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 #004

MATRIX MODEL STAFFING, INC.

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MEMORANDUM OF LAW IN OPPOSITION

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Petitioner, Alvin Clayton Fernandes, respectfully submits this Memorandum of Law in opposition to the Order to Show Cause permitting Jacquelyn Willard's belated BCL 1118(a) election to buy-out Petitioner's shares in the Respondent corporation and expanding the scope of the reference to the Special Referee.

BACKGROUND AND PROCEDURAL HISTORY

The above-entitled proceeding seeks the judicial dissolution of respondent Matrix Model Staffing, Inc. pursuant to Business Corporation Law 1104-a. The proceeding was based on Willard's unilateral designation of Petitioner to the IRS, without his knowledge or consent, as being the individual responsible collecting and paying employment taxes for Respondent, notwithstanding that Petitioner was never responsible for collecting, accounting for or paying same. Respondent did in fact fail to pay the appropriate employment taxes resulting in over $200,000.00 in penalties being assessed against Petitioner personally, with no indication from Respondent or Willard that said sums, as of the date hereof, have been paid or otherwise addressed by Respondent or Willard.

Petitioner commenced 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.

Rather than filing an answer or opposition to the Petition and Order to Show Cause, Respondent filed a motion to dismiss the Petition pursuant to CPLR 3211(a)(1) and (7) and the Court consolidated motion sequences 002 and 003 for the purposes of disposition. It should be noted that neither Willard nor Respondent submitted an affidavit on the motion, nor did Willard elect to exercise her "as of" right to buy-out Petitioner's shares pursuant to BCL 1118(a). It should be further noted that Respondent failed to offer any alternative remedies to dissolution.

By a Decision and Order dated and entered April 20, 2022 (NYSCEF Doc #35), this Court held that "[c]onsequently, respondent Matrix cannot avoid dissolution via BCL 1118 at this time; Willard having not elected to exercise her rights under 1118". Accordingly, the Court directed that the matter be referred to a referee pursuant to BCL 1109 to hear and report on the issue of dissolution.

Respondent now moves for an Order, *inter alia*, permitting Respondent's belated election for a BCL 1118 buy-out of Petitioner's shares in the corporation.

RESPONDENT HAS FAILED TO DEMONSTRATE AN ADEQUATE, ALTERNATIVE REMEDY TO DISSOLUTION, WARRANTING A DENIAL OF THE MOTION

Under BCL 1104-a(b), the court is vested with discretion to grant the petitioning shareholder involuntary dissolution of the company or to direct a buy-out. BCL 1118(a) provides that in any proceeding brought pursuant to BCL 1104-a, any other shareholder or shareholders of the corporation may, at any time within ninety (90) 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 petitioner at their fair value and upon such terms and conditions as may be approved by the court, including petitioner's reasonable expenses incurred in the proceeding, including attorneys' fees (BCL 1118(c)(1)), and the posting of a bond or other acceptable security (BCL 1118(c)(2)).

With respect to the issue of whether a court should order corporate dissolution, the Court of Appeals, in Matter of Kemp Beatley, Inc., 64 N.Y.2d 63 (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]).
>
> By invoking the statute, a petitioner has manifested his or her belief that dissolution may be the only appropriate remedy. Assuming the petitioner has set forth a prima facie case of oppressive conduct, it should be incumbent upon the parties seeking to forestall dissolution to demonstrate to the court the existence of an adequate, alternative remedy (cf. Baker v. Commercial Body Bldrs., 264 Or. 614, 507 P.2d 387, *supra;* White v. Perkins, 213 Va. 129, 189 S.E.2d 315). A court has broad latitude in fashioning alternative relief, but when fulfillment of the oppressed petitioner's expectations by these means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution. Every order of dissolution, however, must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value (see Business Corporation Law, § 1118).
>
> One further observation is in order. The purpose of this involuntary dissolution statute is to provide protection to the minority shareholder whose reasonable expectations in undertaking the venture have been frustrated and who has no adequate means of recovering his or her investment." Id. at 73-74.

In the case at bar, this Court, in its April 20, 2022 Decision and Order, at page 5, held:

> "It is beyond argument that a shareholder, who is not responsible for payroll and accounting, has an objectively reasonable expectation that the corporation will not designate the shareholder as the responsible party for payroll withholdings in IRS filings. The designation of the shareholder, without their consent,

> in IRS filings as the responsible party for payroll taxes and the corporation's subsequent failure to properly withhold payroll taxes – resulting in several hundred-thousand dollars of tax penalties being levied against the shareholder – is oppressive, if not fraudulent or criminal behavior . . . Consequently, respondent's argument that the petition fails to plead requisite oppression for dissolution is entirely without merit."

As with the motion to dismiss, the instant Order to Show Cause is not accompanied by an Affidavit from Willard or Respondent. Rather, it contains only the Affirmation of Respondent's attorney. It does not address why Willard did not make her election within the 90-day period prescribed by BCL 1118(a). Instead, she waited until the Court denied the motion to dismiss to make her election to buy-out Petitioner and only after being confronted with dissolution.

More importantly, the moving papers wholly fail to address the IRS liability or what steps, if any, Willard or Respondent have taken, or will take, to pay the outstanding IRS obligations or otherwise resolve the issue and to relieve Petitioner of his current liabilities. The total outstanding IRS liability was $210,961.22 (NYSCEF Doc #3).

Based on the foregoing, while Petitioner does not per se reject a possible BCL 1118 buy-out, the Special Referee should address Willard and Respondent's continued failure to address the IRS liabilities as a necessary condition to any proposed buy-out.

RESPONDENT SHOULD BE REQUIRED TO POST A BOND PURSUANT TO BCL 1118(c)(2)

BCL 1118(c)(2) states that "[t]he court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares". See, In re Kastleman, 234 A.D.2d 181 (1st Dept. 1996)(It was reversible error not to set an undertaking when there were "serious allegations" of financial impropriety); In re 212 East 52nd Street Corp., 185 Misc.2d 95, 99 (S. Ct. New York Co., 2000)(Bond warranted where there are serious allegations of the diversion of corporate assets and fraudulent conduct, which the Court cannot afford to overlook, especially since they are undisputed).

In the present matter, and as the Court stated in its prior Decision and Order, Willard and Respondent engaged in "oppressive, if not fraudulent or criminal behavior" by designating Petitioner to the IRS as the person responsible for payroll taxes and then subsequently failing to pay same.

Based on the foregoing, it is respectfully requested that a bond in the sum of $210,961.22 representing the unaddressed IRS obligation be required to be posted.

Additionally, notwithstanding the mandate of BCL 1104-a(c), Respondent wholly failed to make available for inspection and

copying to the petitioner under reasonable working conditions the corporate financial books and records for the three preceding years. Consequently, Petitioner cannot determine the value of his shares, but reserves his right, subsequent to full and proper disclosure, to request a further bond be posted.

PURSUANT TO BCL 1118(c)(1), PETITIONER IS ENTITLED TO AN AWARD OF HIS REASONABLE EXPENSES INCURRED PRIOR TO ELECTION, INCLUDING REASONABLE ATTORNEY'S FEES

BCL 1118(c)(1) states that "[i]f such election is made beyond ninety days after the filing of the petition, and the court allows such petition, the court, in its discretion, may award the petitioner his reasonable expenses incurred in the proceeding prior to such election, including reasonable attorneys' fees".

In this matter, Willard offers no explanation for her failure to make her BCL 1118(a) election within the prescribed 90-day period. Rather, she waited until after the motion to dismiss was denied. Petitioner has incurred attorney's fees and expenses, including the costs of publication. In opposing the motion dismiss alone, which could have been avoided had Willard made a BCL 1118(a) election instead of moving to dismiss, Petitioner incurred additional attorney's fees just to oppose the motion.

Based on the foregoing, Petitioner requests an award of expenses and attorney's fees in an amount to be determined by the Special Referee.

CONCLUSION

Based on the foregoing, the Court should deny Respondent's Order to Show Cause, together with such other and further relief that the court deems just and proper.

Dated: White Plains, NY
December 30, 2022

GRAYSON & ASSOCIATES, P.C.

By *Neil Spector*

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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 1,675 according to the word-processing system used to prepare the aforesaid document.

Dated: White Plains, NY
December 30, 2022

Neil Spector

NEIL SPECTOR