

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

In the matter of the Application of
ROBERT COHN a/k/a ROBERT COVEN,

Petitioner,

for judgment pursuant to Business
Corporation Law §1104 judicially
dissolving LAST CHOICE REAL ESTATE
CORP.,

-against-

MARTIN COHN a/k/a MARTIN COVEN and
LAST CHOICE REAL ESTATE CORP.,

Respondents.

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 005940/07

MOTION DATE: June 4, 2007

Motion Sequence # 001

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by petitioner, brought on by order to show cause, for an order:

- A. Granting a judgment or final order directing the judicial dissolution of Last Choice Real Estate Corp., pursuant to §§ 1104 and 1111 of the Business Corporation Law.

- B. And upon such dissolution, distribution to petitioner of fifty percent (50%) of the net assets of Last Choice Real Estate Corp. according to his share;
- C. Compelling Martin Coven to render an accounting to petitioner for the affairs of Last Choice Real Estate Corp.;
- D. Awarding petitioner his share of the rental income from November 2002 to the present;
- E. Awarding petitioner damages in an amount to be determined at trial but in no event less than \$1,000,000.00;
- F. Awarding petitioner punitive damages in an amount to be determined at trial but in no event less than \$1,000,000.00;
- G. Dispensing with publication requirements pursuant to relevant case law concerning a closed corporation;
- H. For the costs and disbursements of this action; and
- I. For such other and further relief as this Court may deem just and proper,

is determined as hereinafter set forth.

FACTS

Robert Cohn, petitioner, and Martin Cohn, respondent, are each 50% shareholders of Last Choice Real Estate Corporation (hereinafter "LCRC").

PETITIONER'S CONTENTIONS

Petitioner contends that a judicial dissolution of LCRC should be granted on the grounds that there is dissension and deadlock between its two shareholders.

RESPONDENT'S CONTENTIONS

Respondent asserts that the petitioner has not provided sufficient evidence to prove that dissension exists between the shareholders.

DISCUSSION

A petition for judicial dissolution of a corporation may be brought pursuant to Business Corporation Law § 1104, which provides, **inter alia**:

"(a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of one-half of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

- (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
- (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
- (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders."

"In the case of a close corporation the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation". (**Molod v. Berkowitz**, 233 A.D.2d 149, N.Y.A.D., 1st Dept. 1996). In such a proceeding the petitioner must provide sufficient evidence that one of the criteria for dissolution has been met. Put another way, the issue herein must be whether a deadlock, in fact, exists (see, **Matter of Kaufman**, 225 AD2d 175, 640 NYS2D 569, 2ND Dept., 1996).

In the instant case, the petitioner is devoid of adequate evidence of any of the grounds of §1104 as to internal dissension in LCRC. Although a pleading verified on the basis of personal knowledge may be used as an affidavit (CPLR 105 [u]), here, the petitioner's pleading was not verified on the basis of personal knowledge. (**Riverhead Building Supply, Corp. v. Regine Starr, Inc.**, 249 A.D.2d 532, N.Y.A.D., 2nd Dept., 1998) The verification of the pleading by the petitioner's attorney is not a valid substitute

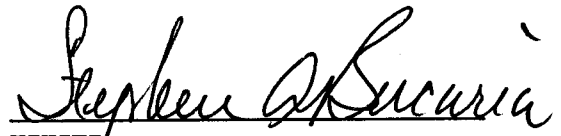
for the petitioner's personal affidavit. (*Id.*) Thus, the petitioner neither submitted an affidavit of merit nor any other evidence in support of his assertion that internal dissension exists between the shareholders of LCRC. The court does not find it to be excusable that the petitioner did not personally verify the pleading due to the fact that he resides out-of-county.

Accordingly, petitioner's order to show cause for judicial dissolution is **denied**, and the petition is **dismissed**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated JUL 18 2007


XXX J.S.C.

ENTERED

JUL 23 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**