

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

DANIEL F. BONAMIE,

Petitioner,

vs.

Index No. 2014-0567

ONGWEOWEH CORPORATION,

Respondent.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

APPEARANCES:

HINMAN, HOWARD & KATTELL, LLP

By: James S. Gleason, Esq.

Attorneys for Petitioner

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HARRIS BEACH, PLLC

By: Edward C. Hooks, Esq.

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119 East Seneca Street

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DECISION & ORDER

Mulvey, Robert C., J.

The respondent corporation (hereinafter the “Company”) has moved for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules to dismiss the petition for dissolution and for declaratory judgment that the shareholders’ agreement sets forth the procedure for determination of the value of the petitioner’s shares.

The petitioner is party to a shareholders’ agreement which prescribes a process and methodology by which the shares of a terminated officer or director can be valued and purchased by the remaining shareholders, without regard to the reason for the termination.

The petitioner seeks judicial dissolution of the Company pursuant to Section 1104-a of the Business Corporation Law on the ground that it failed to honor its obligation under the agreement and oppressed his ability to realize any financial gain from his stock ownership. He has also alleged that the other officers have looted corporate assets.

The Company contends that it has not breached or repudiated the shareholders’ agreement and that because the agreement provides a process for valuation of the stock, the Court should find that liquidation of the corporation through involuntary dissolution is not the only feasible means for the petitioner to obtain a return on his investment, and that it is not reasonably necessary, per BCL Section 1104-a((b)(1) and (2).

DISCUSSION

At issue is whether a letter from the Company counsel, dated May 6, 2014, evidences a repudiation of the shareholders’ agreement.

The letter is part of a series of communications between the parties’ respective attorneys. It followed the termination of the petitioner’s employment with the Company and his removal from the board of directors, in February and March 2014, and an exchange of proposals for the purchase of the petitioner’s shares. The letter begins by announcing the Company’s discovery that the petitioner “appears” to have engaged in improper self-dealing, recites the supporting facts, and then sets forth counsel’s assertion that a self-paid bonus constituted an act of dishonesty warranting termination under paragraph 3.1 of the agreement thereby rendering him ineligible for a buyout under paragraph 3.2. The letter concludes with an invitation for further communications, which took place. After the petitioner communicated his intent to commence this proceeding, Company’s counsel wrote on July 11, 2014 that the Company had withdrawn its position that the petitioner had engaged in improper acts, and that it proposed to proceed with a

buyout under paragraphs 3.2 and 5.2.

The Court finds that the May 6 letter cannot be construed as a repudiation or material breach of the shareholders' agreement. Instead, it must be viewed as an invocation of the agreement.

The petitioner relies upon the holding in **Matter of Funplex, Inc.** [214 AD2d 858 (Third Dept., 1995)] for the proposition that a party who has materially breached a shareholder agreement is precluded from maintaining an action to enforce it. In that case the court did not determine whether there was a breach, yet noted that if the respondents had acted as alleged (barring the petitioners from participating in the business) they should not be able to use the advantageous terms of the agreement. It also appears from the facts of that case that there was no operative agreement, because the contractual right to purchase the petitioners' shares had not been triggered. The holding in **Funplex** is not applicable here.

The Court further finds, contrary to the petitioner's contention, that the shareholders' agreement applies even if a dissolution proceeding is commenced, see **Matter of Dissolution of El-Roh Realty Corp.**, 48 AD3d 1190 (Fourth Dept., 2008).

Finally, because the shareholders' agreement explicitly provides for a method for the valuation and purchase of the petitioner's shares, the Court concludes that involuntary dissolution is not the only feasible means for the petitioner to obtain a return on his investment.

CONCLUSION

For the foregoing reasons, the Court hereby dismisses the petition and directs the parties to follow the procedures set forth in paragraphs 3.2, 5.2(b) and 5.3 of the shareholders' agreement. In the event the parties cannot agree on the value of the stock, they shall jointly retain a third-party appraiser whose determination shall be final and binding.

This shall constitute the Order of the Court.

Signed this 12th day of November, 2014 at Ithaca, New York.

Hon. Robert
C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
DN: cn=Hon. Robert C. Mulvey,
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