

Gupta v E.J.'S Bucket Buddies, Inc.
2020 NY Slip Op 32446(U)
July 24, 2020
Supreme Court, New York County
Docket Number: 650952/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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RAM GUPTA,	INDEX NO. <u>650952/2019</u>
Plaintiff,	MOTION DATE _____
- v -	MOTION SEQ. NO. <u>003 004</u>
IN THE MATTER OF DISSOLUTION OF E.J.'S BUCKET BUDDIES, INC., A DOMESTIC CORPORATION, FROM AN ACCOUNTING FROM MICHAEL BESEN,	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 155, 157 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 152, 153, 154, 156, 158 were read on this motion to/for AMEND CAPTION/PLEADINGS

Masley, J.:

In motion sequence number 003, defendant Michael Besen moves, pursuant to CPLR 404 and 3211 (a) (1), (a) (3), and (a) (7), to dismiss plaintiff Ram Gupta's petition for dissolution of E.J.'s Bucket Buddies, Inc. (E.J. Inc.). In motion sequence number 004, plaintiff Gupta moves, pursuant to Business Corporation Law (BCL) § 1107, to amend his petition for dissolution of E.J. Inc.

The Petition

E.J. Inc. is a domestic corporation, with its principal place of business in New York, New York (NYSCEF Doc. No. [NYSCEF] 1, Petition ¶ 11). E.J. Inc.'s primary asset is real property located at "945 & 947 Columbus Ave," which was purchased January 30, 1995 (*id.* ¶ 12). Gupta identifies E.J. Inc.'s shareholders and their

respective interests as: Besen (37.5%); Amit Doshi (Amit) (37.5%); and Gupta (25%) (collectively, Shareholders) (*id.* ¶ 14).¹

Gupta petitions this court to dissolve E.J. Inc. pursuant to BCL § 1104 (c)

“on the grounds that (i) the directors have failed to hold an annual meeting for at least two consecutive annual meeting dates, and therefore failed to elect directors as called for in the Business Corporation Law; (ii) there is internal dissension between and among the three factions of shareholders holding 100% of the voting stock who are so divided that they are unable or unwilling to elect directors as called for in Business Corporation Law §§ 701 and 703; (iii) the internal dissension among shareholders and failure (or willful refusal) to elect directors has made the lawful and responsible management of the corporation's affairs impossible since the votes required for major and critical decisions by the board (and/or shareholders) cannot be obtained; (iv) as a result of the intractable and internal dissension among shareholders holding 100% of the voting stock who are so divided to elect directors or otherwise reach a consensus required for major and critical decisions, dissolution would be beneficial to the shareholders”

(*id.* ¶ 1). Gupta alleges that “internal dissension” between the Shareholders has caused them to become “so divided” that they are unable to elect directors or responsibly manage the business (*id.*). Gupta alleges that the Shareholders have failed to hold an annual meeting for at least the past two years (March 15, 2017 and March 15, 2018), and therefore, have failed to elect directors as required by E.J. Inc.'s Corporate By-Laws and BCL §§ 701 and 703 (*id.* ¶¶ 82, 111). The Shareholders also allegedly failed to elect directors at a Special Meeting called by Gupta, which took place December 20, 2017 (*id.* ¶¶ 36-40, 84).

Gupta asserts that the failure to elect directors has led to E.J. Inc. “operating without clear direction” and “caught between three factions, unable to move forward to

¹ This identification of E.J. Inc.'s shareholders is incorrect and is largely the subject of Gupta's motion to amend the petition (See NYSCEF 113, Proposed Amended Petition). The correct shareholders of E.J. Inc. are: Besen (37.5%); Kalpana Doshi (Kalpana) (37.5%); and Gupta (25%) (NYSCEF 99, Corporate Certification at 1).

achieve the best interest of the corporation” (*id.* ¶ 89). The Shareholders, “due to fundamental and irreconcilable differences of opinion . . . are hopelessly deadlocked on the management . . . long term strategy . . . and disposition of 945 & 947 Columbus Ave (E.J. Inc.’s primary asset)” (*id.* ¶ 99). Gupta alleges that this is exemplified by (1) the Shareholders’ inability to agree on a method to end their business association² (*id.* ¶¶ 29-51, 103); and (2) “deeply-rooted dissension and distrust between Besen and [Amit],” documented in unrelated litigations between the two shareholders³ (*id.* ¶ 105; *see also id.* ¶¶ 52-68). Furthermore, Gupta alleges that the E.J. Inc. properties have “not been highly profitable, and certainly have not produced any income remotely commensurate with their respective values” (*id.* ¶ 69).

On February 13, 2019, Gupta commenced this special proceeding for the dissolution of E.J. Inc., provisional remedies such as a receiver, if needed, and an accounting (*id.*). On April 11, 2019, Amit filed a motion, by order to show cause, to intervene (NYSCEF 62, Order to Show Cause [Seq. No. 002]). On May 3, 2019, the parties entered into a stipulation permitting Amit to intervene, and Amit was added as a petitioner (NYSCEF 91, Stipulation). On June 6, 2019, Besen cross-moved to dismiss

² Petitioner alleges that the Shareholders are shared owners of six real properties (the Shared Properties), including the two properties at issue in the case (*see* NYSCEF 1, Petition ¶¶ 22-28). Besen proposed a “Barter and Swap” deal whereby the Shareholders “exchange their respective common Interests” in the Shared Properties “so that ultimately, each of the [Shareholders] would own One Hundred Percent (100%) of the Interest in one or more of the Shared Properties” (*id.* ¶ 30). Gupta and Amit allegedly rejected this approach, counter-proposing a “free market sale” of the Shared Properties (*id.* ¶ 40).

³ The litigations referenced are *Michael Besen, individually and derivatively, on behalf of 223 West 20 LLC, et al. v Amit Doshi et al.*, Index No. 652691/2018 (*id.* ¶ 52) and *Jackson Partners LLC v 94-16 34 Road LLC, et al.*, Index No. 715767/2017 (*id.* ¶ 59).

the petition (NYSCEF 97, Notice of Cross Motion). In support of his cross motion, Besen submitted an affidavit, affirming that Amit is not a shareholder of E.J. Inc. (NYSCEF 98, Besen aff ¶ 6). Rather, Doshi's wife, Kalpana Doshi (Kalpana), is a 37.5% shareholder, as reflected on E.J. Inc.'s corporate certificate (*id.* ¶ 7; NYSCEF 99, Corporate Certificate). On June 13, 2019, the parties filed a stipulation discontinuing Amit's intervening petition with prejudice on the grounds that Amit is not currently a shareholder of E.J. Inc. (NYSCEF 108, Stipulation of Discontinuance). Gupta was unaware of Kalpana's status as a shareholder (NYSCEF 112, Gupta aff ¶ 5), and in light of this new information, now seeks leave to amend his petition to add Kalpana as a petitioner (NYSCEF 113, Proposed Amended Petition).

Discussion

1. Besen's Motion to Dismiss Gupta's Petition for Dissolution

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; see also CPLR 3211 [a] [1]).

To prevail on a CPLR 3211 (a) (1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Fortis Fin. Servs. v*

Filmat Futures USA, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted]). “A cause of action may be dismissed under CPLR 3211 (a) (1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted]).

On a motion for dissolution under BCL § 1104 (c), the movant must allege “that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors.” Here, Gupta’s allegations do not meet the statutory requirements for dissolution because he fails to allege a division preventing the actual shareholders from electing directors.

First, Gupta asserts that “[t]he corporation should be dissolved because there is deeply-rooted dissension and distrust between Besen & [Amit] Doshi” (NYSCEF 1, Petition ¶ 105). The statute requires division between “shareholders” (BCL § 1104 [c]), and Amit Doshi is indisputably not a current shareholder of E.J. Inc., as evidenced by the corporate certificate (NYSCEF 99, Corporate Certificate). Therefore, Gupta cannot successfully allege, as a ground for dissolution, that a dispute between Besen and Amit Doshi, a non-shareholder, prevents the election of directors.

Second, Gupta asserts that the parties are deadlocked over the method by which they will end their business relationship (NYSCEF 1, Petition ¶ 51). However, Gupta does not sufficiently allege why this alleged dissension has precluded E.J. Inc. from electing shareholders.

Gupta also claims “Besen cannot be heard to complain about the dissolution given that he initiated the process for the Property Barter and Swap which in and of itself was ultimately the equivalent of a dissolution of E.J. Inc.” (*id.* ¶ 102). However, this court rejects the notion that Besen’s proposed Barter and Swap deal is the equivalent of requesting a court-mandated dissolution. In fact, Besen asserts that E.J. Inc. is “successful and profitable” (NYSCEF 98, Besen aff ¶ 22).

Third, Gupta asserts that he is entitled to relief because “there have been more than two consecutive annual meeting dates (March 15, 2017 and March 15, 2018) to elect directors . . . and no meetings have been held; and consequently no directors have been elected” (NYSCEF 1, Petition ¶¶ 111-112). Gupta relies on *Matter of El-Roh Realty Corp.*, where the Appellate Division, Fourth Department, reinstated the petitioner’s second cause of action for dissolution, pursuant to BCL § 1104 (c), as petitioner sufficiently alleged “that El-Roh failed to hold annual meetings for more than two years, thereby preventing the election of directors and impeding the corporation’s ability to conduct business” (55 AD3d 1431, 1433 [4th Dept 2008]). Putting aside the fact that Amit is not a shareholder, Gupta fails to allege that it was internal dissension that caused the failure to elect directors.

The E.J. Inc. corporate by-laws require that an annual meeting be held on March 15 where an election of directors will take place (NYSCEF 3, Corporate By-Laws ¶¶ 5.1, 5.5). However, despite this requirement, there is no allegation or evidence that E.J. Inc.’s shareholders have ever held an annual meeting or elected directors during the company’s existence.

“The mere failure to hold shareholders’ meetings in and of itself, does not constitute sufficient grounds to bring about dissolution under [BCL § 1104 (c)]” (*Nelkin v H.J.R. Realty Corp.*, 25 NY2d 543, 549 [1969] [holding that the petition for dissolution must be dismissed because it is not alleged that the shareholders are so divided that they cannot elect directors but merely that no meeting was held for the election of directors]. The Shareholders must be “so divided” that they fail to elect directors “for a period which includes at least two consecutive annual meeting dates” (NY CLS Bus Corp § 1104 [c]).

Gupta’s conclusory allegation that “there is internal dissension between and among the three factions of shareholders holding 100% of the voting stock who are so divided that they are unable or unwilling to elect directors as called for in Business Corporation Law §§ 701 and 703” (NYSCEF 1, Petition ¶ 1) is insufficient to support dissolution. Gupta does not dispute that E.J. Inc. has never held an annual meeting and has never elected directors. Thus, to simply allege “internal dissension” as the reason why an annual meeting was not held on March 15, 2017, without more, knowing that the Shareholders have never held an annual meeting to elect directors, is insufficient. The Shareholders’ failure to hold an annual meeting in March 2017 can be attributed to the Shareholders’ customary practice of foregoing the annual meeting every year.

Gupta also alleges that Besen and Amit “refused to address the election (or re-election) of the Board of Directors” at the December 20, 2017 Special Meeting called by Gupta, in part, to elect a board of directors” (NYSCEF 1, Petition ¶¶ 36-40, 84). In response to this allegation, Besen asserts that “[a]t that meeting, the subject of electing

a board of directors was never raised" (NYSCEF 98, Besen aff ¶¶ 37). Nevertheless, even if the issue was raised, the Special Meeting did not include the actual shareholders of E.J. Inc., and thus, without Kalpana's presence, voting on directors could not happen.

Further, Gupta does not dispute Besen's assertion that the issue of electing directors was never raised following the December 20th meeting nor was an annual meeting held in March 2018 in accordance with E.J. Inc.'s By-Laws (NYSCEF 98, Besen aff ¶¶ 34, 37; NYSCEF 112, Gupta aff [failing to dispute the above assertions]). There are no allegations that Gupta called for an annual meeting to elect directors or that there was internal divide between the Shareholder preventing the March 2018 meeting (see *Fazio Realty Corp. v Neiss*, 10 AD3d 363, 364 [2d Dept 2004] [holding that "absence of evidence that the petitioners ever called for an election or proposed a third director, it cannot be said that the election of another director was necessary or could not be obtained]).

Ultimately, Gupta fails to sufficiently allege that division between the Shareholders has prevented the election of directors for a period of at least two consecutive annual meetings. Therefore, the petition for dissolution must be dismissed.

2. Gupta's Motion to Amend his Petition for Dissolution

BCL § 1107 provides that "at any stage, before final order, the court may grant an order amending the petition or any other paper filed in the action or special proceeding, with like effect as though originally filed as amended, or otherwise as the court may direct." Under BCL § 1107, "[i]n general, a motion for leave to amend a pleading shall be freely granted, providing that there is no prejudice to the nonmoving

party and the amendment is not plainly lacking in merit" (*Matter of Digesar v Flach*, 46 Misc 3d 1211(A), 2015 NY Slip Op 50041[U], *2 [Sup Ct, Albany County 2015] [citation omitted]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [citation omitted]).

Gupta's proposed amended petition for dissolution must be denied because it is "clearly devoid of merit." For the aforementioned reasons, this court finds that Gupta's original petition (NYSCEF 1, Petition) does not state a valid claim under BCL § 1104 (c). Similarly, Gupta's proposed amended petition (NYSCEF 113, Proposed Amended Petition) fails to include any new facts or claims sufficient to substantiate a valid claim for dissolution.

Gupta's proposed amended petition seeks to replace Doshi with his wife, Kalpana, as an E.J. Inc. shareholder (*id.* ¶ 14), and alleges that "Besen and [Amit], by their words and actions, misled Gupta to believe that, at all relevant times, [Amit] was the owner of Kalpana's Shares" (*id.* ¶ 32). Although Besen and Amit's failure to reveal to Gupta that Kalpana was the true shareholder, prior to Besen's motion to dismiss, is troubling, it is not alleged that this behavior prevented the shareholders from electing directors.

Gupta attempts to show dissension and mistrust between Kalpana and Besen through unrelated litigation between the two parties (See NYSCEF 129, Amended Complaint, Index No. 652691/2018 [naming Kalpana as a defendant]; NYSCEF 131, ¶¶ Kalpana's Answer and Counterclaims, Index No. 652691/2018 ¶¶ 287, 291, 292).

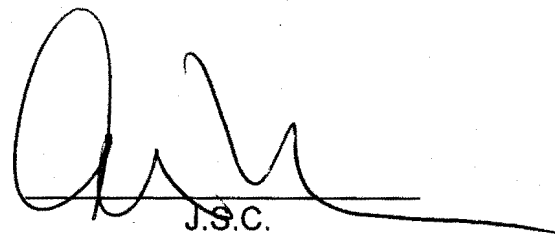
However, "even the existence of multiple lawsuits between the parties" is "insufficient" to take the "extraordinary step of judicial dissolution" (*In re Dissolution of Glamorise Founds.*, 228 AD2d at 189). It is not sufficiently alleged that dissension between Kalpana and Besen prevented E.J. Inc. from electing directors. Therefore, Gupta's motion to amend his petition is denied.

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the Michael Besen's motion to dismiss the petition is granted and the petition for dissolution of E.J. Inc. is dismissed; and it is further.

ORDERED that Gupta's motion to amend the petition for dissolution of E.J. Inc. is denied.


J.S.C.

July 24, 2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE