SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

CESAR RAMIREZ and ADRIANA RODRIGUEZ, individually and as stockholders of MANHATTAN FARE CORP., Index No.: 652676/2024

Petitioners,

-against-

MONEER ISSA, MANHATTAN FARE CORP., and 431 FOOD MARKET CORP.,

Respondents.

----------X

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY AND IN SUPPORT OF CROSS-MOTION FOR APPOINTMENT OF A RECEIVER

Jack S. Dweck
Rourke T. Feinberg
On the Brief

THE DWECK LAW FIRM, LLP
1 ROCKEFELLER PLAZA
NEW YORK, NY 10020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
CESAR RAMIREZ and ADRIANA RODRIGUEZ, individually and as stockholders of MANHATTAN FARE CORP., Index No.: 652676/2024

Petitioners,

-against-

MONEER ISSA, MANHATTAN FARE CORP., and 431 FOOD MARKET CORP.,

Respondents.
----------X

PRELIMINARY STATEMENT

Petitioners are fifty percent (50%) owners of the issued and outstanding stock of Manhattan Fare Corp., which owns the restaurant known as Chef's Table located at 431 West 37th Street in Manhattan. The restaurant is physically located inside the Food Market at the same location which is owned by the Respondent Moneer Issa. The only access to the restaurant is by entering the food market which is controlled by the Respondent Issa.

On July 1, 2023, based allegedly upon unfounded rumors, the Petitioner Cesar Ramirez was wrongfully accused by Issa of stealing company property which, in fact, was owned and paid for by the Petitioner. Petitioner was fired on the spot and told to leave the premises, which he did reluctantly. At that time, Petitioner Cesar Ramirez was earning $12,757.00 weekly in addition to one half of the company profits. In 2022, Manhattan Fare Corp. earned a net profit in excess of $6,500,000.00 after salaries, split evenly between Mr. Ramirez and Respondent Moneer Issa.

Thereafter, Mr. Ramirez commenced an action against Moneer Issa, who personally and individually hired him, seeking his unpaid salary in excess of $900,000.00 dating back over one year. The Amended Complaint sought recovery of Petitioner's unpaid salary under §§ 193 and 195 of the New York Labor Law, together with additional causes of action for an accounting, conversion of Petitioner's property, breach of fiduciary obligations, breach of contract, breach of the covenant of good faith and defamation. On a motion to dismiss by the Respondents, the Court denied the same, issued an injunction against Respondent Issa, which is still in force and upheld the cause of action for unpaid wages under §§ 193 and 195 of the Labor Law. Depositions have been conducted and the action is almost ready for trial, except for a discovery motion presently pending before Justice Leon Ruchelsman in the Supreme Court, Kings County.

Unfortunately, the Petitioner Cesar Ramirez has been physically threatened by Respondent Issa, who has repeatedly threatened to kill him. Mr. Issa carries a gun as a concealed weapon.

The parties are irretrievably irreconcilable based upon the mistaken accusation by Respondent Issa that Mr. Ramirez was stealing company property. That is a classic long standing pre-cursor to a dissolution of an entity when a fiduciary partner or co-stockholder accuses his counterpart of stealing. Regardless, the lack of trust becomes manifest, especially where there is a threat of murder. A dissolution of the company becomes the only alternative, regardless of how profitable the enterprise. The Three Michelin Stars awarded to Mr. Ramirez are of no value where he faces a threat that he will be killed.

Under the circumstances, the only alternative is dissolution, especially so, in this case at bar, after the Respondent Issa had filed a bogus criminal complaint of theft of company property which the Police and the District Attorneys' Office refused to prosecute based upon documentary proof that the property of the restaurant was purchased, paid for and loaned by the Petitioner to the restaurant.

There is no basis in law or in fact for the grant of a stay of this proceeding as requested by the Respondent Issa. The only basis is if Issa had made an offer to buy the shares of the Petitioner pursuant to § 1181 of the Business Corporation Law, which has never been done. Mr. Issa simply declared without authority that the Petitioners are no longer stockholders.

The legal and statutory precedents fully justify denial of Respondents' request for a stay of this proceeding and the grant of the Petitioners' Cross-Motion for the appointment of a Receiver to prevent a dissipation of the company assets and revenues, and to prevent any repeat of the embezzlement by Respondent Issa of the $400,000.00 he withdrew from the Manhattan Fare Operating account on Monday morning, July 3, 2023, two days after he fired Mr. Ramirez and ejected him from the restaurant premises.

POINT I

NO LEGAL BASES EXISTS FOR A STAY

The Respondent Issa has threatened to kill Ramirez. He carries a gun which presents an imminent danger to the Petitioner Ramirez. Based upon his accusations, that Petitioner has stolen company property and his repeated threats to kill Mr. Ramirez, any thought of reconciliation

of Mr. Issa with the Petitioner would amount to a wasted effort and an exercise in futility.

In a case strikingly similar to the one at bar, Matter of Pivot Punch Die Corp., 15 Misc.2d 713 (N.Y.Co. 1959) presents an interesting parallel. Two fifty percent stockholders operated a profitable business. The parties proceeded to arbitration based upon irreconcilable differences. The arbitrators ruled that the employment of the founding principal was terminated based upon the deadlock of the two equal stockholders. Dissolution proceedings were commenced based upon the terminated stockholder's receipt of nothing from the corporation who was without any voice in the operation of the business. The court ruled that dissolution was appropriate since it would be beneficial to both stockholders without being injurious to the public. The fact that there were two actions pending between the parties for money damages was not a sufficient ground to stay the dissolution proceedings, citing Matter of Acker Jablow, Inc., 124 N.Y.S.2d 298, 300, *aff'd.*, 282 A.D. 941 and Matter of Fulton - Washington Corp., 3 Misc.2d 277, 287, *aff'd.*, 2 A.D.2d 981.

Thus, whether to grant a stay rests within the discretion of the Court; Asher v. Abbott Laboratories, 307 A.D.2d 211 (1st Dept. 2003). If the claims are not identical and a dissolution is inevitable, there is no reason to grant a stay. Besides, the Commercial Division of the Court has great expertise as a business court. In addition, because the Kings County action has discovery almost completed and this proceeding does not seek relief against Moneer Issa, individually, which is the case in the Kings County action and the dissolution has to do with the

disposition of corporate assets, not individual liability of Issa, there is no reason to stay either proceeding. In addition, the causes of action against Issa, individually, are completely different from the request to dissolve the corporation.

In Matter of Campbell v. NYC Transit Auth., 32 A.D.3d 350 (1st Dept. 2006); and Stuart v. Tomasino, 148 A.D.2d 370 (1st Dept. 1989), the Court held that there was no obligation to stay a civil action, whether or not a criminal proceeding was pending.

In Matter of Kopf, 169 A.D.2d 428 (1st Dept. 1991), after a dissolution proceeding was commenced by a corporate shareholder, the Appellate Division upheld the Lower Court's denial of a stay of the dissolution pending the disposition of a separate related proceeding based upon the Lower Court finding that there was no jeopardy of the ongoing criminal proceeding.

Similarly, in Yujuico v. STY Builders Corp., 61 A.D.2d 798 (2nd Dept. 1978), the Court affirmed an order directing that the corporation be dissolved and appointing a receiver.

This dissolution proceeding has been properly based upon the unilateral conduct of the Respondent Issa. The Petitioner Ramirez was absolutely justified in commencing this dissolution proceeding based upon the wrongful accusation that he was stealing - which proved to be baseless - and the physical threat by the Respondent that he would kill Mr. Ramirez. No one should be forced to remain in a relationship as a "co-owner" of half of the corporation stock with a person who wrongfully and without a basis accuses him of stealing company property and threatens his life. The discretion of this Court must be exercised in

favor of denying the Respondents' Motion for a stay; Admiral Corporation v. Reines Distribution Inc., 9 A.D.2d 410, 412 (3rd Dept. 1959), where the Court stated:

> "A party having a cause of action properly brought in the Supreme Court should not be denied the right to be heard there, to his possible delay and detriment and to the possible advantage of his adversary."

That case is still binding law and is the basis for the denial of any stay of the dissolution proceeding before this Court.

The Petitioners have exhibited an absolute right to a dissolution of Manhattan Fare Corp., in view of the illegal, fraudulent and oppressive actions of the Defendant Issa. This is justified pursuant to BCL § 1104-a.

POINT II

THE NEED FOR A RECEIVER AND FOR RESPONDENTS TO POST A BOND

A temporary receiver is indispensable for the survival of the Corporation; Meagher v. Doscher, 157 A.D.3d 880 (2nd Dept. 2018).

Dissolution is the order of the day. It is the only alternative to a deadlock between two fifty percent stockholders. After admission under oath to the Justice in Kings County that the restaurant could not re-open, that meaningless claim by the Respondent came to haunt him as being untruthful when he re-opened the restaurant on October 4, 2023. It has been operating from that date to the present.

Despite the fact that Petitioners are still fifty percent shareholders, the Respondent Issa has failed and refused to furnish any account of the business of the restaurant, any account of revenues, any records of the finances of the Corporation since Mid-2023, and least of

all any distributions of profits. Issa as a "fiduciary" has given the Petitioners nothing of any kind; no records, no money, nothing!

Pursuant to CPLR 6401, "Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of a summons and at any time prior to judgment . . . where there is danger that the property will be . . . materially injured." The appointment of a receiver is appropriate where the moving party offers "substantial proof" of his "apparent interest" in the matter in question and demonstrates a likelihood that he will suffer a material injury to his interest. Suissa v. Baron, 107 A.D.3d 689, 690 (2nd Dept. 2013); Singh v. Brunswick Hosp. Ctr., Inc., 2 A.D.3d 433, 434-35 (2nd Dept. 2003); Gimbel v. Reibman, 73 A.D.2d 897, 897 (2nd Dept. 1980). Therefore, it is appropriate for the court to appoint a Temporary Receiver when the moving party demonstrates that the non-moving party "is exercising sole control over the bulk" of jointly-held assets and has previously transferred joint property such as the secret covert embezzlement of $400,000 from the Manhattan Fare Operating Account transferred to his own name, or to an entity controlled by him; Wong v. Wong, 161 A.D.2d 710, 711 (2nd Dept. 1990). The "dilution" of jointly-held assets in itself is a sufficient basis to appoint a receiver. Gimbel, 78 A.D.2d at 897.

The appointment of a receiver is also appropriate where a party has breached his contractual or fiduciary obligations concerning the disposition of business proceeds. Gimbel, 78 A.D.2d at 897 (defendant's commingling of funds warranted receiver's appointment over ongoing

business); Nelson v. Nelson, 99 A.D.2d 917, 918 (3rd Dept. 1984) (defendant's undisputed failure to provide an accounting constituted a *prima facie* showing of the imminent danger of dissipation of assets to warrant receiver's appointment over ongoing business); Meurer v. Meurer, 21 A.D.2d 778, 778, 250 N.Y.S.2d 817, 818 (1st Dept. 1964) (appointment of receiver warranted to prevent abuse of fiduciary relationship and to facilitate accounting for specific monies derived from the fiduciary relationship). See also Application of Jack Martin Auto Sales, 63 N.Y.S.2d 686, 687 (Sup. Ct. N.Y. Co. 1946) (receiver appointed where the moving party is "barred from the operation, management of affairs" of the company, and there was a possibility that "the corporate assets might be dissipated," by the party effectuating the lockout); Kesten v. Morris, 22 Misc. 2d 498, 502 (Sup. Ct. N.Y. Co. 1959) (receiver appropriate where the non-moving party has engaged in waste, dissipation of corporate funds, and improper management).

The appointment of a temporary receiver is also warranted where a party has breached his fiduciary duty by engaging in financial self-dealing. Dolgoff v. Projectavision, Inc., 235 A.D.2d 311 (1st Dept. 1997) (reversing denial of temporary receiver where defendant engaged in self-dealing).; Cellino v. Cellino & Barnes, 175 A.D.3d 1120 (4th Dept. 2019).

In the instant case, the Petitioners are entitled to the appointment of a Temporary Receiver because there has been presented overwhelming irrefutable documentary evidence of record demonstrating that Issa has materially breached his fiduciary and contractual obligations to the Petitioners and the Manhattan Fare Corp., and that

he continues to do so. Pursuant to the Stockholders Agreement, **Exhibit 1** (ARTICLE V, Page 5, Paragraph 5.1) the Court must recognize that:

1. Ramirez was entitled to co-manage the "business and affairs" of the Company.

2. Ramirez was to have full access at any time to review the books and records, premises and operations of the Company, receive information from the employees, accountants and advisors of the Company and receive copies of such business and financial records of the Company

3. Ramirez had the right to share equally in the profits and cash receipts of the Company.

Issa has materially breached his fiduciary and contractual obligations to Ramirez by purporting to unilaterally terminate Ramirez and other employees; improperly and unilaterally authorizing Manhattan Fare attorneys to purportedly act on behalf of the Company, including the defense of this action, using Company funds for unauthorized transactions and expenses; appropriating Manhattan Fare Company funds for personal use and to further his personal agenda to take exclusive control over and diverting Company assets for his own gain, by effectuating unauthorized distributions in the name of the Company, as if he alone owns and controls it, and refusing to grant Ramirez access to the Company's bank accounts, statements, and financials. Since the Petitioners have made a clear and convincing evidentiary showing that a Temporary Receiver is necessary, Suissa v. Baron, 107 A.D.3rd 689, 690 (2nd Dept. 2013) this Court is obliged to and should grant such relief to avoid further injury to the Petitioners and the Company.

Finally, Petitioners recognize that the appointment of a receiver

pendente lite is a drastic remedy, "because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits." Hessert v. Brooklyn Home Dialysis Training Ctr., 231 A.D.2d 719 (2d Dep't 1996); Schachner v. Sikowitz, 94 A.D.2d 709 (2d Dep't 1983); Hahn v. Garay, 54 A.D.2d 629, 629-30 (1st Dep't 1976). However, this documented, undisputed, and ongoing conduct by Issa creates a real danger that Issa will continue to dissipate the Company's assets. Despite being served with process in this action, and this dissolution proceeding, which clearly put Issa on notice of his previous violations of his fiduciary obligations, Issa has boldly used Company funds for himself by his transfer of $400,000 of Company funds to himself for his own use. Any disruptive effects of the appointment of a receiver is tempered in this case by the fact that the restaurant has ceased operating for several months and now suddenly reopened as of October 4, 2023 using Petitioner Ramirez's very property which Issa charged him with stealing and by filing a criminal complaint against him and having him arrested, photographed and fingerprinted, without a shred of evidence to support a criminal complaint.

In addition to a Receiver, since the Respondent Issa has arbitrarily assumed exclusive control of Manhattan Fare Corp. and has been guilty of documented embezzlement, he should be required to post a bond of at least $500,000.00 to secure the Petitioners and the Company against any further fraud on his part; In Re 212 East 52 Street Corp., 185 Misc.2d 95 (N.Y.Co. 2000); The Matter of Toscano v. Southampton Brick & Tile Inc., 233 A.D.2d 515 (2nd Dept. 1996). The bond is appropriate under BCL 1113, 1115 and 1118(c)(2).

CONCLUSION

Based upon the present state of the law, the Respondents' motion for a stay should be denied and the Cross-Motion for a Receiver granted, together with the Respondents posting and undertaking of $500,000.00.

Respectfully submitted,

THE DWECK LAW FIRM, LLP
Attorneys for the Petitioners

By: _____
Jack S. Dweck
Rourke T. Feinberg

S:\SHARED DOCUMENTS\SECRETARY 2\DOCS JSD GIVE SV\CLIENT DOCS\RAMIREZ-MANHATTAN\PETITIONERS' MOL IN OPPOS TO DEFS' MOTION FOR STAY & CROSS-MOTION FOR RECEIVER 7-16-24 DRAFT #3.DOCX