Case No. 511824

To Be Argued by:
WILLIAM J. KENIRY, ESQ.
(Time Requested: 10 Minutes)

NEW YORK SUPREME COURT
Appellate Division - Third Department

In the Matter of Application for Judicial Dissolution of Sunburst Associates, Inc., by **MICHAEL VILARDI**, 50% Shareholder,

Petitioner-Appellant,

-against-

FRED BABBINO,

Respondent-Respondent.

BRIEF OF RESPONDENT

Albany County Index No.: 2536-10

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PRELIMINARY STATEMENT

On appeal, Petitioner challenges the trial court's order dismissing his dissolution petition. Respondent submits that the trial court properly dismissed the petition, as Respondent demonstrated and the trial court credited the evidence that he owns 100% of the corporation's stock.

At the subject hearing, Respondent established that, although Petitioner once owned 50% of all outstanding shares, there came a time when he endorsed his stock certificate away and contemporaneously did so in a separate written signed agreement. Petitioner admitted during the hearing that he signed the stock certificate and certain agreements. He then testified that he did so only to create a facade to obtain money from banks. Petitioner's stated admission approaches criminality. But it does not (and cannot) rebut the proof that he signed the certificate and the agreements. That proof was uncontroverted.

Respondent submits that where, as here, a party transfers over his stock certificate and also executes a document recognizing the other party as the sole shareholder, no other evidence should be considered to determine the issue of ownership. Alternatively, Respondent submits that the trial court was free to reject Petitioner's assertions that he remained a shareholder, as Petitioner relied primarily on unsigned tax returns and his own testimony.

For the reasons that follow, Respondent respectfully requests that the order be affirmed.

COUNTER-STATEMENT OF FACTS

In April 2010, Petitioner Michael Vilardi filed a petition seeking to dissolve Sunburst Associates, Inc., pursuant to BCL § 1104 [PSR at 2-23].[1] In May 2010, Respondent Fred

[1] Page references to "R" are to the volume entitled "Record on Appeal"; page references to "PSR" are to Petitioner's Supplemental Record on Appeal; and page references to "RSR" are to Respondent's Supplemental Record on Appeal.

Babbino served a Verified Answer, asserting, among other things, that Petitioner was "not currently an owner of record of any shares in the Corporation" [PSR at 26, 24-51].

In September 2010, a hearing was held on the issue of whether Petitioner was a 50% shareholder [R at 8-9]. At the hearing, Petitioner called numerous witnesses to testify, including both parties [R at 8-294]. Respondent cross-examined Petitioner's witnesses and called the corporation's attorney to testify [R at 8-294].

Respondent's Case

At the hearing, Petitioner called Respondent as his first witness. Respondent testified about the formation, capitalization, and ownership of the corporation [R at 16-119] (see Ownership Chart, Attached). Respondent also relied upon (and the trial court received into evidence) the corporation's books and records [R at 49-50, 58, 119, 448-515; PSR at 62-69; RSR at 3-32].

According to Respondent, the parties formed the corporation in the mid 1990s [R at 64-66]. At that time, Respondent invested $40,000 [R at 64, 486]. In contrast, Petitioner invested no money [R at 64-67, 486]. Petitioner agreed to capitalize the corporation with some equipment [R at 66-67, 486]. Petitioner obtained the subject equipment, but may have done so so fraudulently [R at 66-67].

In 1996, Stock Certificate No. 1 (10 shares) was issued to Respondent [R at 65, 452, 457]. Stock Certificate No. 2 (10 shares) was issued to Petitioner [R at 65, 453, 458]. After 1996, Respondent borrowed money and personally guaranteed loans for the corporation [R at 68-69, 71, 79, 82-83, 449, 463-515; PSR at 62-68; RSR at 13-18, 22-32]. In contrast, Petitioner did not borrow money or personally guarantee loans for the corporation [R at 68-69, 71, 79, 82-83, 449, 463-515; PSR at 62-68; RSR at 13-18, 22-32].

In October 1997, Stock Certificate No. 3 (35 shares) was issued to Respondent [R at 69, 454, 459; PSR at 62]. Sometime thereafter, Petitioner lost Stock Certificate No. 2 [R at 70; PSR at 69]. In November 2001, Petitioner obtained Stock Certificate No. 4 (10 shares) to replace the lost certificate [R at 70, 455, 460; RSR at 19-20].

In December 2001, Petitioner owed Respondent approximately $200,000, none of which has ever been repaid [R at 71, 511-514; RSR at 22-24]. Petitioner placed his stock in escrow to secure the debt, but the parties agreed that he could still vote and serve as an officer and director [R at 72-73, 511-514; RSR at 22-24].

Around January 2002, Petitioner sold his shares to Respondent to discharge the debt, but never paid him any money [R at 74, 511]. In June 2003, Stock Certificates Nos. 3 and 4 were marked void [R at 75, 464-465]. Certificate No. 5 (10 shares) was issued to Petitioner, replacing Certificates No. 2 and 4 [R at 76, 461, 464-465].

In July 2007, Petitioner endorsed and transferred his Stock Certificate No. 5 over to Respondent [R at 81, 90-93, 461-463, 515]. In July 2007, the parties agreed that Petitioner was "indebted" to Respondent and that Petitioner's stock would be delivered to Respondent in escrow "to secure the payment of such indebtedness" [R at 515; see also R at 79-81, 95-96]. The parties, however, disputed the exact amount of the debt [R at 79 (Respondent: "We were going to consult with the accountant . . . . I had a number which was about a hundred eighty thousand. [Petitioner] had a dispute with that")].

In August 2007, Petitioner subsequently executed a document recognizing Respondent as the "sole shareholder" and "sole officer" with 100% of the voting rights (effective July 2007) [R at 463; see also R at 77, 87-89]. No other transfers of ownership or stock occurred thereafter [R

at 93, 100, 448-515; PSR at 62-69; RSR at 3-32]. Petitioner also never repaid his debt to Respondent [R at 96].

Since then, Respondent has been the sole shareholder [R at 36-42, 93, 96, 100, 448-515] and has conducted virtually all of the corporation's business (including the hiring, firing, and billing), controlled the corporation's bank accounts and finances, and personally incurred and covered liabilities on behalf of the corporation [R at 47-48, 77, 81-83, 95-96, 99, 101; see also R at 157-158, 183-184, 193].

The corporation's attorney, Mr. Irwin, also testified that the parties asked him to prepare the subject agreements and that he believed that Petitioner signed Stock Certificate No. 5 and the August 2007 agreement in his presence [R at 245-250]. The corporate attorney possessed no knowledge of any change in material facts since August 2007 [R at 251].

The corporation's attorney further testified that Petitioner owed Respondent a debt [R at 263-264]. The parties, however, did not expressly fill in the amount of the debt on the July 2007 agreement because they wanted to review the records before putting an exact number onto that document [R at 263-264].

Petitioner's Case

At the hearing, Petitioner admitted that he endorsed Stock Certificate No. 5 in 2007 [R at 193-197, 235]. Petitioner, however, testified that he endorsed it in blank and that someone else filled out the rest of the information on the back of it [R at 193-197, 225, 235]. Petitioner also admitted that he signed the subject agreements, but testified that he executed the August 2007 agreement only to create a facade to obtain money from banks [R at 221-239]. Petitioner further admitted that he never demanded his stock back afterwards [R at 235, 237]. When asked about his debt, Petitioner denied owing anything to Respondent [R at 228, 231].

Petitioner also relied upon two letters written by him in February/March 2010 (at least one sent via certified mail), in which Petitioner referred to an upcoming March 2010 meeting with Respondent as a shareholder(s) meeting [R at 33-43, 295-296, 300-302]. A former (disgruntled) employee of the corporation also testified that she heard Respondent use the phrase "shareholder meeting" prior to the meeting (although she admittedly did not attend it) [R at 177-178, 180-182].[2]

Respondent, however, denied ever referring to the meeting as a shareholders meeting [R at 42]. Respondent also argued with Petitioner over the telephone regarding Petitioner's use of those words [R at 36]. Nevertheless, in light of his history with Petitioner, Respondent met with him in March 2010 to discuss certain business related issues [R at 43].

Petitioner also relied upon certain 2007-2009 tax returns, which referenced Petitioner as a shareholder on certain pages [R at 305-427]. Respondent, however, explained that he did not sign the tax returns and that he relied on his tax preparer (who had been good friends with Petitioner) to fill out and file them [R at 20-25, 46-48, 97; see also R at 141, 160-161, 305-427]. Upon discovering the mistake, Respondent promptly attempted to correct the tax returns [R at 47-48, 98]. His tax preparer, however, did not help him [R at 47-49]. Respondent ultimately terminated her services [R at 47-49].

On cross examination, the tax preparer acknowledged that (1) the tax returns were never signed by Respondent [R at 141]; (2) the tax returns could well be inaccurate, as she had never reviewed any books, records, or papers pertaining to ownership of shares [R at 167-171]; (3)

[2] Notably, as part of the Record on Appeal, Petitioner improperly included the alleged shareholder "minutes" created by Petitioner and his counsel for the March 2010 meeting [R at 428-432]. This document was not received into evidence and therefore should be afforded no weight [R at 204-222].

persons can share revenue or profit without a co-owner relationship [R at 163-164]; and (4) tax returns do not establish ownership or title [R at 164-165].

The tax preparer also conceded that Respondent had terminated her services and stopped communicating with her since May 2010 [R at 150-154]. The tax preparer nevertheless decided a month later (in June 2010) to file the 2009 tax return, which contained the same erroneous information [R at 150-154].

The Decision of the Trial Court

At the conclusion of the hearing, the trial court provided the parties with the opportunity to submit post-trial submissions, including proposed findings of fact and conclusions of law [R at 290]. After receiving the submissions [RSR at 33-78], the trial court "decided and found" that Petitioner "owns no stock in Sunburst" and that Respondent "owns one hundred percent of the stock" [R at 3]. The trial court signed Respondent's proposed Decision/Order without making any changes to it [R at 3; RSR at 33]. Petitioner now appeals [R at 2].

ARGUMENT

BCL § 1104 provides that only a "holder[] of shares representing [a certain percentage] of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution" (see also § 1104-a [accord]). These statutory provisions are "strictly construed" (Concrete Constr. Systems, Inc. v Jensen, 65 AD2d 918, 919 [4th Dept 1978]).

To establish his claim, Petitioner was therefore required to prove, by a preponderance of the evidence, that he was a record shareholder with voting rights and possessed a requisite amount of the corporation's voting shares (see BCL § 1104; Matter of Pappas , 76 AD3d 679, 679-680 [2d Dept 2010]; Honzawa Holding Co. v Hiro Enter. USA, Inc., 291 AD2d 318, 318 [1st Dept 2002]; Matter of Application of Three Hundred Fifty West Forty-Sixth Street, Inc., 20 AD2d 685, 685-686 [1st Dept 1964]; Stewart Becker, Ltd. v Horowitz, 94 Misc 2d 766, 769-772 [Sup Ct, Suffolk County 1978]; see also Matter of Utica Fire Alarm, 115 AD 821, 828 [4th Dept 1906]; Matter of Cassaro, 93 Misc 2d 1096, 1097-1098 [Sup Ct, Erie County 1978]).

As explained below, the trial court properly dismissed the petition, as Petitioner failed to demonstrate that he was a record owner or possessed voting rights.

POINT I EVIDENCE OF THE TRANSFER OF THE STOCK CERTIFICATE AND THE EXECUTION OF THE SUBJECT AGREEMENTS JUSTIFIED DISMISSAL OF THE PETITION

Where certificates of stock are issued and a party transfers over his stock certificate and also executes a document recognizing the other party as the sole shareholder, no other evidence should be considered to determine the issue of ownership (see Matter of Capizola, 2 AD3d 843, 844-845 [2d Dept 2003]; Di Siena v Di Siena, 266 AD2d 673, 674 [3d Dept 1999]; Hunt v Hunt, 222 AD2d 759, 760 [3d Dept 1995]; see also Isham v Buckingham, 49 NY 216, 222 [1872];

Blank v Blank, 256 AD2d 688, 693 [3d Dept 1998]). This is because such evidence effectively constitutes the most reliable and credible evidence (see Isham, 49 NY at 222; Di Siena, 266 AD2d at 674), and also estopps assertions that contradict the transfer (see Matter of Capizola, 2 AD3d at 844-845). For the rules to be otherwise would turn commercial transactions upside down.

Here, the record reveals that Petitioner endorsed and delivered his stock certificate over to Respondent and that the parties subsequently executed an agreement recognizing Respondent as "the sole shareholder" [R at 461-463, 515]. Such evidence was conclusive on the issue of ownership.

A. The Parol Evidence Rule Applies

"Pursuant to the parol evidence rule, where the parties have reduced their agreement to an unambiguous integrated writing, a party generally may not present evidence of prior or contemporaneous negotiations or agreements between the parties to contradict, vary, modify, add to or subtract from the terms of the writing" (Davis v Davis, 266 AD2d 867, 868 [4th Dept 1999]; see Di Siena, 266 AD2d at 674). Generally, "justification for the rule is found in the need for imparting stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses and the infirmity of memory" (Fisch on New York Evidence § 42 [2d ed 1977]).

Here, no ambiguity exists regarding the transfer of the stock or ownership. Petitioner's stock certificate for example unambiguously provides that it was transferred to Respondent for "value received" [462]. The parties' August 2007 agreement also unambiguously provides that Respondent was "the sole shareholder of all the issued and outstanding shares of common stock in Sunburst" [463].

Moreover, although the subject documents do not identify the exact amount of the value received or the exact amount of Petitioner's debt, such does not render these documents so ambiguous so as to justify circumventing the parol evidence rule altogether. At best, parol evidence was admissible solely on these issues (see e.g. Verstandig & Sons, Inc. v Sobel, 26 Misc 2d 649, 652 [Sup Ct, New York County 1960] [explaining that "the parol evidence rule is applicable to partially integrated contracts as well as wholly integrated ones"]).

However, Petitioner's entire case on these issues was unconvincing. For example, Petitioner failed to assert his sham or lack of consideration defense in his Petition and Reply papers [PSR at 3-7, 52-53]. Petitioner never sued for or sought any relief from the signed stock certificate, the agreement, or the debt due Respondent [PSR at 3-7, 52-53]. In addition, Respondent (Petitioner's first witness) was never asked a single question concerning this suspect sham or the alleged lack of consideration [R at 16-119]. In fact, Petitioner's evidence on these issues rested solely on his passing references to the August 2007 agreement as a sham and his general denial of his debt. Notably, Petitioner failed to explain how he owed no debt at the time of the agreement (despite the record evidence to the contrary) and why he waited years to re-claim his ownership rights (see Matter of Dissolution of Pickwick Realty, 246 AD2d 863, 866 [3d Dept 1998]). Although these matters were a significant part of the hearing, Petitioner simply offered no proof.

Further, although irrelevant (see sham exception analysis, infra), the record supports a finding of consideration. For example, at the time of the transfer, Respondent was increasingly assuming the corporation's debts; Petitioner owed Respondent $200,000 (none of which had been repaid); the corporation was having trouble obtaining financing; and Petitioner's status as a shareholder (and bad credit) actually threatened the corporation's continued existence.

Essentially, Respondent agreed to continue to seek out financing for the corporation (something which Petitioner could not) so that both parties could continue to receive some amount of money/salary from the corporation. Respondent could have called it quits at anytime (be it in July or August of 2007), but he nevertheless agreed to continue to keep the corporation afloat, among other things, in exchange for Petitioner's relinquishment of his stock and rights to seek dissolution of the corporation, to which Respondent (unlike Petitioner) was risking his personal assets and credit worthiness. Indeed, Respondent had been left with little or no choice. He had everything to lose where Petitioner had nothing to lose.

Arguably, some other agreement may have also existed for Petitioner to be relieved of his debt or to repurchase his shares. However, Petitioner failed to raise the issue at trial or to explain the terms of any such agreement. Instead, Petitioner purposefully chose to deny the existence of his very significant debt and to characterize the transactions as a scam or fraud. This despite that his own accountant testified that she last calculated and prepared a ledger sheet stating that Respondent's loans were approximately $187,000 [R at 171-174, 514]. Petitioner even went so far as to accuse Respondent of fraudulently writing his own name on the back of Stock Certificate No. 5. However, the trial court was not required to accept Petitioner's assertions as true. It was free to disregard such testimony as not credible or worthy of belief and to make its determination based on its belief that Petitioner was not telling the truth or being entirely forthcoming. For these same reasons, this Court should reject Petitioner's sham or lack of consideration defense.

B. The Sham and Fraud Exceptions To the Parol Evidence Rule Do Not Apply

In any event, Petitioner's testimony was insufficient to invoke the "sham" exception to the parol evidence rule. This exception only applies to proof that the entire contract was intended to be a nullity (see Bersani v General Acci. Fire & Life Assurance Corp., 36 NY2d 457, 461 [1975]; W.L. Christopher, Inc. v Seamen's Bank for Sav., 144 AD2d 809, 813 [3d Dept 1988] [noted in dissenting opinion]). Here, the subject documents expressly note that Petitioner received value for the transfer and that Petitioner owed Respondent a debt [R at 462-463, 515]. Respondent and the corporation's attorney further testified that they absolutely understood and believed that the agreements were valid and that they related (at least in part) to Respondent's growing concern of Petitioner's debt and Respondent's desire to assume complete control over the corporation's financial affairs. Petitioner's general denial of his then-existing debt, which is unmistakably stated throughout the corporate books and records, was insufficient to support any application of the sham exception.

Further, even if the entire written agreement had been intended by both parties to be unenforceable in order to perpetrate a fraud against the banks and financial institutions (the only purported reason Petitioner has given), public policy would prevent the introduction of such parol evidence (see W.L. Christopher, Inc., 144 AD2d at 811-813; Peacock Holdings v Keefe & Keefe, Inc., 232 AD2d 331, 331 [1st Dept 1996] see also Costalas v Amalfitano, 305 AD2d 202, 203 [1st Dept 2003]). Indeed, allowing Petitioner to apply such an exception to the parol evidence rule would undermine the entire financial industry upon which our economy rests.

Similarly, Petitioner seeks to invoke the fraud exception to the parol evidence rule based on his testimony at trial that he signed his stock certificate in blank and left it in the corporate safe for three years thereafter [R at 193-197, 225, 235]. Petitioner asserts that Respondent then

fraudulently wrote his name and the date of transfer on the back of that certificate [R at 193-197, 225, 235]. Again, this assertion by Petitioner rests entirely on his own testimony, which the trial court was free to disregard as not credible.

Accordingly, no basis exists to disturb the trial court's determination, as the stock transfer and the subject agreements constituted conclusive evidence on the issue of ownership.

POINT II THE EVIDENCE DOES NOT SO PREPONDERATE IN PETITIONER'S FAVOR SUCH THAT THE DECISION COULD NOT HAVE BEEN REACHED ON ANY FAIR INTERPRETATION OF THE EVIDENCE

Petitioner also impliedly contends that the trial court's determination was against the weight of the evidence. However, when weight of the evidence is the issue, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (Thoreson v Penthouse Intl., 80 NY2d 490, 495 [1992]; see Morris v Crawford, 304 AD2d 1018, 1020-1021 [3d Dept 2003]). True, "this Court may independently consider the probative weight of the evidence and the inferences to be drawn therefrom" (Winkler v Kingston Hous. Auth., 259 AD2d 819, 823 [3d Dept 1999]; see Shon v State of New York, 75 AD3d 1035, 1036 [3d Dept 2010]; but see Thoreson, 80 NY2d at 495; Morris, 304 AD2d at 1020-1021). However, this Court generally defers to the trial court's credibility determinations, as it had the opportunity to see and hear the witnesses (see Shon, 75 AD3d at 1036; Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster, 40 AD3d 1289, 1291 [3d Dept 2007]; F&K Supply v Willowbrook Dev. Co., 304 AD2d 918, 920 [3d Dept 2003]; Allen v Kowalewski, 239 AD2d 879, 880 [4th Dept 1997]).

Assuming arguendo, that the parol evidence rule does not apply, a review of the record reveals that the trial court attentively presided and properly weighed the evidence (see Hunt, 222 AD2d at 761; Matter of Pappas, 22 Misc 3d 1113A, 2009 NY Slip Op 50109U [Sup Ct, Kings County 2009]; see also Matter of Heisier, 90 NY2d 682, 688 [1997]).

A. Respondent's Position

As stated earlier, Respondent established at the hearing that he was in possession of the Stock Certificate No. 5, endorsed by Petitioner. Respondent in fact testified that he possessed all the stock certificates because Petitioner endorsed his over to him. In addition, the corporate books and records, which constitute prima facie evidence of ownership, also do not list Petitioner as an owner (see BCL § 624 [g]; Matter of Steward, 229 AD2d 500, 500 [2d Dept 1996]; Kyle v Kyle, 111 AD2d 537, 539 [3d Dept 1985]). The credible testimony also demonstrated that, since 2007, Respondent has conducted virtually all of the corporation's business (including the hiring, firing, and billing), controlled the corporation's bank accounts and finances, and personally incurred and covered significant liabilities on behalf of the corporation (see Hunt, 222 AD2d at 760-761). Indeed, even the corporation's longstanding attorney explained (based on his personal knowledge and examination of the books) that he believed that the July/August 2007 agreements/transactions were valid and that Respondent has remained the sole shareholder of the corporation (see Matter of Steward, 229 AD2d at 501).

B. Petitioner's Position

In contrast, Petitioner, who had the burden of proof, failed to prove ownership with any degree of certainty. As the evidence reveals, Petitioner merely "worked" for the corporation, assumed no debts, and contributed no money. Although Petitioner's brother apparently "offset" his salary, Petitioner failed to adequately explain why such constituted a "loan" (as he classified

it) and how much money his brother actually contributed that was not distributed to Petitioner. His brother was not called as a witness. Petitioner also inexplicably neglected to examine the tax preparer about these matters, despite Respondent's prior assertion that she handled the matter.

Further, Petitioner's assertions are also belied by the lack of any "paper trail" showing ownership by Petitioner (Blank, 256 AD2d at 694). Rather, Petitioner relies heavily on unsigned tax returns and self-serving letters that he wrote. It cannot be said that such documents possessed greater weight than the testimony of the witnesses and the corporate books and records.

Indeed, given the absence of any documentary evidence in Petitioner's favor, and considering the evidence of transfer, among other things, it cannot be said that the trial court improperly weighed the evidence.

1. The Tax Returns

Moreover, Petitioner placed far too much reliance on the unsigned tax returns, especially given that the tax preparer was unaware of mistakes contained within them and was very good friends with Petitioner (see Roth v Speilman, 25 AD3d 383, 383-384 [1st Dept 2006]; Hunt, 222 AD2d at 760; see also Matter of Heisler, 90 NY2d at 688; Blank, 256 AD2d at 694). The tax returns in evidence contain no signatures of any party. On cross-examination, the tax preparer admitted that none of the returns were ever signed by any party. She further conceded that the returns could well be inaccurate, as she had never reviewed any books, records or papers pertaining to ownership of shares. Finally, the tax preparer admitted that persons can share revenue or profit without a co-owner relationship.

Moreover, even if the tax returns were considered probative, they should be afforded less weight than the corporate books and records in this case, as they do not reveal any information

regarding Petitioner's possession of any legal title to the shares or any voting rights, which are necessary to seek dissolution (see BCL § 1104; Honzawa Holding Co. v Hiro Enter. USA, Inc., 291 AD2d 318, 318 [1st Dept 2002]; Matter of Utica Fire Alarm, 115 AD 821, 828 [4th Dept 1906] [The petitioner "had neither the legal title to the stock, nor was it the record holder thereof, and it is only stockholders of record who are entitled to vote"]). In contrast, the stock certificate and subject agreements expressly reference title, ownership, and voting rights.

2. Petitioner's Letters

Petitioner attempted to demonstrate his shareholder status by his own creation of papers in an effort to set up a "shareholders meeting." However, the evidence reveals that these were apparently the very first efforts of Petitioner to hold any "shareholders meeting," and that the letters were written by him shortly before he petitioned for dissolution and after his absence from the business. Some of the documents he created involved his litigation counsel. The trial court correctly declined to admit those in evidence. As such, this Court should also disregard the received documents as lacking in probative value since they were clearly created under circumstances in which an incentive to fabricate existed (see Matter of Pappas, 22 Misc 3d 1113A, 2009 NY Slip Op 50109U, *5). Notably, in response to these self-serving letters, Respondent did not recognize Petitioner as a shareholder and he even argued with Petitioner about the issue over the telephone.

3. Petitioner's Remaining Assertions

In addition, the Court should discredit Petitioner's assertions regarding ownership based on his self-serving and unsupported assertions about being an officer of the corporation, which is irrelevant to the issue of ownership. Indeed, regardless of whether Petitioner subsequently "worked" for the corporation at some kind of executive level, he nevertheless possessed only so

much authority as Respondent may have consented to and indisputably possessed no rights to any equity/ownership interest. Corporate culture today is such that anyone can be a Vice-President.

Similarly, Petitioner attempted to prove ownership based on his alleged "exemption" from disability and workers compensation. However, his attorney failed to submit any documentary evidence to prove this assertion, and failed to raise the issue with any of the other witnesses. In any event, numerous reasons (unconnected to ownership) could explain any exemptions, e.g., the designation may have been carried over unintentionally from the previous years or Petitioner may have worked sporadically or been classified by the parties as an independent contractor.

Finally, as explained above, record evidence supports the trial court's determination that Respondent owned 100% of the stock in the corporation and that Petitioner owned nothing. As such, Petitioner's assertion about his stock remaining in escrow should be rejected outright. However, assuming arguendo, that Petitioner's stock remained in escrow as of July 2007, there are at least two reasons why this cannot cause him to prevail. First, Petitioner relinquished his ownership and voting rights (effective "as of July 30, 2007") by the August 31, 2007 agreement [R at 463]. So, even if the stock remained in escrow, Petitioner still no longer possessed the right to vote and was no longer a record owner thereafter (see BCL § 1104). Second, Petitioner did nothing to recover the stock pursuant to any agreement terms or otherwise. Again, assuming arguendo that the stock remained in escrow, at a minimum, Petitioner would have needed to re-pay his debts before re-obtaining his stock. However, no evidence exists of any repayments or action on his part.

POINT III NO BASIS EXISTS FOR ANY EQUITABLE RELIEF

To the extent Petitioner seeks any equitable relief, any such request should be denied, as a matter of law (see e.g. Levy v Braverman, 24 AD2d 430, 430 [1st Dept 1965]). "Where a litigant has himself been guilty of inequitable conduct with reference to the subject matter of the transaction in suit, a court of equity will refuse him affirmative aid" (id.). Indeed, "our courts will not grant relief to one who comes into equity with unclean hands and that a person who has transferred property to hinder or defraud his creditors will be precluded from obtaining a reconveyance of that property" (id. [citation omitted]). The rule is applied "not as a protection to a defendant, but as a disability to the plaintiff, as a matter of public policy and in order to protect the integrity of the court" (Palumbo v Palumbo, 55 Misc 2d 264, 265 [Sup Ct, Nassau County 1967] [internal quotation marks and citation omitted]).

Here, Petitioner asks the Court to undo the trial court's determination by asserting that these July/August 2007 agreements/transactions were entirely a sham to hinder and defraud banks and financial institutions. For the Court to undo such an agreement (based on Petitioner's sole purported reason) would not only contravene public policy and malign the integrity of the Court, but would also be contrary to long-standing, well-settled law (see e.g. Levy, 24 AD2d at 430; Palumbo, 55 Misc 2d at 265).

Accordingly, it is submitted that this Court should not award Petitioner any equitable relief.

POINT IV PETITIONER FAILED TO JOIN A NECESSARY PARTY.

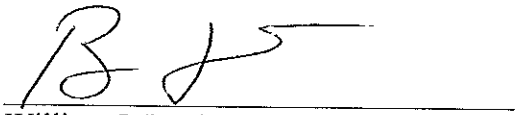
Finally, although not decided by the trial court, the petition was also subject to dismissal for the additional reason that Petitioner failed to join the subject corporation, which was a necessary and indispensable party (see CPLR 1001). It is undisputed that Petitioner sought to dissolve the corporation, which is not a party to this proceeding. Petitioner was given a reasonable period of time to join the corporation and failed to do so. Accordingly, such failure provided an additional ground for dismissal.

CONCLUSION

As stated above, the petition was properly dismissed for numerous reasons. First, by the July/August 2007 agreement/transactions, Petitioner relinquished his voting rights (and all his stock) and, as such, he no longer possessed the ability to seek dissolution pursuant to the Business Corporation Law. Second, the stock transfer and the August 2007 agreement constituted conclusive evidence on the issue of ownership. Third, even if not conclusive, the testimony and documents received in evidence nevertheless established that Respondent was the sole shareholder; since 2007, Respondent had been solely responsible for the finances of the corporation, the only person who had taken out debts in his own name for the corporation's sake, and the only person in charge of hiring and firing employees, billings, and the corporation's bank accounts. Lastly, Petitioner also failed to join the corporation, which was a necessary and indispensable party. Accordingly, Respondent respectfully requests that the Court affirm the order dismissing the petition.

Dated: November 3, 2011
Albany, New York

TABNER, RYAN and KENIRY, LLP



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Ownership Chart

Date	Event
1995/96	The Corporation is formed. Respondent invests $40,000. Petitioner invests $0 and allegedly commits fraud to obtain equipment.
January 1996	Certificate No. 1 (10 shares) issued to Respondent. Certificate No. 2 (10 shares) issued to Petitioner.
Post 1996	Respondent borrows money and personally guarantees loans for the corporation. Petitioner does not borrow or guarantee loans.
October 1997	Certificate No. 3 (35 shares) issued to Respondent.
Nov./Dec. 2001	Sometime before Nov. 2001, Petitioner loses Certificate No. 2. Certificate No. 4 (10 shares) issued to Petitioner to replace it.
Dec. 2001	Petitioner acknowledges that he owes Respondent $200,000, none of which has been repaid to date. Petitioner places his stock in escrow due to debt, but the parties agree that Petitioner can still vote and serve as an officer and director.
Jan 2002	Petitioner sells his shares to Respondent to discharge debt, but fails to pay Respondent.
June 2003	Stock Certificate Nos. 3 & 4 marked void. Certificate No. 5 (10 shares) issued to Petitioner, replacing Certificate Nos. 2 and 4.
July 2007	Petitioner endorses and transfers Certificate No. 5 over to Respondent. Petitioner executes a stock certificate agreement acknowledging his debt.
August 2007	Petitioner executes a written agreement, which acknowledges Respondent as the sole shareholder with 100% of the voting rights (effective July 2007).
Post 2007	Respondent conducts virtually all of the corporation's business (including the hiring, firing, and billing), controls the corporation's bank accounts and finances, and personally incurs and covers liabilities on behalf of the corporation.