

COSTELLO, COONEY & FEARON, PLLC

**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.**

**AFFIDAVIT IN OPPOSITION  
TO CROSS-MOTION TO  
VACATE STIPULATED  
ORDER AND IN FURTHER  
SUPPORT OF MOTION  
FOR RECEIVER**

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

**ROBERT W. CONNOLLY**, being duly sworn, deposes and says:

1.        Your deponent is an attorney duly licensed and admitted to practice law in the State of New York and a member of the law firm of Costello, Cooney & Fearon, PLLC, attorneys for the respondent, 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 Affidavit in opposition to petitioner's cross-motion to vacate this Court's prior Stipulated Order directing the dissolution of Wellesley Island Storage, LLC and liquidation of its assets by auction, because petitioner has not demonstrated any misrepresentation of any fact which would warrant relief from such Stipulated Order. Indeed, petitioner requested such relief within the petition filed in 2015, and respondent admitted at the time of his answer that such relief was appropriate. There are no grounds not to proceed with such interim relief.

3. Petitioner's cross-motion is merely a further thinly-veiled attempt to delay what he requested in his own petition. The issues petitioner attempts to put before this Court relate to his desire for a forensic accounting to support arguments related to the parties various contributions to WIS.

4. The argument that this discovery must occur prior to the stipulated and ordered sale is a red herring. The discovery has no bearing on the auction of the property or its market value at auction. Notably, petitioner does not and cannot legitimately make such a claim.

5. Finally, with respect to Mr. Rich's pending motion to appoint a receiver based upon petitioner's blatant disregard of the Stipulated Order, Petitioner's counsel's affirmation, not based upon any personal knowledge of Yehle's conduct of the business, is without any evidentiary value. Petitioner's disregard of court directives and refusal to cooperate in the auction, alone warrant Mr. Rich's requested relief to ensure this matter proceed to an expeditious resolution.

I. **THERE ARE NO GROUNDS TO VACATE THE STIPULATED ORDER**

6. Petitioner now seeks to vacate his own stipulation and this Court's resulting Order, which directs the dissolution of WIS and sale of its assets. Petitioner bases it's motion solely upon some unidentified "misrepresentation of fact" by Mr. Rich. (*See Slye Aff.*).

7. It is well-established that "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." *Przewlocki v. City of Lackawanna*, 112 A.D.2d 757, 757 (4th Dep't 1985) (quoting *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984)); *see Doe v. Marzolf*, 258 A.D.2d 970, 971 (4th Dep't 1999) (reversing vacatur of stipulation because there was no evidence of fraud, collusion, mistake or accident, and the defendant's "subsequent change of heart provides an inadequate basis for vacating the stipulation").

8. At the outset, petitioner does not allege there was any fraud, collusion, mistake or accident which might warrant vacating the Stipulated Order. (*See Slye Aff.*).

9. Moreover, petitioner has not even identified any **misrepresentation** by Mr. Rich or his counsel which has any bearing whatsoever on the dissolution of WIS and auction of its assets. (*See id.*).

10. Rather, after asserting the motion to vacate the stipulation is based upon some amorphous misrepresentation, petitioner redirected to a recitation related to a Notice of Discovery and Inspection and his alleged forensic accountant's opinion that Mr. Rich's testimony is insufficient to sustain his claims for his contributions to WIS.

11. None of these issues is even related to the relief to which the parties stipulated – the dissolution of WIS and the auction of WIS's assets.

12. Petitioner argues that he must know his percentage of his contribution to the company in order to meaningfully participate in the auction. This argument is clearly a red herring. Petitioner is essentially arguing that he would have an easier time of financing a purchase if he knew his relative percentage contribution. This is mistaken for two reasons. First, knowledge of contributions would in no way impact value of the auctioned property. Rather it would only allow Petitioner to know the percentage of value that he is entitled to after the sale is completed. It will not change the purchase price. Second, and more importantly, even if Petitioner were to know the relative percentage contributions, he is not relieved of any burden at the auction of obligations of financing the full purchase price.

13. As set forth in the Purchase Offer provided by Brzostek's Real Estate Auction Co. ("Brzostek's"), which Mr. Rich forwarded to petitioner on January 29, 2019 and which is attached hereto and made a part hereof as **Exhibit "I"**, the purchaser is responsible for paying into escrow the purchase price plus Buyer's Premium according to a schedule set by Brzostek's at the auction. (*See Exhibit "I"* ¶¶ 1–5).

14. As confirmed in an e-mail from Amiee Bush, Brzostek's Business Manager on May 28, 2019, Brzostek's requires the **entire** purchase price to be paid into escrow according to the schedule. If the purchaser is entitled to some portion of the proceeds, such amount would only after collection into escrow, be distributed as provided for by the LLC's Operating Agreement and/or Court Order. A copy of this e-mail is attached hereto and made a part hereof as **Exhibit "J"**. Respondent would be subject to the same restriction regarding lack of knowledge of contributions.

15. Thus, petitioner's proportionate ownership share in the LLC has absolutely no bearing on the value of the LLC or the amount for which those assets sell at auction, because any successful purchaser - including petitioner - will need to deposit the full value of WIS's assets into escrow at the auction.

16. Respondent would be subject to the same restriction regarding lack of knowledge of contributions.

17. Moreover, as this Court is further aware, petitioner is presently a party to a pending matrimonial action, and this Court's Automatic Orders prohibit him from disposing of any marital property. (*See* Exhibit "K").

18. It would therefore appear that petitioner would be unable to participate in the bidding process at the auction, in any rate. (*See id.*).

19. Following the auction, and liquidation of WIS's assets, this Court may then hold a hearing regarding the parties' interests in the disbursement of the sale proceeds held in escrow, to the extent it is even necessary. Only at that time are petitioner's contentions regarding Mr. Rich's in-kind contributions to WIS appropriately before this Court.

20. In any event, although petitioner's purported forensic accountant alleges she is unable to assign any value to Mr. Rich's contributions due to the lack of receipts, Mr. Rich's sworn testimony

regarding his contributions is more than sufficient for this Court to make a determination about the parties' interests in the limited liability company.

21. None of these questions are presently before this Court, however, because petitioner has failed to demonstrate any legal grounds to vacate petitioner's stipulation or this Court's resulting Order, and WIS's assets must first be auctioned and a closing must occur, without any further delay by petitioner.

## II. A RECEIVER MUST BE APPOINTED TO ENSURE TIMELY AUCTION

22. Petitioner's sole opposition to Mr. Rich's motion for the appointment of a receiver are the unsubstantiated and inadmissible allegations of counsel that petitioner has "been a good steward of the property" and intends to continue to operate WIS through and following the auction. (*See Slye Aff.* ¶ 21).

23. Mr. Rich is unable to present any evidence to the contrary because petitioner has failed to account to Mr. Rich or his counsel for the rents he is purportedly collecting, nor has Mr. Rich even received copies of any tax returns filed for WIS since 2017, notwithstanding petitioner's fiduciary and ongoing discovery obligations to provide same. (*See Exhibits "L"–"M"*).<sup>1</sup>

24. Furthermore, petitioner's own petition seeking this relief, along with his own conduct in blatantly disregarding the Stipulated Order and refusing to cooperate with Brzostek's to effectuate the auction, constitute more than adequate grounds for this Court to appoint a receiver with authority to circumvent petitioner's obstructionist conduct and finally move this matter forward. (*See Rose Aff.* ¶¶ 11–16, 18–21; Rich Exhibits "F"–"H").

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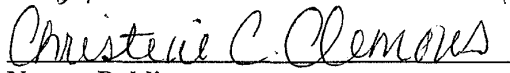
<sup>1</sup> On or about March 23, 2018, Mr. Rich served petitioner with Requests for Production of Documents, a copy of which is attached hereto and made a part hereof as Exhibit "L". Among the documents requested were the LLC's tax returns and the LLC's ledger or corporate books, including records of both accounts receivable and expenses. (*See Exhibit "L" ¶¶ 3–4*). Those demands were noted to be continuing. (*See id.* at 4). In response to these demands, petitioner provided Mr. Rich with tax returns for 2015–2017, and a spreadsheet indicating only the checks drawn against the LLC's account. Those documents, provided on or about April 30, 2018 and attached hereto as Exhibit "M", have not been supplemented since that time. Separate from these ongoing discovery obligations, petitioner continues to owe a fiduciary duty to Mr. Rich. *See McGuire v. Huntress*, 83 A.D.3d 1418 (4th Dep't 2011).

25. Petitioner's delay in prosecuting this action, particularly in light of admissions that the majority of the relief sought was unopposed, for over four (4) years, including his recent refusal to comply with his own stipulation demonstrate receivership is appropriate in this matter, and should be directed by this Court.

**WHEREFORE**, your deponent respectfully requests an Order of this Court: (a) denying respondent's cross-motion on the grounds respondent has not made any showing that the Stipulation was procured by fraud, collusion, accident or mistake, and (b) appointing a receiver to effectuate the auction of WIS's corporate assets, consistent with the Stipulated Order; and (c) directing that the receiver's fees be paid from any ultimate distribution of WIS's assets made to petitioner, together with such other and further relief as this Court may deem just and proper.

  
ROBERT W. CONNOLLY

Subscribed and sworn to before me  
this 29<sup>th</sup> day of May, 2019.

  
Notary Public

Christine C. Clemons  
Notary Public in the State of New York  
Qualified in Onondaga County No. 4959711  
My Commission Expires Dec. 11, 2021