'wrongfully diverting' its assets is insufficient basis for denying corporate dissolution. What is significant and operative is the indisputable fact that this corporation is being continued solely and exclusively for the benefit of those holding 5/9ths of the company's shares. Stated somewhat differently, in the light of what has occurred, the reason for corporate existence is gone.

***552** Although our decision in Leibert v. Clapp, 13 N.Y.2d 313, 247 N.Y.S.2d 102, 196 N.E.2d 540, may not mandate such a result, it certainly points the direction in which we should go. And our later holding in Kruger v. Gerth, 16 N.Y.2d 802, 263 N.Y.S.2d 1, 210 N.E.2d 355, which was decided only after there had been a full hearing and findings of fact, hardly requires that the petition in the present case be dismissed without affording the petitioners a hearing. If it can be shown, as asserted in the petition, that the corporation no longer fulfills the function for which it was organized, no longer serves the interests of the shareholders for whose benefit it was created, then, there is neither reason nor justification to keep it alive, and the courts should not hesitate to direct its dissolution.

In refusing to allow an action for dissolution where it is alleged that a close corporation no longer serves the function for which it was created and employs its assets for the exclusive benefit of only some of its shareholders, the court, I suggest, ignores business reality and perpetuates inequity. A close corporation, like a partnership or joint venture, is nothing more than a convenient business arrangement entered into for the mutual advantage of its participants. Although control of its assets may be exclusively vested in the majority, it is implicit, in the nature of the corporate form, that its purpose is to provide some benefit for all of those who have contributed their capital to the venture. When changing circumstances render that purpose impossible of achievement, a court of equity should be no more reluctant to permit a corporate dissolution than it would be to dissolve a purely contractual relationship.

The order appealed from should be reversed and Special Term's reinstated.

BURKE, BERGAN, BREITEL and GIBSON, JJ., concur with SCILEPPI, J.

FULD, C.J., dissents and votes to reverse in a separate opinion in which JASEN, J., concurs.

Order affirmed, with costs.

All Citations

25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454

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Footnotes

1 Fifty-four shares of stock (of 100 authorized) were issued. Nathan Horowitz, James Horowitz, and Charles Richter (Chatham) each received 6 shares; Irving Epstein (National) received 18 shares; and Henry Nelkin, Inc. (Nelkin) was issued 18 shares.

2 Respondent contends that the Supreme Court did not have power to dissolve the corporation on nonstatutory grounds in the special proceeding instituted pursuant to section 1104 (subd. (c)) of the Business Corporation Law. We do not agree. Although the cause of action for dissolution pursuant to the rule espoused in Leibert v. Clapp, 13 N.Y.2d 313, 247 N.Y.S.2d 102, 196 N.E.2d 540, should have been asserted in an action and not in a special proceeding, the Supreme Court had apparently obtained jurisdiction over the necessary parties and, therefore, did not abuse its discretion by entertaining the nonstatutory cause of action (CPLR 103, subd. (c)).

1 The complaint alleges—and we assume that the allegation is true—that the respondents have refused to purchase the petitioners' shares except at a totally inadequate price.

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85 N.Y.S.2d 93
Supreme Court, New York County, New York,
Special Term, Part I.

Petition of WILLIAMSON et al.
In re AMES AROMATICS, Inc.

Dec. 2, 1948.

Synopsis

Proceeding in the matter of the petition of Hugh S. Williamson and others for the dissolution of Ames Aromatics, Inc., pursuant to section 103 of the General Corporation Law.

Application denied.

Attorneys and Law Firms

***94** Benjamin Machinist, of New York City, for petitioners.

Alexander & Green, of New York City, for Ames Aromatics, Inc.

Opinion

BOTEIN, Justice.

Section 103 of the General Corporation Law provides that if the votes of the stockholders of a corporation are so divided that they cannot elect a Board of Directors, the holders of one-half ot the stock entitled to vote at an election of directors may present a verified petition for dissolution of the corporation. It is clear that the fact that directors previously elected are holding over after the expiration of the terms for which they were elected is insufficient to take the case out of the scope of Section 103, supra (see 1944 Report of Law Revision Commission, p. 353; see also Matter of Superb Diamond Cutting Corp., 183 Misc. 876, 51 N.Y.S.2d 651, where the reason assigned by the court for vacating the dissolution proceedings was not the fact that the directors were holding over, as appears from the first paragraph of the opinion, but because there was no showing of an unsuccessful attempt to elect new directors).

Nor is Section 103 inapplicable by reason of the filling of the vacancies in the Board of Directors by the single elected director and by other directors selected by him to fill vacancies. The section, by its terms, applies to a case where the stockholders are so divided that *they* cannot elect a Board of Directors. The filling of vacancies by a single director and by other directors is not equivalent to the election of a Board of Directors by the stockholders.

***95** It does not follow, however, that the present motion for dissolution should be granted. The application is addressed to the court's discretion. It appears that the issuance of additional stock is imminent and that the inability of the stockholders to elect a Board of Directors may cease to exist upon the issuance of the additional stock.

The application for dissolution is accordingly denied, but without prejudice to a renewal upon a showing that, notwithstanding the issuance of additional stock, the stockholders are unable to elect a Board of Directors.

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85 N.Y.S.2d 93

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225 A.D.3d 919
Supreme Court, Appellate Division, Second Department, New York.

STAGG, TERENZI, CONFUSIONE & WABNIK, LLP, appellant-respondent,
v.
CLARK DODGE HOLDING, LLC, et al., respondents-appellants, et al., defendants.

2020–08404
|
(Index No. 602904/15)
|
Submitted—November 21, 2023
|
March 27, 2024

Synopsis

Background: Law firm brought action against limited liability corporations (LLC) and their member for breach of contract and to recover on an account, alleging that despite retainer agreement prepared by firm and signed by member, the defendants failed to pay for legal services the firm rendered. Following a bench trial, the Supreme Court, Nassau County, Arthur M. Diamond, J., entered a judgment in favor of firm as to one of the LLCs and in favor of member and the second LLC, dismissing the complaint insofar as asserted against them. Firm appealed and member and second LLC cross-appealed.

The Supreme Court, Appellate Division, held that firm failed to establish cause of action to recover on an account against second LLC.

Affirmed; cross-appeal dismissed.

Attorneys and Law Firms

****55** Stagg Wabnik Law Group, LLP, Garden City, NY (Thomas E. Stagg and Andrew Kazin of counsel), for appellant-respondent.

Brian J. Davis, P.C., Garden City, NY, for respondents-appellants.

COLLEEN D. DUFFY, J.P., LINDA CHRISTOPHER, WILLIAM G. FORD, JANICE A. TAYLOR, JJ.

DECISION & ORDER

***919** In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, and the defendants Clark Dodge Holding, LLC, Clark Dodge & Co., Inc., Clark Dodge Asset Management, LLC, and Joseph V. DiMauro cross-appeal, from a judgment of the Supreme Court, Nassau County (Arthur M. Diamond, J.), entered October 19, 2020. The judgment, insofar

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as appealed from, upon a decision of the same court dated July 16, 2018, made after a nonjury trial, is in favor of the defendants Clark Dodge Asset Management, LLC, and Joseph V. DiMauro and against ****56** the plaintiff dismissing the complaint insofar as asserted against those defendants.

***920** ORDERED that the cross-appeal by the defendant Clark Dodge Holding, LLC, is dismissed as abandoned; and it is further,

ORDERED that the cross-appeal by the defendants Clark Dodge & Co., Inc., Clark Dodge Asset Management, LLC, and Joseph V. DiMauro is dismissed, as those defendants are not aggrieved by the judgment cross-appealed from (*see* CPLR 5511; *Mixon v. TBV, Inc.,* 76 A.D.3d 144, 156–157, 904 N.Y.S.2d 132); and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendants Clark Dodge Holding, LLC, Clark Dodge & Co., Inc., Clark Dodge Asset Management, LLC, and Joseph V. DiMauro.

The plaintiff commenced this action, inter alia, to recover damages for breach of contract against the defendants Clark Dodge Holding, LLC (hereinafter CDH), Clark Dodge & Co., Inc., Clark Dodge Asset Management, LLC (hereinafter CDAM), and Joseph V. DiMauro, among others. The plaintiff alleged, among other things, that despite a retainer agreement prepared by the plaintiff and signed by DiMauro as a member of CDH, CDAM, and another entity, the defendants failed to pay for legal services the plaintiff rendered. After a nonjury trial, the Supreme Court determined, inter alia, that DiMauro and CDAM were not liable for the plaintiff ‘s outstanding bills, but CDH was. The court also determined that the causes of action alleging fraudulent conveyances pursuant to Debtor and Creditor Law §§ 273 to 276 insofar as asserted against DiMauro and CDAM should be dismissed in light of the court’s determination that the plaintiff was not a creditor of CDAM. The court entered a judgment, among other things, in favor of the plaintiff and against CDH in the total sum of $284,478.76, and in favor of DiMauro and CDAM dismissing the complaint insofar as asserted against them. The plaintiff appeals.

“In reviewing a determination made after a non-jury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses and hearing the testimony” (*Winston v. Reichenbaum,* 209 A.D.3d 801, 804, 176 N.Y.S.3d 672 [internal quotation marks omitted]). Nonetheless, “[w]here the court’s findings of fact rest in large measure on considerations relating to the credibility of witnesses, ... deference is owed to the trial court’s credibility determinations” (*id.* at 804, 176 N.Y.S.3d 672 [internal quotation marks omitted]).

Contrary to the plaintiff’s contentions, the Supreme Court’s determination that DiMauro and CDAM were not jointly and ***921** severally liable for the legal services the plaintiff performed for CDH was warranted by the facts adduced at trial. Furthermore, because the plaintiff failed to establish that CDAM was liable for the legal services the plaintiff performed, and the parties did not have an express agreement to treat the plaintiff’s invoices as an account stated, the court properly dismissed the cause of action to recover on an account stated insofar as asserted against CDAM (*see Gurney, Becker & Bourne, Inc. v. Benderson Dev. Co., Inc.,* 47 N.Y.2d 995, 996, 420 N.Y.S.2d 212, 394 N.E.2d 282; *M. Paladino, Inc. v. Lucchese & Son Contr. Corp.,* 247 A.D.2d 515, 516, 669 N.Y.S.2d 318).

****57** The plaintiff’s contention that it was deprived of a fair trial is based upon matter dehors the record and, therefore, is not properly before this Court.

In light of the foregoing, we need not reach the parties’ remaining contentions.

DUFFY, J.P., CHRISTOPHER, FORD and TAYLOR, JJ., concur.

All Citations

225 A.D.3d 919, 209 N.Y.S.3d 54, 2024 N.Y. Slip Op. 01741

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2022 WL 10085815 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
Kings County

TOWER OWNERS INC., Plaintiff(s),
v.
Alexander LOEV and Dmitry Yanovsky, Defendant(s).

No. 505437/2022.
October 7, 2022.

***1** At an IAS Part 83 of the Supreme Court of the State of New York Held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 7th Day of October 2022

Order

Present: Hon. Ingrid Joseph, J.S.C.

The following e-filed papers considered herein: **NYSCEF E-filed docs**

Order to Show/Affirmation in Support/Exhibits Annexed/Reply. 17-47; 49; 59-64

Affirmation in Opposition/Exhibits Annexed..... 53-58

In this matter, Tower Owners Inc., ("Plaintiff") move by Order to Show Cause seeking a Temporary Restraining Order enjoining and restraining Alexander Loev and Dmitry Yanovsky ("Defendants"), or anyone elected in a shareholder's meeting held on March 1, 2022, from representing to other shareholders in the Co-op, management or third parties, that they are authorized to act in any capacity, on behalf of the Co-op. Defendants have opposed the motion on the grounds that the subject election in this action was proper under Business Corporation Law ("BCL") § 603.

The underlying action for a declaratory judgment and injunctive relief arises from an internal dispute between two Boards of Directors, in which the Plaintiff and Defendants each claim authority to operate and control the cooperative housing corporation located in Brighton Beach, Brooklyn New York ("The Co-op"). Tower Owners, Inc. is a Co-op comprised of two ocean-front high-rise towers consisting of 588 units with a total population of approximately 1500 residents. Plaintiff in this action previously sought injunctive relief from this Court, including a TRO as part of a summons with notice and Order to Show Cause filed on February 23, 2022 (Motion Seq. 1) in relation to Defendants' advertisement of a March 1, 2022, election to establish a new Board of Directors. The Order to Show Cause was signed on March 1, 2022, without the TRO by Justice Edwards on behalf of Justice Joseph. As a result, the March 1, 2022, election was held allowing for the creation of a new Board of Directors ("The New Board"). Accordingly, Motion Seq. 1 seeking to enjoin the Defendants from holding the election is denied as moot.

On or about December 21, 2021, the Management office for the Co-op was presented with a demand, by Defendants, and signed by more than 10% of shareholders of the Co-op for a meeting to be called to remove certain Board members and to elect a new Board pursuant to BCL § 603. The Petition did not initially specify the date and month of the new meeting, as required by statute but later via email, Defendants asserted that the date would be March 1, 2022. After notice of the meeting

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was given to the secretary of the Old Board, the secretary failed to respond and call a new meeting, so the Defendants as permitted by the statute, held the meeting, and elected the New Board.

In its affirmation, Plaintiff contends that it currently maintains a duly constituted Board of Directors ("The Old Board"), elected in accordance with the provisions of the Co-op's By-Laws. Under Article II, Section I of the By-Laws, the number of directors on the Board shall not be less than three members and not more than seven members. Plaintiff's Board of Directors consists of seven members and officers at the time of the commencement of this action, two of which are the Defendants. Metro Management Development Corp. ("Metro") serves as the managing agent for the Co-op and Honest Ballot serves as an independent vendor for scheduling and overseeing of the Co-op's meetings. In support of its motion, Plaintiff submits affidavits from Alexander Kerzhner ("Kerzhner"), the President of the Old Board, Shanna Grey ("Grey"), the on-site manager for Tower Owners, Inc., and Joanna Symanska ("Symanska") a principal of S. Architecture, P.C. who serves as the licensed architect for the Tower Owners Inc., project site.

***2** Defendants in opposition, argue that pursuant to the procedures in BCL § 603, the election that took place on March 1, 2022, elected a new Board of Directors to make decisions on behalf of the Co-op. Additionally, Defendants raise allegations of mismanagement of the Co-op as justification for holding the special election including two expert letters from separate architectural firms alleging workplace misconduct and overcharging of fees by Symanska. Kerzhner and Symanska have denied and responded to Defendants claims in separate affidavits. In support of their opposition, Defendants submit an affidavit from Loev, who has lived at the Co-op since 1996 and was elected to the Board of Directors in 2017 and re-elected at the March 1, 2022, election. In his affidavit, Loev essentially states that BCL § 603 applies in this action because members of the Old Board acted in ways that were contradictory to the Co-op's By-Laws or were not in the best interest of the Co-op. For example, that the Old Board has failed to elect a new Board of Directors since 2017. Similarly, Defendants claim that Plaintiff's argument that BCL § 603 only applies in instances where a board has been depleted of directors is a fiction created by Plaintiff in a desperate attempt to retain control of the Co-op.

In addition to asserting allegations that Kerzhner has continuously engaged in suspicious conduct in an effort to retain power indefinitely as President of the Board, Loev claims that four members of the Old Board ("The Control Four") contrived to prevent elections from being held by (1) not voting or registering on the voting group attendance sheets at any or the meetings scheduled for elections, thereby registering on the voting group attendance sheets at any of the meetings scheduled for elections, thereby reducing the possibility of obtaining a quorum, (2) advising shareholders as they entered annual meetings not to bother attending as there would be no quorum, so no vote would be held, and (3) ignoring shareholders' requests to adjourn meetings in order to reach a quorum.

Loev claims, that there has been an ongoing process to refinance the Co-op's mortgage, and Loev states that Kerzhner has been operating independently on the matter without consulting the Board. Loev states that according to the 2017 Board agenda from its January 26, 2022, meeting (Exhibit B), the Co-op was "looking to obtain bids" from an independent mortgage broker and no other members of the Old Board other than Kerzhner were involved in, or given any information with respect to, this process. Loev states he requested copies from Kerzhner of the mortgage applications, bids, proposals, communications and documents relating to the refinancing but was ignored.[1]

In reply, Kerzhner denies the allegations asserted by Loev, including the claim that he acted independently without the consent of the board. Kerzhner states that all decisions regarding the refinancing process have been handled by Metro and all communications with respect to the quotes were between lenders and Grey, the property manager (Exhibit D). Kerzhner also asserts that all of the Co-Op's finances are controlled by Metro and that he is an authorized user and signatory on an account held by the Co-op because a signatory was required in order to open the account. Kerzhner further states that the account is regularly audited and reconciled every month by a third-party independent certified accountant. Kerzhner also states that any price increase regarding projects was approved by the Board including a $1 million project to fix a gas leak in one of the Co-op buildings.[2] Kerzhner also claims that Defendants in the past on other projects, did not have any issues with Symanska working as an architect for the Co-op. Additionally Defendants signed Symanska's retainer agreement on March 11, 2021, and her project proposal agreement on June 4, 2021. Kerzhner argues that after Defendants did not provide alternative quotes from qualified architects after they raised concerns about Symansha's performance. Kerzhner justifies the price increase for the project on the necessary filing of a Safe with Maintenance and Repair ("SWARMP") report with the New York City Department of Buildings.

***3** To establish entitlement to a preliminary injunction, the moving party must establish (1) a likelihood or probability of

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success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Grant Co. v Srogi*, 52 NY3d 496 [1981]; *Walsh v Design Concepts, Ltd.*, 221 AD2d 454 [2nd Dept. 1995]). Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient (*Walsh* at 455; *Jackson Dairy, Inc. v HP. Hood & Sons*. 596 F2d 70 [2d Cir 1979]; *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165 [2nd Dept. 1986]). In instances where an opportunity gives Defendants the ability to shift the balance of power and assume management and control of a corporation, may be viewed as irreparable injury to the movant (*Brenner v Hart Systems, Inc.*, 114 AD2d 363 [2nd Dept. 1985]; *Vanderminden v. Vanderminden*, 226 AD2d 1037 [3d Dept. 1996]; *Louis Foodservice Corp. v. Konstantinos Vouyiouklis*, 2002 WL 31663230 [Sup. Ct. Kings Cnty. 2002]). The "balancing of the equities" usually requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (*Burmax Co., Inc. v. B & S Industries, Inc.*, 135 A.D.2d 599 [2nd Dept. 1987]; *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631 [2nd Dept. 1992]). A balancing of the equities favors the movants where the irreparable injury to be sustained by the plaintiff is more burdensome to them than the harm caused to defendant through imposition of the injunction (*Burmax Co.*, at 601; *Gilbert v. Burnside*, 6 AD2d 834 [2nd Dept. 1958]; *Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 AD3d 806 [2d Dep't 2008]).

The function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2nd Dept. 2009]; *Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051 [2nd Dept. 2009]; *Moody v Filipowski*, 146 AD2d 675 [2nd Dept. 1989]). Provided that the elements required for issuance of a preliminary injunction are demonstrated in the movant's papers, an opposing party's presentation of evidence sufficient to raise an issue of fact shall not in itself be grounds for denial of the motion (CPLR § 6312[c]; *Winselberg v 1319 50th Realty Corp.*, 52 AD3d 700 [2nd Dept. 2008]; *Stockley v Gorelik*,24 AD3d 535 [2nd Dept. 2005]). Under these circumstances, the court shall determine, by hearing or otherwise, whether each of the elements required for issuance of a preliminary injunction exists (CPLR § 6312[c]).

Business Corporation Law § 603 establishes a process for a minority group of shareholders to petition for the conducting of an election, and if the Board fails to do so, calling one themselves. BLC 603 reads as follows:

> (a) If, for a period of one month after the date fixed by or under the by-laws for the annual meeting of shareholders, or if no date has been so fixed, for a period of thirteen months after the formation of the corporation or the last annual meeting, there is a failure to elect a sufficient number of directors to conduct the business of the corporation, the board shall call a special meeting for the election of directors. If such special meeting is not called by the board within two weeks after the expiration of such period or if it is so called but there is a failure to elect such directors for a period of two months after the expiration of such period, holders of ten percent of the votes of the shares entitled to vote in an election of directors may, in writing, demand the call of a special meeting for the election of directors specifying the date and month thereof, which shall not be less than sixty nor more than ninety days from the date of such written demand. The secretary of the corporation upon receiving the written demand shall promptly give notice of such meeting, or if he fails to do so within five business days thereafter, any shareholder signing such demand may give such notice.
>
> ***4** (b) At any such special meeting called on demand of shareholders, notwithstanding section 608 (Quorum of shareholders), the shareholders attending, in person or by proxy, and entitled to vote in an election of directors shall constitute a quorum for the purpose of electing directors, but not for the transaction of any other business.

In this case, Defendants have relied on BCL § 603 as justification for holding a special election and have raised additional arguments pertaining to mismanagement of the Co-op by the Old Board. However, BCL § 603 does not reference mismanagement nor does it provide a remedy to address those claims. The only issue currently before the Court, is whether or not to grant injunctive relief.

In addressing the first element for entitlement to a preliminary injunction, the Court finds that the Plaintiff has sufficiently established a likelihood of success on the merits. Defendants' argument that BCL § 603 applies when there is a failure to elect directors for more than thirteen months after the last annual meeting is misplaced, as the provision applies to instances where there has been a failure to elect a *sufficient* number of directors to conduct business. Pursuant to Article II, Section I of the By-Laws, the number of directors shall not be less than three and not more than seven. The Old Board consisted of seven members, including the Defendants who have not argued that at any time prior to the special meeting, that the Board of Directors fell outside of the requisite number of members. Article II, Section II of the By-Laws reads in pertinent part that

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"directors elected at the first annual meeting of shareholders and at meetings subsequent thereto shall serve until the date herein fixed for the next annual meeting of shareholders and until the election and qualifications of their respective successors." COVID-19 Pandemic. Instead, a virtual meeting was called in January 2021 by the Old Board. The certificate issued by Honest Ballot (Exhibit B) states that the January 2021 meeting was duly called, and a quorum was not achieved as only 15% of the shareholders appeared instead of the requisite 50.01% to establish a quorum. A second meeting was held on November 4, 2021 (Exhibit C), conducted by Honest Ballot, in which 40% of the shareholders were in attendance either in-person or by proxy, again falling short of the 50.01%) quorum requirement. In its certificate, Honest Ballot states that all shareholders were mailed written notice at their address registered with the Co-Op. However, the post office receipts of service were not attached to the certificate. In his affidavit, Kerzhner asserts that no motion to adjourn was made at the November 4, 2021, meeting, which Defendants refute. Neither party have submitted the minutes to establish what motions were made at the meeting.

It is undisputed that an election of a new Board of Directors has not been had since 2017. However, there is no showing by Defendants that they complied with the provisional remedies afforded to them in the Co-op's current By-Laws to call a special meeting. While 50.01% attendance is needed to establish a quorum at meetings, Article I, Section II, of the Co-op's By-Laws states that 25% of shareholders may petition to demand a special meeting, providing an ample alternative for Defendants to demand a new election of the Board. BCL § 603 in contrast only requires 10% of shareholders votes with no quorum requirement to demand a special election. By relying on BCL § 603 as a means to demand the election of a new board, Defendants have acted outside the scope of the By-Laws and arguably have even failed to fully comply with the requirements of the statue in that the reasons for the special meeting does not fully compart with the statue which specifies holding a special election in instances where a sufficient number of board members have not been elected.

***5** Moreover, Defendants' demand only sought to remove four directors, not including the Defendants themselves, from the Old Board, which is not permitted under the statue. While BCL § 603 allows Defendants a remedy under the law, the Court finds that the Co-op's By-Laws already establish the procedure in which shareholders may hold a special meeting for a new board. Additionally, Defendants sought to apply BCL § 603 in a manner that in contradictory to its language. Thus, the Court finds that Plaintiff has satisfied the first prong for entitlement to a preliminary injunction.

Plaintiff asserts that it will be severely and irreparably harmed if the defendants are not enjoined from acting on behalf of the Co-op. In instances where an opportunity gives Defendants the ability to shift the balance of power and assume management and control of a corporation, it

Plaintiff asserts that it will be severely and irreparably harmed if the defendants are not enjoined from acting on behalf of the Co-op. In instances where an opportunity gives Defendants the ability to shift the balance of power and assume management and control of a corporation, it may be viewed as irreparable injury to the movant. The conflict of having two Boards claiming authority over the Co-op has resulted in confusion as to who is entitled to make decisions. In her affidavit, Symanska states there is currently a Partial Vacate Order for all 192 balconies at 1311 Brightwater Ave. As a result, no one can use the balconies because they pose a hazard to the residents and the public that passes below them. Symanska claims she initially prepared a scope of work plan to correct the balconies and other issues that needed to be addressed in order to file the Co-op as safe with the Department of Housing, but states that she was told by Defendants to omit her findings. In her professional opinion and expertise, it is estimated that there is approximately 9 months of work needed to file the 1311 Brightwater project as SWARMP and 6 months for 35 Seacost to be able to file as Safe with the Department of buildings. There is also the issue of the Co-op's mortgage that needs to be refinanced before it goes into default later this year. Consequently, the conflict of the Boards has caused all projects to come to a halt. Under the circumstances of this case, the need to maintain the status quo by continuing to enforce the existing Board of Directors through the pendency of the action is proper. Thus, the irreparable injury prong has been satisfied.

Further, the Court finds that the irreparable injury to be sustained by the Plaintiff is more burdensome to it than the harm caused to Defendant through imposition of the injunction. Absent granting a preliminary injunction the two Boards of Directors will continue to compete for authority over the Co-op., the current projects will remain at a halt, and the day-to-day operations of the Co-op will not properly be addressed. Defendants in the alternative have an ample long-standing remedy available to them in Article I, Section II of the Co-op's By-Laws, in which they may demand a new election of the Board. Defendants, as members of the Old Board are still permitted to serve and make decisions on behalf of the Co-op with the remaining directors pursuant to the By-Laws.

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Lastly the Court apperceives that the Old Board's behavior raises questions. The continuous failure to meet quorums cannot be used as justification to allow the Old Board to exist in perpetuity. Since the repeated lack of quorums at meetings tend not to be the result of directors failing to appear but rather the result of the remaining shareholders of the Co-op not showing up, the Court notes that other procedures and processes may need to be implemented to help ensure that a quorum of shareholders participate in the necessary elections.

***6** Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Motion Seq. 1) seeking to enjoin the Defendants from holding the March 1, 2022, election is denied as moot, and it is further

ORDERED, that Plaintiff's motion to enjoin and restrain the Defendants or anyone in concert with them, or on their behalf, from representing to other shareholders in the Co-op, management or third parties, that they are authorized to act in any capacity, on behalf of the Co-op, is granted.

<<signature>>

J.S.C.

Footnotes

1 Kerzhner claims that Tower "received term sheets from 3 or 4 banks as well as Meridian" (Exhibit C), and according to emails between Defendants and the Tower property manager, Grey, states she has not seen any mortgage applications on behalf of Tower nor received any request for documents from any bank (Exhibit D)

2 Kerzhner asserts that Defendants voted in favor of the project and the project was performed by licensed plumbers and overseen by the New York Department of Buildings and National Grid.

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65 A.D.3d 1221
Supreme Court, Appellate Division, Second Department, New York.

TRUSTEES OF GALLILEE PENTECOSTAL CHURCH, INC., appellant,
v.
Frances J. WILLIAMS, et al., respondents.

Sept. 22, 2009.

Synopsis
Background: Action was brought for a judgment declaring that certain persons were the trustees and members of church and that a meeting held to elect successor trustees and a minister was a nullity. The Supreme Court, Dutchess County, Brands, J., dismissed the complaint, and appeal was taken.

Holdings: The Supreme Court, Appellate Division, held that:

purported meeting of church's members was invalid, rendering their election of trustees and a pastor void;

current trustees continued to serve as holdover trustees; and

purported trustees who were not elected at valid meeting could not exercise any authority or control over the church's temporalities and property.

Affirmed as modified.

Attorneys and Law Firms

****525** Jacobowitz and Gubits, LLP, Walden, N.Y. (Donald G. Nichol of counsel), for appellant.

Sholes & Miller, LLP, Poughkeepsie, N.Y. (Robert Irving Miller, Jr., of counsel), for respondents.

****526** MARK C. DILLON, J.P., ANITA R. FLORIO, RUTH C. BALKIN and LEONARD B. AUSTIN, JJ.

Opinion

***1221** In an action, inter alia, for a judgment declaring, among other things, that certain persons are the trustees and members of Gallilee Pentecostal Church, Inc., and that a certain meeting held on August 29, 2006, was a nullity, the plaintiff appeals from (1) a decision of the Supreme Court, Dutchess County (Brands, J.), dated November 26, 2007, made after a nonjury trial, and (2) a judgment of the same court entered January 11, 2008, which, upon the decision, is in favor of the defendants and against it dismissing the complaint.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v. Green Constr. Corp.,* 100 A.D.2d 509, 472 N.Y.S.2d 718); and it is further,

ORDERED that the judgment is modified, on the law and the facts, (1) by deleting the provision thereof dismissing so much of the complaint as sought a judgment declaring that the meeting held on August 29, 2006, was a nullity, and substituting

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therefor a provision declaring that the meeting held on August 29, 2006, was a nullity, (2) by deleting the provision thereof dismissing so much of the complaint as sought a judgment declaring that certain persons are the trustees and members of ***1222** Gallilee Pentecostal Church, Inc., and substituting therefor a provision declaring that Henderson Murphy and Lottie Carey are trustees of Gallilee Pentecostal Church, Inc., and (3) by adding a provision thereto enjoining the defendants from exercising any authority or control over the temporalities and property of Gallilee Pentecostal Church, Inc.; as so modified, the judgment is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The individuals involved in this dispute are associated with the Gallilee Pentecostal Church, Inc. (hereinafter the Church), located in Poughkeepsie, New York, which was incorporated under article 8 of the Religious Corporations Law in 1983. The Church became embroiled in turmoil that has continued throughout the years. While the defendant Frances J. Williams asserts that she has always been pastor of the Church, other members of the Church, including those who brought this action as the plaintiff, Trustees of Gallilee Pentecostal Church, Inc. (hereinafter the Trustees), claim that she has never been voted in by the Church members as pastor, and assert that, in fact, the membership has voted at least twice to declare that she is not the pastor of the Church.

When the Church incorporated, six people, including Henderson Murphy and Lottie Carey, two of the three alleged Trustees, were named as trustees of the Church. Although the certificate of incorporation and the Religious Corporations Law call for staggered annual elections of trustees (*see* Religious Corporations Law §§ 161, 163), it is undisputed that no elections were held subsequent to the meeting for incorporation until the August 29, 2006, meeting which is in dispute. In addition, four of the six original trustees have died.

On August 15, 2006, at the request of Williams, the defendant Dena Bellamy sent an "interoffice memo" to 30 people whom Williams named as members of the Church. The memo stated that a meeting would be held on August 29, 2006, in the presence of a mediator, in order for the members to "voice their opinions and be heard," to "[set] up offices," and to hold an election for those offices. The memo was labeled "[c]onfidential." Bellamy testified at trial that she did not consult the secretary of the Church for a list of members, ****527** and no notice of the meeting was read from the pulpit or posted on the Church door.

Some of the members of the Church, including the Trustees, refused to recognize Williams's authority to call the meeting, and did not attend. Seventeen alleged members attended the meeting, and purported to elect Williams as pastor of the Church and as a trustee, as well as the defendant Barbara Williams–Mahmood as another trustee.

***1223** The Trustees thereafter commenced this action seeking: (1) a judgment declaring that certain persons are the trustees and members of the Church, and that the August 29, 2006, meeting was a nullity because it was not properly noticed and the majority of the people voting thereat were not members of the Church; (2) a permanent injunction barring the defendants from exercising any authority or control over the Church's property and affairs; and (3) an accounting of any and all funds received by the Church during the relevant period. After a nonjury trial, the Supreme Court concluded that there was insufficient evidence to determine the matters raised in the complaint and, therefore, dismissed the complaint. We modify.

Upon review of a determination rendered after a nonjury trial, this Court's authority "is as broad as that of the trial Court," and this Court may "render the judgment it finds warranted by the facts, taking into account in a close case 'the fact that the trial judge had the advantage of seeing the witnesses' " (*Northern Westchester Professional Park Assoc. v. Town of Bedford,* 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350, 458 N.E.2d 809, quoting *York Mtge. Corp. v. Clotar Constr. Corp.,* 254 N.Y. 128, 133–134, 172 N.E. 265; *see Vizzari v. Hernandez,* 1 A.D.3d 431, 431–432, 766 N.Y.S.2d 883).

Ministers of any Church incorporated under article 8 of the Religious Corporations Law "shall be called, settled or removed ... only by the vote of a majority of the members of such corporation duly qualified to vote at elections ... at a meeting of such corporation specially called for that purpose" (Religious Corporations Law § 170; *see Matter of Rock Church v. Milani,* 256 A.D.2d 255, 256, 682 N.Y.S.2d 196). Successors to those trustees whose terms of office have expired "shall be elected by ballot from the qualified voters" at each annual corporate meeting (Religious Corporations Law § 163). Notice for either meeting is required to be publicly read at a regular meeting of the Church for public worship, on the two successive Sundays immediately preceding such meeting (*id.*). Since the trial testimony established that no such notice was given here, the purported meeting was invalid, rendering "the election void" (*Matter of Goldfield Corp. v. General Host Corp.,* 29 N.Y.2d

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264, 269, 327 N.Y.S.2d 330, 277 N.E.2d 387; *see Board of Mgrs. of Park Regent Condominium v. Park Regent Unit Owners Assoc.,* 58 A.D.3d 589, 591, 871 N.Y.S.2d 375; *Matter of Stile v. Antico,* 272 A.D.2d 403, 404, 707 N.Y.S.2d 227; *cf. Matter of Rock Church v. Milani,* 256 A.D.2d at 256, 682 N.Y.S.2d 196).

The persons stated to be the elected trustees in the certificate of incorporation "shall be the trustees thereof for the terms for which they were respectively elected and until their respective successors shall be elected" (Religious Corporations Law § 162). ***1224** Since no successors have been elected, only the current trustees, Henderson Murphy and Lottie Carey, continue to serve as holdover trustees of the Church until such time as a special meeting is duly noticed and their successors are elected (*see* ****528** *Matter of Rye Psychiatric Hosp. Ctr.,* 101 A.D.2d 309, 317, 476 N.Y.S.2d 339, *revd. on other grounds* 66 N.Y.2d 333, 497 N.Y.S.2d 317, 488 N.E.2d 63). Accordingly, since this is, in part, a declaratory judgment action, the judgment should have included an appropriate declaration in favor of the plaintiff with respect to so much of the complaint as sought a judgment declaring that the meeting held on August 29, 2006, was a nullity, and that Henderson Murphy and Lottie Carey are trustees of the Church (*see Lanza v. Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670, *appeal dismissed* 371 U.S. 74, 83 S.Ct. 177, 9 L.Ed.2d 163, *cert. denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164).

In light of this determination, we also enjoin the defendants from exercising any authority or control over the Church's temporalities and property, since they are not duly-elected Church trustees or officers pursuant to Religious Corporation Law § 5, which states that only "[t]he trustees of a every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom" (*see Morris v. Scribner,* 69 N.Y.2d 418, 424, 515 N.Y.S.2d 424, 508 N.E.2d 136).

The Trustees, however, failed to prove, by a preponderance of the evidence, which persons were qualified to vote at corporate meetings, or the Church's membership criteria. Article 8 of the Religious Corporations Law limits those qualified to vote at a corporate meeting of a Church incorporated thereunder to "all persons who are then members in good and regular standing of such Church by admission into full communion or membership therewith in accordance with the by-laws thereof" (Religious Corporations Law § 164). The by-laws the Trustees produced at trial were silent on the issue of how a person becomes a member of the Church. Moreover, while the Trustees asserted that membership could be obtained only after a person receives approval by a majority of the existing members, documents the Trustees submitted at trial contradicted this assertion. The Trustees claimed that only nine persons were "true" members of the Church. However, minutes maintained by the Trustees from two purported business meetings named 12 people as members eligible to attend the meetings. The Trustees, therefore, were not entitled to the relief sought with respect to the members.

Moreover, the Trustees failed to meet their burden of proving at trial their entitlement to an accounting by the defendants ***1225** (*see AHA Sales, Inc. v. Creative Bath Prods., Inc.,* 58 A.D.3d 6, 22–23, 867 N.Y.S.2d 169; *LoGerfo v. Trustees of Columbia Univ. in City of N.Y.,* 35 A.D.3d 395, 397, 827 N.Y.S.2d 166; *Palazzo v. Palazzo,* 121 A.D.2d 261, 265, 503 N.Y.S.2d 381).

All Citations

65 A.D.3d 1221, 885 N.Y.S.2d 525, 2009 N.Y. Slip Op. 06681

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6 Misc.3d 1041(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

In the Matter of the Application of David WAGNER, Holder of One–Half of all Outstanding Shares Entitled to Vote in an Election of Directors of Oyster Bay Manor Senior Residence, Inc., d/b/a Oyster Bay Manor, Oyster Bay Senior Residence, Inc., d/b/a Harbor House, and Oyster Bay Senior Residence Realty, Inc., Petitioner,

v.

Rachel DOMBROWSKY, Respondent.

No. 8455–04.
|
March 15, 2004.

Attorneys and Law Firms

Hamburger, Maxson, Yaffe, Wishod & Knauer, LLP, Melville, for Petitioner.

Ruskin, Moscou & Faltischek, P.C., Uniondale, for Respondent.

LEONARD B. AUSTIN, J.

ORDER

***1** The following papers were read on Petitioner's application to dissolve Oyster Bay Manor Senior Residence, Inc., Oyster Bay Senior Residence, Inc. and Oyster Bay Senior Residence Realty, Inc. and related relief; and Respondent's cross-motion to dismiss the petition:

Order to Show Cause dated June 25, 2004;

Verified Petition affidavit of David Wagner sworn to on June 21, 2004;

Affidavit of Ronald J. DeVito sworn to on June 17, 2004;

Petitioner's Memorandum of Law;

Notice of Cross-motion dated August 12, 2004;

Affirmation of Christine McInerney, Esq. dated August 12, 2004;

Affirmation of Wayne L. Kaplan, Esq. dated August 12, 2004;

Affidavit of Rachel Dombrowsky sworn to on August 12, 2004;

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Respondent's Memorandum of Law;

Affidavit of David Wagner sworn to on October 12, 2004;

Petitioner's Reply Memorandum of Law;

Supplemental Affirmation of Richard Hamburger, Esq. dated December 12, 2004;

Supplemental Affidavit of David Wagner sworn to on December 17, 2004;

Affidavit of Frederick Schulman sworn to on October 28, 2004;

Reply Affidavit of Rachel Dombrowsky sworn to on October 28, 2004;

Reply Affirmation of Christine McInerney, Esq. dated October 28, 2004

Respondent's Reply Memorandum of Law.

Petitioner David Wagner moves by Order to Show Cause pursuant to Business Corporation Law § 1104 for judicial dissolution of the Respondent corporations Respondent Rachel Dombrowsky cross-moves for an order dismissing the petition.

BACKGROUND

Petitioner David Wagner and Respondent Rachel Dombrowsky each own 50% of all outstanding shares in the Respondents Oyster Bay Manor Residence, Inc. ("Oyster Bay Manor") and Oyster Bay Senior Manor Residence, Inc. ("Harbor House"), both of which are currently being operated as duly licensed adult home facilities.

Wagner and Dombrowsky presently constitute the Board of Directors of the two corporations.

Wagner advises that Dombrowsky and he originally purchased the Oyster Bay property in the early 1990's and converted it into an adult home Oyster Bay Manor which opened in 1994. They subsequently developed certain nearby property, and in early 2002 after some two years of construction they opened Harbor House, an adult home which is separate, but physically adjacent to Oyster Bay Manor.

According to Wagner, Harbor House has been operating at a loss since it opened for business in February 2002. Those losses presently amount to some $50,000.00 per month, allegedly "with no relief in sight".

Wagner further contends that when he discussed the corporations' financial situation with Dombrowsky, she agreed that the facilities should be sold to a larger entity which could sustain them until market conditions improved.

To this end, they contacted Ronald J. DeVito, the parties' former counsel, who is now associated with the Senior Housing Consultancy Group. Mr. DeVito apparently located several purchasers, including a national corporation, the Carlyle Group Realty Partner III, L.P. ("Carlyle Group") which later made an "all cash" offer of $22.5 million for the corporations.

***2** Mr. DeVito asserts that there has been a downturn in the adult home industry attributable to overbuilding and that while "empty beds * * * will undoubtedly fill in the years ahead, * * * they are not going to fill in the short-term future."

Wagner contends that when Dombrowsky and he met with representatives of the Carlyle Group in December 2003, Dombrowsky initially favored acceptance of the Carlyle offer. However, Dombrowsky allegedly contacted him shortly

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thereafter and told him that she had changed her mind and that she was no longer interested in selling the corporations.

According to Wagner, Dombrowsky told him that the Carlyle Group offer would not produce the net profit she had hoped for a position which Wagner describes as unrealistic, since the corporations are "hemorrhaging money," and would soon confront an $18 million balloon payment on an outstanding construction loan, scheduled to mature in June 2005.

After rejecting the Carlyle Group offer, Dombrowsky made efforts to locate investors who might be interested in purchasing Wagner's interest in the corporations.

Wagner claims that Dombrowsky arranged for "more than a dozen groups to inspect and tour the facilities * * * [but that] [m]ost of them showed little or no interest" in the properties. It is undisputed, however, that one of the prospective purchasers recently signed an initial letter of intent with Wagner to purchase his stock.

Specifically, Dombrowsky's submissions contain the affidavit of Fredrick Schulman ("Shulman"), who is President of CU Capital Services, Inc. ("CU"), the proposed purchaser. Schulman asserts that Wagner and he entered into a letter of intent in August 2004; that CU has now completed its due diligence; that it is prepared to move ahead; and that an agreement has been effectively reached concerning virtually all material terms, with only one or two exceptions.

Moreover, Schulman asserts that to demonstrate its good faith, CU has agreed to make a $180,000.00 down payment which subject to stated conditions could be retained by the Wagner in the event that the transaction is not consummated.

Thereafter, by verified petition dated June 2004, Wagner commenced this proceeding pursuant to Business Corporation Law § 1104(a)(3) for dissolution of the corporations on the ground "[t]hat there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders."

Wagner now moves for an order dissolving the corporations pursuant to BCL 1104; or alternatively, for an relief (1) directing that the corporations be sold as a going concern; and/or (2) allowing the business and assets of the corporations to be sold to the Carlyle Group. Dombrowsky cross-moves for an order dismissing the verified petition.

Notably, Dombrowsky asserts that Mr. DeVito lacks the requisite national experience as a broker to obtain a full and representative range of offers and that he is biased in favor of the Carlyle Group offer since he would earn a commission if that sale was consummated.

***3** Dombrowsky also contends that Wagner has not shown that any internal dissension exists with respect to the daily operation of the corporations' business activities and that his application is solely driven by personal considerations and the desire to accomplish an immediate "cash out" of his interests. Specifically, Dombrowsky argues that in November 2003, Wagner approached her and advised that he wanted to retire and "cash out his interest in the Corporations."

According to Dombrowsky, the construction and start-up expenses associated with the new facility were anticipated by the parties as a part of their original business plan in which Wagner himself participated.

Dombrowsky advises that although Wagner and she initially projected a break even occupancy for Harbor House at eighteen months in order to obtain a bank loan in 1999, they later realized that this projection was unrealistic since the senior housing market had evolved particularly with respect to the number of facilities operating in the area.

Some eleven months prior to the filing of the petition herein, the parties consulted an expert in the business of senior housing, who apprised them that, in his nationwide experience with the construction of senior housing, senior residence properties "almost always have taken thirty to thirty six months to lease up * * *." After the foregoing consultation, the parties allegedly accepted that certain losses would ensue and hired a full time marketing advisor in December 2003.

Dombrowsky characterizes the corporations' current negative position as only temporary, and asserts that the market has "already begun to improve," in response to which she fully expects that "the Corporations will return to the steady profitability that we saw in prior years."

Dombrowsky further asserts that Wagner was on board with the foregoing projection until he made the decision to cash out

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his share of the business.

DISCUSSION

Pursuant to Business Corporation Law ("BCL"), a petition for dissolution may be presented by the holders of one-half of all outstanding shares of a corporation entitled to vote in an election of directors on the ground "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." BCL §§ 1104(a)(3). See, *In the Matter of Fazio Realty Corp.,* 10 AD3d 363 (2nd Dept.2004); and *In the Matter of Dubonnet Scarfs, Inc.,* 105 A.D.2d 339 (1st Dept.1985).

Generally speaking, "[i]n determining whether a petition for dissolution should be granted, the issue is not who is at fault in creating a deadlock, but whether a deadlock exists." See, *Matter of Validation Review Associates, Inc.,* 236 A.D.2d 477, 478 (2nd Dept .1997), *revd. other grnds.,* 91 N.Y.2d 840 (1997); *Matter of Kaufmann,* 225 A.D.2d 775 (2nd Dept.1996); *Matter of Goodman v. Lovett,* 200 A.D.2d 670 (2nd Dept.1994); and *Sternberg v. Osman,* 181 A.D.2d 897, 898 (2nd Dept.1992).

***4** Nor is the remedy is "to be denied merely because it is found that the corporate business has been or could be conducted at a profit." BCL § 1111(b)(3); *Matter of Validation Review Associates, Inc., supra.* See also, *Application of Dubonnet Scarfs, Inc., supra,* at 346; *Tavlin v. Munsey Candlelight Corp.,* 69 A.D.2d 865, 866 (2nd Dept.1979); and 4 *White On New York Corporations,* ¶ 1104.2[3], at 11–43.

On the other hand, "[t]he fact that the parties disagree over the Petitioner's plan for the company's future is not dispositive of the fundamental issue of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted." *Application of Glamorise Foundations, Inc.,* 228 A.D.2d 187 (1st Dept.1996). Further, "the mere fact that a closely-held corporation may have substantial liquid assets which a shareholder wishes to reach is an insufficient basis for judicial dissolution." See, *Matter of Murphy,* 120 A.D.2d 733, 736 (2nd Dept.1986); and *Matter of Dubonnet Scarfs, supra,* at 343. A hearing may be ordered, however, "if there were some contested issue determinative of the validity of the Petitioner's application." *Matter of Kaufmann, supra,* at 776; *Tavlin v. Munsey Candlelight Corp., supra.*

Whether the remedy of dissolution should be granted rests within the discretion of the court. 4 *White On New York Corporations,* ¶ 1104.2, at 11–40, 11–43.

Application of the foregoing considerations to the facts presented, supports the conclusion that a triable issue has been presented with respect to whether the remedy of dissolution is warranted.

Here, the internal dissension does not arise from the day-to-day operation of the properties but rather, principally derives from a philosophical business disagreement with respect to whether the parties should continue to operate the business in light of the alleged financial difficulties identified by Petitioner. It does not appear that the alleged dissension has materially affected the parties' ability to actually operate the corporations.

Further, while the Wagner contends that the business is effectively moribund with no possibility of financial recovery, Dombrowsky has vigorously opposed this assessment, depicting the corporations' financial circumstances in an entirely different and opposing light, *i.e.,* she has asserted that the market downturn is temporary and that the difficulties presently experienced by the corporations were anticipated and normal in light of the expenditures undertaken and the prevailing market conditions.

Upon these sharply opposing allegations, the Court cannot determinatively conclude that the corporations' plight is irremediable a key premise underlying Wagner's theory that dissolution would be beneficial to the shareholders.

The Court also regards as significant the fact that there is presently outstanding a potential alternative to the drastic remedy of judicial dissolution; to wit: the buy-out offer made by the entity (CU) located by Dombrowsky, which offer could if accepted

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obviate the need for any judicial intervention.

***5** The Court notes that Wagner has not addressed the specific contentions made by Mr. Schulman and Dombrowsky with respect to the potential imminence and/or viability of the buy-out offer made by CU.

It is settled that the dissolution remedy conferred by BCL § 1104(a)(3) is available only where the alleged internal dissension and/or division is such that dissolution would be "beneficial to the shareholders."

Accordingly, while there may be a degree of internal dissension between the parties, their conflicting allegations with respect to the corporation's financial prospects and the significance of the market and financial conditions they are now experiencing, require that a hearing be held to determine if dissolution would, in fact, be beneficial to the stockholders within the meaning of BCL § 1104(a)(3). See, *e.g., Tavlin v. Munsey Candlelight Corp., supra* at 866; and *Matter of Kaufmann, supra* at 776.

Accordingly, it is,

ORDERED that the motion of Petitioner David Wagner is granted to the extent that the matter shall be set down for a hearing with respect to whether judicial dissolution would be beneficial to the shareholders of the subject corporations; and it is further,

ORDERED that the motion by Respondent Rachel Dombrowsky to dismiss the petition is denied; and it is further,

ORDERED, that counsel for the parties shall appear for a conference on April 5, 2005 at 9:30 a.m. to schedule such discovery as may be needed and a hearing herein.

This constitutes the decision and Order of the Court.

All Citations

6 Misc.3d 1041(A), 800 N.Y.S.2d 359 (Table), 2004 WL 3250104, 2005 N.Y. Slip Op. 50384(U)

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209 A.D.3d 801
Supreme Court, Appellate Division, Second Department, New York.

Jonathan WINSTON, et al., respondents, et al.,
v.
Mark A. REICHENBAUM, etc., et al., appellants.

2018–00519, 2018–00520
|
(Index No. 602750/15)
|
Argued—March 28, 2022
|
October 12, 2022

Synopsis
Background: Members of real-estate-investment limited-liability companies (LLCs) brought breach-of-contract action against investor, seeking declaration that he had no rights in LLCs; investor counterclaimed for breach of contract, alleging that LLCs' members had failed to repay certain loans investor had made to a member. After a bench trial, the Supreme Court, Nassau County, Timothy S. Driscoll, J., entered judgment declaring that investor had no rights in LLCs and dismissing investor's counterclaim. Investor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

evidence supported trial court's determination that investor had no rights in LLCs, and

evidence supported trial court's dismissal of investor's counterclaim.

Affirmed.

Attorneys and Law Firms

****673** Rosenberg Feldman Smith, LLP, New York, NY (Michael H. Smith of counsel), for appellants.

Jonathan Winston and Eve Strausman Winston, Locust Valley, NY, respondents pro se.

FRANCESCA E. CONNOLLY, J.P., SHERI S. ROMAN, LINDA CHRISTOPHER, WILLIAM G. FORD, JJ.

DECISION & ORDER

***801** In an action, inter alia, for a judgment declaring the rights of Eric Reichenbaum under two letter agreements dated July

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10, 2006, and April 11, 2007, respectively, the defendants appeal from (1) a decision of the Supreme Court (Timothy S. Driscoll, J.), entered September 20, 2017, and (2) a judgment of the same court entered November 6, 2017. The judgment, insofar as appealed from, upon the decision, made after a nonjury trial, declared that Eric Reichenbaum has no rights in Winhaven Associates, LLC, or Winhaven Associates II, LLC, adjudged that the third cause of action, alleging that Eric Reichenbaum breached the letter agreements, was academic because Eric Reichenbaum canceled the letter agreements in September 2012, and, in effect, dismissed the defendants' counterclaim alleging breach of contract.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v. J.A. Green Constr. Corp.,* 100 A.D.2d 509, 472 N.Y.S.2d 718); and it is further,

***802** ORDERED that the appeal from so much of the judgment as adjudged that the third cause of action, alleging that Eric Reichenbaum breached the letter agreements, was academic because Eric Reichenbaum canceled the letter agreements in September 2012, is dismissed, as the defendants are not aggrieved by that portion of the judgment (*see* CPLR 5511); and it is further,

ORDERED that the judgment is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs Jonathan Winston and Eve Strausman Winston.

Jonathan Winston (hereinafter Winston) negotiated an agreement with Eric Reichenbaum pursuant to which Reichenbaum was to invest in a real estate development project known as the Fields at Mattituck. Winhaven Associates, LLC, and Winhaven Associates II, LLC (hereinafter together the Winhaven LLCs), were the project's developer. On July 10, 2006, Winston's wife, Eve Winston (hereinafter Eve), as principal of the Winhaven LLCs, executed a letter agreement wherein Reichenbaum agreed to purchase a 25% interest in the Winhaven LLCs for a sum of $3.25 million. Under the terms of the letter agreement, Reichenbaum was promised the greater of a guaranteed 10% per annum return on his investment or the 25% equity interest in the project. On April 11, 2007, Eve executed a second letter agreement with Reichenbaum wherein it was agreed that Reichenbaum had contributed an additional $500,000 in capital to the project and otherwise maintained the same terms of the July 10, 2006 letter agreement. The plaintiffs allege that Reichenbaum was responsible for 25% of the Winhaven LLCs' expenses, ****674** but failed to fulfill his obligation. Reichenbaum loaned Eve additional sums totaling $2,219,276 from April 2008 through December 2010. Reichenbaum received a total of $2,261,154.29 or $2,256,154.29 from May 2008 through July 2012 from Eve or various entities. The plaintiffs contend that at a meeting in September 2012, Reichenbaum announced that he no longer wanted to be a part of the deal and ripped up the letter agreements.

On or about December 31, 2012, the plaintiffs commenced the instant action asserting, inter alia, causes of action to recover damages for breach of contract, alleging that Reichenbaum had failed to pay his agreed upon share of the Winhaven LLCs' expenses, and for a judgment declaring that Reichenbaum has no rights in the Winhaven LLCs. The defendants interposed an answer with counterclaims asserting, among others, a counterclaim to recover damages for breach of ***803** contract, alleging that Winston and Eve failed or refused to repay the loans Reichenbaum made to Eve.

A nonjury trial was held, inter alia, with respect to the causes of action for a judgment declaring that Reichenbaum has no rights in the Winhaven LLCs and to recover damages for Reichenbaum's breach of his agreement with Eve, as well as the defendants' counterclaim for breach of contract arising from the loan agreement between Reichenbaum and Eve. At trial, testimony was presented from, among other witnesses, Sheldon Ganz, a certified public accountant who prepared tax returns for Winston, the Winhaven LLCs, and Reichenbaum for many years and who himself was a former member of the Winhaven LLCs. Ganz testified, inter alia, that Reichenbaum and Winston informed him that Reichenbaum had entered into an agreement to purchase a profit participation interest in the Winhaven LLCs, that Reichenbaum expressed to him that he did not want to have an ownership interest in the Winhaven LLCs, that Reichenbaum asked that the Winhaven LLCs' tax returns not reflect any ownership interest by Reichenbaum, that Reichenbaum's personal tax returns did not reflect an ownership interest, that Reichenbaum agreed to be responsible to pay 25% of the Winhaven LLCs' expenses and did pay those expenses for a time, and that Reichenbaum stopped paying the expenses and ultimately canceled the agreement in September 2012. The parties stipulated that from April 2008 through December 2010, Reichenbaum loaned Eve a total of $2,219,276, and that from May 2008 through July 2012, Reichenbaum received a total of $2,261,154.29 or $2,256,154.29 from Eve and various entities. However, they did not stipulate as to the "purpose or characterization" of each payment.

In a decision after trial, the Supreme Court found that Ganz and the other witnesses, other than Winston, were all credible.

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The court found that Reichenbaum did not have a membership interest, but rather a profit participation interest, in the Winhaven LLCs. The court further found that the third cause of action, alleging that Reichenbaum breached the profit participation agreement with Eve, was academic because Reichenbaum had canceled the letter agreements in September 2012. The court also determined that the defendants failed to establish their counterclaim alleging breach of contract, finding that there was no evidence establishing the payment terms of any loan, and that Reichenbaum's loan of $2,219,276 to Eve had been fully repaid as he had been repaid more than the amount of the loan. A judgment was subsequently entered upon the decision. The defendants appeal.

***804** The defendants are not aggrieved by the Supreme Court's determination ****675** that the third cause of action, alleging that Reichenbaum breached the profit participation agreement with Eve, was academic because Reichenbaum canceled the letter agreements in September 2012, even though they do not agree with the legal or factual basis of the ruling (*see* CPLR 5511; *Fabbricatore v. Lindenhurst Union Free School Dist.,* 259 A.D.2d 656, 657, 686 N.Y.S.2d 822). The defendants are not aggrieved simply because they do not agree with the "particular findings, rationale or the opinion supporting the judgment" (*Parochial Bus Sys. v. Board of Educ. of City of N.Y.,* 60 N.Y.2d 539, 545, 470 N.Y.S.2d 564, 458 N.E.2d 1241; *see Allstate Ins. Co. v. Dewar,* 186 A.D.3d 826, 827, 127 N.Y.S.3d 801).

"In reviewing a determination made after a non-jury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses and hearing the testimony" (*Matter of Hersh,* 198 A.D.3d 766, 770–771, 156 N.Y.S.3d 243 [internal quotation marks omitted]). "[W]here the court's findings of fact rest in large measure on considerations relating to the credibility of witnesses, ... deference is owed to the trial court's credibility determinations" (*id.* at 771, 156 N.Y.S.3d 243[internal quotation marks omitted]). Contrary to the defendants' contention, the evidence adduced at trial supports the Supreme Court's conclusion that Reichenbaum purchased a profit participation interest in the Winhaven LLCs, rather than a membership interest, and supports the court's determination granting the plaintiffs' request for a judgment declaring that Reichenbaum has no rights in the Winhaven LLCs. Moreover, the evidence supports the court's conclusion that there was no evidence establishing the payment terms of any loan between Reichenbaum and Eve, and supports its determination, in effect, dismissing the defendants' counterclaim alleging breach of contract (*see generally Elghanian v. Elghanian,* 277 A.D.2d 162, 717 N.Y.S.2d 54). Accordingly, we decline to disturb the court's determination.

In light of our determination, we need not reach the defendants' remaining contention.

CONNOLLY, J.P., ROMAN, CHRISTOPHER and FORD, JJ., concur.

All Citations

209 A.D.3d 801, 176 N.Y.S.3d 672, 2022 N.Y. Slip Op. 05737

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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 732. Probate Code: Intestate Succession and Wills (Refs & Annos)
Part I. Intestate Succession (Refs & Annos)

West's F.S.A. § 732.102

732.102. Spouse's share of intestate estate

Currentness

The intestate share of the surviving spouse is:

(1) If there is no surviving descendant of the decedent, the entire intestate estate.

(2) If the decedent is survived by one or more descendants, all of whom are also descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate.

(3) If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, one-half of the intestate estate.

(4) If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, one-half of the intestate estate.

Credits

Added by Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 8. Amended by Laws 2001, c. 2001-226, § 15, eff. Jan. 1, 2002; Laws 2007, c. 2007-74, § 5, eff. July 1, 2007; Laws 2011, c. 2011-183, § 2, eff. Oct. 1, 2011.

Editors' Notes

RETROACTIVITY

<Laws 2012, c. 2012-109, § 2, provides:>

<"Notwithstanding section 2 or section 14 of chapter 2011-183, Laws of Florida, the amendments to section

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732.102, Florida Statutes, made by section 2 of that act apply only to the estates of decedents dying on or after October 1, 2011.">

Notes of Decisions (35)

West's F. S. A. § 732.102, FL ST § 732.102
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Part I. Intestate Succession (Refs & Annos)
West's F.S.A. § 732.103

732.103. Share of other heirs

Currentness

The part of the intestate estate not passing to the surviving spouse under s. 732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:

(1) To the descendants of the decedent.

(2) If there is no descendant, to the decedent's father and mother equally, or to the survivor of them.

(3) If there is none of the foregoing, to the decedent's brothers and sisters and the descendants of deceased brothers and sisters.

(4) If there is none of the foregoing, the estate shall be divided, one-half of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order:

(a) To the grandfather and grandmother equally, or to the survivor of them.

(b) If there is no grandfather or grandmother, to uncles and aunts and descendants of deceased uncles and aunts of the decedent.

(c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive, in the order stated above.

(5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.

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(6) If none of the foregoing, and if any of the descendants of the decedent's great-grandparents were Holocaust victims as defined in s. 626.9543(3)(a), including such victims in countries cooperating with the discriminatory policies of Nazi Germany, then to the descendants of the great-grandparents. The court shall allow any such descendant to meet a reasonable, not unduly restrictive, standard of proof to substantiate his or her lineage. This subsection only applies to escheated property and shall cease to be effective for proceedings filed after December 31, 2004.

Credits

Added by Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 8; Laws 1977, c. 77-174, § 1. Amended by Laws 2001, c. 2001-226, § 16, eff. Jan. 1, 2002; Laws 2004, c. 2004-390, § 145, eff. July 1, 2004; Laws 2006, c. 2006-1, § 102, eff. July 4, 2006; Laws 2007, c. 2007-74, § 6, eff. July 1, 2007.

Notes of Decisions (79)

West's F. S. A. § 732.103, FL ST § 732.103
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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 733. Probate Code: Administration of Estates (Refs & Annos)
Part VIII. Special Provisions for Distribution (Refs & Annos)
West's F.S.A. § 733.802

733.802. Proceedings for compulsory payment of devises or distributive interest

Currentness

(1) Before final distribution, no personal representative shall be compelled:

(a) To pay a devise in money before the final settlement of the personal representative's accounts,

(b) To deliver specific personal property devised, unless the personal property is exempt personal property,

(c) To pay all or any part of a distributive share in the personal estate of a decedent, or

(d) To surrender land to any beneficiary,

unless the beneficiary establishes that the property will not be required for the payment of debts, family allowance, estate and inheritance taxes, claims, elective share of the surviving spouse, charges, or expenses of administration or to provide funds for contribution or to enforce equalization in case of advancements.

(2) An order directing the surrender of real property or the delivery of personal property by the personal representative to the beneficiary shall be conclusive in favor of bona fide purchasers for value from the beneficiary or distributee as against the personal representative and all other persons claiming by, through, under, or against the decedent or the decedent's estate.

(3) If the administration of the estate has not been completed before the entry of an order of partial distribution, the court may require the person entitled to distribution to give a bond with sureties as prescribed in s. 45.011, conditioned on the making of due contribution for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest on them.

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Credits

Added by Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 86; Laws 1977, c. 77-87, § 37; Laws 1977, c. 77-174, § 1; Laws 1979, c. 79-400, § 272. Amended by Laws 1997, c. 97-102, § 1019, eff. July 1, 1997; Laws 2001, c. 2001-226, § 154, eff. Jan. 1, 2002.

Notes of Decisions (7)

West's F. S. A. § 733.802, FL ST § 733.802
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McKinney's Consolidated Laws of New York Annotated
Business Corporation Law (Refs & Annos)
Chapter 4. Of the Consolidated Laws (Refs & Annos)
Article 6. Shareholders (Refs & Annos)

McKinney's Business Corporation Law § 602

§ 602. Meetings of shareholders

Currentness

(a) [As amended by L.2021, c. 98, § 2. See, also, par. (a) below.] Meetings of shareholders may be held at such place, within or without this state, as may be fixed by or under the by-laws, or if not so fixed, as determined by the board of directors. For the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, or until December thirty-first, two thousand twenty-one, whichever is later, if, pursuant to this paragraph or the by-laws of the corporation, the board of directors is authorized to determine the place of a meeting of shareholders, the board of directors may, in its sole discretion, determine that the meeting be held solely by means of electronic communication, the platform/service of which shall be the place of the meeting for purpose of this article.

(a) [As amended by L.2021, c. 588, § 2. See, also, par. (a) above.] Meetings of shareholders may be held at such place, within or without this state, as may be fixed by or under the by-laws, or if not so fixed, as determined by the board of directors. If, pursuant to this paragraph or the by-laws of the corporation, the board of directors is authorized to determine the place of a meeting of shareholders, the board of directors may, in its sole discretion, determine that the meeting be held solely by means of electronic communication, the platform/service of which shall be the place of the meeting for purpose of this article.

(b)(i) A corporation may, if authorized by the board of directors: (1) implement reasonable measures to provide shareholders not physically present at a shareholders' meeting a reasonable opportunity to participate in the proceedings of the meeting substantially concurrently with such proceedings; and/or (2) provide reasonable measures to enable shareholders to vote or grant proxies with respect to matters submitted to the shareholders at a shareholders' meeting by means of electronic communication; provided that the corporation shall, if applicable, (A) implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of electronic communication is a shareholder of record and (B) keep a record of any vote or other action taken by a shareholder participating and voting by means of electronic communications at a shareholders' meeting. A shareholder participating in a shareholders' meeting by this means is deemed to be present in person at the meeting.

(ii) Nothing required in subparagraph (i) of this paragraph shall limit, restrict or supersede other forms of voting and participation.

(iii) For purposes of this paragraph, “reasonable measures” with respect to participating in proceedings shall include, but not be limited to, audio webcast or other broadcast of the meeting and for voting shall include but not be limited to telephonic and internet voting.

(c) A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws. A failure to hold the annual meeting on the date so fixed or to elect a sufficient number of

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directors to conduct the business of the corporation shall not work a forfeiture or give cause for dissolution of the corporation, except as provided in paragraph (c) of section 1104 (Petition in case of deadlock among directors or shareholders).

(d) Special meetings of the shareholders may be called by the board and by such person or persons as may be so authorized by the certificate of incorporation or the by-laws. At any such special meeting only such business may be transacted which is related to the purpose or purposes set forth in the notice required by section 605 (Notice of meetings of shareholders).

(e) Except as otherwise required by this chapter, the by-laws may designate reasonable procedures for the calling and conduct of a meeting of shareholders, including but not limited to specifying: (i) who may call and who may conduct the meeting, (ii) the means by which the order of business to be conducted shall be established, (iii) the procedures and requirements for the nomination of directors, (iv) the procedures with respect to the making of shareholder proposals, and (v) the procedures to be established for the adjournment of any meeting of shareholders. No amendment of the by-laws pertaining to the election of directors or the procedures for the calling and conduct of a meeting of shareholders shall affect the election of directors or the procedures for the calling or conduct in respect of any meeting of shareholders unless adequate notice thereof is given to the shareholders in a manner reasonably calculated to provide shareholders with sufficient time to respond thereto prior to such meeting.

Credits

(L.1961, c. 855. Amended L.1965, c. 803, § 13; L.1997, c. 449, § 23, eff. Feb. 22, 1998; L.2019, c. 384, § 1, eff. Oct. 23, 2019; L.2020, c. 122, § 2, eff. June 17, 2020; L.2021, c. 98, § 2, eff. April 6, 2021; L.2021, c. 588, § 2, eff. Nov. 8, 2021.)

McKinney's Business Corporation Law § 602, NY BUS CORP § 602
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Article 6. Shareholders (Refs & Annos)

McKinney's Business Corporation Law § 603

§ 603. Special meeting for election of directors

Currentness

(a) If, for a period of one month after the date fixed by or under the by-laws for the annual meeting of shareholders, or if no date has been so fixed, for a period of thirteen months after the formation of the corporation or the last annual meeting, there is a failure to elect a sufficient number of directors to conduct the business of the corporation, the board shall call a special meeting for the election of directors. If such special meeting is not called by the board within two weeks after the expiration of such period or if it is so called but there is a failure to elect such directors for a period of two months after the expiration of such period, holders of ten percent of the votes of the shares entitled to vote in an election of directors may, in writing, demand the call of a special meeting for the election of directors specifying the date and month thereof, which shall not be less than sixty nor more than ninety days from the date of such written demand. The secretary of the corporation upon receiving the written demand shall promptly give notice of such meeting, or if he fails to do so within five business days thereafter, any shareholder signing such demand may give such notice. The meeting shall be held at the place fixed in the by-laws or, if not so fixed, at the office of the corporation.

(b) At any such special meeting called on demand of shareholders, notwithstanding section 608 (Quorum of shareholders), the shareholders attending, in person or by proxy, and entitled to vote in an election of directors shall constitute a quorum for the purpose of electing directors, but not for the transaction of any other business.

Credits

(L.1961, c. 855. Amended L.1962, c. 834, § 29; L.1963, c. 746, § 3; L.1971, c. 768, § 1; L.1997, c. 449, § 24, eff. Feb. 22, 1998.)

McKinney's Business Corporation Law § 603, NY BUS CORP § 603
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McKinney's Business Corporation Law § 606

§ 606. Waivers of notice

Currentness

Notice of meeting need not be given to any shareholder who submits a waiver of notice whether before or after the meeting. Waiver of notice may be written or electronic. If written, the waiver must be executed by the shareholder or the shareholder's authorized officer, director, employee or agent by signing such waiver or causing his or her signature to be affixed to such waiver by any reasonable means, including, but not limited to, facsimile signature. If electronic, the transmission of the waiver must either set forth or be submitted with information from which it can reasonably be determined that the transmission was authorized by the shareholder. The attendance of any shareholder at a meeting, in person or by proxy, without protesting prior to the conclusion of the meeting the lack of notice of such meeting, shall constitute a waiver of notice by such shareholder.

Credits

(L.1961, c. 855. Amended L.1962, c. 834, § 30; L.1998, c. 498, § 2, eff. July 29, 1998.)

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Business Corporation Law (Refs & Annos)
Chapter 4. Of the Consolidated Laws (Refs & Annos)
Article 7. Directors and Officers (Refs & Annos)

McKinney's Business Corporation Law § 702

§ 702. Number of directors

Currentness

(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.

(2) No decrease shall shorten the term of any incumbent director.

Credits
(L.1961, c. 855. Amended L.1962, c. 834, § 45; L.1965, c. 803, § 26; L.1997, c. 449, § 38, eff. Feb. 22, 1998.)

McKinney's Business Corporation Law § 702, NY BUS CORP § 702
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Business Corporation Law (Refs & Annos)
Chapter 4. Of the Consolidated Laws (Refs & Annos)
Article 7. Directors and Officers (Refs & Annos)

McKinney's Business Corporation Law § 703

§ 703. Election and term of directors

Currentness

(a) At each annual meeting of shareholders, directors shall be elected to hold office until the next annual meeting except as authorized by section 704 (Classification of directors). The certificate of incorporation may provide for the election of one or more directors by the holders of the shares of any class or series, or by the holders of bonds entitled to vote in the election of directors pursuant to section 518 (Corporate bonds), voting as a class.

(b) Each director shall hold office until the expiration of the term for which he is elected, and until his successor has been elected and qualified.

Credits
(L.1961, c. 855. Amended L.1962, c. 834, § 46.)

McKinney's Business Corporation Law § 703, NY BUS CORP § 703
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Business Corporation Law (Refs & Annos)
Chapter 4. Of the Consolidated Laws (Refs & Annos)
Article 11. Judicial Dissolution (Refs & Annos)

McKinney's Business Corporation Law § 1104

§ 1104. Petition in case of deadlock among directors or shareholders

Currentness

(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.

(b) If the certificate of incorporation provides that the proportion of votes required for action by the board, or the proportion of votes of shareholders required for election of directors, shall be greater than that otherwise required by this chapter, such a petition may be presented by the holders of shares representing more than one-third of the votes of all outstanding shares entitled to vote on non-judicial dissolution under section 1001 (Authorization of dissolution).

(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.

Credits

(L.1961, c. 855. Amended L.1963, c. 748, § 23; L.1997, c. 449, § 67, eff. Feb. 22, 1998; L.1998, c. 17, § 14, eff. Feb. 19, 1998, deemed eff. Feb. 22, 1998.)

McKinney's Business Corporation Law § 1104, NY BUS CORP § 1104
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Business Corporation Law (Refs & Annos)
Chapter 4. Of the Consolidated Laws (Refs & Annos)
Article 11. Judicial Dissolution (Refs & Annos)

McKinney's Business Corporation Law § 1111

§ 1111. Judgment or final order of dissolution

Currentness

(a) In an action or special proceeding under this article if, in the court's discretion, it shall appear that the corporation should be dissolved, it shall make a judgment or final order dissolving the corporation.

(b) In making its decision, the court shall take into consideration the following criteria:

(1) In an action brought by the attorney-general, the interest of the public is of paramount importance.

(2) In a special proceeding brought by directors or shareholders, the benefit to the shareholders of a dissolution is of paramount importance.

(3) In a special proceeding brought under section 1104 (Petition in case of deadlock among directors or shareholders) or section 1104-a (Petition for judicial dissolution under special circumstances) dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit.

(c) If the judgment or final order shall provide for a dissolution of the corporation, the court may, in its discretion, provide therein for the distribution of the property of the corporation to those entitled thereto according to their respective rights.

(d) The clerk of the court or such other person as the court may direct shall transmit certified copies of the judgment or final order of dissolution to the department of state and to the clerk of the county in which the office of the corporation was located at the date of the judgment or order. Upon filing by the department of state, the corporation shall be dissolved.

(e) The corporation shall promptly thereafter transmit a certified copy of the judgment or final order to the clerk of each other county in which its certificate of incorporation was filed.

Credits

(Formerly § 1112, L.1961, c. 855. Renumbered § 1111 and amended L.1962, c. 834, § 83. Amended L.1979, c. 217, § 2.)

McKinney's Business Corporation Law § 1111, NY BUS CORP § 1111
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