

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of

DAVID CARASSO, HELAINE FRASER, HOWARD
GOLDBERG, ROBERT GOLDBERG, ARTHUR ISRAEL,
RICHARD ISRAEL, SOL ISRAEL, LORRAINE LEVY, BETH
CARASSO SPECTOR and SANDRA C. WEIN REVOCABLE
TRUST,

Index No. 606702/2014

Hon. Vito M. DeStefano

Shareholder-Petitioners,

-against-

PAULINE J. PERAHIA REVOCABLE TRUST, MILDRED S.
QUAIN TRUST and SOLOMON SEVY,

Shareholder-Respondents,

for an order granting judicial dissolution of

CATALINA OPERATING CORP. and SEA ISLE REALTY
CORPORATION,

Corporate-Respondents.

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SHAREHOLDER-PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION
TO DISMISS THIS PROCEEDING

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STATEMENT OF FACTS

At the time this dissolution proceeding was initiated in December, 2014, the Catalina Operating Corp. had a deadlocked board of directors which had failed to appoint a manager to prepare the Catalina Beach Club for the summer 2015 season. Now, however, the board of directors is no longer deadlocked and Sandra Wein has been reappointed as Manager for the 2015 season.

The corporate by-laws of Catalina Operating Corp. provide for a three member board of directors. Despite that, prior to March, 2015, the board of directors of the Catalina Operating Corp. functioned informally with four *de facto* members: Sandra Wein, Lorraine Levy, Pauline Perahia and Mildred Quain.

In March, 2015, Mildred Quain passed away, leaving a three member board of directors of Catalina Operating Corp., as contemplated by its by-laws.

At a duly convened meeting of the board of directors held on March 23, 2015, the board of Catalina Operating Corp., by a vote of two to one, adopted a resolution reappointing Sandra Wein as Manager for the 2015 season, at the same compensation paid to her for the 2014 season.

At a duly convened meeting of the board of directors held on May 1, 2015, the board unanimously determined that certain units would not be rented for the 2015 season due to their need for repairs. Also on May 1, 2015, the board of directors, by a vote of two to one, ratified and approved all prior compensation paid to Sandra Wein for her services as Manager.

Therefore, the board of directors of Catalina Operating Corp. is functioning and is free of the paralysis that resulted from the previous deadlock among directors.

Sea Island Realty Corporation is a real estate holding company and, as such, its board of directors has not been called upon to make any operating decisions. Therefore, it has not experienced deadlock or interference with its management.

While disagreements continue to exist among the corporate shareholders, those disagreements have not prevented management from preparing the beach club for the 2015 season, nor prevented shareholders from negotiating for the sale of corporate assets.

Accordingly, it is respectfully urged that the grounds for judicial dissolution that existed at the time this proceeding was commenced no longer exist, and the Court should grant this motion by petitioners to dismiss this proceeding.

POINT I

THE COURT SHOULD DISMISS THIS PROCEEDING UNDER BCL §1116

BCL §1116 provides:

Discontinuance of action or special proceeding

An action or special proceeding for the dissolution of a corporation may be discontinued at any stage when it is established that the cause for dissolution did not exist or no longer exists. In such event, the court shall dismiss the action or special proceeding and direct any receiver to redeliver to the corporation all its remaining property.

As stated in the accompanying affidavit of petitioner Lorraine Levy, the petitioners seek to discontinue this proceeding because the grounds for judicial dissolution that existed at the time this proceeding was commenced no longer exist. Once the Court finds that the cause for dissolution no longer exists, the dissolution proceeding no longer exists, and the court “shall dismiss” it. See, Lipton v. Carmel Professional Office Park, Inc., 308 A.D.2d 452 (2d Dept.) *app. denied*, 1 N.Y.3d 504 (2003). This may be done “at any stage” of the proceeding.

This is not a case like In the Matter of Hung Yuk Ong, 299 A.D. 2d 173 (1st Dept. 2002), *app. denied*, 99 N.Y.2d 610 (2003), or In re Musilli, 134 A.D. 2d 15 (2d Dept. 1987), where petitions under BCL 1104-a had already triggered buy-out rights in the respondents under BCL §1118. The petition in this case was brought solely under BCL §1104(a) and (c), did not invoke BCL §1104-a, and did not give rise to any buy-out rights under BCL §1118. Dismissal would not avoid any party's statutory rights, and the petition should be dismissed.

POINT II

ANY CONTINUED DEADLOCK AMONG SHAREHOLDERS DOES NOT JUSTIFY DISSOLUTION OF THESE CORPORATIONS

Respondents are expected to argue that some grounds for dissolution still exist, because a deadlock among the shareholders of both corporations persists even after the death of Mildred Quain. However, a deadlock among shareholders does not provide grounds for dissolution of a corporation, in the absence of any interference with the necessary management of the corporation.

In Matter of Fazio Realty Corp., 10 A.D. 3d 363 (2d Dept. 2004), a corporate dissolution proceeding pursuant to BCL §1104 (a) and (c), the Second Department reversed an order of dissolution and dismissed the proceeding, despite a deadlock between two 50% shareholders which prevented the election of a third director. The court's reasoning was:

In any event, the inability of two 50% shareholders to agree on the election of a third director does not constitute grounds for dissolution, absent factual proof that the competing interests prevent efficient management and corporate success, which was not present here.

Id. at 364 (citations omitted). Specifically addressing the claim of shareholder deadlock under BCL §1104(a)(3), the court stated:

While it cannot be disputed that there exists considerable and apparently ever-increasing internal corporate conflict, under the circumstances, the petitioners failed to demonstrate

that the dissension between them and the appellant resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs.

Id. at 365 (citations omitted).

Similarly, In the Matter of the Dissolution of Whitehall Art Co., Inc., 6 A.D. 2d 399 (1st Dept. 1958) involved a petition for dissolution where there was a 50-50 split among shareholders. However, the corporation had a three member board of directors which was still functioning. The court stated:

[P]etitioner did not establish an absolute right to a dissolution ... The prime inquiry is, always, as to necessity of dissolution, that is, whether judicially-imposed death will be beneficial to the stockholders or members and not injurious to the public.

Id. at 400 (citations and internal quotations omitted).

The rule regarding corporate dissolution continues to be that “[T]he mere existence of dissension among the corporation's principals will not alone suffice, and [i]rreconcilable differences even among an evenly divided board of directors do not in all cases mandate dissolution ... There is no absolute right to dissolution”. Matter of Brendan M. Schneck v. Schneck, 27 Misc. 3d 1237A (Sup. Ct. Nassau Co. 2010) (citations and internal quotes omitted).

In the case at bar, the by-laws of Catalina Operating Corp. provided for a three member board of directors for the obvious purpose of avoiding deadlock in operating the business, even if shareholders were equally divided. The board of directors of the operating company is not deadlocked, and the business of the corporate respondents continues to function successfully.

The beach club is being prepared to open for the summer season. Further, the shareholders are in negotiations for the sale of the assets of both corporations. The cause for dissolution of these corporations no longer exists.

CONCLUSION

The Court should find that cause for dissolution of these corporations no longer exists, and should dismiss this special proceeding, without costs to either side.

Dated: Roslyn, New York
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