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Matter of Digeser v Flach
2015 NY Slip Op 51609(U)
Decided on November 5, 2015
Supreme Court, Albany County
Platkin, J.
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In the Matter of the Application of Hank Digeser, as a Shareholder of GOULD ERECTORS & RIGGING, INC., For the Judicial Dissolution of GOULD ERECTORS & RIGGING, INC., and the Petition of HANK DIGESER, as a Shareholder of FLACH CRANE & RIGGING CO., INC., For the Judicial Dissolution of FLACH CRANE & RIGGING CO., INC., Petitioner,

against

John C. Flach and GOULD ERECTORS & RIGGING, INC., and FLACH CRANE & RIGGING CO., INC.,, Respondents.

2382-13

APPEARANCES:

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Richard M. Platkin, J.

Petitioner Henry A. Digeser commenced this special proceeding on April 30, 2013 seeking the judicial dissolution of the two respondent business corporations: Gould Erectors & Rigging, Inc. ("Gould") and Flach Crane & Rigging Co., Inc. ("Flach Crane"). Petitioner allegedly holds minority interests comprising at least 20% of the shares of both corporations, with the remaining majority interests owned by respondent John C. Flach. The petition seeks dissolution of the corporations under Business Corporation Law ("BCL") § 1104-a, based [*2]principally upon allegations of oppressive conduct.[FN1]

Following the completion of extensive fact discovery, the Court ordered a trial on the dissolution allegations of the petition, advising the parties that further proceedings would be held concerning a remedy in the event that petitioner establishes grounds for dissolution under BCL § 1104-a (a). At the trial, which was held over six days, the Court heard the testimony of 17 witnesses and received almost one hundred documents into evidence. Post-trial briefing was completed on or about September 18, 2015. Based upon the credible testimony and evidence adduced, the Court hereby makes the following findings of fact and conclusions of law.

BACKGROUND

Gould is a domestic business corporation formed in or about 1970 to perform commercial construction work. By 1982, Gould was wholly owned by John P. Flach, the father of respondent. John P. Flach has owned and started many other successful businesses in the Capital Region. For many years, he worked closely with Henry J. Digeser, a licensed engineer and the father of petitioner.

Flach Crane originally was formed as R.S. and L. Construction, Corp. ("RSL") in April 1987. John P. Flach purchased all of the shares of RSL and changed its name to Flach Crane in late 1988. His objective was to establish a separate corporation that would insulate Gould's assets from the potential risks associated with crane work.

Petitioner alleges that he is the owner of 24 of 98 issued shares of Gould and the owner of 25 of 100 shares of Flach Crane, with respondent owning the remaining shares. Petitioner claims to have acquired 19 of these shares in the late 1980s, before starting employment with Gould. Certain aspects of petitioner's claim of ownership are controverted by respondent. Until shortly before the commencement of this proceeding, petitioner served as the vice-president of both Gould and Flach Crane. Respondent was and remains the president of both corporations. The parties and their fathers were directors of the corporations at pertinent times.

From about 1990 until late 2012, Gould and Flach Crane were managed jointly by petitioner and respondent. Petitioner focused primarily on the day-to-day operations of Gould, including bidding and project management. Respondent, a licensed crane operator, exercised a more general oversight role with respect to Gould, with a particular emphasis on projects involving crane work. Respondent also was actively involved with Flach Crane with respect to the bidding of jobs, the setup and operation of cranes, and supervision of crane work. As petitioner is not a licensed crane operator, his role with Flach Crane was more limited, focusing primarily on management issues, including scheduling and planning. Over the years, the parties had a close working relationship, and they and their families were friendly.

Through the efforts of both respondent and petitioner, Gould and Flach Crane became very successful and profitable. Gould's gross annual revenues exceeded $10 million at times, and Flach Crane shows a profit margin well in excess of industry standards. Flach Crane's balance sheet also reflects the ownership of millions of dollars of crane equipment and no associated [*3]indebtedness. The success of the two corporations allowed the parties to draw substantial compensation — totaling more than $2 million per year at times.

It was John P. Flach's long-standing desire that both petitioner and respondent receive substantially equal compensation from the two corporations. As memorialized in the minutes of the November 20, 2000 meeting of the Gould board of directors, the parties agreed to jointly determine their compensation annually and distribute it on an equal basis, notwithstanding their unequal ownership interests. In most years, respondent's compensation came in the form of "bonuses" and other compensation from Flach Crane, of which he was an employee. Petitioner's compensation came in similar form, but exclusively from Gould. Neither corporation declared dividends.

By 2007, the next generation of the Flach and Digeser families had become involved in the corporations. The parties developed a succession plan that involved the formation of a new corporation owned in equal shares by three of petitioner's sons and two of respondent's sons. It was the parties' intention that respondent's oldest son J.C., who was highly regarded by all, would serve as president of this corporation. However, J.C. died in a tragic accident in September 2012, and respondent's other son, Keith, was not a suitable candidate to lead an engineering-intensive business.

In the immediate aftermath of J.C.'s death, the parties' relationship deteriorated. The parties offer starkly different explanations of the cause of the breakdown, and each holds the other responsible. Each party also claims that the other first raised the notion of a buy-out. There is no dispute, however, that by early December 2012, respondent wanted a "divorce" from petitioner to focus his efforts on developing a line of business that would be suitable for Keith to eventually run. Petitioner did not have an interest in leaving to start a new company under the proposal advanced by respondent. At that point, things got much worse.

Ultimately, petitioner was terminated as a director of Gould and Flach Crane as of January 29, 2013, and he was given notice that his employment with Gould would be terminated after he completed an important project. The work was completed on April 29, 2013, petitioner commenced this proceeding for judicial dissolution on April 30, 2013, and petitioner's employment with Gould was terminated as of May 1, 2013.

ANALYSIS

Business Corporation Law § 1104-a (a) authorizes a minority shareholder with at least 20% of the voting interest in a corporation to petition for judicial 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.

Petitioner argues that respondent's actions following the death of J.C. and prior to the commencement of this proceeding constitute oppression. Petitioner further contends that respondent has been guilty of converting and looting corporate assets for personal purposes. [*4]Respondent disputes certain of petitioner's allegations regarding stock ownership, and he denies the claims of oppression and conversion. Respondent further maintains that any adverse actions taken with respect to petitioner were the product of petitioner's own bad-faith conduct and petitioner's theft and misuse of corporate assets. Finally, respondent argues that the petition is barred by the equitable doctrines of unclean hands and estoppel.

A. Ownership of the Corporations

1. Gould

Gould's corporate records show that John P. Flach gifted 19 shares of Gould to petitioner by a stock certificate dated February 19, 1986 that was signed by John P. Flach and respondent. The same records show an additional five shares of Gould having been conveyed to petitioner via stock certificate dated June 1, 2001, which was signed by petitioner and respondent. A handwritten note affixed to the 2001 certificate states that petitioner paid John P. Flach the sum of $50,000 for the five shares.[FN2] The remaining 74 shares of Gould are owned by respondent.

At trial, respondent identified a number of discrepancies concerning the corporate records. Respondent observes that the gift of 19 shares preceded petitioner's involvement in Gould, there is no entry on the corporate stock ledger evidencing the transfer, and a different stock certificate issued by Gould on the same date bears a different typeface. Further, Gould's tax returns identify John P. Flach as Gould's sole shareholder until 1996, at which time petitioner and respondent were identified as the owners of 19 and 74 shares respectively. And respondent and his father insist that the five shares conveyed to petitioner in 2001 were a gift.

While it is difficult to reconcile all of these discrepancies, the minutes of a special shareholders meeting of Gould held on November 30, 1989 do reflect petitioner's ownership of 19 shares of stock no later than November 30, 1989.[FN3] This generally is consistent with the testimony of petitioner and his father as to when the shares were acquired. Further, the minutes of a June 2, 2001 shareholders meeting evidence an agreement to convey five shares of stock to petitioner for the sum of $5,000 pursuant to a long-standing agreement of the parties. Moreover, respondent and his father do not dispute the authenticity of their signatures appearing on the stock certificates and meeting minutes.

Claiming that he and his father were induced to sign back-dated documents presented by Henry J. Digeser, respondent insists that the Court should rely upon the representations of ownership made on Gould's federal tax returns. Respondent has not, however, provided a persuasive basis for believing that the representations made on the tax returns are of greater reliability than the stock certificates and corporate meeting minutes signed by respondent and his father. Indeed, the testimony at trial showed that Gould's outside accountant was not always advised of stock transfers and, consequently, "had to work in the dark sometimes". Accordingly, the Court finds that petitioner is the owner of 24 of the 98 issued and outstanding shares of Gould and that he received 19 of the shares prior to commencing employment on April 12, [*5]1990.[FN4]

2. Flach Crane

The first corporate minutes for Flach Crane, dated June 7, 1993, reflect that 75 shares of the company were owned by respondent and the remaining 25 shares were owned by petitioner. The same ownership interests are reflected in stock certificates dated December 14, 1988. The certificate evidencing the conveyance of 75 shares to respondent is signed by both John P. Flach and Henry J. Digeser, but the certificate conveying 25 shares to petitioner is signed only by John P. Flach.

Respondent raises several challenges to the stock ownership reflected in Flach Crane's corporate books and records. A letter in the corporate books dated January 9, 1989 from Flach Crane's then-counsel to John P. Flach and Henry J. Digeser states that no shares in the corporation had been issued. Further, petitioner's stock certificate is signed only by John P. Flach, in contravention of corporate by-laws stating that a stock certificate shall exhibit two signatures. Respondent also relies upon tax returns that consistently fail to identify petitioner as a shareholder.

Given John P. Flach's testimony that he gifted 25 shares to petitioner, the presence of Mr. Flach's signature on the stock certificate, and the additional confirmation of ownership provided by the minutes of the corporation's initial meeting, the Court is unpersuaded by respondent's claim that the absence of a second signature from petitioner's stock certificate renders the conveyance void or voidable. Further, while the Flach Crane corporate records suffer from various discrepancies, respondent again fails to provide a persuasive basis for preferring the corporation's tax returns. Accordingly, the Court finds that petitioner acquired 25 of the 100 issued and outstanding shares of Flach Crane on December 18, 1988.

B. Oppression

The term "oppressive actions" used in BCL § 1104-a (a) (1) refers to conduct that substantially defeats the reasonable expectations of the minority shareholder:

> 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 [*6]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 [Gardstein]*, 64 NY2d 63, 73 [1984]).

Oppression may be found where the minority shareholder is excluded from the operation of the corporation (*Matter of Clever Innovations, Inc. [Dooley]*, 94 AD3d 1174, 1176 [3d Dept 2012]). A finding of oppression also "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 [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment" (*Matter of Parveen*, 259 AD2d 389, 391 [1st Dept 1999]; *see Matter of Williamson v Williamson, Picket, Gross*, 259 AD2d 362 [1st Dept 1999]).

1. Gould

The Court finds that, beginning in December 2012 and continuing through the April 30, 2013 commencement of this proceeding, respondent caused petitioner to be excluded from Gould in almost every respect.

Petitioner was removed from the board of directors, dismissed as corporate secretary, and given notice that his employment would be terminated after completion of the SUNY Nanotech project (and, in any event, no later than May 30, 2013). During the remainder of his employment, petitioner was denied access to his work computer and email, severely restricted in his interactions with Gould's customers and employees, and made the subject of "secret" off-site staff meetings in which respondent accused petitioner of improprieties. And after petitioner refused respondent's buy-out offer, respondent summarily fired petitioner's children from Gould and dismissed long-time employees who were perceived to be loyal to petitioner. Moreover, despite the long-standing agreement and understanding that the parties would share equally in bonuses and other compensation, respondent paid himself a $350,000 bonus in December 2012 and declined to pay petitioner anything.[FN5] As respondent himself acknowledged at trial, all of this conduct was undertaken with the specific purpose and intent of forcing a separation with petitioner.

The Court is satisfied that respondent's conduct in denying petitioner continued employment, freezing him out of the management and affairs of Gould and denying him at least a proportionate share of the corporation's profits all served to defeat legitimate expectations of the petitioner that were objectively reasonable and central to petitioner's long-standing participation in the venture.

John P. Flach gifted the 19 shares to petitioner to create a strong incentive for petitioner to work hard and build Gould into a successful and profitable enterprise. As Mr. Flach testified, it was his "rule of thumb" to give "the person that [he] chose to be the manager who would be in charge . . . 25 percent of the corporation stock for free . . . because . . . it would be incentive for them to work and do a good job. Put in extra time if they needed to make the company to be [*7]successful." And based upon a decade of success at Gould, petitioner was given the opportunity to acquire five additional shares. While petitioner's hard work over the many years is not the only reason for Gould's tremendous success, it certainly was an important factor.

In arguing against a finding of oppression, respondent contends that the Court must consider petitioner to have been employed by Gould on the date of commencement because petitioner was not fired until May 1, 2013, one day later. The Court disagrees. Respondent already had given petitioner notice that he was to be terminated from employment in short order and would remain an employee only so long as it took to complete the SUNY Nanotech project for Gould.

Respondent also argues that petitioner cannot claim a reasonable expectation of receiving dividends from Gould, since the corporation had no history of paying dividends. The parties did, however, have a long-standing custom and practice of distributing *de facto* dividends to the two shareholders in the form of "bonuses" and other compensation (*see Matter of Kemp & Beatley*, 64 NY2d at 67). Further, it is of no moment that petitioner was not employed by or receiving dividends from Gould when he acquired his initial 19 shares. Petitioner's reasonable expectation, as confirmed by the testimony of

John P. Flach, was that he would manage the company, help it grow and prosper, and ultimately share in its financial success. Nothing in BCL § 1104-a forecloses a minority shareholder who receives shares as a gift from claiming oppression where the shares induced the minority holder to invest time and labor in bringing about the success of the enterprise (*see e.g. Matter of Burack [I. Burack, Inc. — Burn-Rite Valve Mfg. Corp.]*, 137 AD2d 523, 526 [2d Dept 1988]).

In fact, respondent essentially concedes that petitioner's expectations regarding his ownership interest in Gould were reasonable, at least until late 2012. Respondent argues, however, that petitioner's "multiple acts of wrongful behavior" defeated respondent's own reasonable expectations and justified his exclusion of petitioner from Gould. The same allegations of wrongful behavior form the basis of respondent's equitable defenses of unclean hands and estoppel. For the reasons that follow, the Court finds these claims and defenses insufficient, either individually or collectively, to justify respondent's oppressive acts.[FN6]

a. Copeland Hill

With respect to the Copeland Hill transaction (also referred to as Code of the West), respondent has failed to demonstrate any impropriety on the part of petitioner. The pertinent facts appear to have been adequately and timely disclosed to respondent, as evidenced by corporate meeting minutes signed by respondent in 2005 (*see Peabody v Northgate Ford, Inc.*, 16 AD3d 879 [3d Dept 2005] [party bound by signed documents regardless of whether or not he read them]). The transaction also was the subject of at least one (and possibly several) contemporaneous conversation, although the parties disagree as to what was said between them [*8]more than one decade prior. Under all of the circumstances, this belated and unsubstantiated grievance cannot serve to justify respondent's oppressive actions toward petitioner.

b. Glenmont Property

The Court also rejects respondent's contention that petitioner acted in bad faith by refusing to commit to a long-term lease of his Glenmont property to Gould. There had been no written lease for the property in place since 2009, and respondent's first request for a long-term lease came at a time when he actively was seeking to sever his business relationships with petitioner. Moreover, any competition by petitioner against the corporations came only after petitioner's termination from employment and in response to respondent's acts of oppression (*see Matter of McKeown [Image Collision, Ltd.]*, 94 AD3d 1445, 1447 [4th Dept 2012]).

c. Personal Benefit

After respondent had decided to force a separation from petitioner, respondent and his attorneys and forensic auditors vigilantly scoured Gould's corporate books and records to identify any personal financial benefits that petitioner may have improperly conferred upon himself or his family over the years. The testimony at trial, however, showed that both parties long had operated in a business environment in which the shareholders freely and mutually exploited their corporate ownership interests in ways that benefitted themselves and their families. Thus, while respondent complains that petitioner's son purchased a residence from the corporation for less than fair value,[FN7] the proof shows that Gould invested far more substantial sums in constructing a residence for respondent's son. Simply put, the record shows that a tacit agreement existed over the years between the two shareholders to use corporate funds to personally benefit the Flach and Digeser families in various ways.

This can be seen most clearly with respect to automobile racing, a long-time hobby of respondent and his family. In what is now claimed to be advertising,[FN8] respondent caused the subject corporations to spend extraordinary sums sponsoring a racing team: about $2.5 million in the six years preceding commencement of this proceeding. This entailed not only the sponsorship of a racing team, but also the employment of a full-time race-car mechanic. In addition, respondent's wife was reimbursed almost $70,000 for expenses allegedly pertaining to auto racing.

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This is not to say petitioner acted correctly and properly toward respondent and the corporations at all times. As the minority shareholder, petitioner can and should have done more to ensure that transactions in which he was interested were conducted with the appropriate degree of rigor and that respondent's consent was knowingly given after full disclosure. And respondent would have been well within his rights to make changes after he became more involved in the [*9]business following the death of his son.[FN9]

But respondent went too far in freezing petitioner out of Gould and stripping him of virtually all of the incidents of ownership reasonably associated with his substantial minority stake (*see Matter of O'Neill,* 214 AD2d at 737-738; *see also Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d 81, 84 [3d Dept 1985]; *DiMino v DeVeaux Servs.*, 238 AD2d 943, 993-994 [4th Dept 1997]). If respondent truly had lost trust and confidence in petitioner, it was incumbent upon him to craft a reasonably proportionate response — one that, at a minimum, recognized petitioner's reasonable expectation of deriving at least some economic benefit from his stock ownership (*see Gimpel v Bolstein*, 125 Misc 2d 45 [Sup Ct, Queens County 1985]).

Under the circumstances, respondent's conduct must be deemed to constitute oppression. For similar reasons, respondent has failed to establish his defenses of bad faith, unclean hands or equitable estoppel.

2. Flach Crane

Flach Crane was formed principally as a means of insulating Gould's assets from the substantial risks and liabilities associated with crane work. The corporation's initial inventory of crane equipment came mainly from Gould, although some equipment also came from a related Flach corporation.

Flach Crane provides crane services to both Gould and to third parties. Work for Gould has always been an important source of income to Flach Crane and, in some years, its primary source of income. While Flach Crane appears to have transacted business with third parties on an arm's length basis, both petitioner and respondent testified that they would sit down at the end of each year and jointly determine the amount that Flach Crane would invoice Gould for specific jobs. This determination reflected not only the cost of performing the work, but also unrelated factors pertaining to the finances of the two corporations, such as Flach Crane's need for capital to invest in new cranes, income tax considerations and the payment of bonuses and compensation to shareholders.[FN10]

Flach Crane and Gould shared the same office space pursuant to a sub-lease that did not call for the payment of fixed rent. The two companies also shared the same officers and directors. In addition, there was some sharing of employees. At times when there was no crane work, Flach Crane's operators and mechanic provided assistance to Gould; similarly, Gould personnel provided services to Flach Crane in areas such as administration, scheduling and management. However, both companies kept their own books and records, filed separate tax returns and complied with corporate formalities in their own right.

In evaluating whether petitioner has proven grounds for the dissolution of Flach Crane, both sides rely to varying degrees upon legal doctrines that allow corporate separateness to be disregarded. "A plaintiff seeking to pierce the corporate veil must demonstrate that a court in [*10]equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009] [citations omitted], *affd* 16 NY3d 775 [2011]). Corporate separateness may also be disregarded "when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 893-894 [3d Dept 2003]).

Respondent argues with some force that petitioner has failed to plead or prove the prerequisites for piercing the corporate veil or deeming Flach Crane to be the alter-ego of Gould. The Court is inclined to agree, at least with respect to claims of third parties. There has been no proven abuse of the corporate form or showing that Flach Crane has been so dominated by Gould that it cannot be deemed to have an independent corporate existence.

But the Court is not convinced that petitioner must demonstrate the applicability of the alter-ego or veil-piercing doctrines to obtain the dissolution of Flach Crane. Petitioner will have established grounds for the dissolution of Flach Crane under BCL § 1104-a (a) (1) if he establishes that respondent's acts of oppression have defeated reasonable expectations that were central to petitioner's decision to join the venture. The Court is satisfied that petitioner has made such a showing here.

In particular, petitioner has established a reasonable expectation that he would derive economic benefit from his minority ownership interest in Flach Crane through at least a share of the corporation's profits. As stated above, John P. Flach gave the shares of stock to petitioner for the specific purpose and objective of investing petitioner in the success of Flach Crane and creating an incentive for petitioner to work hard to make the corporation successful and profitable. Petitioner did in fact contribute to Flach Crane's success. However, by the date of commencement of this proceeding, respondent made it clear through his words and conduct that petitioner would no longer receive *any* economic benefit from his minority interest in Flach Crane.

In opposing dissolution, respondent correctly observes that petitioner never received any compensation from Flach Crane. On that basis, he argues that petitioner could not have had a reasonable expectation of realizing any economic benefit from his shares of Flach Crane. But this argument disregards the fact that the shareholders, directors and officers of Gould and Flach Crane treated the two corporations as a single, integrated economic unit, reflective of the fact that the two corporations were separated only to limit potential legal liability to third parties.[FN11]

Thus, while respondent received a steady stream of *de facto* dividends from Flach Crane, petitioner was compensated at a substantially similar level using Gould funds. Indeed, since the two companies did not transact business with one another on an arm's length basis, some of the Flach Crane funds used to pay respondent came from Gould in the form of management fees and other inter-company transfers for less than fair consideration. Under the circumstances, [*11]petitioner had a reasonable expectation of receiving at least a proportionate share of the profits of Flach Crane and that expectation was central to his decision to participate in the management and affairs of Flach Crane for more than two decades.

Accordingly, the Court finds that petitioner has established shareholder oppression with respect to his minority interest in Flach Crane.

CONCLUSION

Based on the foregoing, it is

ADJUDGED that the petition is granted to the limited extent of determining that petitioner has established grounds for dissolution of Gould and Flach Crane under Business Corporation Law § 1104-a (a) (1); and it is

ORDERED that the parties shall appear for a conference in the Chambers of the undersigned on December 11, 2015 at 9:30 a.m. to schedule further proceedings regarding a remedy.

This constitutes the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being transmitted to petitioner's counsel for filing and service; all other papers are being transmitted to the Albany County Clerk. The parties shall retrieve their original trial exhibits from Chambers within twenty (20) days; otherwise, they will be discarded. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: November 5, 2015
Albany, New York

Richard M. Platkin
A.J.S.C.

Footnotes

Footnote 1: The petition also alleges waste and looting as grounds for dissolution. In addition, the petition originally sought an accounting of the corporations, but those causes of action were dismissed for lack of personal jurisdiction (*see Matter of Gould Erectors & Rigging, Inc.*,119 AD3d 1039, 1041 [3d Dept 2014]).

Footnote 2: Henry J. Digeser testified that he authored this note and mistakenly referred to the sum of $50,000, rather than the correct sum of $5,000.

Footnote 3: There are no corporate records for Gould between July 1, 1986 and November 29, 1989.

Footnote 4: Petitioner did not specifically recall when he began employment with Gould, but believed it was somewhere in the 1988-1989 time-frame. Gould's business records shown that petitioner commenced employment on April 12, 1990, and petitioner's first reported wages from Gould were in 1990. Under the circumstances, the Court finds that petitioner began employment with Gould on April 12, 1990.

Footnote 5: By the date of commencement, it was clear that respondent would not be authorizing any further payments to petitioner.

Footnote 6: Insofar as it is relevant, the Court further finds that none of petitioner's alleged misconduct was "undertaken with a view toward forcing an involuntary dissolution" (*Kemp*, 62 NY2d at 74; *Burack*, 137 AD2d at 526-527). The bulk of respondent's allegations concern events that transpired many years before, which were dredged up only after respondent set out to terminate his business relationship with petitioner (*see Matter of Upstate Med. Assocs. P.C.*, 292 AD2d 732, 733 [3d Dept 2002]).

Footnote 7: Given respondent's inattentiveness to certain types of business details, the Court has no reason to disbelieve petitioner's testimony that the sale of corporate property to his son was disclosed to respondent, who replied "whatever". Indeed, the closing on the property was held at Gould's corporate offices.

Footnote 8: The corporate tax returns treated racing as an ordinary business expense.

Footnote 9: For example, respondent could have established a system of internal controls, curtailed petitioner's discretionary authority in certain areas and/or taken remedial steps tailored to address any prior abuses (*see e.g. Matter of O'Neill,* 214 AD2d 736, 737-738 [2d Dept 1995]).

Footnote 10: As stated above, petitioner was compensated exclusively by Gould, and respondent was compensated primarily from Flach Crane.

Footnote 11: Indeed, the record shows that petitioner had a reasonable expectation that the two corporations would be treated a single economic unit for purposes of shareholder compensation.

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