

Balkind v Nickel

2018 NY Slip Op 31703(U)

July 16, 2018

Supreme Court, New York County

Docket Number: 656594/2017

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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AUBREY BALKIND, DEVIN BALKIND 2011 TRUST, BALKIND
LANSON TRUST,

INDEX NO. 656594/2017

Petitioners,

MOTION SEQ. NO. 002

- v -

DECISION AND ORDER

EDITH NICKEL,

Respondents.

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The following e-filed documents, listed by NYSCEF document number 4, 8, 9, 10, 12, 13, 14, 15, 16, 41, 42, 43, 44, 45, 46, 47, 54, 55, 56, 57, 60, 61, 62, 63, 64, 65, 66, 72, 73

were read on this application to/for Dissolution

HON. SALIANN SCARPULLA:

Petitioners, Aubrey Balkind, the Devin Balkind 2011 Trust, and the Balkind Lanson Trust (collectively, "Balkind") petition to dissolve Lanson Properties, Inc. ("Corporation") pursuant to Section 1104 of the Business Corporation Law ("BCL"). Respondent Edith Nickel ("Nickel") raises an objection by motion to dismiss the petition pursuant to CPLR 404 and 3211 (a)(7).

Background

Balkind owns 49 percent of the Corporation's common stock, totaling 16.3332 of common shares.¹ Nickel owns the remaining 51 percent, which constitutes 16.9998 of the Corporation's common shares. The Corporation's sole asset is property located at 242 East 58th Street, New York, New York ("Property").

The parties entered into an agreement, dated November 22, 2005, establishing their respective rights and obligations as shareholders in relation to the Corporation ("Shareholder Agreement").

Regarding the election of directors, the Shareholder Agreement provides that the parties "will vote all Shares owned or controlled by them so that the Corporation's Board shall consist of two individuals, one of whom shall be **AUBREY BALKIND** and one of whom shall **EDITH NICKEL**." Shareholder Agreement Section 5(a) (emphasis in original). Section 5(b) further provides that for important matters, "[t]he presence in person . . . of a majority of all the directors shall be required to constitute a quorum for the transaction of business. The Board may take action only upon the favorable vote of a majority of the directors present." Otherwise, "all determinations, consents, approvals or other actions . . . with regard to the Corporation shall require the written consent or approval of Shareholders holding at least 55% of the issued and outstanding Shares of the Corporation." Shareholder Agreement Section 5(e).

¹ Aubrey Balkind individually owns 1.5 common shares, and the Balkind trusts together own 14.8332.

As the only two directors of the Corporation, Balkind and Nickel agreed to sell the Property in early 2016. Although the parties having slightly varying accounts of exactly when and how much the Property came to market, it is undisputed that in early 2017 the Property was listed for \$20 million dollars. In mid-2017, an investor offered to purchase the Property for \$15 million, but the Corporation failed to accept the offer. Balkind and Nickel attribute that failure to the other's conduct and are now unable to agree to a purchase price for the Property.

In the petition Aubrey Balkind alleges that Nickel is preventing the Corporation from selling the Property at fair market value to pressure him into waiving reimbursements to which he is entitled. Aubrey Balkind alleges that he has loaned the Corporation \$2,802,854.53 and continues to loan approximately \$45,000.00 per month to meet the Corporation's monthly obligations, including its mortgage payments.² Nickel denies such conduct and instead alleges that Aubrey Balkind is attempting to coerce Nickel into selling the Property below fair market value to achieve his personal goals at her expense.

Balkind petitions for dissolution pursuant to BCL § 1104 because the Corporation is unable to sell the property at agreed upon price, let alone make basic decisions. Balkind alleges that the parties are deadlocked, as the Shareholder Agreement effectively

² Section 7 of the Shareholder Agreement provides that “[i]f the [P]roperty owned by the Corporation does not provide sufficient cash flow to pay the mortgages[] [and other financial obligations] . . . of the Corporation, [then] **AUBREY BALKIND** . . . shall lend the Corporation sufficient funds to meet all of these obligations Any sums so deferred and/or advanced . . . shall be repaid to **AUBREY BALKIND** . . . upon the earlier to occur [including] . . . the sale of the Property[.]”

requires unanimous agreement between the shareholders. Balkind further notes (1) that no one manages the Property because the agreement with the previous property manager expired on November 22, 2016, and (2) that the Property remains largely vacant and unable to generate income.

Nickel opposes dissolution and separately moves to dismiss the petition based on several defenses raised in her answer. Nickel additionally asserts a counterclaim for a declaratory judgment that the Corporation does not owe any loan repayment to Aubrey Balkind upon the sale of the Property.

Discussion

Business Corporation Law provides that “the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

- (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
- (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
- (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.”

BCL § 1104. Nickel opposes dissolution and seeks to dismiss the petition, arguing that Balkind does not have standing pursuant to BCL § 1104 because Balkind represents less than 50 percent of the Corporation’s total voting stock.

Balkind does not dispute that Aubrey Balkind, together with the trusts, only represent 49 percent of the Corporation's total voting stock, but argues that the focus of BCL § 1104 is not equal ownership but equal power. According to Balkind, because the parties have equal power to elect directors under the terms of the Shareholder Agreement, Balkind has standing to seek judicial dissolution pursuant to BCL § 1104.

Contrary to Balkind's position, BCL § 1104 is clear – to petition for judicial dissolution, petitioners must be “the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors” Under the plain meaning of the statute, Balkind, as the holder of 49% of the voting stock, does not have standing, and New York courts strictly interpret and apply the statute. *See In re Sakow*, 297 A.D.2d 229, 230 (1st Dep't 2002) (“The IAS court properly found, however, that one share of the stock claimed by petitioner had been sold, leaving petitioner short of the 50% stock ownership required, depriving her of standing to bring this action and requiring dismissal”); *Rust v Turgeon*, 295 A.D.2d 962, 963 (4th Dep't 2002) (plaintiff lacked standing to judicially dissolve corporation pursuant to BCL § 1104 where he effectively owned 100 percent of the shares of the corporation).

Neither does reference to the Shareholder Agreement confer standing under BCL § 1104. That agreement merely designates Aubrey Balkind and Nickel as the Corporation's two directors irrespective of voting stock ownership, which is not the same as equal voting power to elect directors in the context of BCL § 1104's standing requirement. Under these circumstances, Balkind is unable to invoke BCL § 1104 as a deadlock breaking device.

I have been urging the parties to settle this dispute for quite some time, and am aware that my decision essentially puts the parties back at the starting gate. However, the law is clear and Nickel has established that Balkind lacks standing as a matter of law. I therefore grant Nickel's motion and dismiss the petition for dissolution with leave to replead on any other applicable ground under the BCL.

In accordance with the foregoing, it is

ORDERED the respondent's motion to dismiss the petition is granted; and it is further

ORDERED AND ADJUDGED that the petition for judicial dissolution of Lanson Properties, Inc. brought pursuant to BCL § 1104 by order to show cause is denied, and the petition is dismissed without prejudice.

This constitutes the decision, order and judgment of the Court.

7/16/18
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

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