

STATE OF NEW YORK
SUPREME COURT COUNTY OF JEFFERSON

JOHN L. YEHLE,

Petitioner,

Index No. 2015-1321
RJI No. 22-15-0572
Hon. James P. McClusky, J.S.C.

-vs-

JON T. RICH, JR.,

Respondent.

AFFIRMATION IN SUPPORT
OF MOTION
FOR APPOINTMENT
OF RECEIVER

DANIEL R. ROSE, hereby affirms under penalty of perjury:

1. Your affirmant is an attorney duly licensed and admitted to practice law in the State of New York and associated with the law firm of Costello, Cooney & Fearon, PLLC, attorneys for the defendant, Jon T. Rich, Jr. (hereinafter "Mr. Rich"). As such, I am fully familiar with the facts and proceedings heretofore had in this action.

2. I submit this Affirmation in support of Mr. Rich's application for an Order pursuant to Section 703 of the Limited Liability Company Law for appointment of a receiver for purposes of winding up of Wellesley Island Storage, LLC ("WIS"), due to petitioner's frustration and blatant disregard of this Court's Stipulated Order dissolving the WIS and directing auction of WIS's assets.

3. Prior to addressing the issues raised in the previous paragraph, it is necessary to discuss limited facts and background surrounding this motion.

I. PROCEDURAL HISTORY

4. Petitioner commenced this proceeding by filing of a Verified Petition with the Clerk of the County of Jefferson on or about June 11, 2015, a copy of which is attached hereto and made a part hereof as **Exhibit "A"**. Therein, petitioner sought, *inter alia*: (a) judicial dissolution of WIS; (b) liquidation of

WIS's assets; (c) an accounting of each member's contributions; and (d) distribution of WIS's assets, following payments of its debts and other liabilities.

5. Mr. Rich served his Response to the Verified Petition on August 31, 2015, a copy of which is attached hereto and made a part hereof as **Exhibit "B"**. Mr. Rich admitted that it was no longer reasonably practicable to carry on WIS's business, admitted that judicial dissolution was appropriate, and sought relief himself of dissolution of WIS and a judicial order directing sale of its assets. (*See* Exhibit "B" ¶¶ 1, 3, and at 2).

6. Notwithstanding the absence of any opposition to the majority of the relief sought in the Petition, the parties engaged in discovery, including the exchange documents and conducting depositions of each of the members, relating almost exclusively to the issue of the accounting.

7. During a conference call with petitioner's counsel on July 17, 2018, your affirment suggested that since there was no opposition to dissolution and sale of the assets, Mr. Rich was willing to stipulate to dissolution and a judicially-directed sale of WIS's assets, as requested in the petition.

8. Nearly three (3) years after commencing this proceeding seeking, *inter alia*, that exact relief, counsel was uncertain if his client was willing to stipulate to the very objective sought by the petition.

9. Ultimately, a month later (August 16, 2018), counsel advised petitioner would so stipulate.

10. By e-mail on October 7, 2018, petitioner proposed "a stipulation and order for the Court's signature, which would order the sale and direct where the proceeds should be held, by whom, and state that they must be held pending further order of the court." A copy of this e-mail is attached hereto and made a part hereof as **Exhibit "C"**. Counsel further asserted petitioner would be serving additional discovery requests "investigating Mr. Rich's claimed contributions to the project." (*See* Exhibit "C").

11. Following protracted negotiation between the parties of the stipulation, this Court entered a

Stipulated Order on November 21, 2018, a copy of which is attached hereto and made a part hereof as **Exhibit “D”**.

12. That Stipulation provided, *inter alia*: Mr. Rich’s consent to dissolution of WIS and that the parties had “agreed all assets of Wellesley Island Storage, LLC should be sold at auction by Brzostek’s.” (*See* Exhibit “D”).

13. Following entry of this Stipulated Order, however, Mr. Yehle has taken no steps to cooperate or comply with this Order. Although petitioner was to be responsible for coordinating the auction with Brzostek’s, upon information and belief, no contact was made with Brzostek’s following entry of the Stipulated Order.

14. Your affirmant wrote to Brzostek’s by letter dated January 14, 2019, enclosing this Court’s Order that Brzostek’s was to auction WIS’s assets “at the earliest commercially reasonable date.” A copy of this letter is attached hereto and made a part hereof as **Exhibit “E”**.

15. In the ensuing weeks, Brzostek’s prepared certain documents for execution by WIS’s members. Your affirmant’s office received those documents on or about January 25, 2019, and forwarded partially executed documents to petitioner’s counsel by letter dated January 30, 2019, a copy of which is attached hereto and made a part hereof as **Exhibit “F”**.

16. In that letter, I advised counsel of the various information and signatures which were required by Brzostek’s, and informed that Brzostek’s had scheduled the auction to occur on May 1, 2019, with an open house to occur the preceding week on April 24, 2019. (*See* Exhibit “F”).

17. In the interim, as the Court is aware, petitioner sought to compel responses to certain documents demands related to the outstanding issue of the accounting and Mr. Rich’s contributions to WIS in 2013. These demands were in no way relevant to the auction of WIS’s assets, to which petitioner had stipulated, and which this Court directed in the Stipulated Order.

18. Notwithstanding the utter lack of any connection between the receipts and invoices sought by petitioner's document demands and the court-ordered auction scheduled to occur, petitioner has refused to take any necessary steps to comply with this Court's Order directing the sale of WIS's assets.

19. Indeed, despite efforts by both this office and Brzostek's to obtain petitioner's approval of the necessary auction documents, petitioner has failed or refused to execute and return those documents. Ultimately, by letter dated April 4, 2019, Brzostek's advised it was canceling the auction due to petitioner's refusal to return the executed documents. A copy of this letter is attached hereto and made a part hereof as **Exhibit "G"**.

20. The following day, Mr. Rich objected to petitioner's transparent delay tactics and outright refusal to comply with the Court's directive based upon the absence of outstanding discovery wholly unrelated to the auction. A copy of this letter is attached hereto and made a part hereof as **Exhibit "H"**.

21. There was no response to this letter.

22. Furthermore, Mr. Rich served his responses to petitioner's document requests, which included recitations that Mr. Rich is not in possession of any documents responsive to any of petitioner's requests, on or about April 23, 2019.

23. To date, this office has not received any of the necessary documents for Brzostek's to proceed with the auction.

24. I am also aware that Brzostek's has not directly received any of the necessary documentation from petitioner.

25. Accordingly, inasmuch as petitioner has willfully and intentionally frustrated this Court's Order that WIS's assets be auctioned at the earliest commercially reasonable time by Brzostek's, it is appropriate that WIS be placed into receivership so the receiver may authorize the auction and liquidation of WIS's assets, as required by this Court's Order entered November 21, 2018.

II. THIS COURT MUST APPOINT A RECEIVER

26. Section 703(a) of the Limited Liability Company Law permits this Court to appoint a receiver or liquidating trustee as part of the “winding up” of WIS. *See also Spires v. Casterline*, 4 Misc. 3d 428, 439 (Sup. Ct., Monroe Cnty. 2004).

27. Based upon the foregoing procedural history, including petitioner’s refusal to comply with this Court’s Order or otherwise cooperate in expeditiously auctioning WIS’s assets, it is respectfully submitted this Court should appoint a receiver to carry out all necessary tasks to ensure sale of the assets at the “earliest commercially reasonable time,” without further delay, obstruction or frustration of this Court’s directives.

28. In an uncontested action for dissolution which has been pending for nearly four (4) years, the interests of judicial economy and timely resolution of matters dictate the appointment of a receiver to effectuate this Court’s Order.

29. Furthermore, inasmuch as a receivership is only necessary due to petitioner’s obstructive conduct, it is respectfully submitted the receiver’s fee should be deducted from any distribution of assets to petitioner, rather than be borne by the LLC as a whole.

30. No previous application has been made for the relief sought herein.

WHEREFORE, your affirmant respectfully requests an Order of this Court pursuant to Section 703 of the Limited Liability Company Law appointing a receiver to oversee and effectuate liquidation of all assets of Wellesley Island Storage, LLC and place all proceeds in escrow, as previously directed by this Court, together with such other and further relief as the Court may deem just and proper.

Dated: May 7, 2019
Syracuse, New York



DANIEL R. ROSE