

Matter of Akcan v Vita Ristorante 58 , Inc .
2010 NY Slip Op 32195(U)
August 16, 2010
Supreme Court, New York County
Docket Number: 600113/2010
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. JANE S. SOLOMON PART 55

Justice

AKCAN, SERDAR,
Petitioner,

INDEX NO 600113/2010

-against-

MOTION DATE

VITA RISTORANTE 58, INC.
Respondent.

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1-19, were read on this motion to/for Forced Dissolution.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____	4-7, 8-10
Replying Affidavits _____	11-19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this petition is decided by the annexed memorandum decision, ~~and~~ order *and Judgment*

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____
Dated: _____

8/16/10

J.S.C.
JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

In the Matter of the Application of
SERDAR AKCAN,

Index No. 600113/2010
DECISION, ORDER and
JUDGMENT

Petitioner,

for the Dissolution of

VITA RISTORANTE 58 INC., as
successor in interest to BELLA
PIZZERIA, INC., d/b/a Bella
as successor in interest to
STREET DELI, INC., d/b/a B

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
941B).

Respondent.

-----X

SOLOMON, J.:

This is an action pursuant to Business Corporation Law
(BCL) 1104-a to dissolve a corporation. Petitioner Serdar Akcan
(Akcan) holds a 25% stock interest in Bella Vita Pizzeria, Inc.
(Bella Vita), which ran a restaurant named Bella Vita Pizzeria
located at 158 West 58th Street in Manhattan (see, Petition, Ex.
A) until 2009, in a building allegedly owned by two other of
Bella Vita's principals.

Akcan also alleges that he holds a 15% interest in 43rd
Street Deli Inc. (43rd Street), which runs a restaurant also
named Bella Vita Pizzeria located at 211 West 43rd Street, in
Manhattan (Bella Vita 43).

43rd Street and Bella Vita are not parties to this
action. Vita Ristorante 58 Inc. (Vita Ristorante), the sole
respondent, is a New York corporation with a single shareholder,
Angelo Ortiz (Ortiz). Prior to creating Vita Ristorante, Ortiz

was an employee at the Bella Vita restaurant on 58th Street. Vita Ristorante now operates that restaurant, having entered into a lease that included all the restaurant's fixtures.

Akcan seeks to dissolve Vita Ristorante on the ground that the directors and officers of Bella Vita have fraudulently diverted Bella Vita's corporate assets into Vita Ristorante. Akcan claims that these officers created Vita Ristorante solely to divert Bella Vita's assets without having to compensate him or buy out his shares. Notably, Akcan does not possess any shares of Vita Ristorante.

BCL § 1104-a reads in relevant part:

"§ 1104-a. Petition for judicial dissolution under special circumstances

(a) *The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one of 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;*

(2) *The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers of those in control of the corporation"*

(Emphasis added).

Vita Ristorante cross-moves to dismiss the petition because it is not a successor in interest to Bella Vita or 43rd

Street, but is a separate legal entity. 43rd Street cross-moves to dismiss the petition as against it on the ground that it has not merged with Vita Ristorante or Bella Vita, is not a predecessor in interest to any of the named corporations, and is still an active corporation. The motions are decided as follows.

A. The Vita Ristorante cross-motion

Vita Ristorante argues that the petition should be dismissed because Akcan does not have a shareholder interest in Vita Ristorante, and because there is no evidence that it is the successor-in-interest to either 43rd Street or Bella Vita.

In order to force dissolution under BCL § 1104-a, a petitioner must have at least a 20% share in the closely held corporation. Akcan does not have this statutorily required interest in Vita Ristorante.

In order to circumvent this requirement, as seen by the way the respondent is named in the caption, Akcan argues that Bella Vita and Vita Ristorante entered into a de-facto merger, making him an owner of Vita Ristorante.

Typically, the de facto merger doctrine is used in tort or breach of contract actions to protect against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity (see, e.g., *David Kretzmer v. Firesafe Products Corporation et al*, 24 AD3d 158 [1st Dept, 2005]). Akcan cites to no authority that would allow a court to utilize the doctrine of de facto merger to shift his shareholder

interest in one corporation to another corporation for the purpose of forced dissolution of the new corporation. While Akcan may have claims against Vita Ristorante or the co-owners of the other two corporations, his lack of direct ownership interest in the respondent prevents him from seeking its dissolution under the statute upon which he relies.

Because Akcan has no standing to force the dissolution of Vita Ristorante under BCL § 1104-a, Vita Ristorante's cross-motion to dismiss is granted.

B. The 43rd Street cross-motion

This action seeks to forcibly dissolve Vita Ristorante. 43rd Street is not a party, and has not sought to make itself one. As it is impossible to dismiss a lawsuit against a non-party, 43rd Street's motion to dismiss is denied as moot.

In accordance with the foregoing, it hereby is

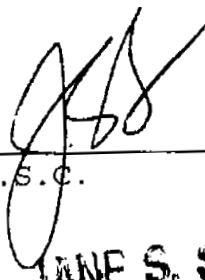
ORDERED that non-party 43rd Street Deli, Inc.'s motion to dismiss is denied; and it further is

ORDERED that respondent Vita Ristorante 58, Inc.'s motion to dismiss is granted; and it further is

ORDERED and ADJUDGED that the petition is dismissed.

Dated: August 16, 2010

ENTER:



J.S.C.
JANE S. SOLOMON

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