To be Argued by:
CHRISTOPHER P. MILAZZO
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

VASILIKI APOSTOLOPOULOS, Holder of Fifty Percent of all Outstanding Shares of Oxford Associates Group, Inc. and Lancaster Realty Mgt. Corp.,

Petitioner-Respondent,

– against –

OXFORD ASSOCIATES GROUP, INC. and LANCASTER REALTY MGT. CORP. and GEORGE KYRIAKOUDES a/k/a George Kyriak,

Respondents-Appellants,

For the Dissolution of OXFORD ASSOCIATES GROUP, INC. and LANCASTER REALTY MGT. CORP. Pursuant to BCL § 1104-a(1).

Docket No.: 2020-04670

BRIEF FOR RESPONDENTS-APPELLANTS

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QUESTIONS PRESENTED

1. Is Petitioner-Respondent's claim for dissolution of Respondents-Appellants Lancaster Realty Management Corp. and Oxford Associates Group, Inc. pursuant to Section 1104-a(a)(1) of the Business Corporations Law barred by the statute of limitations?

The trial court found that this claim was not barred by the statute of limitations.

2. Did Petitioner-Respondent's significant delay in seeking a preliminary injunction preclude the grant of preliminary injunctive relief?

The trial court found that Petitioner-Respondent was entitled to a preliminary injunction.

3. Did the trial court err in determining that Petitioner-Respondent established her entitlement to a preliminary injunction?

The trial court, without setting forth any facts supporting its finding, found that "preliminary injunctive relief was warranted to maintain the status quo."

PRELIMINARY STATEMENT

The underlying proceeding is a special proceeding pursuant to Section 1104-a to dissolve two corporations. In the proceeding, Petitioner-Respondent Vasiliki Apostolopoulos ("Petitioner-Respondent") seeks the dissolution of Respondents-Appellants Lancaster Realty Management Corp. ("Lancaster") and Oxford

Associates Group, Inc. ("Oxford")[1] (collectively, the "Corporate Appellants") pursuant to Business Corporations Law § 1104-a(a)(1). Respondent-Appellant George Kyriakoudes a/k/a George Kyriak ("Kyriak"), the president of the Corporate Appellants, was also named as a Respondent.

Petitioner-Respondent contends that she is a 50 percent owner of Oxford and Lancaster, and that Kyriak owns the other 50 percent of the Corporate Appellants. (R. 13, 92.) After having no involvement whatsoever with the Corporate Appellants for more than 10 years, Petitioner-Respondent commenced the underlying special proceeding to dissolve the Corporate Appellants by claiming that Kyriak engaged in oppressive conduct, and froze her out of the Corporate Appellants, defeating her reasonable expectations as a shareholder of the Corporate Respondents, and asserts that dissolution is the only way she can expect to obtain a fair return on her "investment".[2] Contemporaneously with the commencement of this proceeding, Petitioner-Respondent also sought a preliminary injunction.

Appellants opposed the motion for a preliminary injunction and cross-moved to dismiss the Petition and/or for summary judgment dismissing the BCL 1104-

[11] The Court should note that Oxford was dissolved by proclamation in 2016, and thereafter filed for bankruptcy under Chapter 11 of the Bankruptcy Code. On June 27, 2019, the Bankruptcy Court of the Southern District of New York, finding the Chapter 11 case having been fully administered and the Debtor's Second Amended Plan of Reorganization substantially consummated, entered a final decree closing the bankruptcy case. Oxford is no longer an operating entity.

[2] Lancaster, Oxford and Kyriak shall be referred to collectively herein as the "Appellants".

a(a)(1) claim, inter alia, on the ground that this claim was barred by the statute of limitations. By Order, dated May 13, 2020 (the "Order"), the Supreme Court, Queens County (Livote, J.) granted Petitioner-Respondent's motion for a preliminary injunction, in part, and denied Appellants' cross-motion to dismiss the BCL 1104-a(a)(1).

As discussed below, the trial court erred in denying Appellants' cross-motion to dismiss on statute of limitations grounds. Indeed, Appellants established that this action was commenced years after the six-year statute of limitations applicable to BCL 1104-a claims expired.

Further, the trial court erred in granting, in part, Petitioned-Respondent's motion for a preliminary injunction. As discussed below, Petitioner-Respondent failed to establish any of the three criteria (*i.e.*, irreparable harm, a likelihood of success on the merits of her claim, and a balance of the equities in her favor) necessary for the grant of a preliminary injunction.

Accordingly, for the reasons set forth below, this Court should reverse the trial court's denial of Appellants' motion to dismiss the BCL 1104-a claim, and reverse the grant of preliminary injunctive relief in the Order.

STATEMENT OF FACTS

In the Petition, Petitioner-Respondent alleges that she is a 50 percent owner of Oxford and Lancaster, and that Kyriak owns the other 50 percent of the Corporate

Appellants. (R. 31-32, 111.) Petitioner-Respondent alleges that she was the president "at the very inception" of the Corporate Appellants, and participated in the management and day-to-day activities of the Corporate Appellants. (R. 33.)

The Petition further alleges that Petitioner-Respondent's foregoing participation continued "until several years ago" when Kyriak took over the Corporate Appellants, and terminated Petitioner-Respondent's employment with the Corporate Appellants. (R. 33.) The Petition further alleges that since that time, Petitioner-Respondent has not been employed by the Corporate Appellants, has had no voice in the management, operations, or tax matters thereof, has not been consulted by other officers and/or directors regarding business decisions and has been barred from the premises of the Corporate Appellants. (R. 33.)

While Petitioner-Respondent does not set forth the date that she was purportedly terminated and "frozen-out", Kyriak alleged in support of his motion to dismiss and/or for summary determination that Petitioner-Respondent's employment and affiliation with the Corporate Appellants was terminated in 2005. (R. 80-81.) Since 2005, Petitioner-Respondent has had no involvement with the Corporate Appellants. (R. 81.) From that time, Petitioner-Respondent has not had, nor did she seek, any involvement whatsoever in the management, the day-to-day operations, financial or other decisions of the Corporate Appellants. (R. 81.) Indeed, the only time Petitioner-Respondent sought any information regarding the Corporate

Appellants since 2005 was when she commenced a proceeding to allow her to inspect the books and records of the Corporate Appellants in 2007. (R. 68-70, 82.) Petitioner-Respondent did not dispute the foregoing. (R-110-12.)

Based upon this alleged "freeze-out" of Petitioner-Respondent, she alleges that her reasonable expectations of ownership in the Corporate Appellants were defeated. (R. 34.)

PROCEDURAL HISTORY

Petitioner-Respondent commenced this proceeding on June 28, 2019 by the filing of the Petition. (R. 31-38.) In the Petition, Petitioner-Respondent asserts one cause of action for dissolution of the Corporate Appellants pursuant to Business Corporations Law § 1104-a(1). (R. 31-38.)

Upon filing, Respondent moved by Order to Show Cause for a preliminary injunction, and sought a temporary restraining order in the Order to Show Cause, which sought to, *inter alia*, enjoin Appellants from transferring any property or assets of Oxford and Lancaster, enjoining Appellants from transferring assets of Oxford and Lancaster not in the ordinary course of business, enjoining Appellants from entering into any contracts, purchase orders, commitment or incurring obligations that would devalue the assets of Oxford and Lancaster, and directing Appellants to deposit all receivables into the bank accounts of the corporations. Respondent also sought an order directing Appellants to make available to

Respondent all books and records of Oxford and Lancaster for the last 12 years. (R. 39-42.)

The court below held argument on Respondent's application for a TRO on June 28, 2019. (R. 12-30.) During argument, counsel for Petitioner-Respondent admitted that Petitioner-Respondent had been "shut out" of the business of Oxford and Lancaster "for much more than 2 years" and that she had not received profits or seen a tax return in ten years. (R. 19, 21.) On July 1, 2019, the court below granted the requested TRO, in part, and enjoined Appellants from disposing, transferring, diverting or selling any cash or assets, not in the normal course of operations belonging to the corporation and/or charging expenses to the corporations without the consent of Petitioner. The Supreme Court further directed Appellants to make available the books and records of the corporate Appellants for the last 12 years. (R. 39-42.)

On August 9, 2019, Appellants submitted opposition to Respondent's motion for a preliminary injunction, and cross-moved to dismiss the Petition under, *inter alia*, CPLR 3211(a)(5) and/or for a summary determination dismissing the Petition under CPLR 409(b), on the ground that, *inter alia*, Respondent's claim under BCL 1104-a was barred by the statute of limitations. (R. 77-103.) Appellants also filed their Answer to the Petition on the same date. (R. 71-76.) On October 16, 2019,

Petitioner-Respondent submitted opposition to Appellants' cross-motion, and also moved for leave to file an Amended Petition. (R. 104-56.)[3]

On May 13, 2020, the Supreme Court, Queens County (Livote, J.) issued the Order, which granted Respondent's motion for a preliminary injunction, in part, and denied Appellants' cross-motion to dismiss the BCL 1104-a(a)(1) claim as time-barred. (R. 7-9.) With respect to the cross-motion, the court held:

> The motion to dismiss on statute of limitations grounds is addressed to the merits and is not defeated by an amended pleading (*Livadiotakis v. Tzitziklakis*, 302 AD2d 369, 370 [2d Dept 2003]). However, respondent contends, at this time, that petitioner has no ownership interest, and therefore, no right to participate in the management of the corporate entities. Thus, there are grounds for dissolution within the statute of limitations. Accordingly, the cross-motion is denied.

(R. 8-9.)

The trial court granted, in part, Petitioner-Respondent's motion for a preliminary injunction and enjoined Appellants from:

> disposing, transferring, diverting or selling any cash or assets, not in the normal course of operations belonging to the [Corporate Appellants] without the consent of [Petitioner-Respondent].

(R. 9.) In the Order, the trial court did not address how Petitioner-Respondent met the three criteria necessary to establish an entitlement to injunctive relief (i.e., (1)

[3] By Order, dated January 15, 2020, the trial court granted Petitioner-Respondent's motion for leave to file an Amended Petition. (R. 10-11.) Petitioner-Respondent filed her Amended Petition on January 30, 2020, which added a cause of action under Business Corporations Law § 1104(a)(2) and (a)(3). (*See* R. 148-56.)

likelihood of success on the merits; (2) irreparable harm in the absence of a preliminary injunction; and (3) balance of the equities in favor of the movant), but simply determined the "preliminary injunctive relief is warranted to maintain the status quo. (R 9.)[4]

On June 2, 2020, Petitioner-Respondent served Notice of Entry of the Order. (R. 5-6.) On June 14, 2020, Appellants filed their Notice of Appeal from the Order. (R. 39.)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING THAT PETITIONER-RESPONDENT'S CLAIM FOR DISSOLUTION UNDER BCL 1104-a WAS NOT BARRED BY THE STATUTE OF LIMITATIONS

In the court below, Appellants cross-moved pursuant to dismiss the Petition under CPLR 404 and/or for summary determination dismissing the Petition under CPLR 409(b) on the ground that the dissolution claim under BCL 1104-a(a)(1) was barred by the statute of limitations. The trial court denied Appellants' cross-motion to dismiss the BCL 1104-a(a)(1) claim, finding that the claim was timely commenced because there was a ground for dissolution within the limitations period, *i.e.*, Appellants' contention in the proceeding that Petitioner-Respondent has no

[4] The trial court also directed the Appellants to make the books and records of the corporate Defendants for the last 12 years available for inspection, and denied Appellants' cross-motion to dismiss and/or for summary determination dismissing the Petition. (R. 9.)

ownership interest in the Corporate Appellants and therefore, no right to participate in their management. (R. 8-9.) As discussed below, the trial court's determination was in error.

A. Standard of Review

The denial of a motion to dismiss is reviewed de novo.[5] *See Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 279 (1st Dep't 2004) (Court reviews questions of law de novo). On a motion to dismiss on statute of limitations grounds, the moving party must establish *prima facie* that the time to commence the action or proceeding has expired. *See Coleman v. Wells Fargo & Co.*, 125 A.D.3d 716, 716 (2d Dep't 2015); *Baptiste v. Harding-Martin*, 88 A.D.3d 752, 753 (2d Dep't 2011). To make the *prima facie* showing, the defendant must establish when the cause of action accrued. *See Loiodice v. BMW of N.A., LLC*, 125 A.D.3d 723, 725 (2d Dep't 2015). To meet this burden, the court may consider affidavits submitted by the defendant. *See Doylan v. Bascom*, 38 A.D.2d 645, 646 (3d Dep't 1971). *See also New York State Workers' Comp. Bd. v. Compensation Risk Managers, LLC,* 59 Misc.3d 254, 263 (Sup. Ct. 2017) ("The movant bears the burden of supporting the motion with an affidavit or other competent proof sufficient, if uncontroverted, to

[5] The denial of a motion for summary determination (or summary judgment) is also reviewed de novo.

establish the statute of limitations defense as a matter of law") (internal quotations and citations omitted).

Once the defendant meets this burden, the burden then shifts to the plaintiff or petitioner to raise an issue of fact as to whether the action was commenced within the applicable limitations period or whether the limitations period is tolled or otherwise inapplicable. *See NM v. Estate of Grainger, Jr.*, 171 A.D.3d 1197, 1198 (2d Dep't 2019). *See also Coleman*, 125 A.D.3d at 716

As demonstrated below, Appellants established, *prima facie*, that Petitioner-Respondent's claim under BCL 1104-a(a)(1) is time-barred, and that Petitioner-Appellant failed to raise an issue of fact as to whether she commenced this underlying proceeding prior to the expiration of the statute of limitations, or that the statute of limitations should be tolled.

B. Appellants Established, *Prima Facie*, That the Statute of Limitations Applicable to Petitioner-Respondent's Claim for Dissolution Under BCL 1104-a(a)(1) Expired Years Prior to the Commencement of the Underlying Proceeding

A claim for dissolution under BCL 1104-a is "governed by the so-called residual six-year period of limitation" of CPLR 213. *See Pappas v. Fontinos*, Misc.3d 1212(A), 2010 WL 2891194, at *3 (Sup. Ct., Jul. 23, 2010); *DiPace v. Figueroa*, 223 A.D.2d 949, 952 (3d Dep't 1996). *See also Kermanshah v. Kermanshah*, 580 F. Supp.2d 247, 270 (S.D.N.Y. 2008) ("The statute of limitations

in New York for dissolution is six years"). The period of limitation is measured from the "instances of alleged wrongdoing adverted to by [the petitioner] as grounds for dissolution." *See DiPace*, 223 A.D.2d at 952*; Pappas*, 2010 WL 2891194, at *3.

Accordingly, in *DiPace*, the Third Department held that the petitioner could only base her claim for dissolution under BCL 1104-a on claims of alleged oppressive conduct that occurred within the six years *prior* to the commencement of the proceeding. 223 A.D.2d at 952. Along those lines, the court in *Pappas* explained that the petitioners in a claim for dissolution under BCL 1104-a "may legitimately support their claim for dissolution with evidence of 'oppressive action' (*see* BCL 1104-a[a][1]) during the six-year period prior to the commencement of the [d]issolution [p]roceeding . . ." 2010 WL 2891194, at *3

Petitioner-Respondent's claim for dissolution under BCL 1104-a(a)(1) accrued more than six years prior to the commencement of the underlying proceeding. Petitioner-Respondent bases its claim on alleged oppressive conduct of Kyriak that froze-out Petitioner-Respondent from the Corporate Appellants "several years ago". (R. 33.) Petitioner-Respondent alleges that from the inception of the Corporate Appellants she participated in the day-to-day activities of the Corporate Appellants when she was discharged and all employment with the Corporate Appellants was terminated. (R. 33.) Petitioner-Respondent asserts that since that

time, she has not been employed by the Corporate Appellants, has had no voice in their management or operations, has not been consulted by the officers and/or directors concerning any aspect of the business of the Corporate Appellants and has been completely frozen-out of the business of the Corporate Appellants. (R. 33.)

While Petitioner-Respondent was intentionally vague regarding when the alleged oppressive conduct upon which her claim was based, Appellants presented proof regarding same. In support of their cross-motion to dismiss on statute of limitations grounds, Appellants presented evidence that Petitioner-Respondent and Appellants decided to part ways in 2005 as a result of the illegal conduct of Petitioner and her husband. (R. 80-81.) Thereafter, Petitioner-Respondent did not seek any involvement in the Corporate Appellants, and did not have any involvement therein. (R. 81.)

Further, the last time that Petitioner-Respondent even sought documents and information regarding the Corporate Respondents was in 2007 when she commenced a proceeding to compel Respondents to permit her to inspect the corporate and financial records of the Corporate Respondents. (R. 68-70, 81.) Indeed, it is uncontroverted that over at least the last ten years, Petitioner-Respondent has not received any distribution of profits from the Corporate Appellants and has not received a tax return (or other information). (R. 21.) Moreover, the fact that any alleged oppressive conduct, and the alleged freeze-out, occurred more than six years

ago is supported by the relief sought in the Order to Show Cause, which seeks the production of records for 12 years prior to the commencement of this action. (R. 39-42.) In seeking records so far back as allegedly having being kept from her, she necessarily concedes that her cause of action accrued twelve years ago. Petitioner-Respondent failed to controvert any of the foregoing in opposition to Appellants' cross-motion.

Based upon the foregoing, it is clear Appellants established, *prima facie*, that Petitioner-Respondent's claim for corporate dissolution based upon oppressive conduct accrued no later than 2007 or 2008 – more than 10 years prior to the commencement of this action – and that the statute of limitations would have expired no later than 2014.

C. Petitioner-Respondent Failed to Meet Her Burden of Demonstrating That the Proceeding Was Timely Commenced or That the Statute of Limitations Should be Tolled

Recognizing that any claim of oppressive conduct arose significantly more than 6 years prior to the institution of the underlying proceeding, Petitioner-Respondent asserted, in the court below, that the statute of limitations was tolled. (R. 105-07, 114.) Specifically, Petitioner-Respondent asserted that her claim for dissolution based upon oppressive conduct under BCL§ 1104-a was timely because the accrual of the statute of limitations on such claim was tolled because up until

August 6, 2019 when Kyriak purportedly first repudiated his fiduciary duty to Petitioner-Respondent.[6]

In the court below, Petitioner-Respondent cited *Matter of Therm*, 132 A.D.3d 1137, 1138, (3d Dep't 2015) and *Twin Bay Village, Inc. v. Kasian*, 153 A.D.3d 998, 1001 (3d Dep't 2017), for the proposition that the accrual of the statute of limitations on Petitioner-Respondent's dissolution claim was tolled until August 6, 2019 because, until then, there had been no "open repudiation of their fiduciary duty to Petitioner[-Respondent] . . ." (R.105-07.) In both of these cases, at issue was whether the accrual of the statute of limitations was delayed on dissolution claims sounding in breach of fiduciary duty, not a freeze-out which forms the basis of her Petition.

In *White v. Fee*, 35 Misc.3d 1243(A), 2012 WL 2360934 (Sup. Ct., Jun. 7, 2012), the Supreme Court, Westchester County, addressed, and rejected, the precise argument raised by Petitioner-Respondent regarding the tolling of the statute of limitations in a dissolution claim. In that case the defendants moved to dismiss common law dissolution claims as time-barred based upon the fact that the two

[6] The trial court apparently did not decide whether Petitioner-Respondent's dissolution claim was tolled under this theory with respect to an ostensible breach of fiduciary duties, but rather found that Appellants' contention *during* the underlying proceeding that Petitioner-Respondent did not have an ownership interest in the Corporate Appellants, and therefore, no right to participate in the management, provided grounds for dissolution with the statute of limitations. (R. 8-9; *see* Part I.D., i*nfra*.) Petitioner-Respondent did not allege this as a ground for dissolution in her Petition nor did she raise this argument on the underlying motion.

alleged wrongful acts at the heart of the action occurred more than six years prior to the commencement of the action. 2012 WL 2360934, at *22-23. The plaintiffs raised the same argument as Petitioner-Respondent did in the court below, *i.e.*, that because the dissolution claim is really a breach of fiduciary duty claim, the statute of limitations should be tolled until the fiduciary repudiates the relationship or the relationship is terminated. *Id.* at *23.

The court rejected the plaintiffs' argument for a tolling of the statute of limitations for the dissolution claim based upon a continuing fiduciary relationship. *Id.* The court's reasoning is instructive. The court explained that:

> The fiduciary toll is usually found in actions seeking an accounting based on a breach of fiduciary duty and the rationale for the rule is that a person should be able to rely on the fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit (*People ex rel. Spitzer ex rel. Ultimate Charitable Beneficiaries v Ben*, 55 AD3d 1306 [4th Dept 2008]; *Westchester Religious Institute v Kamerman*, 262 AD2d 131 [1st Dept 1999]). However, in a situation such as here, where it is undisputed that Defendants announced the Stock Redemption Plan in 2004 and Plaintiffs were aware of the 1999 Stock Transfer at least since 2002, there is no basis for an equitable tolling based on a breach of fiduciary duty (*see, e.g., Veritas Cap. Mgt., L.L.C. v Campbell*, 82 AD3d 529, *lv dismissed* 17 NY3d 778 [2011]). Indeed, it is evident that Defendants repudiated their fiduciary relationship at the time they performed these allegedly bad acts. It is also evident that Plaintiffs made known their objections at least as early as 2004. Plaintiffs have not shown they were "actively misled "by Defendants from filing suit or that Plaintiffs were "in some extraordinary way" prevented from complying with the limitations period. There is no evidence that Plaintiffs were prevented from timely filing an action due to reasonable reliance

> on their part upon deception, fraud or misrepresentation by Defendants (*Shared Communications Serv. of ESK, Inc. v Goldman, Sachs & Co., Inc*., 38 AD3d 325 [1st Dept 2007]). Because Plaintiffs have made no allegations that Defendants concealed these transactions or otherwise prevented Plaintiffs from knowing that they had occurred, there is no basis for tolling the statute of limitations based on some continuous fiduciary relationship between the parties.
>
> While Plaintiffs do allege that critical information was not provided at the time of the 1999 transfer (see Complaint, ¶¶157-159), this is different from alleging that Defendants did something to lull Plaintiffs into inaction, particularly given Plaintiffs' concessions that they have known about these two challenged transactions for more than six years prior to the commencement of this case and the absence of any explanation from any one with personal knowledge of the facts as to why a timely suit was not, or could not have been, brought.

Id. at *23-24.

Further, the Court in *White* recognized the absurd result of acknowledging a tolling rule (as urged Petitioner-Respondent) in the dissolution, context. *See Id*. at *23. Like here, a purported shareholder can make a claim of ownership and for dissolution years after allegedly being frozen-out of the corporation. Incredibly, under Petitioner-Respondent's theory, as long as the respondent was still the corporate officer, or shareholder that controlled the company, the non-controlling shareholder of the company could wait years to assert her rights with respect to alleged oppressive conduct, and the statute of limitations would never even begin to accrue for a dissolution claim based upon such alleged conduct. This would be an

absurd result that could be abused to bring stale claims against corporate officers and shareholders.[7]

Based upon the foregoing, Petitioner-Respondent failed to meet her burden of establishing that the claim was timely commenced or that the statute of limitations should be tolled. Petitioner-Respondent's dissolution claim under BCL 1104-a accrued at the time of the alleged wrongful acts that resulted in the "freeze-out." As discussed above, because any alleged misconduct upon which this claim was based occurred at least 10 years ago, Petitioner-Respondent's claim for dissolution under BCL § 1104-a is time-barred. Accordingly, the trial court's denial of Appellants' cross-motion to dismiss and/or for summary judgment dismissing Petitioner-Respondent's BCL 1104-a claim should be reversed.

D. The Trial Court Erred in Determining That There Were Grounds for Dissolution Within the Statute of Limitations

In denying Appellants' cross-motion to dismiss on statute of limitations grounds, the trial court found that because Appellants asserted *during* the underlying proceeding that Petitioner-Respondent had no ownership interest in the Corporate Appellants, and therefore, no right to participate in their management, there were

[7] Additionally, as in *White*, Petitioner-Respondent did not allege any representations or conduct on the part of Appellants that misled her into not asserting her alleged rights in the Corporate Appellants. To the contrary, Petitioner-Respondent and Kyriak have not even spoken for more than 12 years. (R. 81.) Moreover, for more than 10 years prior to the commencement of this action, Petitioner-Respondent did not receive (nor did she seek) any documents or information regarding the Corporate Appellants, and did not have any involvement with them. (R. 81-82.)

grounds for dissolution within the limitations period. (R. 8-9.) In other words, the trial court found that Appellants' challenge as to Petitioner-Respondent's ownership in the Corporate Appellants was oppressive conduct that could support a claim for dissolution under BCL 1104-a. This was in error.

First, Petitioner-Appellant's BCL 1104-a claim, as alleged in the Petition, was based only on alleged oppressive conduct that occurred prior to the institution of the underlying special proceeding. Indeed, as discussed above, Petitioner-Respondent's claim is actually based upon conduct that began more a decade ago. As there is nothing in the Petition regarding alleged oppressive conduct that occurred in this litigation as a basis for her claim, it was incorrect for the trial court to find a basis for the BCL 1104-a claim in conduct undertaken in the litigation of this action.

Second, the trial court's finding that Appellants engaged in oppressive conduct by challenging Petitioner-Appellant's ownership in the Corporate Appellants (and her right to participate in the management thereof) in their defense of the underlying proceeding effectively was improper. Essentially, the trial court found that Appellants' position taken in the underlying proceeding constituted oppressive conduct that would support Petitioner-Respondent's claim for dissolution under BCL 1104-a(a)(1). Taken to its logical extreme, a claim for dissolution under BCL 1104-a based upon oppressive conduct could never be dismissed on statute of limitations grounds where the petitioner's ownership and/or right to participate in

the management of the subject corporation was challenged in the litigation. This would effectively preclude a respondent from raising valid defenses to a dissolution claim by forcing a respondent to make a choice between raising statute of limitations defense and challenging a respondent's ownership and/or right to participate in the management of the subject corporation.

Accordingly, based upon the foregoing, this Court should reverse the trial court's denial of Appellants' motion to dismiss and/or for summary determination dismissing Petitioner-Respondent's claim for dissolution under BCL 1104-a(a)(1), and dismiss this claim.[8]

POINT II

THE TRIAL COURT ERRED IN GRANTING, IN PART, PETITIONER-APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION

Even if this Court determines that the BCL 1104-a claim was timely commenced, the Court should determine that the trial court abused its discretion in granting Petitioner-Respondent's motion for a preliminary injunction. The trial court granted, in part, Petitioner-Respondent's motion for a preliminary injunction pursuant to CPLR Article 63, and enjoined Appellants from:

[8] In the event that this Court reverses the denial of Appellants' cross-motion to dismiss the BCL 1104-a claim, and dismisses that claim, it must also reverse that portion of the Order the directed Appellants to make the Corporate Appellants' books and records available to Petitioner-Respondent as the only basis for such relief was pursuant to BCL 1104-a. Petitioner-Respondent's additional claim in its Amended Petition under BCL 1104(a) does not provide for such relief. *See* Bus. Corp. L 1104(a) and 1104-a (McKinney 2019)

> disposing, transferring, diverting or selling any cash or assets, not in the normal course of operations belonging to the [Corporate Appellants] without the consent of [Petitioner-Respondent].

(R. 9.) The trial court found that such relief was warranted to maintain the status quo. (R. 9.)

As discussed more fully below, Petitioner-Respondent failed to establish her clear right to preliminary injunctive relief Therefore, the trial court abused its discretion in granting such relief.

A. <u>Standard of Review and Burdens of Proof</u>

The decision to grant or deny a preliminary injunction is committed to the sound discretion of the trial court. *See Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 715 (2d Dep't 2011); *Waldron v. Hoffman*, 130 A.D.3d 1239, 1239 (3d Dep't 2015). Therefore, this Court reviews the grant of a preliminary injunction to determine if the trial court abused its discretion in granting same. *See Doe v. Dinkins*, 192 A.D.2d 270, 275 (1st Dep't 1993).

Article 63 of the CPLR governs preliminary injunctions. Pursuant to CPLR 6301:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining

> the defendant from the commission or continuation of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. . . .

N.Y. Civ. Prac. L. & R. 6301 (McKinney 201p). CPLR 6313(a) provides that:

> (a) Affidavit; other evidence. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

N.Y. Civ. Prac. L. & R. 6313(a)(McKinney 2019).

The purpose of a preliminary injunction is to preserve the status quo pending a trial. *See Alayoff v. Alayoff*, 112 A.D.3d 564, 565 (2d Dep't 2013). However, it is well-settled that preliminary injunctive relief is a drastic remedy that is not routinely granted. *See Omakazee Sushi Rest., Inc. v. Lee*, 57 A.D.3d 497, 497 (2d Dep't 2008). *See also Town of Carmel v. Melchner*, 105 A.D.3d 82, 90-91 (2d Dep't 2013) (Court recognized that a preliminary injunction "is considered a drastic [remedy] which should be used sparingly"). Therefore, a party seeking a preliminary injunction is required to establish a clear right to that relief under the law and the undisputed facts. *See Omakazee Sushi Rest., Inc.*, 57 A.D.3d at 497. *See also Radiology Assoc. of*

Poughkeepsie, PLLC v. Drocea, 87 A.D.3d 1121, 1123 (2d Dep't 2011) ("A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts"); *Gagnon Bus Co., Inc. v. Vallo Trans. Ltd.*, 13 A.D.3d 334, 335 (2d Dep't 2004) ("A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers"); *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001) ("Preliminary injunctive relief is a drastic remedy and will only be granted when a movant establishes a clear right to it under the law and the undisputed facts found in the moving papers").

On a motion for a preliminary injunction, a plaintiff bears the burden of establishing: (1) a likelihood of success on the merits of its claims; (2) danger of irreparable injury in the absence of injunctive relief; and (3) a balancing of the equities in its favor. *See Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840, 833 N.E.2d 191, 192 (2005). *See also* N.Y. Civ. Prac. L. & R. 6313 (McKinney 2019). Each of the foregoing elements must be established by clear and convincing evidence. *See Liotta v. Mattone*, 71 A.D.3d 741, 741 (2d Dep't 2010). *See also East Coast Drilling, Inc. v. Total Structure Enter., Inc.*., 106 A.D.3d 688, 689 (2d Dep't 2013) (Court denied preliminary injunction where the plaintiff failed to establish the foregoing elements by clear and convincing evidence); *Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1435 (4th Dep't 2010) (Court denied

preliminary injunction where the plaintiff failed to establish, by clear and convincing evidence, the foregoing elements).

As demonstrated below, Petitioner-Respondent failed to sufficiently establish any of the foregoing elements. Accordingly, the trial court abused its discretion in granting, in part, Petitioner-Respondent's motion for preliminary injunctive relief.[9]

B. Petitioner-Respondent Failed to Establish a Likelihood of Success on Her Claim for Dissolution Under BCL 1104-a

The threshold inquiry in determining whether the movant has established a likelihood of success on its claims is whether the movant has tendered sufficient evidence demonstrating ultimate success on her underlying claims. *See 1234 Broadway LLC v. West Side SRO Law Project Goddard Riverside Comm. Ctr.*, 86 A.D.3d 18, 23 (1st Dep't 2011). Although it is not necessary for the movant to conclusively establish her claims, a party must establish its clear right to relief under the law and the undisputed facts. *See id*. Conclusory statements lacking factual evidentiary support are not sufficient to meet this burden. *See id*. *See also Gagnon Bus Co., Inc.*, 13 A.D.3d at 335.

Where, as here, the facts underlying the claims are in sharp dispute, a preliminary injunction should not be granted. *See Advanced Digital Sec. Solutions,*

[9] In the Order, the trial court failed to set forth or discuss how Petitioner-Respondent met the three criteria for the issuance of a preliminary injunction. Rather, the trial court simply listed the three criteria and determined that a preliminary injunction was necessary to maintain the status quo. (R. 7-9.)

Inc. v. Samsung Techwin Co. Ltd., 53 A.D.3d 612, 613 (2d Dep't 2008). Indeed, while a mere factual dispute may not justify the denial of a motion for a preliminary injunction, the motion should be denied where there are issues of fact that subvert the likelihood of success on the merits to such a degree that it cannot be said that the movant established a clear right to relief. *See id*. *See also Milbrandt & Co., Inc. v. Griffin*, 1 A.D.3d 327, 328 (2d Dep't 2008).

1. Petitioner-Respondent Failed to Establish That She Timely Asserted a Claim for Dissolution Under BCL 1104-a(a)(1)

As set forth above (*see* Part I., *supra*), there are at the very least, serious questions as to whether Petitioner-Appellant's claim for dissolution is barred by the statute of limitations. Accordingly, for this reason alone, the trial court should have found that Petitioner-Respondent did not establish a likelihood of success on her BCL 1104-a(a)(1) claim, and denied Petitioner-Respondent's motion for a preliminary injunction.

2. Petitioner-Respondent Failed to Demonstrate that the Alleged Oppressive Conduct Defeated Her Reasonable Expectations of Ownership in the Corporate Appellants as is Necessary to Establish a Claim for Dissolution under BCL 1104-a(a)(1)

Furthermore, Petitioner-Respondent did not sufficiently establish on her motion for a preliminary injunction that Appellants' alleged conduct substantially defeated her reasonable expectations of ownership in the Corporate Appellants as is

necessary to establish a claim under BCL § 1104-a(a)(1). Section 1104-a(a)(1) provides as follows:

> (a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
>
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> * * *

N.Y. Bus. Corp. L. § 1104-a(a)(1) (McKinney 2019)

Section 1104-a of the BCL was enacted to provide relief to minority shareholders in a close corporation who are being treated unfairly, or who are being frozen-out, due to oppressive conduct of the majority shareholder. *See Mardikos v. Arger*, 116 Misc.2d 1028, 1031 (Sup. Ct. 1982). Oppressive conduct in the context of an application to dissolve a close corporation under BCL 1104-a is conduct of the majority or controlling shareholder that defeats the reasonable expectations of the minority shareholder in owning stock in the corporation. *See Matter of Mintz*, 113 A.D.2d 803, 808 (2d Dep't 1985). *See also Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73 (1984) ("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 the conduct alleged to be oppressive is appropriate"); *Matter of Tehan*, 144 A.D.3d 1530, 1533 (4th Dep't 2016) (Court granted summary judgment dismissing claim under BCL 1104-a where evidence established that the respondent's conduct did not defeat the petitioner's reasonable expectation or otherwise amount to oppressive conduct).

Therefore, in order to establish a claim for dissolution under BCL 1104-a(a)(1) based upon oppressive conduct, a petitioner must demonstrate that his or her reasonable expectations with respect ownership in the subject corporation were defeated. *See In re Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1176 (3d Dep't 2012).

In support of her motion for a preliminary injunction, Petitioner-Respondent failed to allege any specific oppressive conduct. Instead, Petitioner-Respondent merely alleged, in conclusory fashion that she has had no voice in the management and operations of the corporations, has not been consulted and has been barred from the premises of the corporations. (R. 33-34.)

Petitioner-Respondent failed to adequately demonstrate that her Appellants engaged in oppressive conduct towards Petitioner that defeated her reasonable expectations of ownership. To the contrary, the evidence establishes that from 2005 after Petitioner-Respondent and Kyriak parted ways, Petitioner-Respondent had no further involvement in either Oxford or Lancaster, nor did she ever seek any

involvement. (R. 81.) From 2005 to the present, Petitioner-Respondent did not have any involvement in the management of the Appellants, the day-to-day operations of the Corporate Appellants, or the financial or other decisions made with respect to the Corporate Appellants. (R. 81.) Simply put, from 2005 to the present, Petitioner-Respondent had no involvement with the Corporate Appellants and never contacted Kyriak to express any desire to be involved any never communicated with Kyriak regarding same, and thus never denied or refused the same. (R. 81.) Further, Petitioner-Respondent did not submit any evidence to dispute the foregoing.

The only time Petitioner sought any documents regarding the operation of the Corporate Appellants after 2005 was in 2007, when she commenced a proceeding to allow her to inspect the books and records of the Corporate Respondents and for an accounting. From the time the court issued its order in that proceeding compelling Appellants to permit such inspection in 2008, Petitioner-Respondent did not seek any documents regarding the Corporate Appellants. (R. 81-82.)[10]

Based upon the foregoing, this Court should find Petitioner-Respondent failed to establish a likelihood of success on her claim for dissolution under BCL 1104-a(a)(1). *See Matter of Schlachter*, 154 A.D.2d 685, 686 (2d Dep't 1989) (Court

[10] *See Brickman v. Brickman Estate at Point, Inc.*, 253 A.D.2d 812, 813, (2d Dep't 1998) (Court held that where, as here, the petitioners did not seek responsibilities in the day-to-day management of the corporation, the respondents' failure to allow them access to corporate records was insufficient to establish the requisite oppressive conduct).

granted summary judgment dismissing claim for dissolution under BCL § 1104-a where the "record was devoid of any evidence suggesting that the petitioner ever sought a role in the day-to-day operations of the corporations or their management"); *Matter of Farega Realty Corp*., 132 A.D.2d 797, 798 (3d Dep't 1987) (Court denied petition for dissolution where the petitioner did not seek responsibilities in the day-to-day operation of the corporation and did not expect the corporation to provide him with an occupation); *Matter of the Dissolution of Rencor Controls Inc*., 263 A.D.2d 845, 846 (3d Dep't 1999) (Court held that the petition was properly dismissed by the trial court where the petitioner failed to present any proof of oppressive conduct). As a result, the trial court abused its discretion in granting Petitioner-Respondent's motion for a preliminary injunction.

C. Petitioner-Respondent's Unreasonable Delay Precludes a Finding of Irreparable Harm

Petitioner-Respondent also failed to establish that she would be irreparably harmed in the absence of injunctive relief.[11] Irreparable harm in the context of a preliminary injunction motion is an injury for which money damages are insufficient. *DiFabio v. Omnipoint Commun., Inc*., 66 A.D.3d 635, 636-37 (2d Dep't 2009). Damages that are compensable by money damages and capable of calculation, even with some difficulty, do not constitute irreparable harm.

[11] Aside from the fact that Petitioner-Respondent's delay precludes a finding of irreparable harm, Petitioner-Respondent did not actually allege, better yet establish, any type of irreparable harm that was to be suffered, precluding her from entitlement to a preliminary injunction.

SportsChannel Am. Assoc. v. National Hockey League, 186 A.D.2d 417, 418 (1st Dep't 1992). Moreover, the alleged irreparable harm cannot be remote or speculative. *See Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep't 2010).

Further, it is well-established that a delay in seeking a preliminary injunction or temporary restraining order undermines any claim of urgency as is necessary for a finding of irreparable harm. *See Tactica Int'l, Inc. v. Atlantic Horizon Int'l, Inc.*, 154 F. Supp.2d 586, 604 (S.D.N.Y. 2001). *See also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Majorica, SA v. R.H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir. 1985) (court held that lack of diligence alone may preclude granting of preliminary injunction "because it goes primarily to the issue of irreparable harm . . ."); *Straisa Realty Corp. v. Woodbury Assoc.*, 154 A.D.2d 453, 454 (2d Dep't 1989); *Mercury Serv. Sys., Inc. v. Schmidt*, 50 A.D.2d 533, 533 (1st Dep't 1975) ("Denial of an injunction pendente lite against solicitation of plaintiff-appellant's customers is amply justified by delay of three and one-half months in seeking relief").

Here, Petitioner-Respondent delayed years in commencing this proceeding and seeking preliminary injunctive relief. It is clear that Petitioner-Respondent – despite her best attempts to avoid admitting that she delayed years in bringing this proceeding and seeking the injunctive relief – has delayed at least a decade in

seeking injunctive relief. As set forth above, from 2005 Petitioner has had no involvement in the operations or management of the Corporate Appellants. (R. 81.) Prior to commencing the underlying proceeding, the last time Petitioner sought any information or documents from the Corporate Appellants was in 2007 and 2008 in connection with the proceeding she commenced to compel Appellants to permit her to inspect the books and records of the Corporate Appellants. (R. 68-70, 82.) Moreover, as Petitioner-Respondent conceded, she did not receive a distribution of profits, nor was she provided a corporate tax return for ten years. (R. 21.)

Petitioner-Respondent's inexplicable delay of more than ten years in seeking preliminary injunctive relief undercuts any claim of irreparable harm to support injunctive relief. Based upon the foregoing, the trial court erred in granting preliminary injunctive relief.

D. Petitioner-Respondent Failed to Demonstrate That a Balancing of the Equities Favored Her

Finally, to establish her right to a preliminary injunction, Petitioner-Respondent was required to demonstrate that a balancing of the equities tips in her favor. In balancing the equities, the Court must weigh the hardship to each side and determine whether the irreparable injury that would be sustained is more burdensome to the plaintiff than the harm caused to the defendant by the injunction. *See Felix v. Brand Serv. Grp.*, LLC, 101 A.D.3d 1724, 1726, 957 N.Y.S.2d 545, 547 (2d Dep't 2012). *See also Destiny USA Hold., LLC v. Citigroup Global Markets*

Realty Corp., 69 A.D.3d 212, 223, 889 N.Y.S.2d 793, 802 (4th Dep't 2009) ("It must be shown that the irreparable injury to be sustained is more burdensome [to the plaintiff] than the harm caused to defendant though the imposition of the injunction") (citations omitted). Furthermore, as part of its balancing, the Court is required to weigh the interests of the general public as well as the interests of the parties to the litigation. *Destiny USA Hold.*, 69 A.D.3d at 223, 889 N.Y.S.2d at 802.

Petitioner-Respondent failed to establish that the equities tips in her favor. The injunctive relief granted limits Kyriak in his operation of the Corporate Appellants, and injects Petitioner-Respondent into the decision-making process for transactions "not in the normal course" of their business, despite the fact that Petitioner-Respondent waited more than 10 years to bring the underlying proceeding, and has had no involvement in the Corporate Appellants for more than a decade. Petitioner-Respondent's significant delay in commencing the underlying proceeding clearly tips the scales in favor of Appellants.

Petitioner-Respondent could not establish that she would suffer any harm in the absence of an injunction. Rather, she would be in the same position she has been in for more than a decade with respect to the Corporate Appellants – at best, a passive shareholder. Accordingly, a balancing of the equities favored Appellants.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that it this Court: (1) reverse the denial of Appellants cross-motion to dismiss and/or for summary determination dismissing the Petition; (2) reverse that part of the Order that granted Petitioner-Respondent preliminary injunctive relief; and (3) reverse that portion of the Order that directed Appellants to make available to Petitioner-Respondent the books and records of Lancaster and Oxford from the last 12 years. .

Dated: New York, New York
January 14, 2021

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Dated: January 14, 2021

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

VASILIKI APOSTOLOPOULOS, Holder of Fifty Percent of all Outstanding Shares of Oxford Associates Group, Inc. and Lancaster Realty Mgt. Corp.,

Petitioner-Respondent,

– against –

OXFORD ASSOCIATES GROUP, INC. and LANCASTER REALTY MGT. CORP. and GEORGE KYRIAKOUDES a/k/a George Kyriak,

Respondents-Appellants,

For the Dissolution of OXFORD ASSOCIATES GROUP, INC. and LANCASTER REALTY MGT. CORP. Pursuant to BCL § 1104-a(1).

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1. The index number of the case in the court below is 711131/19.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The Proceeding was commenced in Supreme Court, Queens County.

4. The Proceeding was commenced on or about June 27, 2019 by the filing of a Verified Petition. Issue was joined on or about August 9, 2019 by service of an Answer.

5. The nature and object of the Proceeding is the Dissolution of Corporations.

6. This appeal is from the Decision and Order of the Honorable Leonard Livote, dated May 8, 2020, which granted in part Petitioner's Motion for a Preliminary Injunction and denied Respondents' Cross-Motion to Dismiss the Petition.

7. This appeal is on the full reproduced record.