

NYSCEF To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 10/28/2014

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,  
Justice.

-----X  
In the Matter of the Application of MICHAEL ZWARYCZ,  
as a holder of fifty percent of all outstanding shares of  
Marina Construction Inc.,

Index No. 63671/14  
Motion Seq. # 1  
Motion Date: 10/27/14

Petitioner,

DECISION & ORDER

for the Judicial Dissolution of

STEMAR CONSTRUCTION INC.,  
a New York corporation, pursuant to Business Corporation  
Law § 1104 and/or the common law of New York

-against-

STEMAR CONSTRUCTION INC., KERRY SULLIVAN  
and WILLIAM J. SULLIVAN,

Respondents.  
-----X

Scheinkman, J:

The following papers numbered 1 to 16 were read on this order to show cause petition brought by Michael Zwarycz ("Petitioner" or "Zwarycz") for an order dissolving Respondent Stemar Construction Inc. (the "corporation"):

Order to Show Cause - Affidavit of Michael Zwarcyz	1-2
Petition and Exhibits	3-10
Affirmation of Peter Piddoubny, Esq.	11
Affirmation in Anthony G. Piscionere, Esq. in Opposition and Exhibits	12-14
Affidavit of William J. Sullivan, Jr.	15
Affidavit of Kerry Sullivan	16

Upon the foregoing papers it is ordered that this petition is decided as follows.

Petitioner and Respondents have been in litigation for several years over whether Petitioner is a shareholder of the corporation. Petitioner, having recently prevailed in that litigation, now seeks the dissolution of the corporation. While it is true that there is enmity between the parties, and while it is also true that counsel for Respondents represented that Respondents would not agree to a shareholders' meeting pending the outcome of an appeal, the fact remains that the corporation owns real estate and has historically made a profit. At the initial appearance before this court, the parties were able to reach an agreement as to restraints on Respondents' conduct pending the return date. On the return date of this proceeding, the parties initially agreed to hold a shareholder meeting over the lunch recess, though the actual holding of the meeting did not occur because of Petitioner's insistence that Respondents acknowledge that Petitioner had effectively transferred one-half of his shares to his wife. While Respondents were willing to proceed with the meeting if Petitioner gave his wife a power of attorney over his shares, Petitioner's counsel declined to proceed, claiming that Petitioner wanted "parity".

Because there is no indication that (1) Respondents' defense to Petitioner's claim of stock ownership was frivolous such that Respondents' refusal to recognize Petitioner's claim of ownership over the past years is a basis for finding that both sides cannot manage to operate the corporation together prospectively; (2) Petitioner and Respondents are so divided on the management of the corporation's affairs that action by the Board cannot be obtained or that they cannot elect directors (BCL § 1104[a][1] and 1104[a][2]),<sup>1</sup> or (3) there is such internal dissension that dissolution would be beneficial to the shareholders (BCL § 1104[a][3]), cause for dissolution does not now exist. Respondents' stated willingness to proceed with a shareholders' meeting to discuss all business affairs also tends to negate a finding of deadlock. Accordingly, the Court shall dismiss the causes of action seeking a dissolution (First, Second and Seventh Causes of Action), without prejudice to these claims being pursued again in the event a shareholders' meeting is not held within a reasonable time or in the event that, subsequent to the date hereto, cause for dissolution arises. With regard to Petitioner's claims for injunctive relief, an accounting, fraud, unjust enrichment and breach of fiduciary duty (Third, Fourth, Fifth and Sixth Causes of Action), those causes of action are hereby severed and the Court shall hold a preliminary conference on such claims on November 14, 2014 at 9:30 a.m. since it would appear that Petitioner may, at the very least, have a direct cause of action based on his claim that Respondents have wrongfully excluded him from the dividends issued for the six years prior to the commencement of this proceeding (Petition at ¶¶ 43, 83, 93-103). In addition, Petitioner may well have a claim for breach of fiduciary duty based on looting, however, such a claim would necessarily have to be brought derivatively. At the conference, the Court and the parties will address a discovery schedule as well as any pleading issues that remain.

Based on the foregoing, it is hereby

---

<sup>1</sup>In this regard, although Petitioner's and Respondents' counsel could not initially agree on an attorney to represent the corporation in this proceeding, both Petitioner and Respondents readily agreed to this Court's suggestion that the corporation retain Paul Noto, Esq. to represent the corporation's interests as a nominal respondent in this proceeding.

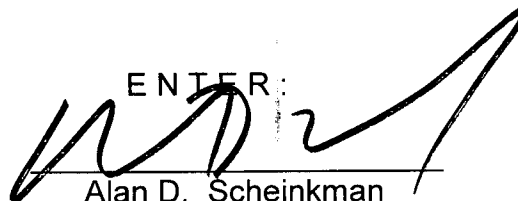
ORDERED that Petitioner's First, Second and Seventh Causes of Action are dismissed without prejudice to these claims being pursued again in the event a shareholders' meeting is not held within a reasonable time or in the event that, subsequent to the date hereto, cause for dissolution arises; and it is further

ORDERED that Petitioners' Third, Fourth, Fifth and Sixth Causes of Action are hereby severed and the Court schedules a Preliminary Conference to be held with regard to said causes of action on November 14, 2014 at 9:30 a.m.; and it is further

ORDERED that the conference scheduled for November 14, 2014 shall not be adjourned without the prior written consent of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
October 28, 2014

ENTER:  
  
Alan D. Scheinkman  
Justice of the Supreme Court

APPEARANCES:

PETER PIDDOUBNY, ESQ.  
Attorneys for Petitioner  
25-84 Steinway Street  
Astoria, New York 11103

PISCIONERE & NEMAROW, P.C.  
By: Anthony G. Piscionere, Esq.  
Attorneys for Respondents Kerry Sullivan and William J. Sullivan, Esq.  
263 Boston Post Road  
Rye, New York 10580