SHORT FORM ORDER

INDEX No. 02-8512

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 20 - SUFFOLK COUNTY

PRESENT:

Hon. HOWARD BERLER
Justice of the Supreme Court

MOTION DATE 4/23/02 (#001)
MOTION DATE, 6/5/02 (#002)
MOTION DATE 6/24/02 (#003)
ADJ. DATE 8/12/02
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MotD
Mot. Seq. # 003 - MD

----------X

In the Matter of the Application of
KEVIN SPRINGER, holder of 33⅓% of all outstanding shares of RAPID RECOVERY ENTERPRISES, INC., RAPID RECOVERY TOWING LTD. and MARINER DRIVE AUTO AND TRUCK REPAIR., INC. pursuant to §1104-a of the BCL,

Petitioners.

----------X

BONDI & IOVINO
Attorneys for Petitioners
190 Willis Avenue
Mineola, New York 11501

PASHKIN & BRADY
Attorneys for Respondents
277 Indian Head Road
Kings Park, New York 11754

JOSEPH R. ATTONITO, ESQ.
Former Attorneys for Respondents
59 Landing Avenue, Ste. 4
Smithtown, New York 11787

Upon the following papers numbered 1 to 35 read on this petition for judicial dissolution BCL 1104-a: Notice of Motion and Order to Show Cause and supporting papers 1 - 12; Order to Show Cause and Notice of Cross Motion and supporting papers 13 - 30; Answering Affidavits and supporting papers 31 - 34; Replying Affidavits and supporting papers ____; Other 35 (stipulation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this special proceeding for the judicial dissolution of Rapid Recovery Enterprises, Inc., Rapid Recovery Towing Ltd. and Mariner Drive Auto and Truck Repair, Inc., (#001) is denied without prejudice to re-notice, pending a determination of fair value and/or approval by the Court regarding the buyout of the one-third shareholder's interest pursuant to the irrevocable election by the two-thirds majority, based on objective appraisal, the parties' agreement or by order of this Court (BCL §1104-a, §1118[a] and [b]) and it is

ORDERED that restraints imposed by order of the court signed March 27,2002 by Hon. Ralph F. Costello, which were modified by stipulation of the parties dated April 26,2002, are continued pending further order of the court, and it is

ORDERED that the pre-answer motion by respondent majority shareholders is decided as follows:

(1) the motion to stay corporate dissolution is denied as moot since a stay is mandatory pending appraisal and buyout pursuant to BCL 11 and (b); and

(2) the appointment of Joel A. Rakower, Financial Appraisals Ltd., 366 Veterans Memorial Highway, Commack, New York 11725 as the sole objective appraiser of fair value for the buyout of petitioner's shares is denied based on the petitioner's opposition and the potential conflict of interest between Rakower in the within litigation and in unrelated matrimonial litigation; and

(3) pending appraisal and the final determination of fair market value and judicial approval under HCL § 1118, petitioner is hereby restrained from disclosure of customer lists and/or the finances of respondent corporation and shareholders; and

(4) pending the final determination of fair market value judicial approval of fair value pursuant to BCL § 1118, the petitioner is hereby restrained from any competition for services performed by the subject corporations; and it is

ORDERED that the parties are directed to retain, and upon mutual agreement, select one qualified, objective appraiser and/or accountant experienced in similar business valuations who has never been affiliated with either party to file an appraisal with the shareholders and the court, based on a careful review of the books and records of the corporations and the shareholders, within sixty (60) days of the date of this order. In the alternative, the parties shall each submit the names of two such objective, qualified experts to the court within fifteen (15) days of the date of this order. The court will select one qualified from those submitted by each party to evaluate the corporations. The expense will be charged to the account of the corporate entities and final of fair value shall be made by the court 1118, BCL §623); and it is

ORDERED that respondents are directed to providsaccess to petitioner and the experts selected to appraise to all corporate books and records for inspection and copy at corporate offices on a date and time mutually convenient to all parties (BCL 624; ***Crane v Anaconda,*** 39 14,382 707 ***Tatko Tatko,*** 173 917, 569 783 and it is

ORDERED that the date for determination of fair value is set on the date prior to the commencement of the within proceeding, March 26,2002; and it is

ORDERED that respondents Perlow and Lang are directed to file a bond with the court in the sum of four hundred thousand ($400,000) dollars, the individual respondents, and subject to reimbursement by the corporations upon final determination of fair value, (BCL 118[c][2]: CPLR *et* ***In re*** 234 181, 651 485 and it is

ORDERED that the fair value of petitioner's interest shall be subject to the legal rate of interest from a date to be determined upon final judgment to the date that payment in full or each periodic payment is made. The reasonable documented expenses of this proceeding for all parties shall be charged to the corporate entities unless undue delay or a failure to cooperate is attributed to either party (***Whalen v Whalen***, 234 AD2d 552,651 NYS2d 579 [1996]; ***Blake v Blake***, 107 AD2d 139,486 NYS2d 341, *app den.* 65 NY2d 609,494 NYS2d 1028 [1985]); and it is

ORDERED that the motion by petitioner (#003) to disqualify the firm of Joseph Attonito, Esq. from continuing legal representation of the respondents based on conflict of interest is denied as moot. A signed consent to substitute counsel and notice of appearance shall be filed by Pashkin & Brady, 277 Indian Head Road, Kings Park, New York 11754 within ten (10) days of the date of this order. The majority shareholders have voluntarily retained new counsel to avoid the costs of additional litigation regarding disqualification.

In this special proceeding petitioner, a minority shareholder with a one-third voting interest in the corporations, has petitioned the court for dissolution of the corporations based on alleged oppressive acts and the diversion of corporate assets for non-corporate purposes by the majority shareholders who are currently in control of corporate operations (BCL § 1104-a [a][1][2]). As a result, petitioner has withdrawn from active participation.

The three corporate entities are in the auto/truck repair and towing business. Petitioner and Scott Perlow were originally equal (50%) shareholders in both Rapid Recovery corporations until 1999. On or about July 1999, the partners sold a one-third interest to respondent Eric Lang allegedly for a sum between $12.000.00, and $100,000.00. The petitioner contends that Mr. Lang purchased the one third interest in the original two corporations for $100,000. The shareholder agreement refers to the amount of $12,000.00, which is "owed" petitioner and Perlow, and does not refer to the total amount paid. Another majority shareholder has estimated the value of his one third share to be $150,000 in unrelated litigation. Thus value is subject to dispute. After the shareholders' agreement was signed November 1, 1999 a third corporation was formed, Mariner Drive Auto and Truck Repair, Inc. All the corporate entities operate successfully and effect value. Dispute among the principal parties developed over the division of labor, management, operating decisions and expenditures without consultation with petitioner. The petitioner contends that the majority parties excluded petitioner from corporate decisions, and aligned against the minority which led to the commencement of this proceeding. The respondents contend that the petitioner chose to change careers.

Upon commencement of the within proceeding March 27,2002, respondents cross moved and timely elected to purchase the petitioner's shares in the corporations prior to service of a verified answer (BCL $1104-a: $1118[a][b]; ***Pace Photographers, Ltd.***, 71 NY2d 737, 530 NYS2d 67 [1988]). The parties dispute the fair value of the corporations and petitioner's interest. Therefore the determination of fair value has been imposed on this court. Respondents' irrevocable election to buy out the minority interest eliminates all need for proof on issues concerning fault. The only issue before this court is the assessment of fair value based on an offer to purchase a viable operating business in an arm's length

transaction. This is not an offer of value for a business in liquidation or for discount ***(Pace Photogruphers, Ltd.,*** *supra;* ***Gerzof v Coons,*** 168AD2d 619,563 NYS2d 458 [1990]). In this process

the court may consider the shareholders' agreement with regard to value and the restrictive covenants. However, the parties' agreement, signed November 1, 1999, contains no set value and is primarily addressed to the timing of payments, non-disclosure and non-compete provisions ***(Pace Photographers, Lid.,*** *supra;* ***Amodio v Amodio,*** 70 NY2d 5, 516 NYS2d 923 [1987]). In a judicial valuation the objective is to value the corporations as going concerns on the date prior to the filing of the petition which in this instance is March 26, 2002. Ultimately, the final estimate is governed by BCL §1118[a] and [b] and is not controlled by the parties' shareholders' agreement ***(Pace Photographers, Ltd.,*** *supra).* Since the true financial condition of the corporations is material to value, customers, accounts, assets, debts, the propriety of transfers, management decisions and distributions are relevant and material. This information is relevant to value and is not limited to an alleged wrongdoing ***(Crane v Anaconda,*** *supra;* ***Tatko v Tatko,*** *supra).* Therefore, the parties are entitled to objective appraisals, disclosure of proof of adjustment and setoffs relevant to a fair buyout value pursuant to objective appraisal, agreement or order of the court (BCL § 1118; BCL 624).

Counsel's contention that the special proceedings filed March 27,2002 was removed from the calendar of the court is not confirmed on the record. Although the original return date, April 23,2002, was admittedly adjourned several times to August 12,2002, for new applications, support and opposition papers, the original service was proper, and no further service appears to be warranted.

Dated: OCT 23 2004

J.S.C.

—— FINAL DISPOSITION __X__ NON-FINAL DISPOSITION