

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JOSEPH VELLA,

Plaintiff,

-against-

PERFORMANCE MECHANICAL CORP., LLC,
FRANK DELLABOVIE and PANAGIOTIS
PSALIDAS,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 005546/12

MOTION DATE: Oct. 5, 2012
Motion Sequence # 001

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Affidavit in Support..... X
- Reply Affirmation..... X

Motion by plaintiff Joseph Vella for the appointment of a temporary receiver of the assets of Performance Mechanical Corporation is **denied**.

This an action arises from a dispute among the shareholders of defendant Performance Mechanical Corporation. Performance Mechanical is engaged in the business of installation and servicing of air conditioning units. Vella alleges that Performance was formed on May 16, 2001, at which time it issued 50 shares to Vella and 50 shares to Claude Antonelli, who is not a party to the action. In May 2004, Vella entered into an agreement to purchase Antonelli's shares.

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On June 25, 2004, at a special meeting of the stockholders, it was agreed to sell 50 shares each to defendants Frank Dellabovie and Panagotis Psalidas and to Sean Cassidy, who is not a party to the action. On October 28, 2004, the four shareholders entered into a "buy-sell agreement." The agreement provided that the shareholders agreed not to sell their stock to third parties during their joint lives. In the event of the death of a shareholder, the corporation would buy their stock for \$1 million, to be funded by term life insurance. Upon retirement of a shareholder, their stock was to be purchased at a value established by the agreement.

On April 17, 2006, the shareholders passed a resolution that "voting % be increased from 50 % to 70 %." On January 17, 2007, Performance entered into an agreement to purchase Cassidy's shares.

On January 24, 2012, at a special meeting of shareholders and directors, Psalidas and Dellabovie voted to remove Vella as an officer and director of the corporation. The parties are unable to agree as to the price at which Performance would repurchase Vella's shares.

This action was commenced on May 1, 2012. In the first cause of action, Vella seeks a declaratory judgment that he is the sole shareholder of Performance and the share issued to Dellabovie and Psalidas were unauthorized. In the second cause of action, Vella seeks a declaratory judgment that the action of the other shareholders at the January 2012 meeting, removing him as an officer and director, was invalid because it was not approved by the holders of 70 % of the shares. In the third cause of action, Vella seeks a declaratory judgment that Performance's purchase of Cassidy's shares was improper. In the fourth cause of action, Vella seeks a declaratory judgment that defendants are bound by the terms of the buy-sell agreement to repurchase his shares.

By order to show cause dated August 29, 2012, plaintiff seeks the appointment of a temporary receiver over Performance Mechanical's operations, records, accounts, and other property.

Business Corporation Law § 1113 provides that at any stage of an action for judicial dissolution of a corporation, the court may make all orders in connection with preserving the property and carrying out the business of the corporation, including the appointment of a receiver. A party moving for the appointment of a temporary receiver must submit clear and convincing evidence of irreparable loss or waste of the subject property and that a temporary receiver is needed to protect their interests (*Nob Hill Condominium v Bd of Managers*, 2012 N.Y. App. Div. LEXIS 7584 [2d Dept 2012]).

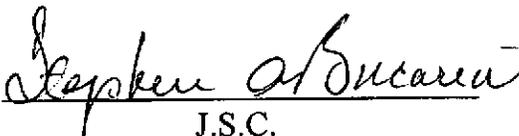
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Plaintiff's conclusory allegation as to mismanagement by defendants does not constitute the required showing. Accordingly, plaintiff Joseph Vella's motion for the appointment of a temporary receiver of the assets of Performance Mechanical Corporation is **denied**.

A Preliminary Conference has been scheduled for February 8, 2013 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated NOV 21 2012


J.S.C.

ENTERED
NOV 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE