

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

In the Matter of the Application of
DIANE HUDSON and STUART HUDSON,
holders of fifty (50%) percent of all shares of
PURE LIME USA, INC.,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 600127/16

MOTION DATE: March 28, 2016
Motion Sequence #001, 002

Petitioner,

-against-

For the Dissolution of
PURE LIME USA, INC., a Domestic
Corporation,

Respondent.

The following papers read on this motion:

- Order to Show Cause..... X
- Notice of Motion..... X
- Affirmation in Support..... X
- Affirmation in Opposition..... XX
- Reply Affirmation..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

Motion by petitioners Diane and Stuart Hudson for the dissolution of respondent Pure Lime USA, Inc., a preliminary injunction restraining the transfer of Pure Lime's assets, and consolidating the above action with Diane Hudson v Pure Lime APS, Index No. 606262/15 is **granted** to the extent indicated below. Motion by respondent Pure Lime USA, Inc. to

dismiss the petition for a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

This is a proceeding for the judicial dissolution of a closely held corporation on the ground of deadlock pursuant to Business Corporation Law § 1104. Petitioners Diane and Stuart Hudson jointly hold 50% of the shares of respondent Pure Lime USA, Inc. Pure Lime APS is a Danish limited liability company and the other 50% shareholder of Pure Lime USA. The Danish company designs and manufactures active and fitness clothing for women and girls, which is marketed and sold by Pure Lime USA in the United States.

Pursuant to a shareholder's agreement dated November 29, 2009, Stuart Hudson is the president and treasurer of Pure Lime USA, and Diane Hudson is the vice president and secretary. The agreement provides that Stuart and Diane are to receive reasonable compensation in salary and benefits commensurate with their contribution to the success of the corporation.

The shareholder agreement provides that management of Pure Lime USA shall be by a board of directors comprised of Christian Friis Olesen, who is aligned with Pure Lime APS, as chairman, Diane and Stuart Hudson, and a fourth person designated by the Danish company. Section 2.2 of the shareholder agreement provides that a quorum consists of the full board and, in case of a tie, the Chairman shall cast the deciding vote.

Section 1.6 of the shareholder agreement provides that if a shareholder desires to sell or transfer all or any part of his shares, he shall give the corporation written notice. If there is a prospective transferee other than the corporation or another shareholder, the notice shall state the terms and conditions of the proposed transfer. The corporation shall have the option to purchase the shares at "book value," defined as assets minus liabilities including good will, or any lower price stated in the notice.

Petitioners alleges that between 2009 and 2014 the Danish company diverted approximately \$1,349,949 from Pure Lime USA, avoiding distribution to the shareholders. Various other disputes arose between the Hudsons and Pure Lime APS, including the Danish company's markup on the merchandise, a \$142,000 credit for defective merchandise, and a \$121,620 credit for "export disbursements." Petitioners allege that after a board of directors meeting on October 1, 2015 the directors aligned with Pure Lime APS excluded them from the business.

On September 28, 2015, petitioners commenced a derivative action on behalf of Pure Lime USA against Pure Lime APS and its aligned directors (Index No. 606262/15).

By order to show cause dated January 11, 2016, petitioners commenced the present judicial dissolution proceeding. In the order to show cause, the court issued a temporary restraining order prohibiting the directors of Pure Lime USA from transferring the assets of the company, except by permission of the court.

By notice of motion dated March 21, 2016, respondent moves to dismiss the petition for a defense founded upon documentary evidence and failure to state a cause of action. Respondent argues that the tie-break provision in the shareholder agreement prevents the possibility of deadlock. Respondent further argues that, by seeking dissolution, petitioners have triggered the buy-out provision in the shareholder's agreement. Petitioners counter that respondents' interpretation of the tie-break provision as precluding judicial dissolution is contrary to public policy.

Generally, the terms of a shareholder agreement should be given effect (*Ferolito v Vultaggio*, 99 AD3d 19, 26 [1st Dept 2012]). Statutory dissolution and election rights may be restricted, but not nullified, by the shareholder agreement (Id). The shareholders may agree in advance that the commencement of a dissolution proceeding under BCL § 1104-a on the ground of "special circumstances," such as oppressive action toward the complaining shareholders, shall be deemed a voluntary offer to sell (Id). However, in the absence of an "explicit agreement," a shareholder agreement fixing the terms of a voluntary sale does not limit a shareholder or the corporation's BCL § 1118 right to elect to purchase the complaining shareholder's shares at "fair value," in the event of a § 1104-a dissolution proceeding (Id).

The tie-break provision in the shareholder agreement does not expressly limit a shareholder's right to bring a dissolution proceeding. As the court should not limit a shareholder's statutory buy-out rights by implication, neither should it limit a shareholder's right to bring a dissolution proceeding. Accordingly, respondent's motion to dismiss the petition on the ground of a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

While the present proceeding is brought pursuant to BCL § 1104 on the ground of deadlock, the allegations of the petition also state a claim for dissolution on the ground of oppressive conduct pursuant to BCL § 1104-a. Nevertheless, it appears that respondent does

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not have the right to elect to buy petitioner's shares at fair value pursuant to BCL § 1118 (See, Sakow v Seafood Restaurant, 297 AD2d 229 [1st Dept 2002]).

Petitioners' application for dissolution is **granted** only to the extent that a hearing shall be conducted on a date to be set by the court. Petitioners' application for a preliminary injunction is **granted** to the extent that respondent is restrained from disposing of the asset of Pure Lime, USA, except in the ordinary course of business. Petitioners' application for consolidation with Index No. 606262/15 is **granted**, only to the extent of joint discovery and joint trial.

So ordered.

Dated APR 11 2016


J.S.C.

ENTERED

APR 13 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE