

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

Matter of the Application of RAMON x
SOLORIN the holder of 25 percent of Index
all outstanding shares of SANTO Number 4592 2012
DOMINGO CAR SERVICE, INC.,

Petitioner, Motion
Date July 10, 2012
-against- Motion Seq. No. 1

For the Dissolution of SANTO
DOMINGO CAR SERVICE INC. a Cal No.: 40
domestic corporation,

Respondent.

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The following papers numbered 1 to 24 read on this by petitioner Ramon M. Solorin pursuant to dissolve Santo Domingo Car Service Inc. (Santo Domingo) pursuant to Business Corporation Law § 1104(a)(3), to adjust the rights and interests of the shareholders of Santo Domingo pursuant to Business Corporation Law § 1104-a(d), to impose a surcharge upon Ana Alaimo, Jose Salazar and Teodoro Rosario a/k/a Todoro Rosario pursuant to Business Corporation Law § 1104-a(d), to enjoin Ana Alaimo, Jose Salazar and Teodoro Rosario pursuant to Business Corporation Law § 1115(a) from transacting any unauthorized business, exercising any corporate powers, except by permission of the court, and paying out or otherwise transferring or delivery any property of the corporation except by permission of the court, and for an award of costs and disbursements in this special proceeding.

Papers
Numbered

Order to Show Cause - Petition- Affirmation -
Exhibits.....1-11

Answering Affidavits - Exhibits.....12-21
Reply Affidavits.....22-24

Upon the foregoing papers it is ordered that the motion is determined as follows:

Petitioner commenced this proceeding seeking judicial dissolution of Santo Domingo pursuant to Business Corporation Law § 1104-a, and for appointment of a receiver. In the petition, petitioner alleges he has owned and held 25% of the outstanding shares of Santo Domingo since January 15, 1993, and that Ana Alaimo, Jose Salazar and Teodoro Rosario are co-shareholders of stock in Santo Domingo, with each owning a one-quarter share of the remaining outstanding shares. Petitioner also alleges that he was the treasurer of the corporation and active participant in the corporation's business, but that beginning on or about June 21, 2011, the co-shareholders initiated an oppressive course of conduct towards him designed to freeze him out of all the affairs of, participation in, and income from Santo Domingo, and to deny him any knowledge about, and any return on, his investment in Santo Domingo. It is alleged that the co-shareholders prevented petitioner from his active participation in the corporation, and failed to make any monthly distributions of corporate profits since September 2010, notwithstanding the corporation grosses approximately \$696,000.00 per year. Petitioner further alleges that the co-shareholders have denied him access to the corporation's bank accounts, books and records, failed to keep adequate records, refused to give him information regarding lawsuits against the corporation and the corporation's activities, failed to reimburse his expenses advanced on the part of the corporation, removed his name as a signatory for a corporate bank account with TD Bank, misappropriated corporate opportunities and monies, and failed to defend lawsuits against the corporation.

By order to show cause dated March 2, 2012, petitioner moves to dissolve Santo Domingo pursuant to Business Corporation Law § 1104(a)(3), adjust the rights and interests of the shareholders of Santo Domingo pursuant to Business Corporation Law § 1104-a(d), impose a surcharge upon Ana Alaimo, Jose Salazar and Teodoro Rosario pursuant to Business Corporation Law § 1104-a(d), enjoin Ana Alaimo, Jose Salazar and Teodoro Rosario pursuant to Business Corporation Law

§ 1115(a) from transacting any unauthorized business, exercising any corporate powers, except by permission of the court, and paying out or otherwise transferring or delivery any property of the corporation except by permission of the court, and for an award of costs and disbursements in this special proceeding. In support of the motion, petitioner submits, among other things, a copy of the petition, a certificate of incorporation for respondent Santo Domingo, minutes of a meeting of the shareholders of Santo Domingo held on July 2, 2007, and a letter dated June 21, 2011 to petitioner from an attorney then representing Ana Alaimo, Jose Salazar, Teodoro Rosario, Ramon Lora and Rafael Gonzalez.

The certificate of incorporation reflects that there were 200 shares of no par value stock issued. The minutes submitted by petitioner indicate that respondent Santo Domingo accepted the offer of petitioner and Ana Alaimo, Jose Salazar and Todoro Rosario, to purchase 28.57 shares of stock from Luis Ocampo, Rafael Gonzalez and Ramon Lora, respectively, and that the corporation accepted Ana Alaimo, Jose Salazar, Todoro Rosario and petitioner as officers of the corporation, with each holding 25% of the total of 200 shares of stock. The June 21, 2011 letter advised petitioner that Ana Alaimo, Jose Salazar, Teodoro Rosario, Ramon Lora and Rafael Gonzalez, unanimously decided to terminate their business relationship with him in connection with the operation, management and ownership of Santo Domingo, and demanded that he arrange for the sale of his stock to them or his purchase of their stock.

Respondent Santo Domingo has served no answer to the petition, but in opposition, offers its counsel's affirmation, affidavits of Ana Alaimo, Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora, and various exhibits. Respondent Santo Domingo asserts that Ana Alaimo, Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora are co-shareholders of stock in Santo Domingo with petitioner and that they have not committed illegal, fraudulent or oppressive acts towards petitioner. Respondent Santo Domingo also asserts that petitioner has engaged in wrongful conduct by writing false and inflammatory letters to various shareholders to create division and dissension among them, and as a consequence, it sought to buy-out petitioner's shares in the corporation. Respondent Santo Domingo offers copies of stock certificates dated June 30, 2010 and minutes of a meeting of

the shareholders of Santo Domingo held on June 30, 2010, to show that petitioner possesses only 33.33 shares of Santo Domingo stock, or 17% of the 200 shares of outstanding stock, and that the remaining shares are owned by Ana Alaïmo, Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora, who each own 33.33 shares of stock. Jose Salazar, Teodoro Rosario, Ramon Lora, and Rafael Gonzalez each state in their respective affidavits that the minutes offered by petitioner in support of his petition are a fabrication and do not constitute the minutes of any Santo Domingo shareholder meeting, and that the alleged transfer and allocation of stock referred to in the minutes is incorrect and inaccurate. Ana Alaïmo states that respondent Santo Domingo was not able to distribute dividends to its shareholders for a period of time when its bank accounts were frozen in connection with enforcement proceedings arising out of a judgment obtained against the corporation in the action entitled *Madtes v Santo Domingo*, (Supreme Court, Queens County, Index No. 21758/2004) and that the bank accounts only became partially accessible in or around December 2011. Ana Alaïmo, Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora also state that petitioner has rejected "payments" from the corporation since December 2011. Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora further state that the corporate records are available for inspection by petitioner.

As a preliminary matter, the court notes that respondent Santo Domingo does not cross move to dismiss the petition by service of a notice of motion and supporting papers. Rather, respondent Santo Domingo, in effect, raises objections in point of law based upon improper service of the order to show cause and petition, and lack of standing, and a claim that judicial dissolution and the other relief sought in the order to show cause is unwarranted. As a consequence, the court deems the affirmation of counsel and the affidavits of Ana Alaïmo, Jose Salazar, Teodoro Rosario, Rafael Gonzalez and Ramon Lora submitted by respondent Santo Domingo in opposition to the order to show cause to be Santo Domingo's answer to the petition (CPLR 405, 2001).

To the extent respondent Santo Domingo asserts improper service of the order to show cause and petition, petitioner has submitted an affidavit of service dated March 22, 2012 of a licensed process server indicating service of a copy of the

order to show cause and petition upon respondent corporation by in-hand delivery to Elizabeth Rosario, as authorized agent for the corporation, on March 20, 2012. Petitioner also submits two affidavits of service dated March 21, 2012 of a licensed process server, indicating service upon New York State Tax Commission and New York State Attorney General by personal delivery on March 20, 2012 of a copy of the order to show cause and petition to William H. Collins and Pam Kelly, the respective authorized agents of New York State Tax Commission and New York Attorney General. Petitioner further submits three affidavits dated March 22, 2012 of a licensed process server, indicating service upon Ana Alaimo, Jose Salazar and Todoro Rosario by in-hand delivery of a copy of the order to show cause and petition to each of them. Petitioner additionally offers an affidavit indicating publication of a copy of the order to show cause and petition in the Forum of Queens (the Forum South) once a week for three successive weeks prior to April 3, 2012. These affidavits constitute prima facie evidence of proper service of the order to show cause and petition upon Ana Alaimo, Jose Salazar and Teodoro Rosario pursuant to CPLR 308(1), and respondent Santo Domingo, and New York State Tax Commission and New York State Attorney General pursuant to CPLR 311, and in accordance with the service directions in the order to show cause (see *Scarano v Scarano*, 63 AD3d 716 [2009]; CPLR 403[c], [d]).

Respondent Santo Domingo does not deny service of the papers upon it, and offers no other evidence to rebut the presumption of proper service established by the process servers' affidavits. Under such circumstances, no evidentiary hearing is warranted on the issue of proper service (see *Associates First Capital Corp. v Wiggins*, 75 AD3d 614 [2010], *supra*). The objection in point of law asserted by respondent Santo Domingo based upon improper service is denied.

Business Corporation Law § 1104-a authorizes a dissolution petition to be brought by the holders of 20% or more of the voting shares of stock of a corporation whose stock is not traded on a securities market (see Business Corporation Law § 1104-a[a]). The statute protects minority stockholders who have been wrongfully excluded from participating in the affairs of the corporation and the provision allows for dissolution or dissolution subject to an opportunity by the corporation to redeem the shares as a

remedy for either illegal, fraudulent or oppressive conduct (see *Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63 [1984]). The appropriateness of an order of dissolution, pursuant to section 1104-a, including whether it should be made subject to an opportunity by the corporation to redeem the shares, rests within the sound discretion of the court (see *id.* at 73).

The submissions herein create questions of fact, which do not allow the court to determine as a preliminary matter, whether petitioner has a sufficient ownership interest in respondent Santo Domingo to establish standing, and second, if petitioner has standing, whether the co-shareholders have engaged in illegal, fraudulent or oppressive conduct towards petitioner, warranting the relief sought in the order to show cause or petition. Under such circumstances, a hearing is necessary on the issue of the extent to which petitioner holds shares in respondent Santo Domingo (see *Matter of Finando*, 226 AD2d 634 [1996]), and in the event the court determines at the hearing that petitioner has at least the requisite ownership interest necessary to bring a dissolution proceeding under Business Corporation Law § 1104-a, the hearing shall continue on the merits of the petition, i.e. whether the co-shareholders have engaged in illegal, fraudulent or oppressive conduct towards petitioner (see *Matter of Fancy Windows & Doors Mfg. Corp.*, 244 AD2d 484, 484 [1997]; *Matter of Rosen*, 102 AD2d 855, 855 [1984]), and if so, the appropriate remedy (see *Matter of WTB Properties, Inc.*, 291 AD2d 566 [2002]).

Accordingly, this matter is set down for a hearing, which shall be held on Friday, December 14, 2012, at 9:30 A.M. in Part 24. The Temporary Restraining Order contained in the Order to Show Cause dated March 2, 2012 shall remain in effect pending the hearing of this matter.

A copy of this order is being faxed on this date to both sides.

Dated: October 3, 2012

Augustus C. Agate, J.S.C.