

At an IAS Term, Commercial Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of May, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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NEDAL HAMMAD

Plaintiff(s),

- against -

AL-LID FOOD CORP.,

Defendant(s).

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2018 MAY 31 AM 9:11
FILED
SUPREME COURT

DECISION AND ORDER
Mot. Seq. # 2
Index # 518406/2017

The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1
2
3

After oral argument and upon the foregoing papers, Plaintiff's motion is hereby GRANTED in part and DENIED in part.

BACKGROUND

This is an action whereby Nedal Hammad (hereinafter "Plaintiff"), a 25% shareholder in Al-Lid Food Corp. (hereinafter "the Corporation"), seeks dissolution of the Corporation owned by him and his brothers, Samir Hammad [20%], Jamal Hammad [15%], Omar Hammad [20%], Kamal Hammad [20%] pursuant to BCL § 1104(a). The Corporation, however, seeks to avoid dissolution and purchase Plaintiff's shares pursuant to BCL § 1118.

PLAINTIFF'S MOTION

Plaintiff filed an order to show cause (Mot. Seq. #2) seeking an order: (1) pursuant to BCL § 1115 and CPLR § 6301, for a preliminary injunction; (2) pursuant to BCL § 1114, declaring that all conveyances or other transfers of any property of Al- Lid Food Corp (hereinafter "Defendant") to any of its directors, officers, and/or shareholders be void against such persons; (3) pursuant to BCL § 1113 and 1202(a)(1) for the appointment of a temporary receiver over Defendant's assets; (4) pursuant to BCL §1118(a), referring the matter to a judicial hearing officer for the hearing and determination of the fair value of Plaintiff's shares; (5) pursuant to BCL § 1118(c)(2), directing Defendant to post a bond for the fair market value of Plaintiff's shares; (6) pursuant to CPLR § 602, consolidating this action with another action entitled *Hammad v. Siham Realty Corp.*, Index No. 713242/2017, Queens County Supreme Court; (7) restraining and enjoining directors, officers, and shareholders of the corporation from using assets of the corporation to pay for attorney's fees and expenses defending this proceeding; and (8) granting Plaintiff leave to serve the subpoena on Roth & Co., LLP, the Corporation's accountant.

Plaintiff was the president of the Corporation from 2011-2017, when he was unanimously voted out by the remaining shareholders (hereinafter "the Brothers"). Since his ouster, Plaintiff alleges that the Brothers have been misappropriating the Corporation's assets by taking unprecedented salaries/bonuses outside of the ordinary course of business and failing to account for specific cash withdrawals. Plaintiff further alleges that the Brothers have intentionally withheld numerous books and records concerning the Corporation's finances in 2017 and 2018. Plaintiff claims that the Corporation sought to purchase his shares pursuant to BCL § 1118, however, it never made a "genuine, bona-fide offer" to purchase his shares because they offered an amount with no methodology or calculation to show how they arrived at that fair value amount. Plaintiff also seeks to consolidate another action for dissolution of Siham Realty Corp with the instant action. Siham Realty Corp is the Queens County corporation owned by Plaintiff and the Brothers that is responsible for owning, leasing, and managing the building in which the Corporation is located in. Plaintiff claims that the two businesses are so intertwined that the fair value of his shares in the Corporation cannot be determined without also calculating the fair value of his shares in Siham Realty Corp.

In opposition, the Corporation argues that a bona fide offer was presented to Plaintiff, however, Plaintiff chose not to assess or counter that offer with what he believes is a fair value of his shares. The Corporation also argues that the salaries paid to the shareholders were only \$3,000 in excess of the salaries that were distributed in the period during which Plaintiff was the president. Moreover, the Corporation argues that the bonuses were given in exchange for the shareholder's

tireless work that was completed throughout 2017 when no compensation was given. The Corporation further claims that there were no cash withdrawals that were not accounted for, as these withdrawals were for the purpose of paying expenses incurred by the Corporation. Lastly, the Corporation argues that consolidation would be inappropriate because there are no common questions of fact or law that make consolidation appropriate.

Discussion

The business judgment rule provides that a court should defer to a cooperative board's determination "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003]).

Business Corporation Law § 1118 allows a corporation or its majority shareholders to respond to a claim for dissolution under Business Corporation Law § 1104-a by making a binding election to purchase the complaining shareholder's shares at their fair value. Such an election may be made as of right within 90 days after the filing of the dissolution petition (Business Corporation Law § 1118 [a]). The fair value of the corporation shall be determined as of the day prior to the date on which the petition was filed (*id.* § 1118 [b]). "The buyout election accommodates the interests of the respective parties in ensuring the continued functioning of the business, while also protecting the financial interest of the shareholders and creditors"

O'Connor v Coccadotts, Inc., 47 Misc 3d 331, 333 [NY Sup 2015].

In the present case, the court finds that a preliminary injunction is not an appropriate remedy to resolve the issues that Plaintiff has alleged. The issues alleged by Plaintiff are remedied by the Corporation's petition to purchase Plaintiff's shares at the fair value retroactive to the day prior to the date in which the petition was filed irrespective of the Corporation's actions. Moreover, there is no indication that the Corporation is in jeopardy of losing its financial ability to pay Plaintiff the fair value of his shares absent an injunction or a security bond. Accordingly, the court finds that the appointment of a receiver is not warranted and would be a waste of the Corporation's assets. The court finds that consolidation of the parties' Queens County Supreme Court action is not warranted, as both cases do not contain common questions of fact that are determinative of the outcome of either case.

In considering the issue of counsel fees, it is relevant to take into account [whether] (1) there exists a fiduciary relationship between the parties as stockholders in a close corporation; and (2) it has been held that attorney fees incurred by a shareholder in defending a dissolution proceeding are not payable out of corporate funds. Thus, in the usual dissolution proceeding, where the corporation appears as a nominal party and the proceeding amounts to a dispute between the shareholders, corporate funds may not be used in payment of counsel fees for the individual shareholders. (*Petition*

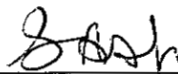
of *Levitt*, 109 AD2d 502, 511 [1st Dept 1985]). The court reasons parallel to the court in *Petition of Levitt* in holding that the Corporation's election pursuant to BCL § 1118 has stopped the dissolution proceeding. Therefore, any use of corporate funds to pay attorney's fees after said election shall be deemed valid, however, any corporate funds used to pay attorney's fees after the commencement of the dissolution but prior to the BCL § 1118 election shall be deemed improper and shall be refunded to the Corporation.

Therefore, Plaintiff's request for an order: (1) issuing a security bond; (2) issuing an injunction; (3) appointing a receiver; (4) restraining the Corporation from using assets to pay for attorney's fees; (5) consolidating the action entitled *Hammad v. Siham Realty Corp.*, Index No. 713242/2017, Queens County Supreme Court; and (6) voiding any conveyances or transfers is hereby DENIED.

The facts of this case indicate that the main issue rests on the determination of the fair value of Plaintiff's shares, therefore, the court finds it proper to refer this matter to a special referee/ JHO to determine the fair value of Plaintiff's shares. Furthermore, Plaintiff is hereby granted leave to serve a subpoena on Roth & Co., LLP for the production of an electronic copy of the Quickbook files sent to Roth & Co., including a certification that such file is a true and accurate copy of such accounting. Therefore, Plaintiff's requests seeking leave to serve a subpoena on Roth & Co., LLP and to refer the matter to a special referee/ JHO is hereby GRANTED. Any relief not specifically discussed is hereby DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.

FILED
MAY 31 AM 9:24
KINGS COUNTY CLERK