SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Petition of Index No. 160294/2021

ALVIN CLAYTON FERNANDES

For the Judicial Dissolution of Motion #003

MATRIX MODEL STAFFING, INC.

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MEMORANDUM OF LAW IN OPPOSITION

GRAYSON & ASSOCIATES, P.C.
Attorney for Plaintiff
175 West Putnam Avenue, 2nd Fl.
Greenwich, CT 06830
(203) 622-8100

NEIL SPECTOR, ESQ.,
Of Counsel
50 Main Street – 10th Fl.
White Plains, NY 10606
(914) 682-2055

Petitioner, Alvin Clayton Fernandes, respectfully submits this Memorandum of Law in opposition to Respondent Matrix Model Staffing, Inc.'s motion to dismiss the Amended Petition seeking corporate dissolution pursuant to BCL 1104-a.

BACKGROUND

A complete recitation of the background is set forth in the accompanying Affidavit of Petitioner and the Court is respectfully referred thereto for the content thereof.

PROCEDURAL HISTORY

Petitioner commenced the above-entitled proceeding on November 11, 2021 by the filing a Petition and proposed Order to Show Cause. Petitioner filed an Amended Petition on November 30, 2011 (NYSCEF Doc #14). The Court signed the Order to Show Cause (NYSCEF Doc #15) on November 30, 2021.

This proceeding seeks the judicial dissolution of Respondent, Matrix Model Staffing, Inc. ("Respondent" or "Matrix"), pursuant to Business Corporation Law 1104-a.

Respondent now moves, on unspecified grounds, for an order dismissing the Amended Petition.

STANDARDS ON A MOTION TO DISMISS

On a motion to dismiss a petition, the court must accept the facts alleged in the petition as true, petitioner must be afforded every possible favorable inference, and the court determine whether the facts alleged by petitioner fit within any cognizable legal theory. Lawrence v. Miller, 11 N.Y.3d 588 (2008); Leon v. Martinez, 84 N.Y.2d 83 (1994). Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action". Rovello v. Orofino, 40 N.Y.2d 633 (1976).

"In opposition to such a motion, a [petitioner] may submit affidavits 'to remedy defects in the [petition]' and 'preserve inartfully pleaded, but potentially meritorious claims' . . . . Though limited to that purpose, such additional submissions of the [petitioner], if any, will similarly be 'given their most favorable intendment'." Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 975 (1998)(internal citations omitted).

While Petitioner does not believe that the Amended Petition was "inartfully pled" and in fact was more than sufficient to meet the pleading standards, out of an abundance of caution, Petitioner has submitted a detailed Affidavit which is incorporated herein, demonstrating why the Motion to Dismiss is baseless and respectfully should be denied.

Applying that standard to the Amended Petition herein and as more fully set forth below and in the accompanying Affidavit in Opposition, Petitioner has adequately stated a cause of action for corporate dissolution pursuant to BCL 1104-a and the Court should deny the instant motion to dismiss in its entirety.

PETITIONER HAS STANDING TO MAINTAIN THE ACTION

BCL 1104-a(a) states, in relevant part, that "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . entitled to vote in an election of directors may present a petition of dissolution . . ."

BCL 612(a) states "[e]very shareholder of record shall be entitled at every meeting of shareholders to one vote for every share standing in his name on the record of shareholders, unless otherwise provided in the certificate of incorporation".

Therefore, by definition, a shareholder of a closely held corporation has a right to vote in an election of directors unless limited by the corporation's by-laws or a shareholder's agreement.

In the case at bar, Matrix does not dispute that Fernandes is a twenty percent (20%) shareholder of Matrix (see 2017-2019 K-1's, Fernandes Aff. Exhibits "A", "B" and "C"), nor does it allege that Fernandes is not entitled to vote in an election of directors.

The motion does not contain any evidence or allegations that (i) the certificate of incorporation provides otherwise or (ii) the Petitioner holds only a second class of non-voting shares. Similarly, the Motion does not nor could it assert the existence of a shareholder's agreement or by-laws that provide otherwise.

Rather, Matrix argues only that Fernandes failed to plead that he holds any voting shares and therefore the Amended Petition should be dismissed. The moving papers, however, fail to offer any support for this contention and the cases relied on are inapposite.

In Matter of Wiedy's Furniture Clearance Center Co., Inc., 108 A.D.2d 81 (1st Dept. 1995), the petition was dismissed where it was undisputed as a matter of fact that petitioner did not own 20% of the voting stock, not because petitioner failed to plead same. In In re Michael Bernfeld, D.D.S., 86 A.D.3d 244 (2nd Dept. 2011), the issue was whether a nonprofessional, who was the transferee of a majority of shares in a professional service corporation, may obtain judicial dissolution of the corporation pursuant to BCL 1103 because she was not a professional and the court concluded that such a nonprofessional lacks standing to seek such relief. Bernfeld does not involve a BCL 1104-a dissolution nor did it address pleading requirements.

Fernandes, as an undisputed matter of fact, is a 20% shareholder of shares entitled to vote and therefore is entitled

under the settled statutory and case law to petition for dissolution.

Based on the foregoing, Fernandes has standing to maintain the instant dissolution proceeding. There is simply no merit, or authority, for Matrix's argument regarding pleading requirements and the instant motion should be denied on that ground.

THE MAJORITY SHAREHOLDER'S OPPRESSIVE CONDUCT HAS DEFEATED PETITIONER'S REASONBLE EXPECTATIONS WARRANTING DISSOLUTION UNDER BCL 1104-A

Pursuant to BCL 1104-a(a)(1), a petition for dissolution may be presented on the grounds that "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders".

"The touchstone for oppressive conduct is whether the actions of the majority substantially defeat the reasonable expectations that were central to the petitioning shareholder's decision to invest in the corporation." Kassab v. Kasab, 56 Misc.3d 1213(A), *11 (Sup. Ct., Queens Co. 2017).

"It is frequently said that the relationship between the founders of a close corporation approximates that between partners and the "reasonable expectations" test is indeed an examination into the spoken and unspoken understanding upon which the founders relied when entering into the venture". Gimpel v. Bolstein, 125 Misc.2d 45, 51 (Sup. Ct., Queens Co., 1984).

With respect oppressive conduct and defeating a shareholder's reasonable expectations, the Court of Appeals, in Matter of Kemp & Beatley, Inc., 64 N.Y.2d 63, 72 (1984), stated:

> "A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.
>
> Given the nature of close corporations and the remedial purpose of the statute, this court holds that utilizing a complaining shareholder's "reasonable expectations" as a means of identifying and measuring conduct alleged to be oppressive is appropriate. A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.
>
> Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. It would be inappropriate, however, for us in this case to delineate the contours of the courts' consideration in determining whether directors have been guilty of oppressive conduct. As in other areas of the law, much will depend on the circumstances in the individual case." Id.

Relying on Matter of Kemp, supra., the First Department, in In re Miescher, 288 N.Y.S.2d 129 (1st Dept. 2001) held:

> We affirm the finding of the Referee, as confirmed by the Supreme Court, that the non-petitioning

> shareholder (Haimovich), who was in day-to-day control of Haimil's business, engaged in "oppressive actions" toward the complaining shareholder within the meaning of § 1104-1(a)(1). The record of the reference hearing supports the conclusion that Haimovich unjustifiably failed for two years to cause Haimil to make payments on the mortgage encumbering the building it owns, its sole substantial asset, which ultimately resulted in the commencement of a foreclosure action, and that Haimovich further unjustifiably failed to cause Haimil to pay off tax liens on the building during the same period. Under the circumstances of this case, it could fairly be concluded that such a consistent pattern of corporate mismanagement defeated petitioner's reasonable expectations in connection with her investment to such an extent as to constitute oppression". Id.

And in Starka v. Arcara Zucarelli Lenda & Associates CPAs, P.C., 62 Misc.3d 1064, 1070 (Sup. Ct., Erie Co. 2019), the court, also following Matter of Kemp, supra., held:

> "This court also finds that Straka's reasonable expectation for fair compensation was frustrated by the use of the earnings matrix, particularly by allocating expenses of Weiss and Urbanek to all four shareholders while allocating their revenues only to Zucarelli and Lenda."

In the case at bar, and as more fully set forth in the Amended Petition and the accompanying affidavit of Petitioner, Petitioner's reasonable expectations at the time he entered into the venture, which were known to Willard, with respect to protection from personal liability and direct input into the major decision-making process and financial dealings of Matrix Staffing were defeated by Willard's conduct, warranting judicial dissolution of the corporation.

First, at some unknown time after the Matrix Staffing's inception, Willard, without Petitioner's knowledge and consent, designated Petitioner to the Internal Revenue Service as a "person responsible for collecting, truthfully accounting for, or paying over employment taxes for the entity (Amended Complaint Par. 25).

Unbeknownst to Petitioner, Matrix Staffing and Willard failed to pay payroll taxes in 2019 (Amended Complaint Par. 26).

In or around August 2021, Petitioner received four (4) notices from the Internal Revenue Service advising him that he was being personally charged the Trust Fund Recovery Penalty (TRFP) for willfully failing to collect, account for, pay over, or otherwise evade employment (Amended Complaint Par. 27).

The total amount of the penalties was $210,961.22, which amount remains due and owing together with additional interest charges (Amended Complaint Par. 28).

At no time since Matrix's inception was Petitioner ever responsible for collecting, truthfully accounting for, or paying over employment taxes. This was the sole responsibility of Willard (Amended Complaint Par. 29).

Respondent does not deny these allegations nor does Respondent even address them in the instant motion. In fact, the motion does not include an affidavit from Willard or a substantive affirmation from counsel.

It is undisputed that Willard was responsible for the day-to-day operations of Matrix. Yet, Willard unilaterally and without Petitioner's knowledge or consent, designated Petitioner to the IRS as being responsible for the employment taxes. Further, there is no indication that Willard likewise obligated herself to the IRS.

At the time of Matrix's inception, it is inconceivable that Petitioner's reasonable expectations, objectively viewed, included being exposed to personal liability for the actions of Willard in failing to pay employment taxes, especially given that Willard admittedly ran the day-to-day operations of Matrix. It was Willard's sole responsibility to pay said employment taxes.

Under the circumstances, it is likewise inconceivable that potential exposure to IRS liability based on something over which Petitioner had no control, was central to Petitioner's decision to join the venture. (Fernandes Aff., Par.'s 28-33).

Secondly, Willard caused Matrix to issue to Petitioner 2017, 2018 and 2019 K-1's to Petitioner that at best incorrectly and at worst fraudulently overstated the amounts of money that Petitioner received from Matrix those years, thereby causing Petitioner to incur additional tax liability. It should be noted that as of the date hereof, Matrix has failed to issue Petitioner K-1's for 2020 or 2021.

Again, objectively viewed, it is inconceivable that at the time he joined the venture, Petitioner had a reasonable expectation of

receiving incorrect and/or fraudulent K-1's at the time Petitioner joined the venture. (Fernandes Aff., Par.'s 34-41).

Third, in May 2020, Matrix received a $375,000.00 Covid related PPP loan, without Petitioner's knowledge. Respondent has failed to provide any evidence as to how said loan proceeds were utilized. Clearly they were not used to pay the overdue employment taxes, which would have relieved Petitioner of his current IRS obligations. Nor has Respondent provided any evidence that the loan has been forgiven. Consequently, Willard has caused Matrix to unnecessarily incur additional debt, thereby reducing the value of Petitioner's interest in the corporation.

Lastly, based on Petitioner's extensive experience in the industry, Petitioner had a reasonable expectation at the time of inception, which expectation was known to Willard, that although he would not be involved in Matrix's day-to-day operations, he would have a role in the major decision-making process.

It was Petitioner who originally formed Matrix Management (Amended Petition Par. 13). It was Petitioner who originally hired Willard (Amended Petition Par. 15). It was Petitioner who gave Willard her interest in Matrix Management and then Respondent (Amended Petition Pars. 16 and 18).

It was always understood that Willard would call Petitioner with concerns about the company and that Petitioner would give her counsel and advice. It was always further understood that Willard

would reach out to Petitioner via telephone because Petitioner was not one to check his emails on a regular basis. Willard was and is very aware of this and knows email is not Petitioner's preferred method of communication.

Specifically, Willard failed to heed Petitioner's advice regarding paying the employees before Matrix was paid, i.e., "pay when paid". This resulted in Willard entering into onerous re-financings, unbeknownst to Petitioner, that Matrix has struggled to repay. (Fernandes Aff., Par.'s 19-27).

Contrary to Respondent's assertions, and as more fully set forth in the Petitioner's accompanying affidavit, Petitioner and Willard did in fact discuss the re-financing attempts. Petitioner did not ignore his e-mails, rather he simply called Willard. Petitioner did not "single-handedly sabotage" Matrix's re-financing efforts.

The Amended Petition herein clearly and unequivocally alleges that Willard has engaged in oppressive conduct as against Petitioner that defeated Petitioner's reasonable expectations at the time Petitioner joined the venture, and that these expectations were known to Willard. Accepting those allegations as true for purposes of the instant motion to dismiss, the Amended Petition adequately states a cause of action for dissolution, warranting a denial of the motion and dissolution of the corporation.

THE REMAINING SHAREHOLDER HAS FAILED TO ELECT TO PURCHASE PETITIONER'S SHARES PURSUANT TO BCL 1118(a)

BCL 1118(a) states:

> "In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph (c) herein. An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable."

In the present case, Willard has failed to make the BCL 1118(a) election, thus evidencing that she believes that dissolution is the appropriate remedy. Obviously the fact that "Matrix employs 170 people" is of no concern to Willard (Memo of Law, page 9).

Based on the foregoing, the should order dissolution pursuant to BCL 1104-a.

THE COURT MAY FASHION AN ALTERNATIVE REMEDY TO DISSOULTION

With respect to a Court having the authority to fashion alternate remedies to dissolution, the Court of Appeals, in Matter of Kemp & Beatley, Inc., 64 N.Y.2d 63, 73 (1984), stated:

> "The appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application (see Business Corporation Law, § 1111, subd [a]). Under the terms of this statute,

> courts are instructed to consider both whether "liquidation of the corporation is the only feasible means" to protect the complaining shareholder's expectation of a fair return on his or her investment and whether dissolution "is reasonably necessary" to protect "the rights or interests of any substantial number of shareholders" not limited to those complaining (Business Corporation Law, § 1104-a, subd [b], pars [1], [2]). Implicit in this direction is that once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders (see, also, Business Corporation Law, § 1111, subd [b], par [1])." Id.

In the case at bar, Petitioner does not dispute that a Court may fashion an alternate remedy to dissolution as feasible means of resolving the dispute. It must be noted that a dismissal of the instant proceeding would result in Petitioner's continued exposure to liability in a situation over which he has no control or input. Willard has already demonstrated that she has no issue exposing Petitioner to personal liability for the corporation's debts, especially where she is not personally exposing herself. There is a limit to what Petitioner can be forced to bear, and that limit has been reached. It is incumbent on the Court to recognize that Petitioner cannot be forever compelled to remain subject Willard's oppressive conduct.[1]

[1] Even Cain was granted protection from the perpetual vengefulness of his fellow man. (Genesis 4:12-15).

CONCLUSION

Based on the foregoing, the Court should deny Respondent's motion to dismiss in its entirety, together with such other and further relief that the court deems just and proper.

Dated: White Plains, NY
February 25, 2022

GRAYSON & ASSOCIATES, P.C.

By *Neil Spector*

NEIL SPECTOR, ESQ.,
Of counsel
Attorney for Petitioner
175 West Putnam Avenue, 2nd Fl.
Greenwich, CT 06830
(203) 622-8100

NEIL SPECTOR, ESQ.
50 Main Street – 10th Fl.
White Plains, NY 10606
(914) 682-2055

CERTIFICATION OF WORD COUNT PURSUANT TO 22 NYCRR 202.8-b

Neil Spector, undersigned counsel for Petitioner Alvin Clayton Fernandes, hereby certifies that the number of words in the within Memorandum of Law, excluding the caption and signature block is 2955 according to the word-processing system used to prepare the aforesaid document.

Dated: White Plains, NY
February 25, 2022

Neil Spector

NEIL SPECTOR