SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

TO BE ARGUED BY:
CRAIG D. CHARTIER
ESTIMATED TIME: 10 MINUTES

DOCKET NO. CA 19-01847

IN THE MATTER OF THE APPLICATION OF
BRANDON M. BRADY,

PETITIONER-RESPONDENT,

FOR THE JUDICIAL DISSOLUTION OF
BRADY FARMS, INC.,

MYRON O. BRADY AND MYRON C. BRADY,

RESPONDENTS-APPELLANTS.

DOCKET NO. CA 19-01849

BRANDON M. BRADY INDIVIDUALLY AND DERIVATIVELY AS
A SHAREHOLDER OF BRADY FARMS, INC.,

PLAINTIFF-RESPONDENT,

v.

MYRON O. BRADY AND MYRON C. BRADY,

DEFENDANTS-APPELLANTS,

BRADY FARMS, INC.,

NOMINAL DEFENDANT.

APPELLANTS' BRIEF ON APPEAL

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QUESTIONS PRESENTED

1. Given the variety of issues left in dispute in the pleadings and the lack of objective evidence of the alleged wrongdoing, did the lower court abuse its discretion when it summarily granted dissolution of Brady Farms, Inc. in the absence of discovery and a hearing?

The court below overlooked the conflicting allegations and granted dissolution on the parties' opposing pleadings alone.

2. Did the lower court abuse its discretion when it appointed a temporary receiver when the petition failed to show any asset of Brady Farms, Inc. was at risk of dissipation, removal from the state, or in danger of being materially injured or destroyed, where the corporation's main, if not only, asset is the hundreds of acres of farmland titled in its name worth millions of dollars?

Without a clear evidentiary basis for doing so, the court below belatedly appointed a temporary receiver.

I. PRELIMINARY STATEMENT

The matters on appeal concern a dispute between a father and his youngest son about a closely held corporation, Brady Farms, Inc. ("Brady Farms" or the "Company"). Since it was formed in 1984, nearly all of the Company's corporate actions involved transactions between Myron O. Brady ("Myron O.") and his sons, Myron C. Brady ("Myron C."), Scott Brady, and Brandon Brady ("Brandon"). The Company's main, if not only, asset is its substantial real estate holdings (worth millions of dollars), which were gifted to it by Myron O. Brady Farms was always operated under the sole direction and control of Myron O. as the family patriarch. This remained true after Myron O. gifted his youngest son, Brandon, shares of stock in Brady Farms and millions of dollars' worth of other farmland, and after Brandon decided he no longer wanted to follow his father's directives concerning the farmland. Brandon now seeks to use the knowledge and fortune gifted to him by his father to attempt to drive his father out of business, house and home, and seeks to impose serious financial distress on his brother's (Myron C.'s) farming business.

Myron O. is 89 years old, with a high school education, and has been a farmer all his life. Myron O.'s various farms are located in Livingston County, near Mount Morris, New York. In 1984, Myron O. formed Brady Farms to be used as a real estate holding company. Myron O. purchased some real property to be used for farming purposes and titled it to Brady Farms. As a result of the purchase of real

property by Myron O., the Company owns about 400 acres of tillable land, which is worth several million dollars. The Company's land has always been farmed by Myron O., individually, or through leases to his sons. None of the land titled to the corporation has ever been farmed by the Company itself, which is reflected in the Company's income tax returns. None of the Company's land has been farmed by Brandon, despite his claims to the contrary.

Brady Farms' shareholders have never been reliant on the Company for employment or income. The Company did not make any shareholder distributions, and none of its shareholders made any requests for distributions. Since it was formed and continuing after Brandon was gifted a minority share of Company stock, Myron O. handled everything related to the Company, which was always done with Brandon's full knowledge and consent. The Company's books and records were stored in Myron O.'s home, where Brandon also lived, and all the Company's shareholders always had full access to the corporation's books, records and bank account information, bankers and accountant.

Myron O. was creator of the family's wealth and significant real property holdings, which included the Company's land that was used in Myron O.'s farming business. Along with the gift of Brady Farms' stock, Myron O. also gifted Brandon over $8,500,000 worth of other real property, which had also been historically farmed by Myron O., through outright gifts and via a trust. Myron O. made the gifts

to his son with the intention that Brandon, and Brandon's children, would continue to operate the vast majority of the family farm after Myron O.'s death. Despite the gifts he made to Brandon, Myron O. intended to continue his involvement with the family farm, and to continue to personally farm large portions of the gifted land until his death.

In essence, Brandon's dissolution petition alleged that Myron O. was hiding information about the Company's finances, refusing to account for those finances, diverting corporate revenue or profits for his own personal gain, and that Myron O. and Myron C. had conspired to freeze Brandon out of the Company. Myron O. and Myron C. denied Brandon's allegations of wrongdoing. They also claimed that Brandon's dissolution action was part of a larger scheme to take over most of Myron O.'s farming operation before his father's death, and asserted that Brady Farms is a real estate holding company, so Brandon's interest in the Company remains fully preserved despite his various allegations of misconduct due to its 400 acres of farm-land (worth millions of dollars).

At the time the lower court issued the decisions on appeal, the matters re-mained in the pleading stage.

The court below committed reversible error when it summarily ordered the dissolution of Brady Farms because there were unresolved and material issues of fact raised in the pleadings concerning, among other things, the parties' stock

ownership percentages in the Company. The lower court abused its discretion in ordering dissolution of the corporation without discovery and further proceedings, including a hearing.

Brandon's dissolution petition maintained that he owns 96 shares of Brady Farms' stock, or a 48% ownership stake in the Company. The lower court adopted this assertion without an adequate factual basis because the petition itself raised incontrovertible issues of fact as to the parties' proper ownership percentages. Brandon's petition included copies of the stock certificates that the Company issued to him, which curiously purported to show that Brandon was issued 112 shares, or 56% of the Company stock. Yet, all parties agreed that Brandon is a minority shareholder.

Even before acknowledging the dispute of the stock ownership percentages in respondents' answer, which the lower court did in its decision, it should have been clear based on the claims in the petition alone that there was a factual dispute concerning the parties' stock ownership percentages. The petition itself included copies of corporate records that directly contradicted Brandon's claim that he owned 96 shares or 48% of the Company's stock.

Not only did the corporate stock records fail to support Brandon's allegation that he owns 48% of Brady Farms' shares, but copies of the Company's partial 2016 and 2017 federal income tax returns, also attached to the petition, reported different percentages of the parties' stock ownership from year to year (showing Brandon

owned 49% in 2016, and then that he owned 48% in 2017). There was no evidence indicating where the different stock ownership percentages reported in the Company's 2016 and 2017 income tax returns came from or that those differing percentages were accurate as reported in the returns, especially since the petition revealed that the Company had not issued any shares to Brandon or anyone else since 2013.

In their answer, Myron O. and Myron C. disputed the accuracy of the Company's 2016 and 2017 income tax returns and claimed the returns required amendment due to the incorrect stock ownership percentages reported in them. Moreover, as also alleged in the petition, appellants maintained that Brandon only owned 39% of Brady Farms' stock, which was based on corporate records related to the number of shares gifted to Brandon, and the fact that Company was only authorized to issue a total of 200 shares when it purportedly issued 50 shares each to Myron O. and Brandon in August 2013.

In granting corporate dissolution, based solely on contradictory pleadings and the inconsistencies within the petition itself concerning percentage of ownership, the court below held Myron O. and Myron C. had engaged in "fraudulent and oppressive conduct….For example, Respondents deny that Brandon owns 48% of the Company stock, but do not explain why the Company tax returns, signed by Myron O. acknowledge Brandon's 48% ownership." This is the only "example" of fraudulent or oppressive conduct recited in the lower court's decision granting dissolution.

Given unresolved factual issues in the pleadings concerning the parties' stock ownership percentages in the Company, it was an abuse of discretion for the Court to make any findings as to the ownership percentages and to order dissolution without further proceedings, including discovery and a hearing. Based solely on Brandon's petition it should have been clear that a decision as to the parties' stock ownership could not be made, and reversal of the decision should be granted.

The pleadings were also replete with issues of fact concerning petitioner's claims of supposed financial impropriety, oppression, and the legitimacy of acts taken by Myron O. as the majority shareholder concerning Brady Farms' corporate governance. Many of claims were unsupported by any objective evidence. In granting corporate dissolution, based solely on contradictory pleadings and in the absence of further proceedings, the court below committed reversible error when it held Myron O. and Myron C. had engaged in fraudulent and oppressive conduct.

Then, despite recognizing the need to exercise extreme caution in doing so without a full adjudication on the merits, the lower court also appointed a temporary receiver for Brady Farms to preserve its property during the pending litigation. This was error because:

1. The value of the real property owned by Brady Farms (400 acres worth millions of dollars) provided sufficient security to petitioner to protect him where, in the absence of a temporary receiver, if a future accounting or

findings reveal any alleged wrongdoing, a setoff against the majority shareholder's interest would be more than sufficient;

2. The lower court failed to identify any Company asset at risk of dissipation, removal from the state, or in danger of being materially injured or destroyed, especially where Brady Farms' main, if not only, asset is the real property titled in its name, and given the other injunctive relief imposed (preventing the transfer of the Company's real property, etc.) that was unopposed by respondents;
3. There was no need grant provisional relief, especially where the court below failed to explain the significant delay in the appointment of a temporary receiver, given the petition was filed on March 8, 2019, the parties argued before the court on May 2, 2019, and the court did not issue its decision until September 9, 2019; and
4. The lower court failed to explain, and a review of the pleadings does not reveal, how respondents' answer at paragraphs 66, 67, 69 and 70 supported the court's conclusion that a temporary receiver was necessary.

The appointment of a temporary receiver and the decision to dissolve Brady Farms in summary fashion were abuses of the lower court's discretion and require reversal.

II. FACTUAL BACKGROUND

A. BRIEF PROCEDURAL HISTORY – CONSOLIDATION OF MATTERS

The dissolution proceeding was commenced by order to show cause and petition on March 8, 2019. Record on Appeal at pages 15-128 ("R ___".). Among other things, the application sought dissolution of Brady Farms, Inc. ("Brady Farms" or the "Company") pursuant to Business Corporation Law Section 1104-a and the appointment of a temporary receiver. R 16. Several months later, following appearances and argument on May 2, 2019, the court below issued its decision dissolving the Company on September 9, 2019, which was incorporated into the Order appealed from in that matter, dated October 2, 2019. R 3-14.

The companion derivative action was commenced by summons and complaint on November 6, 2018. R 194-217. By motion, also filed on March 8, 2019, Brandon Brady sought, among other things, an accounting, and the appointment of a temporary receiver for Brady Farms. R 189. Several months later, following appearances and argument on May 2, 2019, the court below issued its decision in the derivative action on September 9, 2019, which was incorporated into the Order appealed from in that matter, dated October 2, 2019. R 185-188.

Given that the lower court's decisions treated the dissolution and derivative matters as intertwined – involving the same parties, nearly identical or related issues arising from the same sets of facts related to Brady Farms, and the appointment of a

temporary receiver for the Company – the parties to this appeal agreed that the dissolution proceeding (Docket No.: CA 19-01847) and the derivative action (Docket No.: CA 19-01849) should be combined for purposed of appeal, and appellants' unopposed motion seeking consolidation was granted by this Court.

B. THE INDIVIDUAL PARTIES

The matters on appeal are part of a larger dispute between Myron O. and his youngest son, Brandon. R 129, 132. Myron O. is married to Linda Brady, and they are currently involved in a divorce action, which has also likely contributed to the dispute between Myron O. and Brandon. R 130. Linda Brady is Brandon's mother, and step-mother to Myron O.'s other, older children, Myron C. Brady ("Myron C"), Scott Brady and Lana Senkovich (Brady). R 19, 130.

Myron O. is 89 years old, with a high school education, who has been a farmer all his life. R 129. As he had learned from his father, beginning when he was very young, Myron O. taught his children how to farm. During his lifetime, through hard work and sheer determination, Myron O. amassed hundreds of acres of real property that he used for farming. R 129-130. It was and is Myron O.'s wish that his children continue to farm the land, which he has farmed all of his life and hopes he will continue to farm until his death. R 130, 132.

C. MYRON O. FORMED BRADY FARMS TO HOLD SOME REAL PROPERTY

In 1984, Brady Farms was formed by Myron O. as a holding company, to hold real estate that Myron O. purchased for farming purposes and titled the land to Brady Farms. R 40-47, 129. Myron O.'s farm is located in Livingston County, largely near Mount Morris, New York. R 40-47. As a result of the purchase by Myron O., the Company owns over 400 acres of tillable land. R 129. *None* of the land titled to the corporation is farmed by the Company itself or by Brandon, nor has it ever been. R 129. It is undisputed that the real property is the Company's main, if not only, asset.

Throughout its history, Brady Farms' land was farmed by Myron O., individually, or at Myron O.'s direction and control through leases to his sons, Myron C. Brady ("Myron C.") and Scott Brady, who were gifted shares of Company stock at the time it was formed. R 40-47.

Myron O.'s residential home, and his office and maintenance facility (his farm or main work "shop") are located on the land he gifted to the Company, and are buildings that were constructed and paid for by Myron O. R 20, 135.

D. THE MULTI-MILLION DOLLAR GIFTS FROM MYRON O. TO BRANDON

Myron O. has also *gifted* over $8,500,000 worth of other real property to Brandon. R 129. On or about July 16, 2014, Myron O. gave Brandon approximately 541 acres of land worth about $2,902,000. R 130. On or about September 10, 2014,

Myron O. created a trust – The Brady Trust – and gifted another 700 acres of land valued at approximately $5,600,000 to his son Brandon. R 130.

Likewise, Brandon's interest in Brady Farms was *gifted* to him by his father, Myron O. R 130.

Myron O.'s largess was the result of his desire for the land to remain in his family and to ensure that the land continues to be farmed long after his death. R 130. Myron O. made the gifts to Brandon because Myron O. believed Brandon would continue to farm the land with Myron O. during their lifetimes, and then the land would be handed down to Brandon's children, who would continue the family farm. R 130, 132. When Myron O. made the gifts to Brandon, Brandon was fully aware and agreed that Myron O. would continue to farm portions of the lands owned by The Brady Trust and Brady Farms, as Myron O. always had, until his death. R 132.

E. BRADY FARMS ALWAYS OPERATED WITH BRANDON'S FULL KNOWLEDGE & CONSENT

Brandon's interest in the Company, from the start, has been passive. R 130. He did not seek responsibilities in corporate operations or decisions. R 130. Brandon left everything to his father to handle as Myron O. had done historically before he gifted shares in the Company to Brandon. R 130. Myron O. continued to operate Brady Farms in the same fashion as he had for years before he gifted an interest in the corporation to Brandon. R 130.

Brandon was fully aware of how his father operated the Company. R 130. Brandon always had unfettered access to the Company's books and records, bank accounts, bank records and bankers, tax returns, tax records and accountant. R 130. Brady Farms' books and records were stored at Myron O's home, which is where Brandon lived as well. R 131. Brandon continued to have unfettered access to the Company's bank accounts, bank records and bankers, tax returns, tax records and accountant after the legal proceedings began. R 131.

F. THE INDIVIDUAL FARMING OPERATIONS OF MYRON O. & BRANDON

None of the land titled to the corporation is farmed by the Company itself or by Brandon, nor has it ever been. R 129. Brandon is not, and never has been, reliant on the Company for employment, nor did he expect to be employed by the Company. R 131. Brandon runs his individual farming operation on the lands given to him by his father, which farmland is completely separate from that owned by Brady Farms. Likewise, Myron O. is not, and never has been, reliant on the Company for employment, nor did he expect to be employed by the Company. R 131.

Brady Farms never made any formal distributions. R 131. Brandon never requested any distributions from the Company. R 131.

Brady Farms does not own the heavy equipment required for farming. R 131. The heavy farming equipment is owned, individually, by Myron O., Myron C. and Brandon. R 131. After Brandon was given the interest in the Company by his father,

Brady Farms began processing the farm employee payroll through the Company, but the employees worked for Myron O. and Brandon individually. R 131, 72, 75.

G. THE BRADY TRUST – LITIGATION & BACKGROUND

The real dispute(s) concerning Brady Farms is not the result of any failure(s) or any improper conduct by Myron O. or Myron C., or Myron O.'s desire to renew a lease of 165 acres of Company owned land to Myron C., but the action appears to have been commenced in retaliation by Brandon against his father, and brother, due to Myron O.'s decision to bring a lawsuit to seek to set aside The Brady Trust (*Myron O. Brady v. The Brady Trust, et al.*, NYS Supreme Court, Livingston County, Index No.: 000741-2018). R 132, 23.

In 2018, Myron O. brought the action seeking to set aside The Brady Trust because he did not realize that he did not retain a life estate in the Trust land, which would permit him to continue farming the land until his death, and Brandon had denied his father access to the Trust land Myron O. had historically farmed. R 132.

Anyone who knows Myron O. realizes that he loves farming, he continued to farm despite being 89 years old, and that it has always been his desire to continue to farm until his death. R 132. Myron O. intended to reserve his rights to continue to farm The Brady Trust land until his death, which he believed was clear to all of his children, including Brandon. R 132.

Myron O. did not fully understand the basic workings of The Brady Trust, and he did not internalize that he was giving up life use of the Trust land for farming when the Trust was created. R 133. Myron O. did not realize that The Brady Trust did not give him life use of the Trust lands until February 2018, which was about four farming seasons after the Trust was created. R 133.

It was after February 2018, when the conflict between Brandon and his father escalated, as Brandon began restricting his father's use of the farmlands in the Trust, which Myron O. had historically farmed himself. R 133. Thereafter, Myron O. commenced the Trust litigation seeking to uphold his presumed life estate. R 133. The litigation brought by Brandon regarding the Company followed. R 133.

H. THE LOWER COURT'S DECISIONS

Brandon's applications filed on March 8, 2019, and the responses to them, were pleadings alone, and following arguments on May 2, 2019, the court below issued its decisions on September 9, 2019. R 7-14; 15-17;187-188; 189-190.

Brandon maintained in his dissolution petition that he owns 96 shares of Brady Farms' stock, or a 48% ownership stake in the Company. R 8; 19; 21. The lower court adopted this assertion without an adequate factual basis because the petition itself raised issues of fact as to the parties' proper ownership percentages. R 13; 21; 59-70; 72-78.

The petition alleged:

> 14. In keeping with this arrangement, Myron O made multiple transfers of shares to Brandon, on multiple occasions, beginning in 2006, ultimately resulting in Brandon acquiring a 48% interest in the Company – or 96 shares – as of December 31, 2017. Copies of various share transfers from Myron O to Brandon are attached hereto as **Exhibit 6**. R 21.

In their answer (at paragraph 52), appellants denied the allegations in paragraph 14 of the petition and referred to the corporate documents as the best evidence of the allegations therein. R 136. Given the copies of corporate records attached to the petition, this was not just an unsubstantiated denial. R 21; 59-70.

Brandon's petition (at Exhibit 6) included copies of stock certificates issued to Brandon by the Company from 2006 through 2013, which contradicted Brandon's assertion therein that he owned 96 shares or a 48% ownership interest in Brady Farms. R 21; 59-70.

The records (at Exhibit 6 to the petition) appear to reveal that *112 shares* (or a 56% ownership interest) were issued to Brandon by the Company, *not 96 shares* (or a 48% ownership interest) as he asserted in the body of his petition. R 59-70.

A review of Brandon's petition at Exhibit 6 shows the following:

Certificate #	Shares	Issue Date
9	6	01-02-2006
10	14	01-18-2007
11	14	12-31-2008
12	14	11-23-2009
13	14	12-31-2010
15	50	08-23-2013

Brandon's Total: **112 Shares.** (R 59-70).

The petition also alleged:

> 15. Brandon's 48% interest in the Company is also reflected in tax returns signed and verified by Myron O and filed by the Company. Copies of portions of the company's 2017 tax return (redacted to remove confidential information) showing Brandon's 48% ownership interest are attached hereto as **Exhibit 7**. R 21.

In their answer (at paragraph 53), appellants denied the allegations in paragraph 15 of the petition, referred to the corporate documents as the best evidence of the allegations therein and asserted: "Any such documents referenced in said paragraph *are incorrect and require amendment*." (Emphasis added). R 137. Again, a review of the Company's 2016 and 2017 partial tax returns attached to the petition shows this too was far from an unsubstantiated denial. R 21; 72-78; 95.

As set forth in Exhibit 6 of the petition (as outlined above), even though the Company had *not* issued any stock certificates to Brandon after 2013, the Company's 2016 income tax return reported Brandon's ownership interest as *49%*, and its 2017 income tax return reported Brandon's ownership interest as *48%*. R 59-70; 73; 77; 95.

Copies of stock certificates attached to the petition did not show Brandon's ownership interest as 48% (96 shares), and the discrepancy regarding Brandon's ownership interest in the Company, given the conflict between the stock certificates and the income tax returns, which also varied from year to year, was never explained. There was also no further explanation in the pleadings, other supporting papers, or

any exhibits before the court below, as to why the Company's 2016 income tax return reported Brandon's ownership interest as 49%, and its 2017 income tax return reported Brandon's ownership interest as 48%. The origin of those percentages remained unknown (and remains unknown to this day).

The lower court's decision in the dissolution proceeding acknowledged that Myron O. and Myron C.'s answer disputed the petition's allegations as to the parties' respective ownership percentages. R 8; 134; 137.

The petition and decision in the dissolution proceeding both recognized that Myron O. and Myron C. maintain that Brandon only owns 31% of Brady Farms' outstanding stock. R 8; 19. Myron O. and Myron C.'s position is based on the fact that Brady Farms only had authority to issue a total of 200 shares of stock, and the Company had already issued all 200 authorized shares of stock when Brandon and Myron O. were each purportedly issued 50 shares on August 23, 2013. R 19; 37-41; 59-70; 95 (paragraph 14); 134.

Based on the corporate records, Myron O. and Myron C. have maintained that the shares of stock purportedly "transferred" by the Company, 50 shares each to Myron O. and Brandon on August 23, 2013, were invalid shares because all 200 of the Company's authorized shares (138 shares or 69% held by Myron O. and 62 shares or 31% held by Brandon, 138 + 62 = 200) were already issued and outstanding. R 19; 59-70; 95 (paragraph 14); 134.

Without an adequate factual basis for doing so, the lower court's decision in the dissolution proceeding also found that the Company's 2016 and 2017 income tax returns were "*signed* by Myron O." as alleged in the petition. R 13 (emphasis added). While Myron O.'s name was typed on the income tax returns (R 72; 75), there was no indication in the petition, other supporting papers, or any exhibits before the lower court at that time, that the typed name was an electronically authorized signature or otherwise.

In granting the requested corporate dissolution, based solely on contradictory pleadings, and the inconsistencies within the petition itself concerning percentage of ownership, the court below held Myron O. and Myron C. had engaged in "fraudulent and oppressive conduct….For example, Respondents deny that Brandon owns 48% of the Company stock, but do not explain why the Company tax returns, signed by Myron O. acknowledge Brandon's 48% ownership." R 13. This was the only "example" of fraudulent or oppressive conduct recited in the lower court's decision granting corporate dissolution. R 7-14. The lower court also failed to address the discrepancy reported in the Company's 2016 and 2017 income tax returns concerning Brandon's ownership percentage (given the Company's 2016 income tax return reported Brandon's ownership interest as *49%*, and its 2017 income tax return reported Brandon's ownership interest as *48%*. R 73; 77).

The lower court appointed a temporary receiver for Brady Farms in the dissolution proceeding pursuant to Business Corporation Law Section 1113 and Civil Practice Law and Rules Section 6401. R 13 (The lower court also noted the appointment of a temporary receiver in the dissolution proceeding in its decision in the derivative action. R 188). In finding a need for a temporary receiver, the court below recognized that it needed to exercise extreme caution because such an appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits. R 13.

Without reference to any specific allegations in or exhibits to the petition, the lower court stated the application for a temporary receiver was amply supported. R 13. The lower court also did not identify any reason that the value of the real property owned by Brady Farms (over 400 acres, worth millions of dollars) failed to provide sufficient security to petitioner to protect him where, in the absence of a temporary receiver, if a future accounting or findings reveal any alleged wrongdoing, a setoff against majority shareholders' interest would be sufficient to protect the petitioner. R 13.

Without identifying any Company asset at risk of dissipation or in danger of being materially injured or destroyed, the lower court held that the appointment of a temporary receiver was necessary to protect and preserve the assets of the Company. R 13. The lower court also did not explain the significant delay in the appointment

of a temporary receiver, given the petition was filed on March 8, 2019, the parties argued before the court on May 2, 2019, and the court did not issue its decision until September 9, 2019. R 7; 14; 15.

In appointing a temporary receiver, the court below found that Myron O. and Myron C. asserted a "disturbing" lack of knowledge and information as to crucial financial, organizational and other Company matters, despite Myron O.'s assertion that he has always managed the Company's finances and records, and the lower court cited to several paragraphs of respondents' answer (paragraphs 48, 50, 66, 67, 69, and 70). R 13.

Respondents' answer at paragraph 48 addressed allegations in the petition (at paragraph 10), and admitted the Company holds a mortgage and receives mortgage payments from Letchworth County Store, Inc., admitted Myron O.'s home is located on land owned by the Company, and denied Brandon's offices and maintenance facility were located on Company land, denied knowledge or information as to Brandon's allegation of a $50,000 contribution to buildings he claimed were located on Company land, and stated that all buildings on Company land were built and paid for by Myron O. R 20; 135. The petition did not present any objective evidence of Brandon's claimed $50,000 contribution or the location of his offices.

The answer at paragraph 50 addressed allegations in the petition (at paragraph 12), and admitted Myron O. always managed the Company's finances and

maintained its books and records, and denied Brandon's claimed role in the Company's farming operations, denied that Brandon assumed sole responsibility for farming approximately 200 acres and denied that Brandon performed substantially all of the farming-related labor for the Company, given that respondents have maintained that none of the land titled to the corporation has ever been farmed by the Company itself or by Brandon (as demonstrated by the Company's, and Myron O.'s personal, income tax returns). R 20-21; 136.

The answer at paragraphs 66, 67, 69 and 70 addressed allegations in the petition (at paragraphs 28, 29, 30, and 31) concerning the replacement of petitioner as a director of the Company and the amendment of the Company's certificate of incorporation to remove a restriction on alienation, and denied those allegations on the basis that the corporate records documenting the same are the best evidence of those allegations and the documents (Exhibits 10, 11, 12 and 13 to the petition) speak for themselves. R 24-25; 84; 86; 88-91; 93-99. In essence, asserting Myron O.'s corporate actions as its majority shareholder were a legitimate exercise of authority and did not harm Brandon as a minority shareholder or harm the Company, especially given the actions did not affect the corporation's main, if not only asset, 400 acres of farmland. The court below did not further expound on how the answer at paragraphs 66, 67, 69 and 70 supported its conclusion that a temporary receiver was necessary. R 13.

This appeal followed. R 1; 183.

I. EPILOGUE

The farmland Myron O. transferred into the Brady Trust and Brady Farms was not all of the acreage he has acquired during his lifetime, but it does represent the lion's share of that real property. Myron O's home on the Company's real property has been his and his wife's residence since 1984. For decades, Myron O.'s farming operation and "main shop" have been located on Brady Farms' land, near his home, and all of his tools and equipment are located there, which includes heavy farming equipment. The main shop and storage buildings built and paid for by Myron O. and located on Brady Farms are the only facilities Myron O. has available to him to store, prepare, and repair his farm equipment. Through 2019, Myron O.'s overall farming operation included a portion of Brady Farms' land, and other lands that he owns and rents, individually, that are unrelated to the Company or the Trust.

III. ARGUMENT

THE STANDARD OF REVIEW – ABUSE OF DISCRETION

The lower court abused its discretion in granting dissolution of Brady Farms because it did so on the pleadings alone, summarily, without a proper evidentiary foundation, in the absence of discovery or a hearing, and where the pleadings raised material issues of fact.

While the standard of review on appeal is for an abuse of discretion, it is also the standard to hold a hearing in cases involving dissolution of a closely held corporation when contested issues of fact exist. *See In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 74 (1984) (dissolution ordered following a hearing); *Matter of Inzer v West Brighton Fire Dept., Inc.*, 173 A.D.3d 1826 (4th Dep't. 2019) (appeal followed a trial on the merits); *Singer v. Evergreen*, 205 A.D.2d 694, 695 (2nd Dep't. 1994) (given questions of fact, the court could not decide as a matter of law with respect to the issue of stock ownership and a hearing was required); *Jedrzejcyk v. Gomez*, 116 A.D.3d 632, 633 (1st Dep't. 2014) (conflict in assertions and inconsistent information in corporate documents raise issues of fact that preclude a summary determination of ownership status); *In re Kournianos*, 175 A.D.2d 129 (2nd Dep't. 1991) (court abused its discretion in granting dissolution without a hearing where issue of fact as to stock ownership and otherwise existed).

POINT I: THE PARTIES' STOCK OWNERSHIP PERCENTAGES REMAIN IN DISPUTE

The decision to grant dissolution based on disputed stock ownership claims in the pleadings alone was reversible error, as demonstrated by a review of the petition itself.

A. THE OWNERSHIP PERCENTAGE MATH DOES NOT ADD UP

The lower court's order granting the dissolution of Brady Farms purportedly found that Brandon Brady owns 48% and Myron O. owns 52% of the Company's outstanding stock. The sole basis cited by the court below in granting corporate dissolution was respondents' dispute of those ownership percentages. The petition itself reveals issues of fact precluding the determination of the parties' ownership percentages without further proceedings.

Specifically, the petition revealed a conflict in ownership percentages between what Brandon alleged in the petition, what was reported in the copies of corporate stock certificates attached to the petition, and what was reported in copies of the Company's income tax returns attached to the petition, which remained unexplained at the pleading stage.

1. HOW MANY SHARES WERE ISSUED TO BRANDON?

The petition maintained that Brandon owns 96 shares of Brady Farms' stock, or a 48% ownership stake in the Company. However, simple arithmetic, based on documents attached to the petition itself, reveal the existence of issues of fact as to

Brandon's stock ownership, and as to the proper ownership percentages to be assigned to the parties.

The petition alleged:

> 14. In keeping with this arrangement, Myron O made multiple transfers of shares to Brandon, on multiple occasions, beginning in 2006, ultimately resulting in Brandon acquiring a 48% interest in the Company – or 96 shares – as of December 31, 2017. Copies of various share transfers from Myron O to Brandon are attached hereto as **Exhibit 6**. R 21.

In their answer (at paragraph 52), appellants denied the allegations in paragraph 14 of the petition and referred to the corporate documents as the best evidence of the allegations therein. R 136. Given the copies of corporate stock certificates attached to the petition, this was not just an unsubstantiated denial. R 21; 59-70.

Brandon's petition (at Exhibit 6) included copies of corporate stock certificates issued to Brandon by the Company from 2006 through 2013, which contradicted Brandon's assertion that he owned 96 shares or a 48% ownership interest in Brady Farms. R 21; 59-70.

A review of Brandon's petition at Exhibit 6 shows the following:

Certificate #	Shares	Issue Date
9	6	01-02-2006
10	14	01-18-2007
11	14	12-31-2008
12	14	11-23-2009
13	14	12-31-2010
15	50	08-23-2013

Brandon's Total: **112 Shares**. (R 21; 59-70).

The records (at Exhibit 6 to the petition) appear to reveal that *112 shares* (or a 56% ownership interest) were issued to Brandon by the Company, *not 96 shares* (or a 48% ownership interest) as he asserted in the body of his petition. R 21; 59-70.

Based on the pleadings it is also undisputed that Brandon is the minority shareholder.

2. THE COMPANY'S INCOME TAX RETURNS ONLY ADD CONFUSION

The petition also alleged:

> 15. Brandon's 48% interest in the Company is also reflected in tax returns signed and verified by Myron O and filed by the Company. Copies of portions of the company's 2017 tax return (redacted to remove confidential information) showing Brandon's 48% ownership interest are attached hereto as **Exhibit 7**. R 21.

In their answer (at paragraph 53), appellants denied the allegations in paragraph 15 of the petition and referred to the corporate documents as the best evidence of the allegations therein and asserted: "Any such documents referenced in said paragraph *are incorrect and require amendment*." (Emphasis added). R 137. Again, a review of the Company's 2016 and 2017 partial tax returns attached to the petition as Exhibit 7 shows this too was far from an unsubstantiated denial. R 21; 72-78; 95.

As set forth in Exhibit 6 of the petition (as outlined above), even though the Company had *not* issued any stock certificates to Brandon after 2013, the Company's 2016 income tax return reported Brandon's ownership interest as *49%*, and

its 2017 income tax return reported Brandon's ownership interest as *48%*. R 59-70; 73; 77; 95.

Copies of corporate stock certificates attached to the petition did not show Brandon's ownership interest as 48% (96 shares), and the discrepancy regarding Brandon's ownership interest in the Company, given the conflict between the stock certificates and the income tax returns, which also varied from year to year, was never explained. There was also no further explanation in the pleadings, other supporting papers, or any exhibits before the court below, as to why the Company's 2016 income tax return reported Brandon's ownership interest as 49%, and its 2017 income tax return reported Brandon's ownership interest as 48%.

3. CORPORATE RECORDS SUPPORT THE OWNERSHIP PERCENTAGES ASSERTED BY MYRON O. AND MYRON C.

The lower court's decision in the dissolution proceeding acknowledged that Myron O. and Myron C.'s answer disputed the petition's allegations as to the parties' respective ownership percentages. R 8; 134; 137.

The petition and decision in the dissolution proceeding both recognized that Myron O. and Myron C. maintain that Brandon only owns 31% of Brady Farms' outstanding stock. R 8; 19. Myron O. and Myron C.'s position is based on the fact that Brady Farms only had authority to issue a total of 200 shares of stock, and the Company had already issued all 200 authorized shares of stock when Brandon and

Myron O. were each issued 50 shares on August 23, 2013. R 19; 37- 41; 59-70; 95 (paragraph 14); 134.

As set forth more fully below, based on the corporate records, Myron O. and Myron C. have maintained that the shares of stock purportedly "transferred" by the Company – 50 shares each to Myron O. and Brandon on August 23, 2013 – were invalid because all 200 of the Company's authorized shares were already issued and outstanding (138 shares or 69% held by Myron O. and 62 shares or 31% held by Brandon, 138 + 62 = 200) at that time. R 19; 59-70; 95 (paragraph 14); 134.

4. THE DOCTRINE OF ESTOPPEL COULD NOT APPLY

Without an adequate factual basis for doing so, the lower court's decision also accepted the assertion in the petition that the Company's 2016 and 2017 income tax returns were "*signed* by Myron O." R 13 (emphasis added). While Myron O.'s name was typed on the partial income tax returns (R 72; 75), there was no indication in the petition, other supporting papers, or any exhibits before the lower court at that time, that the typed name was an electronically authorized signature or otherwise.

In the absence of confirmation of Myron O.'s signature on the Company's partial income tax returns, the doctrine of estoppel concerning the information purportedly contained in them could not have been applied by the court. *See Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009) (as a matter of policy a party to

litigation cannot take a position contrary to a position taken in an income tax return that was declared under penalty of perjury).

Based on the record before the lower court at that time, it remained unclear if Myron O. signed the Company's income tax returns or authorized them to be electronically signed on his behalf, much less where the stock ownership percentages as reported in the returns came from, or if those purported percentages were verified by Myron O. or anyone else before the returns were filed.

5. CORPORATE RECORDS BELIE THE OWNERSHIP PERCENTAGES IN THE TAX RETURNS

Even assuming evidence Myron O. *did* sign the Company's 2016 and 2017 income tax returns had been available to lower court at the time it issued its decision, it still would have been improper to apply the doctrine of estoppel. The corporate records do not support the ownership percentages purportedly recited in the income tax returns, especially where the percentages reported in the tax returns inexplicably varied from year to year (49% in 2016 and 48% in 2017. R 73; 77). As explained in *New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.*, 35 Misc.3d 1206(A) (Kings. Co. 2012):

> Courts have generally found that the doctrine of quasi estoppel, as a matter of policy "extends to prevent a party from asserting, ***without ample explanation***, a factual position in a legal proceeding that is directly contradicted by his or her tax return" (*Mikkelson v Kessler*, 50 AD3d 1443, 1444, 857 N.Y.S.2d 311 [2008]; *see also Estate of Ginor v Landsberg*, 159 F3d 1346, 1998 WL 514304, *1 [2d Cir 1998]; *American Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 704

> F Supp 2d 177, 194 [ED NY 2010]; *Meyer v Ins. Co. of Am.*, No. 97 Civ 4678, 1998 U.S. Dist. LEXIS 15863, 1998 WL 709854, *11 [SD NY Oct. 9, 1998]; *MahoneyBuntzman v Buntzman*, 12 NY3d 415, 422, 909 N.E.2d 62, 881 N.Y.S.2d 369 [2009]; *Gagen v Kipany Prods., Ltd.*, 27 AD3d 1042, 1044, 812 N.Y.S.2d 689 [2006]; *Naghavi v New York Life Ins. Co.*, 260 AD2d 252, 252, 688 N.Y.S.2d 530 [1999]; *PL Diamond LLC v BeckerParamount LLC*, 16 Misc 3d 1105[A], 841 N.Y.S.2d 828, 2007 NY Slip Op 51298[U], *10 [Sup Ct, NY County 2007]; *Zemel v Horowitz*, 11 Misc 3d 1058[A], 815 N.Y.S.2d 496, 2006 NY Slip Op 50276[U], *5 [Sup Ct, NY County 2006]). (Emphasis added).

For the lower court to apply the doctrine of estoppel in a blind vacuum was an abuse of discretion because the percentages of Brady Farms' ownership reported in its tax returns had no basis in reality when compared to the Company's other corporate records. The Company's stock certificates purportedly issued to Brandon attached to the petition at Exhibit 6 did not support the percentages reported in the tax returns, which appear to be without any basis in fact whatsoever. R 21; 59-70. Myron O.'s and Myron C.'s answer disputed the accuracy of the partial tax returns and asserted the ownership percentages are incorrect and require amendment. R 137.

6. BRADY FARMS ISSUED 100 UNAUTHORIZED SHARES

On August 22, 2013, the corporate records also indicate that Myron O. held 138 shares (69%) and Brandon held 62 shares (31%) of Brady Farms' 200 total shares of stock. R 19; 37- 41; 59-70; 95 (paragraph 14); 134. As set forth in

Brandon's petition (at paragraph 6), Myron O. has maintained that he owned 69% and Brandon owned 31% of Brady Farms' stock. R 19.

On August 23, 2013, the Company purportedly "transferred" 50 shares of Brady Farms' stock to Myron O. and "transferred" 50 shares to Brandon. R 95 (paragraph 14). However, at that time, *all 200* of Brady Farms' authorized shares of stock had *already* been issued – Myron O. held 138 shares and Brandon held 62 shares. R 19; 37- 41; 59-70; 95 (paragraph 14); 134. Importantly, if 50 shares of stock each were "transferred" to both Myron O. and Brandon from the existing 200 authorized shares of Company stock, the stock swap would not have affected the stock ownership percentages of the parties (as they were the only two shareholders).

On August 23, 2013, despite having issued its 200 shares and having no additional shares to issue, Brady Farms purportedly issued new stock certificates and additional shares – 50 shares to Myron O. and 50 shares to Brandon. R 68-70; 95 (paragraph 14). Had those shares actually been authorized and issued, for a total of 300 shares, it would have resulted in Myron O. holding 188 shares, and Brandon holding 112 shares (as set forth in his petition at Exhibit 6), which would have resulted in ownership percentages of 62.67% to 37.33%, respectively. However, appellants have maintained that since the Company did not have authorization to issue any additional shares, the shares issued on August 23, 2013 were invalid. R 95

(paragraph 14); 134; 137. Therefore, Myron O. held 138 shares (69%) and Brandon held 62 shares (31%).

Brandon's petition attached a copy of stock certificate number 15 showing the 50 additional shares purportedly issued to Brandon on August 23, 2013. R 68-70. However, the petition did *not* address or attach the stock certificate (stock certificate number 14) showing the 50 additional shares purportedly issued to Myron O. on August 23, 2013, or how it affected the parties' ownership percentages. R 68-70 (Notably, the stock certificate numbering jumps from stock certificate number 13 to number 15).

B. THE LOWER COURT'S DECISION LACKED A FACTUAL BASIS

1. OPPRESSION WAS NOT SHOWN BY STOCK OWNERSHIP CLAIMS

Brady Farms has no corporate records that support Brandon's claim that he owns 48% or 96 shares, and no such records were before the court below. The allegations in the petition are in direct contrast to Brady Farms' corporate records and remain in dispute.

In granting corporate dissolution, based solely on contradictory pleadings, and the inconsistencies within the petition itself concerning percentage of ownership, the court below committed reversible error when it held Myron O. and Myron C. had engaged in "fraudulent and oppressive conduct….For example, Respondents deny that Brandon owns 48% of the Company stock, but do not explain why the Company

tax returns, signed by Myron O. acknowledge Brandon's 48% ownership." R 13. This was the only "example" of fraudulent or oppressive conduct recited in the lower court's decision, which the petition itself empirically reveals could not be a basis to grant corporate dissolution. R 7-14.

2. CORPORATE ACTIONS WERE NOT PART OF A FRAUDULENT SCHEME

The alleged corporate actions also did not provide a factual basis for the lower court to grant dissolution based on the pleadings alone.

The petition alleged that respondents, with notice to petitioner, acted to diminish his role in the Company, and that those actions occurred, nearly a year before he filed his petition, in May and June 2018. R 24-25; 84; 86; 89; 93-99. Specifically, as authorized the corporate bylaws, Myron O., as the Company's president and majority shareholder, called a special meeting to elect the board of directors and to consider a proposed amendment to the certificate of incorporation. R 24-25; 86. Petitioner did not allege that the special meeting was not authorized, or that special meetings for actions to elect board members or officers were unusual. R 49; 53; 80. At the special meeting held on May 23, 2018, Myron O. as the majority shareholder reelected himself as a director, and elected Myron C. to hold the seat on the board of directors that Brandon previously occupied for the prior 13 months. R 86.

Myron O. also voted his majority of the shares to approve the proposed amendment to the certificate of incorporation removing the restraint on alienation at

paragraph 6 thereof (right of first refusal of current shareholders). R 43; 86; 88-91. Then, Myron O. and Myron C. held a meeting of the board of directors of the Company and, among other things, authorized Myron O. as president to effectuate the amendment of the certificate of incorporation as previously approved by majority of the shareholders. R 84. *See In re McKinney*, 306 N.Y. 207, 215 (1954) (authorization of a certificate of amendment requires a vote of the board of directors and of the shareholders, but it is not necessary that the votes of those two bodies occur in that order).

Upon the amendment to the certificate of incorporation, Myron O. sold his Brady Farms' stock to Myron C., with Myron O. retaining the right to continue to farm his share of the farmland owned by the corporation, life use and control of all buildings owned by the corporation, and the right to continue to manage the corporate finances. R 93-99.

In their answer, Myron O. and Myron C. denied that the actions in question were part of any illegal, fraudulent, or oppressive scheme, and that the documented, legitimate corporate actions, undertaken on notice to Brandon, spoke for themselves. R 133; 139-140. The corporate elections and subsequent actions did effectively replace Brandon as a director and officer, and permitted the transfer of corporate shares without first offering to sell them to Brandon. However, it is undisputed that there was dissention between Myron O. and Brandon concerning, among other things,

Myron O's life use of the farmland and the renewal of the lease for 165 acres of Company land to Myron C.

It is also well settled that corporate elections furnish the only remedy for internal dissention, and the majority shareholder must rule, so long as he acts within the powers conferred by the corporate charter and the provisions of Business Corporation Law ("BCL"). *See Cont. Ins. Co. v. New York & Harlem R.R. Co.*, 103 A.D. 282, 300 (1st Dep't. 1905). A majority shareholder has the right and power to control the corporation within the limits of the BCL and its chartered powers, and he has the right to sell his stock. *Barnes v. Brown*, 80 N.Y. 527, 536-37 (1880) (It is the general rule, sanctioned by the policy of the law, that those who have the largest interest in corporations may control them, as they have the greatest interest that they shall be well managed).

The petition alleged that the corporate transactions "…effectively render[ed] Brandon's ownership [interest] worthless." R 26. However, the petition offered no evidence that the actions complained of:

1. Altered the value of Brandon's ownership percentage in the Company (as the corporation's main, if not sole, asset is the real property titled in its name);
2. Altered or reduced Brandon's ownership percentage in the Company, or his ability to avail himself of BCL § 1104-a protections;

3. Denied Brandon of his source of employment, income, salary, or benefits as the Company never provided him with any of the same;
4. Altered the management of Brady Farms or Brandon's passive role in the Company, which remained the same since his father began gifting him shares of stock in Brady Farms;
5. Defeated Brandon's reasonable expectations in his passive role in the Company, which was formed and had always been controlled and operated by his father;
6. Caused any injury or detriment to the Company (e.g., there was no evidence that the renewal of Myron C.'s lease was not a legitimate corporation action, or that the lease equated to improper self-dealing or any other injury to Brady Farms); or
7. Affected the Company's ability to continue to hold the real property titled in its name or affected the value of that real property.

Brandon's subjective disappointment in Myron O.'s reasonable reaction to his youngest son's attempt to usurp his majority ownership position and historical role in the management and control of Brady Farms was not a sufficient basis for the lower court to find that Brandon had been illegally oppression or frozen out of the Company. *See In re Kemp & Beatley*, 64 N.Y.2d 63, 73 (1984) (subjective disappointment alone does not rise to the level of oppression).

3. THE LACK OF EVIDENCE OF FINANCIAL WRONGDOING

Beyond cursory or speculative allegations in the petition, there was no evidence of improper diversion of Company assets or funds to Myron O. or Myron C. or any financial harm to the corporation itself, which the answer denied had taken place. R 131-133.

Examination of the pleadings reveals there was no basis for the lower court to make a finding of oppression based on the disputed allegations about illegal or fraudulent conduct. The petition alleged that Brandon began assisting with the Company's farming operations after his father began gifting him shares of stock. Then, in 1998, that Brandon assumed sole responsibility for farming about 200 acres of the real property titled to Brady Farms and performed substantially all of the farm-related labor. R 20. The answer not only denied that Brandon had ever farmed the land at issue, but denied the Company had any farming operations and alleged it was nothing more than a real estate holding company. R 129-131; 136. There was no documentary evidence submitted in support of Brandon's allegations that the Company was an ongoing farming operation or that supported his claims he was solely responsible for running the farm or performed substantially all of the farm-related labor on the corporation's behalf.

The petition alleged that Brandon was responsible for paying income taxes on Company profits and he shared in paying Company employees. R 22. Respondents

denied these claims and asserted that the employees worked for Myron O. and Brandon individually (on farmland titled to the corporation and hundreds of other acreage), they were not employed by the Company, and the Company was only used to process payroll. R 131; 137. Moreover, the copies of portions of the Company's tax returns from 2016 and 2017 attached to the petition showed that the corporation operated at a loss. R 72; 75. There was no documentary evidence that Brandon made any payment of Company income taxes, payments to the purported Brady Farms' employees or capital contributions of any kind to the corporation.

Brandon alleged that the corporation generated revenue or proceeds from its farming operations, and he had not received information or distributions from the Company concerning the same. R 22-23. Myron O. and Myron C. asserted the Company did not make distributions, Brandon did not request any distributions and that Brandon always had full access to the corporate books, records, tax returns, bankers, and accountant. R 130-131; 138. Again, corporate income tax returns attached to the petition showed the Company operated at a loss in 2016 and 2017. R 72; 75. There was no documentary evidence showing that the Company ever made any distributions or excluded Brandon from the same.

Despite the apparent access to the corporate books and records located in his own home, Brandon made various allegations of looting and diversion of monies from the Company purportedly for respondents' personal gain or other non-

corporate purposes. R 23-25; 29-30; 130-131; 138. There was no documentary evidence that accompanied the petition to support these allegations. The answer denied the claims of wrongdoing. R 138-139; 142.

The petition alleged, upon unidentified information and belief, that Myron O. had transferred shares of Company stock to Myron C. in violation of a court order in his divorce proceeding, which was denied in the answer. R 25; 140. There was no documentary evidence submitted in support of claimed court order violation (and there was no such finding in the pending divorce matter).

Brandon alleged that he learned Myron O. and/or Myron C. had removed all funds from the Company's bank accounts and caused them to be closed, based on a purported statement by Myron O. and a hearsay communication with an unidentified Five Star Bank representative. R 27. Despite Brandon's asserted access to the Company's bankers, and apparent access to its books and records located in his own home, the petition lacked any documentary proof to support these claims, which were also denied in the answer. R 141.

The petition alleged that Myron O. had allowed Myron C. and Scott Brady to use about $16,000 worth of the Company's fuel, that Brandon had incurred the costs for the fuel, and Brandon had not been reimbursed for the same. R 27. Myron O. and Myron C. denied these allegations, asserted that Myron C. and Scott Brady have their own fuel tanks and did not use the fuel in question, and that the Company's

fuel tank at issue was owned by Myron O. and his access to the tank had been blocked by Brandon placing a lock on the tank. The petition's claims about the use of the fuel or any charges allegedly incurred by Brandon were unsupported by documentary evidence.

Brandon claimed that he incurred costs of approximately $10,000 per year (for an unspecified number of years) for stone to place on Company driveways and for insurance, and that he was forced to personally incur other costs and personal responsibility for other Company purchases and improvements such as concrete and electrical work for an unidentified Company building. R 27-28. Documents to support these claims did not accompany the petition, and the allegations were denied by respondents. R 142.

The petition alleged that Myron O. and/or Myron C. caused the Company to fail to pay its real property taxes and, upon unspecified information and belief, that the taxes were delinquent. R 29. It also alleged that Myron O. and/or Myron C. engaged in unidentified actions outside the Company's normal course of business concerning the movement, misappropriation, or waste of corporate assets, which remained undisclosed in the pleading. R 29-30. Myron O. and Myron C. denied all of these allegations. As with the other claims, there was no documentary evidence submitted in support of these speculative allegations.

The disputed allegations do not support the lower court's summary finding of fraudulent and oppressive conduct. R 7. At minimum, there is no objective evidence of fraud or that Brandon supplied any capital, skill, experience or labor toward the active management or operation of the Company, nor was there any allegation that he was reliant on Brady Farms for income or employment. *See In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 71 (1984) (the legislature's general purpose in creating BCL § 1104-a was to protect minority shareholders who are actively involved in a closely held corporation's management and operation, have contributed capital skill and labor toward the business, and who are reliant on the corporation for income and employment).

The pleadings were replete with issues of fact concerning petitioner's claims of supposed financial impropriety. In granting corporate dissolution, based solely on contradictory pleadings and in the absence of further proceedings, the court below committed reversible error when it held Myron O. and Myron C. had engaged in fraudulent and oppressive conduct.

Point II: THE LOWER COURT WAS WITHOUT A SUFFICIENT BASIS TO APPOINT A TEMPORARY RECEIVER.

The appointment of a temporary receiver by the court below was without an adequate procedural or substantive basis and should be reversed.

The Company's main, if not only, asset is real property (400 acres, worth millions of dollars), which provided more than ample security to protect Brandon if a future accounting or findings reveal any alleged wrongdoing, because a setoff against the majority shareholders' interest can be made. There was no evidence that the Company's land was at risk of dissipation, removal from the state, or in danger of being materially injured or destroyed. Given the other, unopposed, injunctive relief imposed maintaining the status quo, which prevented the transfer of the Company's real property, a temporary receiver was unnecessary. R 12; 133.

A. THE FAILURE TO SHOW A RECEIVER WAS NECESSARY

The petition failed to allege or show that there was any danger of irreparable loss or injury. Petitioner also failed to seek to invoke the court's emergency powers to avoid imminent harm such as seeking temporary restraints and failed to record a lis pendens seeking to protect the Company's real property assets from transfer at the time of commencement. *See Lee v. 183 Port Richmond Ave. Realty, Inc.*, 303 A.D.2d 379, 380 (2d Dep't. 2003); *Secured Capital Corp. v. Dansker*, 263 A.D.2d 503 (2d Dep't. 1999) (the drastic and intrusive remedy of the appointment of a

receiver cannot be granted without a clear evidentiary showing that funds or properties are in danger of being materially injured or destroyed).

The court below saw no immediate danger or need to act either. The petition was filed on March 8, 2019, the lower court heard arguments on the pleadings on May 2, 2019, and then issued its decision on September 9, 2019, several months later. R 3-14.

Since the matter was in its infancy, and Brady Farms owns millions of dollars of real property, petitioner's alleged concerns were more than adequately safeguarded by the lower court's order enjoining respondents from transferring or otherwise encumbering the Company's real property outside the ordinary course of business, protecting petitioner's interest, or percentage of shares, in the Company, and ensuring that the Company and respondents cannot otherwise act outside the ordinary course of business. Myron O. and Myron C. did not oppose such relief. R 12; 131; 133; 138-139.

There was no showing of any immediate need to appoint a receiver and no evidence of wrongdoing by respondents in support of the request for a receiver.

B. THE FAILURE TO MAKE A CLEAR EVIDENTIARY SHOWING

The appointment of a receiver is an extreme remedy that requires a clear evidentiary showing that a receiver is a necessity, which was lacking. *Kristensen v. Charleston Square, Inc.*, 273 A.D.2d 312 (2d Dep't. 2000) (value of real estate

owned by the corporations provided sufficient security to petitioners to protect them, if future accounting reveals wrongdoing, a setoff could be made against majority shareholders' interest). Petitioner failed to make such a showing, and many of the assertions in his petition remained in substantial dispute.

The petition made various allegations of wrongdoing, but failed to present any evidentiary support, in admissible form, for those claims. Further, the allegations in the petition were refuted in answer. For example, the petition alleged that there were no distributions to Brandon arising out of payments of rent to the Company from Myron C. R 22. The answer asserted that there were no shareholder distributions by the Company, and Brandon never requested any distributions. R 131; 138. There was no evidence that the Company made any distributions of any kind. The petition alleges, upon unspecified information and belief, and apparently in the alternative, that Myron O. was not collecting any rent from Myron C. for his lease of Company land. The answer denied this allegation. R 138. The petition alleged improper removal of all funds from the Company's bank account based on unspecified hearsay from a bank representative. R 38. There was no evidence submitted in support of this allegation, which was also denied in the answer. R 139.

The petition alleged that the Company engaged in farming the land titled in its name, that Brady Farms generated revenue from the farming activity, and Myron O. failed to distribute any corporate profits from the farming operations to Brandon.

R 22-23. There was no documentary evidence that the Company or Brandon was farming the land titled in its name, that the Company generated any revenue from farming activity, or that the Company owned the necessary equipment to engage in its alleged farming operations. The copies of the Company's partial income tax returns for 2016 and 2017 attached to the petition showed Brady Farms operated at a loss. R 72-78.

The answer asserted that Brady Farms was a real estate holding company and that it was not engaged in farming the land titled in its name, asserted the land was actually farmed individually by Myron O. and Myron C, and refuted that there was any distribution of profits from farming operations. R 129. The answer also asserted that the Company does not own the necessary equipment to farm the land. R 131.

The petition alleged that Myron O. failed or refused to provide an accounting and access to Company records. R 23. The answer refuted this claim and asserted that Brandon always had full access to the Company's books and records, including income tax and banking records, which were kept in the house where Brandon and Myron O. both lived, and full access to the Company's bankers and accountant. R 130-131.

C. THE FAILURE TO COMPLY WITH BCL § 1203(A) WAS FATALLY DEFECTIVE

In the application for a receiver, it is undisputed that petitioner *failed* to provide notice to the New York State Attorney General's Office, which was a fatal

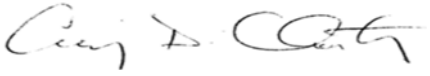
procedural defect. Business Corporation Law § 1203(a); *P.B.G. Realty, Inc. v. Putter*, 41 Misc.2d 129, 132 (NY Co. 1963) (the request for temporary receiver would have to be denied due to lack of proper notice to the Attorney General). For reasons that were not explained by the lower court, this defect was ignored in its decision(s). This defect, which was not addressed by the lower court or rectified in any manner by the court or petitioner prior to (or after) the issuance of the decision(s).

IV. CONCLUSION

For these reasons, it is respectfully requested that the Court vacate the order of dissolution and vacate the appointment of the temporary receiver, and award such other and further relief as to the Court seems just, proper, and equitable.

Dated: June 10, 2020
Rochester, New York

Respectfully submitted,



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