

Kocak v Dargin

2017 NY Slip Op 30051(U)

January 4, 2017

Supreme Court, New York County

Docket Number: 652078/2016

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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ISMAIL KOCAK,

Petitioner,

-against-

Index No.: 652078/2016
DECISION/ORDER

AYHAN DARGIN and BABA's RESTAURANT,
INC.,

Respondents.

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RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion for Dissolution and to Dismiss.

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u>2</u>
Answering Affidavits.....	<u>3, 4</u>
Replying Affidavits.....	<u>5, 6</u>
Exhibits.....	<u> </u>
Memorandum.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner Ismail Kocak, as a minority shareholder, commenced this proceeding under Business Corporation Law § 1104-a, seeking judicial dissolution of Baba's Restaurant, Inc. (Baba's Restaurant) due to alleged illegal, fraudulent and oppressive actions of the majority shareholder. Respondents Ayhan Dargin (Dargin) and Baba's Restaurant move, pursuant to CPLR 3211 (a) (7), for an order dismissing the petition.

BACKGROUND AND FACTUAL ALLEGATIONS

In April 2016, petitioner filed a petition seeking the dissolution of Baba's Restaurant, a New York corporation. Shortly thereafter, petitioner moved, by order to show cause, for a

hearing on the petition. Petitioner states that he currently owns 25% of the issued shares of Baba's Restaurant and that Dargin owns the remaining 75% of the shares. Baba's Restaurant owns and operates a restaurant named Sahara's Turkish Cuisine which is located in New York, New York.

Petitioner is "seeking the dissolution of Baba's Restaurant due to the illegal, fraudulent and oppressive actions of Dargin, who has assumed total control over Baba's Restaurant and diverted its assets to another entity, and whose actions have caused great harm to the Petitioner." Petition, ¶ 5. According to petitioner, up until February 1, 2012, he owned 100% of the shares of Baba's Restaurant. On that date, petitioner entered into an agreement with Dargin, transferring to Dargin 75% of his shares, in exchange for a fee. In connection to the stock transfer, Dargin would be mainly responsible for operating Sahara's Turkish Cuisine and was provided with the books and records.

In addition, petitioner contends that the parties had an employment agreement whereby petitioner would be employed by Baba's Restaurant as a "marketing and business development manager" and receive a monthly salary of \$2,500.00. According to petitioner, he has not received his monthly salary since October 1, 2015. Petitioner claims that he has demanded his monthly salary from Dargin, but that Dargin will not pay his salary anymore, despite the parties' agreement. Moreover, although Baba's Restaurant has been making a profit, petitioner has not received any distribution of these profits, in accordance with his ownership interest.

Petitioner further alleges that Dargin opened a new bank account and entered into a new lease for the restaurant in the same premises, "between the owner of the premises and a new entity formed by Dargin for the purposes of further removing the operations and assets of Baba's

Restaurant from petitioner's reach." Petition, ¶ 21. In addition, petitioner claims that he has been denied access to the books and records and that Dargin withdrew the funds from the account that was in both his and petitioner's name, without first informing petitioner. Although petitioner offered to sell his shares to Dargin, Dargin allegedly refused.

As Dargin has purportedly exercised complete dominion and control over Baba's Restaurant's assets and funds, without buying out petitioner's shares, petitioner argues that dissolution of the corporation is the only appropriate remedy. Specifically, petitioner contends that liquidation of the corporation is the only way petitioner's rights will be protected and he will receive a fair return on his investment. The petition contains one cause of action, seeking an order statutorily dissolving Baba's Restaurant, pursuant to BCL § 1104-a.

Respondents seek to dismiss the petition for various reasons. Procedurally, they claim that the order to show cause is defective as it names Baba's Restaurant as a respondent without referring to it as such and that it failed to name Dargin as a respondent. Respondents further maintain that service was defective and that petitioner failed to publicize the proposed dissolution in the New York Law Journal.

Regarding the merits, respondents argue that petitioner cannot demonstrate illegality, fraud or oppressive actions and that he failed to provide alternative remedies to liquidation. Respondents further allege that petitioner has been paid all that he is due. They argue that petitioner did no work in 2012, 2013, 2014 or 2015, despite being paid \$105,000 total, and that, in actuality, it is respondents who are owed money. According to respondents, petitioner was already paid \$281,500 for his shares in 2012. As the value of the corporation at the time of transfer was \$375,000, and he has already been given \$105,000, he has already been

compensated for his shares. Finally, respondents contend that petitioner misrepresented to them that there were no outstanding financial obligations, as they incurred approximately \$30,000 in tax liability.

In Dargin's affidavit, he states the following, in pertinent part:

"I contend that the Petitioner has been more than paid in full for his remaining 25% interest in the corporation which shares of stock he has wrongfully withheld from me. In addition, the Petitioner in accordance with an employment agreement between us was supposed to work in return for the \$2,500.00 per month that we paid to him for more than 3.5 years. His work was supposed to be additional consideration as part of the remaining \$100,000.00 with respect to his 25% interest. We paid him and his payroll taxes but he did not work and in fact, his inactivity hurt our business. He was supposed to generate business for us but did nothing in that regard."

Dargin aff, ¶¶ 9, 10.¹

In opposition to the motion, petitioner states that the order to show cause was signed by this court on April 27, 2016 and a hearing date was scheduled for May 12, 2016. On May 6, 10 and 16, 2016, the order to show cause was published in the New York Law Journal. Petitioner provides affidavits of service demonstrating that the petition was served on Dargin, Baba's Restaurant, the New York State Attorney General and the New York State Department of Taxation and Finance. Petitioner states that he completed the order to show cause with the form order provided by the court and that respondents cite no legal authority in connection to why it is defective.

¹ Petitioner simultaneously commenced a summons and complaint against Dargin, Index No. 652072/2016, essentially requesting the same relief as in the petition herein. There has been no motion for consolidation. In Dargin's answer, he alleges that he owns 100% of the issued and outstanding shares of Baba's Restaurant.

Citing the reasons provided in the petition, petitioner argues that he has sufficiently alleged illegality, fraud and oppressive actions, and that respondents did not address those allegations. In addition, petitioner argues that the allegation regarding his lack of work is unfounded and that the additional allegations regarding the tax liabilities or the valuation of the corporation in 2012 should not amount to dismissal of the petition. Petitioner reiterates that, due to Dargin's actions, liquidation is the only way he can obtain a fair return on his investment.

DISCUSSION

Dismissal:

On a motion to dismiss pursuant to CPLR 3211, “the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference,” and the court must determine simply “whether the facts as alleged fit within any cognizable legal theory.” *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

Petition for Judicial Dissolution:

Pursuant to BCL § 1104-a (a) (1), shareholders of at least 20% of outstanding shares in a corporation may petition for its dissolution when, in relevant part, “[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders.”

Petitioner claims that he owns 25% of the shares of Baba's Restaurant and that Dargin, as majority shareholder, has engaged in illegal, fraudulent and oppressive actions by attempting to

take over Baba's Restaurant without buying out petitioner's interest in the corporation. In support of his contentions, petitioner alleges, among other things, that Dargin withdrew funds from a joint account without informing petitioner, entered into a new lease and denied petitioner access to the books and records. In addition, petitioner claims that he has not been properly paid pursuant to an employment agreement and that he has not received all of the profits of the restaurant that he is entitled to.

Procedurally, petitioner's order to show cause complied with BCL § 1006 as it was published and served on the necessary parties. Assuming the facts to be true, petitioner has satisfied the pleading standards to state a cause of action for involuntary dissolution based on oppressive conduct. Oppressive conduct "refers to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the closed corporation [citation omitted]." *Matter of Rambusch*, 143 AD2d 605, 606 (1st Dept 1988). "Mere disappointment in the results of a venture is not sufficient." *Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d 81, 84 (3d Dept 1985).

The employment agreement submitted by respondents indicates that petitioner is supposed to be compensated a monthly salary of \$2,500.00. Reasonable expectations of minority shareholders have been defined as, in relevant part, continued employment. *See e.g. Matter of Williamson v Williamson, Picket, Gross*, 259 AD2d 362, 362 (1st Dept 1999) ("petitioner's employment was an incident of his stock ownership, cloaking him with a reasonable expectation of continued employment"). In addition, active participation in the corporate affairs has also been considered to be reasonable expectations. *See e.g. Matter of Burack (I. Burack, Inc. - Burn-Rite Valve Mfg. Corp.)*, 137 AD2d 523, 526 (2d Dept 1988) ("his reasonable expectation of

being an active participant in the company was frustrated. This has been held to constitute oppression in other similar situations”).

Moreover, contrary to respondents’ contentions, petitioner is not required to provide alternative routes to liquidation at this juncture. The appropriateness of dissolution is vested with the court, as is the alternative relief that can be fashioned by the court. *See Matter of Kemp & Beatley (Gardstein)*, 64 NY2d 63, 73-74 (1984); BCL § 1104-a (b).²

As a result of the conflicting submissions, respondents’ motion to dismiss is denied. Questions remain as to whether or not the majority shareholder has committed oppressive conduct against petitioner regarding his expectations of continued employment with a salary and access to corporate records. A hearing should be held, pursuant to BCL § 1009, to resolve the merits and disputed issues of facts of the petition and to determine whether liquidation of the corporation is required. *See e.g. Matter of Kournianos (H.M.G., Inc.)*, 175 AD2d 129, 130 (2d Dept 1991) (“a hearing pursuant to Business Corporation Law § 1109 is required to resolve disputed issues of fact with respect to the merits of petitioner’s application under Business Corporation Law § 1104 and § 1104-a and the appropriate remedy”).

CONCLUSION AND ORDER

Accordingly, it is hereby

² “The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account: (1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.”

ORDERED that the motion of Ayhan Dargin and Baba's Restaurant, Inc. to dismiss the petition is denied; and it is further

ORDERED that the petition is granted to the extent that a hearing shall be held to resolve the merits of petitioner's application and the appropriate remedy.

Effective January 9, 2017, Judge Erika Edwards will be presiding over Part 47. The parties are directed to contact the chambers (646) 386-5698 to schedule a conference date to discuss discovery and the scheduling of the hearing.

The Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2017
January 4, ~~2016~~

ENTER:


GEOFFREY D. WRIGHT

AJSC

J.S.C.