SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of ANO, INC., by its 50% shareholder, ARIEH YEMINI a/k/a ARI YEMINI, pursuant to New York Business Corporation Law, §1104, and for other relief,

INDEX No. 601079/15

MOTION DATE: Feb 1, 2016
Motion Sequence #001, 002

Petitioner,

-against-

ODED GOLDBERG, GOLDBERG COMMODITIES INC., ROSALIE MOORE and CANDLEWOOD HOLDINGS, INC.,

Respondents.

The following papers read on this motion:

Order to Show Cause..... X
Cross-Motion..... X
Affidavit in Support..... X
Affirmation/Affidavit in Opposition..... XX
Reply Affidavit..... X
Sur-Reply Affirmation..... X

Petition for the dissolution of ANO, Inc. is **granted**. Motion by petitioner for a preliminary injunction is **granted** to the extent indicated below. Motion by petitioner for a receiver is **denied**. Cross-motion by respondents to dismiss the petition for failure to state a cause of action is **denied**.

This is a proceeding seeking the judicial dissolution of a closely held corporation on the ground of deadlock pursuant to Business Corporation Law § 1104. Petitioner Arieh Yemini owns 50% of the stock of ANO, Inc. Respondent Goldberg Commodities, Inc. holds the other 50 % of the stock of the company. ANO holds 2/3 of the stock of respondent Candlewood Holdings, Inc., which is ANO's primary asset. The other 1/3 of Candlewood is held by respondent Rosalie Moore. Candlewood's primary asset is a 90% stock ownership interest in Valle Auto Mall, Inc., a Massachusetts corporation, which owns and operates a car wash/gasoline service station in that state.

Yemini and respondent Oded Goldberg, the controlling shareholder of Goldberg Commodities, have had an ongoing dispute concerning the management and control of ANO since 2007 (See **Yemini v Goldberg**, 60 AD3d 935 [2d Dept 2009]). By order dated May 31, 2012, this court determined that Goldberg had not been duly elected as the sole director of ANO at a special shareholder meeting which was conducted on January 9, 2012. This court's order was affirmed by the Appellate Division, which remitted for the entry of an appropriate declaratory judgment (***Yemini v Goldberg***, 119 AD3d 557 [2d Dept 2014]).

The dispute between Yemini and Goldberg with respect to control of ANO has inevitably affected the management of Candlewood. Yemini alleges that the business of the car wash/gasoline station has declined over several years, and he is interested in selling the property. While Goldberg opposes the sale, he denies knowledge as to whether the car wash/gas station business is actually profitable.

By order dated January 21, 2015, the Appellate Division reversed this court's order granting dissolution of Candlewood (***In re Candlewood Holdings, Inc.***, 124 AD3d 775 [2d Dept 2015]). The Appellate Division held that Yemini could not seek dissolution of Candlewood pursuant to Business Corporation Law § 1102 because he did not represent a majority of the board of directors of the corporation.

This proceeding was commenced by order to show cause dated February 20, 2015. In the order to show cause, the court stayed a meeting of the shareholders of Candlewood which Moore had noticed for February 24, 2015. Yemini requested that the meeting be stayed because the deadlock between Yemini and Goldberg might otherwise have allowed Moore, a minority shareholder in Candlewood, to gain control of that corporation.

Respondents Moore and Candlewood cross-move to dismiss the petition for failure to state a cause of action. Respondents stress that neither of them is a shareholder in ANO. In opposition to dissolution, Goldberg argues that there is no actual deadlock as to ANO because its sole asset is a controlling interest in Candlewood, and there is no deadlock at the Candlewood level. Goldberg further argues that because Yemini is in control of Valle, he may make the car wash/gas station appear unprofitable. Finally, respondents argue that the court may not restrain the operation of a corporation other than the one which is the subject of the dissolution proceeding.

Business Corporation Law § 1104(a) provides that the holders of shares representing 50 % of the voting stock of a corporation may present a petition for dissolution on the ground that 1) 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) the shareholders are so divided that the votes required for election of directors cannot be obtained, or 3) there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders. In order to grant dissolution pursuant to BCL § 1104(a)(1), there must deadlock over a management decision (***Parveen v Hina Pharmacy***, 259 AD2d 389 [1st Dept 1999]). Dissolution may not be granted for failure to elect directors under BCL § 1104(a)(2), unless an attempt to elect directors has actually been made (Id). Dissolution may not be granted under BCL § 1104(a)(3), unless petitioner can demonstrate that the deadlock precludes the successful and profitable conduct of the corporation's affairs (***In re Fazio Realty Corp.***, 10 AD3d 363, 365 [2d Dept 2004]).

Where the corporation is a passive real estate corporation, or the holding company for a passive real estate corporation, the criterion of "successful and profitable" operation is difficult of application. For example, even if the underlying property is profitable, one of the shareholders may need to liquidate his investment. Alternatively, if the property has been fully depreciated, one or more of the shareholders may wish to sell it for tax reasons, regardless of its profitability. Thus, depending upon the tax and liquidity situations of the individual shareholders, a dispute may arise, independent of profitability of operation, as to whether the corporation should continue to hold the property.

For this reason, a passive real estate corporation is more akin to a limited liability company for purpose of judicial dissolution. Under Limited Liability Company Law § 702, a court may order dissolution of an LLC if it is not "reasonably practicable" to carry on the business in conformity with the articles of organization or operating agreement. Under this standard, the petitioning member must establish that 1) management is unable or unwilling to reasonably permit or promote the stated purpose of the entity, or 2) continuing the entity

is financially unfeasible (***In re 1545 Ocean Ave, LLC***, 72 AD3d 121, 131 [2d Dept 2010]).

Neither ANO's nor Candlewood's bylaws contain a stated purpose of the company (Petitioner's ex K and N). As noted above, depending upon the tax and liquidity situation of the individual shareholders, it may be "financially unfeasible" to hold the investment, regardless of the profitability of the property. Thus, Judge Fisher, in his concurring opinion in ***1545 Ocean Ave***, would grant dissolution when there is a fundamental and intractable dispute as to the "means, methods, or finances, of the company's operations" (Id at 133). The court concludes that Yemini and Goldberg have a fundamental and intractable dispute as to the means, methods, and finances of ANO. As a result, the petition for the judicial dissolution of ANO, Inc. is **granted**. Petitioner shall settle a formal order of dissolution, not providing for distribution of ANO's property (See Business Corporation Law § 1111). Respondents' cross-motion to dismiss the petition is **denied**.

Business Corporation Law § 1115 provides that at any stage of a proceeding for judicial dissolution of a corporation, the court may grant an injunction, effective during the pendency of the proceeding, restraining the corporation from exercising any corporate powers, except by permission of the court. The statute authorizes the court to preserve the status quo pursuant to its general equity power in a dissolution proceeding (***Rust v Turgeon***, 295 AD2d 962, 964 [4th Dept 2002]).

Candlewood's bylaws provide that "Each share shall entitle the holder thereof to one vote. In the election of directors, a plurality of the votes cast shall elect. Any other action shall be authorized by a majority of the votes cast...." (Petitioner's ex. N). Thus, any disposition by Candlewood with regard to Valle, and ultimately the car wash/gas station, would require a vote of the majority of the shares. Because ANO is a 2/3 owner of Candlewood, and the shareholders of ANO are deadlocked, a majority of the shares of Candlewood cannot be obtained. In these circumstances, to preserve the status quo, petitioner's application for a preliminary injunction is **granted** to the extent that respondents are restrained from conducting a meeting of the shareholders or directors of Candlewood, for the purpose of taking any action with respect to Valle Auto Mall or the subject property, pending resolution of the present proceeding.

Business Corporation Law § 1113 provides that at any stage of a dissolution proceeding the court may make all orders in connection with preserving the property, including the appointment of a receiver. A receiver should not be appointed where there is no showing of danger of irreparable loss of the property (***Armienti v Brooks***, 309 AD2d 659

[1st Dept 2003]). Moreover, a court may appoint a receiver of the property of a foreign corporation only if the property is located in this state (Business Corporation Law § 1203). Although ANO and Candlewood are New York corporations, Candlewood's sole asset is a foreign corporation, Valle, whose sole asset is real property located in Massachusetts. Since there is no showing of danger of irreparable loss of the car wash/gas station, which in any event is located outside the state, petitioner's motion for a receiver is **denied**.

So ordered.

Dated FEB 0 2 2016

Stephen A. Bucaria
J.S.C.

ENTERED

FEB 0 4 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE