SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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In the Matter of the Application of

RENA PACHTER, in her representative capacity as Administrator of the ESTATE OF JUDITH LINDENBERG, deceased, individually and derivatively on behalf of 3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Petitioner,

Decision and Order
Index No. 502779/2020

For the Dissolution of 3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC, and other relief,

- against -

October 13, 2020

DAVID WINIARSKY, ESTHER WINIARSKY, and MYRON WINIARSKY,

Respondents,

- and -

3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Nominal Respondents,

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved seeking a restraining order preventing the respondents from mortgaging or transferring the properties in question, prohibiting the dissipation of assets other than in the ordinary course of business and for the retention of all records. Further, the petitioner seeks the appointment of a receiver. Further the petitioner has moved seeking to disqualify counsel for the nominal respondents, Myron Winiarsky, who is also a respondent in this case. A supplemental

motion seeks to disqualify Nativ Winiarsky as well. The respondents have cross-moved seeking to dismiss the first four causes of action of the petition. All the motions have been opposed respectively and papers were submitted by the parties and after review of all the arguments this court now makes the following determination.

This lawsuit was filed by the petitioners, half owners of the nominal respondent entities. The petition seeks the dissolution of those entities and further seeks claims against Myron Winiarsky, the manager of the entities, and others, based on fraud, forgery and other improprieties. The motions seeking a restraining order a receiver and to dismiss and for disqualification have now been filed. The petitioner has moved seeking to disqualify Winiarsky from representing the nominal entities on the grounds he will undoubtedly be a witness in this lawsuit. Additionally, Winiarsky has represented Judith Lindeberg, whose estate is pursuing these claims and thus cannot represent entities in an adversarial proceeding. Further, in a supplemental motion the petitioner seeks the disqualification of Nativ Winiarsky the brother of Myron who became substituted counsel for the nominal entities. Further, petitioner seeks disqualification of the law firm of Kucker, Marino, Winiarsky & Bittens LLP the firm where Nativ Winiarsky is employed. The disqualification is based upon the fact that Nativ Winiarsky's

representation still presents an appearance of impropriety and that further Nativ Winiarsky engaged in a communication in violation of the Rules of Professional Conduct. Moreover, petitioner argues a conflict is presented because Nativ represented individuals who provided him with Ms. Lindenberg's confidential financial information making his representation of her adversaries improper.

Conclusions of Law

First, "a motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determinaion of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Concerning the first cause of action of the petition, first, common-law dissolution remains a viable cause of action in New York. Where statutory dissolution is unavailable then

"shareholders in that situation have had, and continue to have, recourse in the form of common-law dissolution. Common-law dissolution, which predates BCL §1104-a is an equitable cause of action which permits shareholders below the 20% ownership threshold to seek dissolution of a private corporation under certain circumstances of malfeasance. Although common-law dissolution cases are relatively rare in New York, a body of case law has evolved (and continues to evolve) that sheds light on this cause of action, the burden of proof necessary to sustain such a cause of action, and the available remedies if liability is found to exist" (see, *The Contours of Common-Law Dissolution in New York*, by Phillip Halpern, New York State Bar Journal, March/April 2008). Thus, it is well settled that common-law dissolution is only available to a minority shareholder alleging violations of fiduciary duties (In Re Candlewood Holdings Inc., 124 AD3d 775, 2 NYS3d 184 [2d Dept., 2015], see, also, Sternberg v. Osman, 181 AD2d 897, 582 NYS2d 206 [2d Dept., 1992]). Further, in Ferolito v. Vultaggio, 99 AD3d 19, 949 NYS2d 356 [1st Dept., 2012] the court held that "a claim for common-law dissolution is properly stated where it is alleged with sufficient factual detail that the shareholders in control have been looting the company's assets at the expense of the minority shareholders" (id). The petitioner argues the above cited cases do not foreclose an action for common law 'equitable dissolution'

because those cases and Osman in particular only "held that mere deadlock caused by a stalemate of equal membership positions did not give rise to equitable dissolution because deadlock alone, without oppression or abuse of control, is insufficient" (see, Petitioner's Memorandum in Law in Opposition, page 28). Thus, petitioner argues that where oppression or other improprieties are alleged then a claim for equitable dissolution can exist even if the petitioner is a fifty percent owner. Indeed, the arbitrary rule allowing only minority ownership to pursue such claims makes "no sense" (supra, at 29). There are cases in other jurisdictions that hold 'minority' status can be obtained and dissolution pursued even from a fifty percent owner. Thus, in Bonavita v. Corbo, 300 N.J. Super. 179, 692 A2d 119 [Superior Court of New Jersey, Chancery Division, Bergen County 1996] the plaintiff was a fifty percent owner of the corporation's stock. The court stated that "an initial question is whether she can be considered a 'minority shareholder' within the meaning of the statute. Consideration of the policy underlying the statute, however, makes clear that the answer to that question is 'yes.' If the statute is otherwise applicable, it is not rendered inapplicable simply because plaintiff owns 50% of the Corbo stock rather than, hypothetically, 40% or 49%. Indeed, while defendants deny any oppressive or wrongful conduct, they do not claim that the statute is inapplicable simply because plaintiff owns one

half of the corporation's stock rather than a numerical minority. Clearly, such a distinction would make no sense and would be inconsistent with what N.J.S.A. 14A:12-7 is designed to accomplish" (id). The court in Kortum v. Johnson, 2008 ND 154, 755 NW2d 432 [Supreme Court of North Dakota 2008] adopted this position as well. Thus, a narrow approach which forecloses relief because the petitioner happens to be a fifty percent owner fails to consider the individual facts of each dissolution request on a case by case basis (see, *The Contours of Common-Law Dissolution in New York*, by Phillip Halpern, New York State Bar Journal, March/April 2008). It also fails to appreciate that since statutory dissolution is unavailable, as the court will presently address, the petitioner will have no avenue in which to challenge the improprieties alleged, an untenable situation. Therefore, the petitioner should be entitled to pursue the claims and allegations contained in the petition, notwithstanding the status as a fifty percent owner. Therefore, the motion seeking to dismiss the first count is denied.

Concerning the second claim seeking statutory dissolution, it is well settled that such dissolution is only available "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement" (see, LLCL §702, In re 1545 Ocean Avenue LLC, 72 AD3d 121, 893 NYS2d 590 [2d Dept., 2010]). That criteria

has been defined to allow such statutory dissolution only where the corporation is not financially feasible to continue (Mizrahi v. Cohen, 104 AD3d 917, 961 NYS2d 538 [2d Dept., 2013]) or the management of the corporation is unable or unwilling to reasonably permit or promote the stated purpose of the corporation (In re 1545 Ocean Avenue LLC, supra). The Petition alleges that "the Companies' management is and has become so dysfunctional that it is no longer practicable to operate the business of the Companies" (see, Verified Petition, ¶178). Further the Petition alleges "the Companies' management is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved" (see, Verified Petition, ¶179). Those conclusory allegations merely mimicking the statutory requirements do not explain the nature of the unwillingness or inability to promote the stated nature of the corporation. The Petition does not allege any facts supporting these criteria. The crux of the petition is that respondents, as managers of the corporation essentially stole over a million dollars by diverting rental incomes and committed other improprieties as well. Further, there are allegations of oppression and freezing out the petitioners. However, those allegations, while supporting common law dissolution do not support statutory dissolution at all (see, Kassab v. Kasab, 137 AD3d 1135, 29 NYS3d 39 [2d Dept., 2016]). Therefore, the motion

seeking to dismiss the second cause of action is granted.

The motions seeking to dismiss the third cause of action, a buy out and the fourth cause of action for withdrawal are denied. These remedies are only available after dissolution (Mizrahi, supra). Thus, since dissolution remains viable the remedies contained in the third and fourth counts are viable as well and survive this motion to dismiss.

The petitioner's request seeking summary disposition on the first count pursuant to CPLR §409(b) is denied. The respondents should be afforded the opportunity to contest the allegations and answer the petition and proceed with discovery. Likewise, the petitioner may supplement or amend the petition as they see fit.

Next, turning to the motion for the appointment of a receiver, it is well settled that a receiver may be appointed pursuant to CPLR §6401 where there is "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Board of Managers of Nob Hill Condominium Section II v. Board of Managers of Nob Hill Condominium Section I, 100 AD3d 673, 954 NYS2d 145 [2d Dept., 2012]). The petitioner argues the basis for the receiver is the fact there are allegations the respondents have essentially stolen rental income from the various properties. The respondents do not address that allegation but insist the properties are not in danger of waste or loss.

However, there can be no question that where there is evidence that a party has taken unilateral action without consulting the other members of the corporation that damaged the corporation that a receiver should be appointed (Chaline Estates, Inc. v. Furcraft Associates, 278 AD2d 141, 718 NYS2d 53 [1st Dept., 2000]). As noted, the petitioner has presented evidence in the form of an affidavit and exhibits from Glen Liebman CPA that provides significant documentary evidence that rental income has not been deposited with the company and was taken by the respondents. The affidavit contains a thorough analysis of the company's books and records and bank statements which demonstrate missing rental income dating back to 2008. Although the court denied the request essentially for summary judgement pursuant to CPLR §409(b) to afford the respondents an opportunity to rebut and present evidence to the contrary, nevertheless, the evidence presented at this juncture is sufficient to warrant the appointment of a receiver. Therefore, the motion seeking to appoint a receiver is granted. The identity of the receiver and the powers and duties of such receiver will be clarified in a separate order.

Turning to the motion to disqualify, it is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62

NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Rovner v. Rantzer, 145 AD3d 1016, 44 NYS3d 172 [2d Dept., 2016]).

The rule prohibiting an attorney from communicating with a person or party known to be represented by counsel has been part of the legal fabric of our jurisprudence since at least 1836. In that year, David Hoffman of the Baltimore Bar published a book entitled *A Course of Legal Study Addressed to Students and the Profession Generally* wherein he included various 'resolutions' he believed should be adopted by all practicing attorneys. Resolution XLIII states "I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent and in the presence of his counsel" (id., 2d Ed., page 771). The first formal inclusion of these ideals took place in 1908 when the American Bar Association adopted a Canon of Professional Ethics and included Canon 9 which stated "a lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel" (id). More recently, the New York State Bar Association has adopted Rule 4.2 of New York's Rules of Professional Conduct which is identical to DR 7-104, save certain non-material changes not relevant here. The rule, commonly known as the 'no-contact rule' provides that a "lawyer shall not communicate or cause another to communicate

about the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter" (id).

The respondents concede that Nativ sent a text to Adiv Pachter the prior executor, however, when the text was sent Nativ did not represent any client and Adiv was no longer the representative. Thus, that text was sent by Nativ, someone close with the management of the properties, to Adiv, someone close with the plaintiff, in efforts to try and settle the dispute between the parties. While that would surely be prohibited if Nativ was counsel and Adiv was a party, however, at the time the text was sent neither Nativ or Adiv were parties or represented parties in the lawsuit.

However, those excuses, while technically valid, touch upon another basis for disqualification, namely Nativ's familiarity with his brother Myron and the lingering appearance of impropriety. This impropriety is specifically expressed by the fact Nativ represented the former attorney and accountant of Ms. Lindenberg in a dispute about confidential financial information pertaining to Ms. Lindenberg.

The former client conflict of interest rule is codified in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a

substantially related matter in which that person's interests are materially adverse to the interests of the former client..." (id). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept., 2016]).

Thus, in interpreting the prior rule DR 5-108(A)(1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial

relationship between the current litigation and the prior one (Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999]).

Thus, concerning this substantial relationship prong, in Spano v. Tawfik, 271 AD2d 522, 705 NYS2d 659 [2d Dept., 2000], the court held disqualification improper where the plaintiff's attorney suing defendant for breach of contract once represented the defendant in a trademark infringement action when plaintiff and defendant were the sole shareholders of the corporation that settled that trademark action. The court noted there was insufficient evidence the matters were substantially related. Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same' (Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1st Dept., 1994]).

In this case there has been no evidence presented the matters are the same in any significant way. Indeed, the petitioner merely alleges that "Nativ Winiarsky previously represented Ms. Lindenberg's former attorney (Aryeh Weber) and accountant (Robert Lubin) when those parties failed to turn over documents concerning Ms. Lindenberg to the Estate. The documents requested from Mr. Weber and Mr. Lubin included Ms. Lindenberg's privileged and confidential information, including attorney client communications and confidential tax information" (see,

Supplemental Affirmation in Support of Disqualification, ¶25). The petitioner does not explain the nature of that action and why such documents were required. More importantly the petitioner does not explain how representation about Ms. Lindenberg's financial information is related to a dissolution proceeding based upon improper management. The cases cited by petitioner, Colonie Hill Ltd., v. Duffy, 86 AD2d 645, 447 NYS2d 23 [2d Dept., 1982], Gordon v. Obiakor, 117 AD3d 681, 984 NYS2d 421 [2d Dept., 2014] all deal with prior representations that concerned the same transactions as the subject lawsuits. The courts properly disqualified counsel on the grounds they could not represent different parties in the same transactions. The tangential nature of the other representation is too attenuated to create any conflict. The case of Sessa v. Parrotta, 116 AD3d 1029, 985 NYS2d 128 [2d Dept., 2014] is instructive. In that divorce case the court denied the wife's motion to disqualify the husband's attorney on the grounds that attorney had prepared the wife's will. The court held the subject matter of both cases were not related thus there was no substantial relationship between the two representations. Again, in Altungeyik v. Ayknat, 49 Misc3d 1209(A), 26 NYS3d 212 [Supreme Court Suffolk County 2015] the court denied plaintiff's motion to disqualify the defendant's counsel. In that derivative shareholder action the defendant's counsel had previously represented the plaintiff in preparing a

pre-nuptial agreement, an immigration application and the shareholder agreement of defendant Euro Planet Inc. The court held the current lawsuit concerned the value of the defendant Euro Planet Inc. The court noted the formation of the corporation years before was not substantially similar to its value in the current action and thus denied the motion for disqualification.

These cases demonstrate that a party seeking disqualification of opponent's counsel "bears a heavy burden" (Mayers v. Stone Castle Partners, LLC, 126 AD3d 1, 1 NYS3d 58 [ast Dept., 2015]) and the court must examine the evidence presented and determine whether in its discretion such disqualification is proper (id).

Next, the petitioner argues that since Nativ and Myron Winiarsky are brothers the principle of attribution should disqualify Nativ. That principle bars former counsel from representing opposing parties in the same case. For example, in Aversa v. Taubes, 194 AD2d 579, 598 NYS2d 804 [2d Dept., 1993] the attorney for the defendants, Lawrence Burnett used to work for the plaintiff's law firm and in fact participated in the litigation on behalf of plaintiff's law firm before leaving the firm and then representing defendants in the very same case. The court concluded that Burnett could not represent the defendants. Citing earlier authority the court noted that "the first client

is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney" (id). Further, the principle of attribution disqualified Burnett's entire firm from representing the defendants in that case.

In this case, on the other hand, neither Nativ or Myron ever represented the plaintiff in any capacity. It is true that Myron could not represent the defendants and thus Nativ assumed the responsibilities of representation. The familial relationship does not demand that Nativ be disqualified simply because Myron would in all likelihood have been disqualified. Indeed, there is no such broad rule of disqualification. Nor could such a rule exist. To be sure, the respondents, the parents of Nativ and Myron have more of a reason to select their son (Nativ) as counsel who is more intimately familiar with them, rather than someone else. The fact that Myron can assist in the preparation of the case does not demand that Nativ be disqualified. The petitioner argues that "Myron and Nativ Winiarsky are so closely associated with one another that they can be expected to share client confidences and 'ideas about how to handle' this action" (see, Petitioner's Memorandum in Law in Further Support, page 6). However, that reality, if true, is more of a reason for the respondents to select Nativ as their counsel not less since it

provides them with greater understanding and insights into the case. It is true that Myron should not be acting as an attorney in any capacity, should not be receiving any correspondence or emails and should not participate in court conferences. However, the mere fact that Nativ and Myron are close is not a basis upon which to grant disqualification. Therefore, the motion seeking to disqualify Nativ Winiarsky as counsel for the respondents as well as the law firm of Kucker Marino Winiarsky & Bittens LLP is denied. However, the motion seeking to disqualify Nativ from representing the nominal companies is granted. This action is derivative in nature wherein the companies are suing the respondents. Nativ cannot represent them. That portion of the motion is granted.

So ordered.

ENTER:

DATED: October 13, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC