

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

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In the Matter of the Application : Index No. 655933/2019
of TESS HALEY WACHS, Holder of a :
50% Interest in COMIC STRIP :
PROMOTIONS INC. a New York :
Corporation, :

Petitioner, :
:

For the Dissolution of COMIC STRIP :
PROMOTIONS INC., a New York : AFFIDAVIT IN OPPOSITION
Corporation, Pursuant to §§ 1004 :
of the BUSINESS CORPORATIONS LAW, :

-against- :

RICHARD TIENKEN, JEAN TIENKEN :
and COMIC STRIP PROMOTIONS INC., :
a New York Corporation, :

Respondents. :

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

TESS WACHS, being duly sworn, deposes and says:

1. I am the petitioner in this proceeding to dissolve
Comic Strip Promotions Inc. (the "Comic Strip"), a New York
Corporation. I submit this affidavit in opposition to
respondents' cross-motion to dismiss. I am fully familiar with
the matters set forth herein.

2. Respondents' motion should be denied and the
petition granted in its entirety because, as demonstrated below,
the elements found by an arbitrator to be sufficient for
dissolution under New York law are undisputedly present. (See

Final Award and the Supplemental Award attached to the Petition as Exs. A and B.)

THE SHAREHOLDERS ARE UNABLE TO AGREE ON OFFICERS

3. In a prior arbitration proceeding conducted before the American Arbitration Association, arbitrator Peter L. Altieri, Esq., determined that: (1) a failure of the shareholders of the Comic Strip to agree on the election of officers will result in a deadlock; and (2) that such deadlock constitutes sufficient grounds for dissolution of the corporation under New York law. (See Petition, Ex. A, at 3-4, Item (e); Ex. B, at 2.) This arbitrator's determination has been confirmed by the Supreme Court of the State of New York in all respects. (Petition, Ex. C, at 11.)

4. Here, the Minutes of a Board of Directors' Meeting held on March 1, 2019, distributed to respondents without objection, clearly establish that the Comic Strip shareholders have been unable to agree on the election of officers. (Ex. A.) This deadlock constitutes sufficient grounds for dissolution under the arbitrator's award which I understand is dispositive of this proceeding. See Feinberg v. Boros, 99 A.D.3d 219, 226 (1st Dept. 2012) ("collateral estoppel principles apply as well to awards in arbitration as they do to adjudications in judicial proceedings"); Maidman v. O'Brien, 473 F. Supp. 25, 29 (S.D.N.Y. 1979) ("it is well settled that the related doctrines of res

judicata and collateral estoppel are properly applied to arbitration decisions”).

5. Respondents’ contention that an inability to agree on officers is not a proper ground for dissolution was expressly rejected by the court. In confirming the arbitrator’s award, the court characterized this contention as “unsupported by any citation to legal authority” and further noted that “even if the arbitrator’s interpretation of the [statutory] section were incorrect that would not rise to the level of irrationality within the meaning of CPLR 7511.” (Petition, Ex. C, at 11.)

6. Thus, the statutory elements for dissolution have been established. Respondents’ motion to dismiss should be denied and the Petition granted on this ground alone.

THE SHAREHOLDERS ARE OTHERWISE DEADLOCKED

7. In addition to being unable to agree on officers, the shareholders are divided on a plethora of other matters, making proper operation and management of the company impossible.

8. Specifically, I have been denied a meaningful role in the management and operation of the company, notwithstanding the arbitrator’s ruling that I be treated equally and have equal say in the way the corporation is governed. As the arbitrator ruled:

From a governance standpoint Tienken and [I] 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.

(Petition, Ex. B, at 2.)

9. Nevertheless, respondents locked me out of the Comic Strip's premises and have denied me access to the company's full books and records, such as the point-of-sale (POS) system and the nightly texts, the only records that provide accurate gross and net receipts information. (See Ex. E attached to the Tienken Aff.) Further, I have been subjected to vicious verbal assaults from one of the company's managers, Tommie Latsch (who was appointed by Jeannie Tienken who, despite her claims, is not the manager of the club), to the point where I fear for my safety when I enter the premises.¹

10. Because respondents have frozen me out of the company's affairs, respondents have been free to loot and mismanage the company and turn a premier comedy club, home to some of the most iconic names in comedy (such as Eddie Murphy, Jerry Seinfeld and Chris Rock) into the financial disaster that Tienken describes.²

¹ Contrary to Tienken's claim, I never refused to attend a properly-noticed shareholders meeting.

² Tienken's attempts to blame the company's financial difficulties on my late husband is as wrong as it is shameful. In fact, Mr. Wachs was not aware and never approved of any of the
(continued...)

11. Specifically, it is respondents who have the motive and opportunity to under-record, under-deposit and under-report cash received by the company from cover charges (which respondents demand be paid in cash), in-house produced shows and private parties and take such cash for themselves. As the arbitrator explicitly found: "it is clear from the tax returns in evidence that revenues and expenses have been substantially and consistently underreported." (See Petition, Ex. A, at 2.) In fact, in a business that is open seven nights a week and takes in approximately 20% of its receipts in cash, in the period February 2017 through November 2019 there have only been six deposits of cash for a total of \$28,920.91.

12. In addition to pilfering cash, Tienken has been taking \$1,500.00 out of the company every week as a distribution while I have not received a single distribution or any pay-out.³ He also has been charging personal expenses to the company.⁴

²(...continued)

loans identified by Tienken with which the club is saddled and inured to the benefit of Tienken only.

³ Tienken did not "give" me \$150,000 in life insurance. I received the proceeds of a key-man policy. Notwithstanding my clear entitlement to the funds, Tienken nevertheless tried to block it and re-direct the monies to himself.

⁴ Personal expenses include payments to Bobby McCann Sport, In-Home Golf, Guitar Center, Benchmark Mortgage, various New Jersey restaurants, Sam Ash Music, Auto Bar Used Car Dealership and Burlington Coat Factory. There are also substantial cash withdrawals and transfers to a checking account. None of these
(continued...)

Yet, respondents have refused to implement even the most basic controls. Contrary to respondents' contention, the company's accountant cannot possibly serve this purpose. In arbitration, he admitted filing tax returns based solely on POS sales receipts without recording any of the company's substantial cash receipts, which exposes me, as a shareholder, to legal jeopardy.

THE DIRECTORS ARE OTHERWISE DEADLOCKED

13. While not denying that the shareholders are deadlocked concerning the management of the company, respondents claim that the directors are not deadlocked. This is based on the erroneous claim that Tienken is the "sole director" of the Comic Strip. However, as the transcript of a shareholders meeting demonstrates (Ex. B), on February 8, 2018, I was elected as a director under the authority of BCL § 603, pursuant to notice dated December 7, 2017 (Ex. C). This election was memorialized by Edward D. Altabet, Esq., in a letter to Anthony A. LoPresti, Esq., dated February 8, 2018 (Ex. D), which went unchallenged.

14. On March 1, 2019, as a director, I attended a Board of Directors meeting at which the Tienkens were present. The agenda of such meeting included but was not limited to the

⁴(...continued)
expenditures can be identified as legitimate business expenses of the company. He has also been improperly using the company's coffers to pay attorneys to deny me my rights as a 50% shareholder.

appointment of officers. (See Ex. A to the Tienken Aff., item V.) It was at this meeting that the directors deadlocked on the appointment of officers and other things.⁵

15. Significantly, respondents' counsel herein has confirmed my status as a director of the Comic Strip. In open court, on July 23, 2019, Bryan McKenna, Esq., represented:

It's not about directors; which [Ms. Wachs] is one - she voted herself in. . . . [S]he is a director of the company, and, she does have the rights of a director. She has been to meetings.

(Petition, Ex. C, at 8.)

16. Thus, the directors are as deadlocked as the shareholders so that the company is unable to be managed properly.

DISSOLUTION WOULD BE BENEFICIAL TO THE SHAREHOLDERS

17. In his affidavit, Tienken makes the self-serving argument that dissolution would be detrimental to the shareholders. Nothing could be further from the truth. Dissolution might be detrimental to Tienken and his wife only

⁵ Contrary to Tienken's assertion, despite my status as a 50% shareholder, I sought to share the presidency with Tienken who only owned 25%. At the meeting, Tienken expressed his intense hatred for me and vowed never to work together on corporate affairs. As the minutes of the meeting record, Tienken stated that he "does not recognize T. Wachs as his equal partner, despite her status as a Director and 50% Shareholder;" "Tommie Latsch [a manager] and Jeannie Tienken [wife and newly-minted 25% shareholder] maintained there will never be a resolution between R. Tienken and T. Wachs;" and the dissolution of the company in light of the arbitrator's award was discussed. (Ex. A.)

because they would no longer be free to loot the company for their own personal benefit. However, dissolution would benefit the shareholders by preventing further debt from being incurred due to looting and mismanagement and un-locking the true value of the company to the benefit of all the shareholders.⁶

18. Indeed, respondents' argument is directly contradicted by the AAA arbitrator. The arbitrator expressly found that dissolution would be beneficial to the shareholders. The arbitrator stated:

[T]here currently exists sufficient evidence of such internal dissension between the two shareholders that dissolution of the Corporation would be beneficial to the shareholders pursuant [to] the New York Corporation Law § 1104.

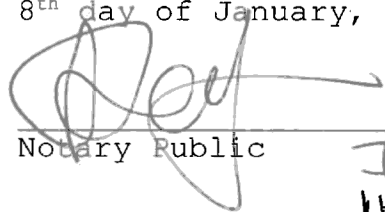
(Petition, Ex. A, at 4, item (e); e.s.) He further found that "my finding of such in this arbitration may serve as a basis for either 50% shareholder to petition the Court to confirm this Award and order such relief." Id. This finding was confirmed by the court and is dispositive of the proceedings herein.

⁶ Given the club's iconic stature, massive historic good will and mark (which, contrary to Tienken's claim, has value as evidenced by the Tienkens' attempt to secretly register The Comic Strip and Comic Strip Live for themselves), we have requested the appointment of a receiver who might be able to restore financial viability to the business and sell it as a going concern.

WHEREFORE, based on the foregoing, respondents' cross-motion should be denied in all respects and the Petition granted in its entirety.

TESS WACHS
TESS WACHS

Sworn to before me this
8th day of January, 2020



Notary Public

IRA DANIEL NARES
Notary Public, State of New York
Reg. No. 0270494432
Qualified in New York County
My Commission Expires 10/17/2022