# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

***Justice***

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TESS WACHS,

Plaintiff,

- v -

RICHARD TIENKEN, JEAN TIENKEN, COMIC STRIP PROMOTIONS INC.

Defendant.

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**INDEX NO.** 655933/2019

**MOTION DATE** 01/17/2020

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, petitioner's motion for leave to renew and/or reargue this court's interim decision and order dated January 10, 2020 (the **Prior Decision**) is granted solely to the extent set forth below.

The facts of this matter are set forth in the court's Prior Decision and familiarity with the underlying facts is presumed (NYSCEF Doc. No. 36). On its Prior Decision, the court referred this matter to a Special Referee or JHO to hear and report with recommendations: (1) whether the shareholders of the comedy club known as the Comic Strip have reached a deadlock, and (2) whether dissolution would be beneficial to the shareholders (NYSCEF Doc. No. 36).

As relevant, the deadlock that is identified in the verified petition (the **Petition**) for dissolution is the inability of the shareholders "to agree on the election of officers" (Petition, ¶ 15, NYSCEF

Doc. No. 1). As a result of this, the petitioner argues that her statutory right to dissolve the Comic Strip has been triggered (*id.*, ¶ 16). In her affidavit, the petitioner claims that the Minutes of a Board of Directors' Meeting held on March 1, 2019, "establish that the Comic Strip shareholders have been unable to agree on the election of officers" (Wachs Aff., ¶ 4, NYSCEF Doc. No. 19; NYSCEF Doc. No. 20). As proof the petitioner attaches an unsigned, 3-page document purporting to be the board minutes for a "Board meeting" held on March 1, 2019 "on the Company's premises" (NYSCEF Doc. No. 20). Item IV of the document addresses the Appointment of Officers as follows:

> T. Wachs stated her position that there are currently no Officers (and have not been any since her husband's passing)
>
> R. Tienken stated his position that he is still President, Treasurer, acting Secretary
>
> Election held:
> T. Wachs moved that she and R. Tienken be co-Presidents
> R. Tienken voted against this motion
> Therefore, motion failed
>
> T. Wachs said not interested in any other Officer positions
>
> R. Tienken rejected T. Wachs serving as sole President

(NYSCEF Doc. No. 20, p. 3).

The respondents dispute the petitioner's account of the March 1, 2019 board meeting. In his affidavit, Richard Tienken states that, "Tess did not ask for a vote to appoint directors" at the March 1, 2019 board meeting, and claims that since that meeting, he has "tried to have more than one shareholder meeting that Tess has refused to attend, so we have not had a quorum" (NYSCEF Doc. No. 11, ¶ 3). Mr. Tienken goes on to say that at the last meeting, the petitioner

"did not propose the election of officers except to state that she wanted to be appointed co-president and would accept no other position" (*id.*, ¶ 13). Jean Tienken also attests that, "at our March 1, 2019 shareholder meeting, Tess did not call for a vote of directors" (NYSCEF Doc. No. 12, ¶ 2).

The parties likewise dispute what took place at an earlier board meeting noticed for February 8, 2018 at 10 A.M. The petitioner claims that as the transcript of that meeting demonstrates, she was elected as a director of the company under the authority of BCL § 603, pursuant to a Demand for Special Meeting of the Shareholders of Comic Strip Promotions, Inc. for the Election of Directors (the **Notice**) dated December 7, 2017 (NYSCEF Doc. No. 19, ¶ 13; NYSCEF Doc. Nos. 21-22). The Notice calls for a special meeting to be held at 1568 Second Avenue, New York, NY (i.e., the location of the Comic Strip) on February 8, 2018 at 10 A.M. (NYSCEF Doc. No. 22). The transcript provided by the petitioner states that a meeting was held at 418 East 59th Street at 10:32 A.M., which is the location of the petitioner's apartment (NYSCEF Doc. No. 21). The respondents were not present at the meeting (*id.*). According to the transcript, the petitioner waited for "approximately five or ten minutes" at the Comic Strip and then, when Mr. Tienken did not appear, unilaterally decided to move the meeting to her apartment (*id.*). Without Mr. Tienken or Ms. Tienken being present, the petitioner voted to elect herself a director of the board of directors of the Comic Strip. In his reply affidavit, Mr. Tienken (again) disputes the petitioner's account of this meeting:

> My understanding is that a meeting was scheduled to be held at the Comic Strip on Second Avenue on February 8, 2018 at 10:00 A.M. I went to the Comic Strip that day at that time and Tess was not there. I cannot say whether Tess left after 5 minutes and I got there six minutes or if she left after 3 minutes and I got there four minutes late, but I was not even 10 minutes late, and Tess has my cell phone number and she could easily have

> called me and said that she was moving the meeting to her apartment or that I should call her when I arrived, but she never called me at all. She called a meeting for the Comic Strip and then held it someplace else. For this reason, I do not believe that Tess is a director. My understanding from my attorney is that BCL 603 states that "The meeting shall be held at the place fixed in the by-laws or, if not so fixed, at the office of the corporation." Tess demanded that the meeting be held at our office, she could not move it - especially without telling me -- and then elect herself director. I would have met her at her apartment. So Tess is not a director. … She is not a director and has no right to elect officers.

(NYSCEF Doc. No. 35, ¶ 2).

**Motion to Reargue**

To prevail on a motion for leave to reargue, the movant must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (CPLR 2221[d]; *William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). New arguments that were not previously advanced may not be brought up on reargument, nor may a reargument motion be used as a vehicle to repeat or reargue what has already been considered and determined (*id*., *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Here, in seeking leave to reargue, the petitioner contends that by referring this issue to a Special Referee for a hearing on the issue of deadlock, the court overlooked: (i) the fact that the arbitrator had already determined that a deadlock necessarily warranted dissolution, and (ii) that a deadlock clearly exists. The argument fails.

As the court discussed in its Prior Decision, the petitioner initially commenced an arbitration proceeding before the American Arbitration Association in July of 2016 to, among other things, confirm her 50% stake in the Comic Strip (NYSCEF Doc. No. 36). In that proceeding, the

arbitrator confirmed her 50% stake in an award (the **Award**) dated February 14, 2017 (NYSCEF Doc. No. 2) and this court (Hon. Charles Ramos, J.) confirmed the Award in October of 2017 (652586/2017). The Award states that:

> Unless the issues …[concerning the election of directors and officers] and the responsibility for and the procedures attendant to the management and operation of the Corporation determined and agreed upon by the two shareholders within the next 45 days, I find on the record before me that there currently exists sufficient evidence of such internal dissension between the two shareholders that dissolution of the Corporation would be beneficial to the shareholders pursuant the New York Corporation Law § 1104 and that my finding of such in this arbitration may serve as a basis for either 50% shareholder to petition the Court to confirm this Award and order such relief.

(NYSCEF Doc. No. 2).

However, and significantly, as this court discussed in its Prior Decision, the parties returned to the arbitrator concerning the control and operations of the Comic Strip ***because Justice Ramos did not find the Award to be dispositive on all issues*** (October 24, 2017 Tr., p. 9:24-10:6, 652586/2017). The arbitrator then issued another, supplemental award (the **Supplemental Award**) dated February 13, 2018 which, significantly, does not require dissolution in the event of a deadlock. To wit, the Supplemental Award provides:

> From a governance standpoint Tienken and Tess Wachs as equal shareholders must be treated equally and have equal powers to determine the management and operations of the Corporation unless they now agree otherwise. One shareholder's will and desire cannot be forced upon the other under any of the viable terms of the Shareholders Agreement or the N.Y. Business Corporations Law. ***If the shareholders are unable to agree on the election of directors and officers, such division and dissention will result in deadlock and Tienken and Tess Wachs may proceed with their statutory rights under such circumstances based on this finding.***

(NYSCEF Doc. No. 3 [emphasis added]).

The Supplemental Award was confirmed by this court (Hon. Marcy Friedman, J.) in a decision and order dated September 26, 2019 (650783/2019).

Importantly, whereas the initial Award finds "evidence of such internal dissension between the two shareholders ***that dissolution of the Corporation would be beneficial to the shareholders*** pursuant the New York Corporation Law § 1104," the Supplemental Award only provides that, "***If*** the shareholders are unable to agree on the election of directors and officers, such division and dissention will result in deadlock and Tienken and Tess Wachs ***may proceed with their statutory rights***" (NYSCEF Doc. Nos. 2-3 [emphasis added]). In other words, contrary to what the petitioner argues, the arbitrator did not find that deadlock mandated dissolution. In addition, here, there appears to be a genuine dispute as to whether that is actually the case. To wit, as discussed above, the petitioner claims that the parties were unable to elect officers at their March 1, 2019 meeting and the respondents claim that she never called for an election to take place and only demanded that she be co-president. The parties also dispute what transpired at the February 8, 2018 meeting, whether it was validly moved to the petitioner's apartment without any notice to the respondents, and whether the petitioner properly elected herself a director at that meeting. In addition, according to the respondents, the petitioner has refused to attend additional meetings since the March 1, 2019 meeting so as to enable the shareholders to elect officers. As even petitioner's own memorandum of law concedes, "***a bona fide dispute as to whether the condition identified by the arbitrator as warranting dissolution has occurred could make a hearing on that single issue appropriate***" (NYSCEF Doc. No. 39, p. 7 [emphasis added]).

The petitioner also argues that Mr. Tienken has conceded that the shareholders have been unable to agree on the election of directors and officers. This argument is unsupported by the evidence that the petitioner cites. In this regard, the petitioner relies on Mr. Tienken's reply affidavit filed on January 9, 2019 (NYSCEF Doc. No. 35). As an initial matter, the court notes that there appears to have been a technology glitch in that the reply affidavit was not identified by NYSCEF document number in the pre-populated list of motion papers in the Prior Decision. For the avoidance of doubt, it was reviewed and considered together with all of the papers submitted. And, nothing in Mr. Tienken's reply affidavit requires a different outcome. Simply, Mr. Tienken reiterates his position that, "[w]e as shareholders are not deadlocked," and disputes the alleged March 1, 2019 board minutes relied upon by the petitioner (NYSCEF Doc. No. 35, ¶¶ 5, 10, 13). As discussed above, in his reply affidavit, Mr. Tienken also vigorously disputes the petitioner's account of the February 8, 2018 meeting and whether a valid election of the petitioner as a director took place at that meeting.

In short, based on all the foregoing, a determination as set forth in the court's Prior Decision is appropriate to determine whether the shareholders are, in fact, unable to agree on the election of directors and officers.

**Motion to Reargue**

To prevail on a motion for leave to renew, the movant must put forth "new facts not offered on the prior motion that would change the prior determination," along with a "reasonable justification to present such facts on the prior motion" (*Assevero v Rihan,* 144 AD3d 1061, 1062

[2d Dept 2016] [citation and quotation omitted]). The only new "fact" presented by the petitioner in support of her motion for renewal is the Shareholders' Agreement (the **Shareholders Agreement**) dated December 16, 2010 by and between Robert Wachs and Richard Tienken (NYSCEF Doc. No. 31). Nothing contained in the Shareholders Agreement changes the court's prior determination. To the extent that the petitioner now presents the Shareholders Agreement because its "broad arbitration clause demonstrates the contractual basis for the [prior] arbitration," this is not a basis for renewal (NYSCEF Doc. No. 39). Nor does the petitioner present any reasonable excuse for failing to present the Shareholders Agreement on the prior motion as is required for a motion for renew (*id.*, [petitioner argues only that, "for purposes of the preclusive effect of the arbitrator's award, it does not matter why the parties' dispute was submitted to arbitration"]). To the extent that the petitioner implies that the Shareholders Agreement requires arbitration of ***all*** disputes between the shareholders, the court only notes that no request for arbitration has been made in this action by either party. As there is no basis for renewal, the motion for leave to renew is denied.

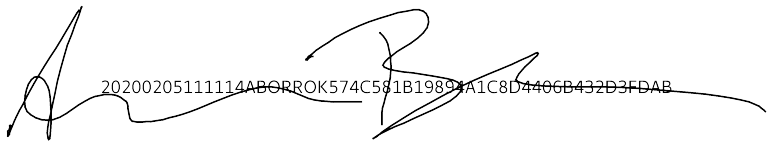
**BCL § 1104**

However, upon review of the underlying petition, the court notes that the instant petition was brought pursuant to BCL § 1104, not BCL § 1104-a. Whereas the court has the discretion to fashion a less drastic remedy to dissolution under BCL § 1104-a, such relief is not available under BCL § 1104 (*In re Parveen*, 259 AD2d 389, 392 [1st Dept 1999]; *Greer v Greer*, 124 AD2d 707 [2d Dept 1986] [buy-out provision applies only to petitions brought pursuant to BCL § 1104-a, not to petitions brought pursuant to BCL § 1104]). Although the petitioner does not raise this argument as a basis for reargument, to the extent the Prior Decision discusses whether

dissolution would be beneficial to the shareholders or if a less drastic remedy would be appropriate, the decision is clarified to strike the aspect of the reference to the Special Referee as to whether a less drastic remedy would be appropriate as the petition was brought under BCL § 1104 and not BCL § 1104-a. The remainder of the reference shall proceed as set forth in the court's Prior Decision.

Accordingly, it is

ORDERED that the petitioner's motion to renew and/or reargue is granted solely to the extent of clarifying the scope of the reference as set forth above and is otherwise denied.




**2/5/2020**
**DATE**

**ANDREW BORROK, J.S.C.**

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|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | | **CASE DISPOSED** | | **X** | **NON-FINAL DISPOSITION** | | |
| | | **GRANTED** | **DENIED** | | **GRANTED IN PART** | **X** | **OTHER** |
| **APPLICATION:** | | **SETTLE ORDER** | | | **SUBMIT ORDER** | | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | **FIDUCIARY APPOINTMENT** | | **REFERENCE** |