SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

CRISTINA QUAZZO,

Petitioner,

- against -

9 CHARLTON STREET CORPORATION, et al.,

Respondents.

Index No.: 652282/2010

DECISION/ORDER

Motion Seqs. 005, 006

In this special proceeding for judicial dissolution of three closely-held corporations, respondents Ugo Quazzo (Ugo),[1] 9 Charlton Street Corporation (Charlton), Pearlbud Realty Corporation (Pearlbud), and Orbis International Corporation (Orbis) move for summary judgment dismissing the proceeding. Petitioner Cristina Quazzo (Cristina) seeks leave to subpoena limited bank records of third parties.[2]

The following material facts are undisputed. Ugo is the father of Cristina and respondents Stephen Quazzo (Stephen) and Marco Quazzo (Marco). (Aff. of Ugo Quazzo, dated October 5, 2012 [Ugo Aff.], ¶ 2; Amended Verified Petition, ¶¶ 8-10.) Ugo has exercised control over the corporations since their founding or acquisition. (Ugo Aff., ¶¶ 3-5; Amended Verified Petition, ¶ 8.) Charlton and Pearlbud own and manage rental property in New York. (Ugo Aff., ¶¶ 4-5; Aff. of Cristina Quazzo, dated Dec. 14, 2012 [Cristina Aff.], ¶ 23.) Orbis is involved in a

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[1] As many of the parties share the same surname, each will be referred to by his or her first name.

[2] Respondents Stephen Quazzo and Marco Quazzo take no position on either motion. (See May 9, 2013 Tr. at 17.)

business that is described variously as servicing espresso machines in New York (Ugo Aff., ¶ 3) and importing and selling "various products." (Amended Verified Petition, ¶ 38.) Cristina was never employed by the corporations, except for two summers, and has not otherwise been involved in their operations. (Ugo Aff., ¶¶ 4-5; Cristina Aff., ¶¶ 5, 8.) Cristina never purchased shares of the corporations. (Ugo Aff., ¶ 8; Cristina Aff., ¶ 3.) It is also undisputed that Cristina has received financial support from Ugo "[o]ver the years." (Cristina Aff., ¶ 6; see also Ugo Aff., ¶ 10.)

Cristina claims that prior to 2001, Ugo gifted her, Marco, and Stephen each one-third of the shares in each of the three corporations, and that she continues to be the record and beneficial shareholder of one-third of the outstanding shares of each of the corporations. (Cristina Aff., ¶ 3.) Cristina further asserts that she is a director of Charlton and Pearlbud. (Id.) Ugo claims that although he considered gifting shares of the corporations to his children as part of his estate planning and prepared share certificates, he never delivered the shares to the children, and had no intention of transferring any "present interest" in the corporations to them. (Ugo Aff., ¶¶ 6-7.) Instead, Ugo states that it has always been his understanding that he is the sole shareholder of the corporations and that the shares, if not revoked, would pass upon his death. (Id., ¶ 7.) He also states that he has "always exercised complete control" over the corporations. (Id.) Further, Ugo denies that he has "looted" the corporations and represents that "much" of the financial support he has provided to Cristina was transferred from accounts held by third parties Walter Gabutti and Fiorella Carli, his relatives. (Id., ¶ 10.) Cristina counters that she did not know the source of the funds sent by her father or that the money came from the corporations. (Cristina Aff., ¶ 6.) Cristina further states that she has been denied access to the corporations' books and records and

that at least one dividend was paid, but she has received no distributions from the corporations. (Id., ¶¶ 9, 20.)

Summary Judgment

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

Standing

Ugo and the corporations contend that Cristina lacks standing to bring this proceeding because she is not a shareholder. In support of this claim, they rely on Ugo's affidavit setting forth his self-professed lack of donative intent, his assertion that he never delivered the shares to her or his other children, and Cristina's lack of involvement in the management of the corporations. (Resps.' Memo. In Support at 7-9.) In opposition, Cristina produces documentary evidence that, on its face, identifies her as a shareholder and states that she took corporate actions in that capacity. For example, Cristina annexes written shareholder consents for action without a meeting for all three corporations signed by Cristina, Marco, and Stephen as shareholders, dated May 2001; certificates of amendment for Pearlbud and Charlton corporations signed by Cristina, Marco, and Stephen as shareholders, dated July 29, 2003; Charlton share certificates issued to

Cristina, dated August 29, 1990, September 28, 1993, and August 8, 2003; a Pearlbud share certificate issued to Cristina, dated April 10, 1976; an Orbis share certificate issued to Cristina, dated March 13, 2001; a corporate resolution signed by Ugo canceling existing Orbis shares and issuing new shares to Cristina, Marco, and Stephen, dated March 13, 2001; Charlton Schedules K-1 issued to Cristina as a shareholder, dated each year from 1996 through 2001 and 2003 through 2010; minutes of Charlton annual meeting of shareholders identifying Cristina, Marco, and Stephen as shareholders and signed by Ugo, dated June 1, 2010. (Cristina Aff., Exs. F-N, P, R, S, V.)

Significantly, the majority of these documents were produced by respondents, and respondents do not contest their authenticity. With the exceptions of the Schedules K-1, respondents offer no explanation for the numerous corporate documents identifying Cristina as shareholder and specifying actions she took in that capacity. (May 9, 2013 Tr. at 8-9.) With respect to the Schedules K-1, respondents contend only that "[a]pparently, the accountant prepared those tax documents in reliance upon the shares prepared in the children's names, without realizing that the shares had never been delivered to the children and [they] are therefore not shareholders." (Ugo Aff., ¶ 7 n 1.) The corporations' own records, however, reveal that this "mistake" was repeated annually for over a decade. Further, no affidavit from the accountant was presented to support respondents' contention that the Schedules K-1 were issued in error.

On this record, the court holds that the Schedules K-1 constitute evidence, along with the other documents produced by petitioner, which raise a triable issue of fact as to her ownership of shares of the corporations. (See e.g. Matter of Capizola v Vantage Intl., Ltd., 2 AD3d 843, 845 [2nd Dept 2003] [Schedule K-1 reporting petitioner as shareholder, among other evidence,

"prove[d] the issuance of stock to petitioner"].) Put another way, Ugo's conclusory assertions of lack of donative intent do not warrant summary judgment in the face of Cristina's documentary evidence to the contrary. (See Pell St. Nineteen Corp. v Yue Er Liu Mah, 243 AD2d 121, 125 [1st Dept 1998], lv dismissed 92 NY2d 947 [1998], lv denied 93 NY2d 808 [1999].)

In so holding, the court rejects respondents' contention that the lack of delivery of the shares to Cristina demonstrates as a matter of law that no inter vivos gift of the shares was effectuated.[3] (Resps.' Memo. In Support at 8.) Physical possession of the shares is not dispositive. "The elements necessary for an effective gift are: (1) an intent on the part of the donor to make a present transfer; (2) delivery of the gift, either actual or constructive, to the donee; and (3) acceptance by the donee." (Widom v Mittman, 39 AD3d 374 [1st Dept 2007] [citation omitted].) Where a transfer of stock certificates is at issue, "a symbolical delivery" may be sufficient where the facts otherwise show a transfer, as where the certificates are recorded on the books of the company. (Matter of Szabo, 10 NY2d 94, 98 [1961].) As this Department has held, "physical delivery of a stock certificate is not a rigid requirement; constructive or symbolic delivery may suffice." (Pell St. Nineteen Corp., 243 AD2d at 126.) Thus, the transferor's retention of shares in a closely held corporation was not conclusive where the transfer was evidenced by gift and corporate tax returns. (Id.) Lichtenstein v Eljohnan, Inc. (161 AD2d 397 [1st Dept 1990]), on which respondents rely, is not to the contrary. This case also involved a purported gift of shares in a family business, and the Court noted that the absence of physical

[3] It is noted that Cristina does not concede non-delivery of the shares, although she states: "I do not recall if I ever received the original share certificates that had been gifted to me." (Cristina Aff., ¶ 3.) Moreover, as noted above, she produces documentary evidence that certain shares were designated as lost and reissued. (Cristina Aff., Ex. G.)

delivery did not preclude a claim where donative intent could otherwise be established. (Id. at 398.) The Court rejected the plaintiff's claim to ownership of the shares, in part, because the plaintiff did not "exercise any of the incidents of ownership over the stock." (Id.)

On this motion, in contrast, Cristina presents evidence that she did exercise control over the stock, including evidence that she executed written shareholder consents for action without a meeting (Cristina Aff., Exs. K-M) and certificates of amendment (id., Exs. N, S) and received Schedules K-1 from at least one of the corporations. (Id., Ex. P.)

The court also rejects respondents' contention that an email from Cristina to Ugo, dated May 26, 2008, contained an admission by Cristina that she is not a shareholder in the corporations. The email, which discussed her need for money from Ugo, suggested sources of funds, including the following: "2) or I could receive loan money for that amount. (ie a mortgage from one of the buildings as I am not a shareholder or owner of them now. . ." (Aff. of Ugo Quazzo, dated March 13, 2013, Ex. B.) Cristina contends that the last line contains a typographical error, and that she did not know whether the properties that the corporations owned had at some point been transferred directly to Ugo's children. According to Cristina, what she meant to say was that a mortgage on the building(s) could be offered for a loan as she was "now a shareholder or owner of them now." (Aff. of Cristina Quazzo, dated May 13, 2013, ¶ 8.) At best, the statement is ambiguous.[4] In any event, resolution of the meaning of the email involves credibility determinations which are not properly made on a motion for summary judgment.

[4] Parenthetically, the court notes that one of the corporations, Orbis, indisputably does not hold real property.

Grounds for Dissolution

The petition seeks dissolution of the corporations pursuant to Business Corporation Law § 1104-a (a) (1) and (a) (2). This statute provides, in relevant part, as follows:

> "(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
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> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation."

With respect to § 1104-a (a) (1), Cristina alleges that "she has been denied access to all corporate information and records, has never received any remuneration or distributions from her ownership in the Corporations, and her very status as a minority shareholder has been denied." (Amended Verified Petition, ¶ 58.) Respondents contend that, even assuming that all of petitioner's allegations are true, they do not state a claim of oppression as a matter of law. (Resps.' Memo. In Support at 10.)

"[O]ppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." (Matter of Kemp & Beatley, Inc., 64 NY2d 63, 73 [1984].) Contrary to respondents' contention, the facts that Cristina did not invest capital, but rather allegedly was gifted the shares, and was not involved in management do not preclude her claim that she had reasonable expectations of economic benefit as a result of

ownership of shares in the corporations.

Respondents cite a number of authorities that have held that a shareholder's reasonable expectations have not been frustrated where the shareholder, who had never sought a role in management of the corporation, was denied a role, or where the shareholder, who had never been employed by the corporation, was denied employment. (See e.g. Matter of Schlachter, 154 AD2d 685, 686 [2d Dept 1989], appeal denied 76 NY2d 705 [1990] [where shareholder's husband "was employed prior to the acquisition of the petitioner's stock ownership and was an employee at will, the petitioner could have had no reasonable expectation that he would continue to be employed"]; Matter of Farega Realty Corp., 132 AD2d 797, 798 [3d Dept 1987] [petitioner could not state claim for oppression where petitioner was "a passive investor" and he neither sought "responsibilities in the day-to-day management nor did he expect the corporation to provide him with an occupation"]. Compare Matter of Rambusch, 143 AD2d 605, 606 [1st Dept 1988] [petitioner stated claim for oppression where "he was employed for 36 years, and in which he served in executive positions and owned over 30% of the stock"].) However, respondents do not, on this inadequately briefed record, demonstrate as a matter of law that an oppression claim may not be maintained based on the very denial of a petitioner's status as a shareholder. Indeed, there appears to be some authority that has recognized a claim on this basis. (See Dissolution of Pickwick Realty Ltd., 246 AD2d 863 [3rd Dept 1998] [affirming finding that petitioner was shareholder of subject corporations where respondents had held him out as a shareholder and that denying that status, among other things, constituted oppression]; Pappas v Fotinos, 28 Misc 3d 1212 [A], 2010 WL 2891194, *11 (Sup Ct Kings County July 23, 2010] ["It is difficult to recognize a more reasonable shareholder expectation than that its interest will not be repudiated

in its entirety, and that legal action would be required to compel its acknowledgment"].)

While the court makes no final determination on the motion, as briefed, as to whether petitioner has a viable oppression claim, the court holds that she states a viable independent claim for dissolution pursuant to § 1104-a (a) (2). Petitioner alleges that the "[d]irectors, officers, or those in control of the Corporations" have "looted, wasted, and diverted for non-corporate purposes" assets of the corporations. (Amended Verified Petition, ¶ 57.) Respondents assert that petitioner is barred from objecting to any lack of corporate formality or wrongful use of corporate funds because she had been a beneficiary of those very acts. (See Resps.' Memo. In Support at 14-16.) This bare assertion is insufficient to shift the burden to Cristina to raise a triable issue of fact as to whether Ugo's governance of the corporations was proper. To the extent that respondents raise the bar of bad faith or assert the "in pari delicto" doctrine as a bar to this claim, they produce no evidence that the payments that were made to Cristina over the years were wrongfully transferred out of corporate accounts. Moreover, Cristina asserts that she "never knew" the source of the funds she received. (Cristina Aff., ¶ 6.) Respondents fail to prove that Cristina knew that Ugo was using those accounts to divert funds that belonged to the corporations, a necessary element of any in pari delicto claim. At best, questions of fact remain as to Cristina's knowledge.[5] (See Whitney Group, LLC v Hunt-Scanlon Corp., 106 AD3d 671, 672 [1st Dept 2013].)

Finally, respondents seek dismissal based on the statute of limitations, contending that

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[5] It is noted that discovery has not yet been completed in this action or in the related plenary action, Quazzo v 9 Charlton Street Corporation, et al. (No. 652002/2011), also before this court. As of oral argument on these motions, depositions had not begun in this action. (May 9, 2013 Tr. at 20.) In any event, Cristina presents evidence on this motion sufficient to raise triable issues of material fact.

"[m]any of the allegations made in support of Cristina's dissolution proceeding occurred, if at all, more than six years prior to the commencement of this proceeding." (Resps.' Memo. In Support at 14.) Respondents assert, and petitioner does not appear to dispute, that the six-year statute of limitations governs Cristina's claims. (Resps.' Memo. In Support at 14; Pet's Memo. In Opp. at 18.) However, respondents do not identify which allegations they contend are time-barred and how the striking of those allegations would affect the viability of the claims. In response, Cristina attests that respondents first denied her status as a shareholder in 2010 and that she only discovered the alleged dissipation of corporate assets through discovery in this action. (Cristina Aff., ¶¶ 7-8, 13, 34.) Cristina further contends that respondents are equitably estopped from asserting that her claims are time-barred, as they concealed their wrongful actions from her. (Pet.'s Memo. In Opp. at 18.)

In the plenary action, this Court (Fried, J.) rejected a similar argument on a motion to dismiss a fraud claim, holding that "questions of fact exist as to when [Cristina] could have discovered the alleged fraud." (Decision and Order, dated July 16, 2012 at 9.) Although that determination dealt with an alleged forgery of a document, which is not the subject of this proceeding (see Cristina Aff., ¶ 39), the same reasoning applies. (See Simcuski v Saeli, 44 NY2d 442, 448-449 [1978] ["It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action"]; see also Corsello v Verizon New York, Inc., 18 NY3d 777 [2012].) On this limited record, respondents fail to demonstrate that Cristina knew or could have known of the claims in her petition before any applicable statute of limitations period ran.

The court has considered respondents' remaining contentions and finds them to be without merit. On this record, respondents have failed to meet their burden of entitlement to

summary judgment.

Third-Party Discovery

Cristina contends that Ugo deposited monies due to the corporations, including rent payments, into bank accounts of third parties in an effort to secrete assets. (Amended Verified Petition, ¶¶ 51-54.) On April 26, 2012, this Court (Fried, J.) granted Cristina leave to subpoena bank records related to the respondent corporations as well as the "account opening documents" for the accounts held by certain third-party individuals and a third-party corporation. The purpose for obtaining the account-opening documents was to determine whether those accounts were connected to the corporate respondents or had a business purpose. (April 26, 2012 Tr. at 57-58.) Having obtained those documents, Cristina now seeks leave to serve a subpoena duces tecum on Citibank for "(i) the account balances; (ii) all documents showing deposits from any tenant of the properties owned by 9 Charlton Street Corporation . . . or Pearlbud Realty Corporation . . . and (iii) all documents showing all cash deposits or withdrawals by 9 Charlton, Pearlbud, Orbis International Corporation . . ., the Corporations' employees, officers, directors, or agents, or respondent Ugo Quazzo . . ., for the years 2007 through the present" for specified Citibank accounts associated with Walter Gabutti, Fiorella Carli, Paola Quazzo, and Ada Chester Corporation. (Pet.'s Memo. In Support at 1.)

Cristina alleges that Ugo opened the accounts in the names of Walter Gabutti, Fiorella Carli, Paola Quazzo, and Ada Chester Corporation, among other things, to divert rents received on real property held and managed by Charlton and Pearlbud. Cristina identifies Gabutti as Ugo's cousin and godson and Carli and Paola as her cousins and states that, to her knowledge, none of these individuals has a valid business reason for receiving corporate monies. (Cristina Aff. ¶¶ 25-26, 28-29; Aff. of Cristina Quazzo, dated Nov. 9, 2012, ¶¶ 2-4.) Cristina also states

that, to her knowledge, Ada Chester Corporation performs no services for the respondent corporations. (Id., ¶ 5.) Cristina provides an affidavit of a forensic accountant detailing transfers made from the corporate respondents' accounts to the accounts held in the name of Gabutti, Carli, Paola, and Ada Chester Corporation, and transfers from such accounts back to the corporate respondents' accounts. (Aff. of James J. Donohue, Exs. 1-3.) Further, Cristina produces a canceled check from an alleged tenant of respondent Charlton made out to Gabutti for "rent and electric." (Aff. of Daniel Mandel, Ex. D.) Ugo and the corporations do not dispute the transfers between the corporations and the third-party accounts and offer no explanation as to the account holders' connection to the corporations.

"The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are matters within the sound discretion of the trial court." (Bernardis v Town of Islip, 95 AD3d 1050 [2d Dept 2012]. See also Matter of Mintz, 113 AD2d 803, 809 [2d Dept 1985] [holding that "a determination of whether petitioner has been the victim of oppressive conduct can only be made upon a full development of the facts after an opportunity for discovery . . . and not upon acrimonious affidavits"] [quoted with approval in Rambusch, 143 AD2d at 606].) Cristina alleges waste, dissipation, and looting of corporate assets. (Amended Verified Petition, ¶¶ 49-51, 55.) Cristina seeks discovery in the form of production of documents from seven accounts, limited to deposits from tenants of Charlton and/or Pearlbud, and deposits or withdrawals by the corporations or Ugo. Contrary to respondents' contention, petitioner does not already have all records showing transfers from the respondent corporations to third parties. (See Resps.' Memo. In Opp. at 8.) While she has evidence of the transfers from the corporations or back to the corporations, she does not have evidence of any deposits made directly by parties other than by the corporations into the third-party accounts, or of transfers made out of those

accounts to parties which may be related to the corporations. Cristina therefore demonstrates the need for the requested limited third-party discovery to trace potential corporate assets. In consideration of the privacy interests of the third-party account holders, the confidentiality provisions set forth in paragraph 4 of the preliminary conference order, dated July 1, 2011 shall apply to any productions made pursuant to this order.

It is accordingly hereby ORDERED that the motion of respondents Ugo Quazzo, 9 Charlton Street Corporation, Pearlbud Realty Corporation, and Orbis International Corporation for summary judgment is denied; and it is further

ORDERED that Cristina Quazzo's motion for leave to conduct third-party discovery is granted to the extent of granting leave to serve upon Citibank the subpoena duces tecum for the following records: (i) the account balances; (ii) all documents showing deposits from any tenant of the properties owned by 9 Charlton Street Corporation or Pearlbud Realty Corporation and (iii) all documents showing all cash deposits or withdrawals by 9 Charlton Street Corporation, Pearlbud Realty Corporation, Orbis International Corporation, the aforementioned corporations' employees, officers, directors, or agents, or respondent Ugo Quazzo, for the years 2007 through the date of this order for the following Citibank accounts held in the names of Walter Gabutti (Account Nos. 16700132, 73024791), Fiorella Carli (Account Nos.05160732, 16663319), Paola Quazzo (Account Nos. 88745209, 9938454573), and Ada Chester Corporation (Account No. 16700685); and it is further

ORDERED that the release of information pursuant to the aforesaid subpoena duces tecum shall be subject to the confidentiality provisions set forth in paragraph 4 of the preliminary conference order, dated July 1, 2011; and it is further

ORDERED that petitioner shall serve the account holders with a copy of this order, by

overnight mail at their last known addresses, at least 20 days before the return date of the subpoena duces tecum; and it is further

ORDERED that the parties shall appear in Part 60, Room 248, 60 Centre Street, New York, New York for the previously-scheduled compliance conference on June 24, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
March 11, 2014

MARCY S. FRIEDMAN, J.S.C.