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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

In the Matter of the Application of JOSEPH DIMARIA, the holder of more than 20 percent of all outstanding shares of BAYSIDE PIZZA CORP., and JJM PIZZA CORP., and CASCARINO's REALTY CORP.,

Plaintiff,

INDEX NO.:006859/2011
MOTION DATE: 9/19/2011
MOTION SEQUENCE: 1

-against-

For the Dissolution of JJM PIZZA CORP., BAYSIDE PIZZA CORP., and CASCARINO's REALTY Corp., three domestic corporations,

Defendant.

The following papers read on this motion:

Order to Show Cause	1
Memorandum of Law	2
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In a dissolution proceeding pursuant to, *inter alia*, Business Corporation Law § 1104-a the petitioner Joseph DiMaria moves by order to show cause for *inter alia*, an order: (1) appointing a temporary receiver to operate Bayside Pizza Corp., JJM Pizza Corp. and Cascarino's Realty Corp., and (2) directing the respondents to produce stated corporate books and records.

The respondent corporations JJM Pizza Corp ["JJM"] and Bayside Pizza Corp

["Bayside"] "are large well known, popular Italian restaurants" located in northeast Queens, which have developed a popular following under the trade name "Cascarinos" (Resps' Mem of Law, ¶ 1).

The petitioner, Joseph DiMaria, currently holds a 30% shareholder interest in Bayside and also serves as a director of that corporation (Pet., ¶¶ 6-7). Additionally, DiMaria owns 20% of the outstanding shares of JJM in which he serves as a director and president (Pet., ¶¶ 15-16). Lastly, DiMaria is also a director of, and the holder of a 25% shareholder interest in, Cascarino Realty Corp ["Cascarino"], which owns the property on which Bayside is situated (Pet., ¶¶ 7, 15-16). James Coady and his brother Vincent Coady, collectively own the remaining, majority shareholder interests in Cascarino, Bayside and JJM (Pet., ¶¶ 9-10, 16-17).

According to the petitioner, both Bayside and JJM are profitable entities, with JJM currently grossing approximately $2.1 million, while Bayside grosses some $1.1 million (Pet., ¶ 18). The real property owned by Cascarino is allegedly worth $1 million (Pet., ¶¶ 18-19).

DiMaria was an original founder of JJM, d/b/a, "Cascarino's Pizza" (Pet., ¶¶ 11-16). At the time JJM was founded, it was allegedly agreed by all of JJM's principals that DiMaria would play an active management role in JJM and continue to serve as a salaried employee (Pet., ¶¶ 14-15; 17-20). Later, DiMaria and the Coadys formed Bayside and Cascarino's acquired the real property on which it is currently being operated (Pet., ¶¶ 15-16).

However, commencing in early February of 2010, the Coadys allegedly began to engage in oppressive, dictatorial and improper conduct towards DiMaria. Specifically, they: (1) "locked out" DiMaria from both Bayside and JJM; (2) terminated his employment, salary and health benefits; (3) excluded him from all corporate decision making processes; (4) failed to make distributions and allegedly diverted corporate assets to themselves; and (5) also denied him access to corporate bank accounts and corporate information, thereby precluding him from meaningfully exercising his rights as a shareholder (Pet., ¶¶ 20-35, 37-38).

However, it is undisputed that approximately a year prior to the June, 2011 commencement of the within proceeding, the Coadys – through Bayside and JJM as plaintiffs – instituted their own action against DiMaria. In that action, they accused DiMaria of misappropriating corporate funds and violating of his fiduciary duties as a Bayside/JJM

shareholder, director and officer (Pet., ¶¶ 21-22). Specifically, the complaint alleges that DiMaria did so by, *inter alia*, opening a nearby Italian restaurant which currently competes with JJM and Bayside. Moreover, the complaint further avers, *inter alia*, that DiMaria misappropriated JJM's funds, stole certain key employees, and also diverted business and good will to his new restaurant (Pet., Exh., "G"; Cmplt., ¶¶ 50-70; Rasps' Mem. of Law, ¶¶ 8-10; 11; 18-20-24; 26).

By petition dated May, 2011, the petitioner commenced the within proceeding, alleging in sum, that Vincent and James Coady have since engaged in oppressive conduct within the meaning of to BCL § 1104-a, thereby entitling him to dissolution of all three corporate respondents (Pet., ¶¶ 6-8). The petition also requests the appointment of a temporary receiver and a valuation of DiMaria's shares in each involved corporate entity (Pet., ¶¶ 40, 41-44; 51).

At approximately the same time, DiMaria commenced the subject proceeding, he moved pre-answer by order to show cause for, *inter alia*, the appointment of a temporary receiver, *pendent lite*, and access to stated, corporate books and records.

Upon review of the order to show cause, this Court struck the decretal paragraphs thereof which authorized the appointment of a receiver, but directed the respondents to produce, "on the return date of this Order," "a schedule of the Corporate assets and liabilities, and the names and addressees of each shareholder and of each creditor and claimant [of the respondent-corporations], including any with unliquidated or continent claims, and any with whom the corporation[s] * * * [have] unfulfilled contracts * * *" (Order to Show Cause at 2 [1st decretal paragraph]).

The petitioner's order to show cause is now before the Court for review and resolution of relief sought on the motion. The motion should be granted to the limited extent indicated below.

Specifically, the relief granted by the Court upon its original review of the petitioner's application shall be continued, *i.e.*, its directive with respect to the production of stated records, books and information (BCL § 624[b], [c], [f]; *Dwyer v. DiNardo & Metschl, P.C.*, 41 AD3d 1177; *Troccoli v. L & B Contract Industries, Inc.*, 259 AD2d 754). However, those branches of the motion which are for the appointment of a temporary receiver and for the ultimate relief sought – dissolution of the respondent-corporations – are denied at this preliminary juncture.

In sum, BCL § 1104-a, authorizes the "holders of 20% or more of the outstanding shares of a corporation to present a petition for dissolution based on any of several enumerated grounds, including oppressive acts by the directors or those in control of the corporation" (*Matter of Seagroatt Floral Co., Inc.*, 78 NY2d 439, 444 [1991]; *Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72-73 [1984]; *In re Parveen*, 259 AD2d 389, 391).

The Court of Appeals has equated the term "oppressive" conduct as utilized by BCL § 1104-a[a][1], to mean in part whether the acts complained of substantially defeat "the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise" (*Matter of Kemp & Beatley, Inc., supra*, 64 NY2d 72-73; *Burack v. I. Burack, Inc.*, 137 AD2d 523, 526; *In re Maybaum*, ___Misc.3d ___, 2005 WL 287391 [Supreme Court, Nassau County, 2005]; *Marciano v. Champion Motor Group, Inc.*, ___Misc.3d___, 2007 WL 2846933 [Supreme Court, Nassau County 2007] *see also*, *In re Charleston Square, Inc.*, 295 AD2d 425). "Whether the expectations of the complaining shareholder are reasonable must of course be determined on a case-by-case basis" (*Matter of Burack, supra,* 137 AD2d 523, 526 *see also*, *Matter of Kemp & Beatley, Inc., supra*, at 73).

Relatedly, "[a] shareholder whose own acts result in the complained of oppression cannot seek dissolution of the corporation, utilizing Business Corporation Law § 1104-a, on the basis of those very acts" (*In re Maybaum, supra*, 2005 WL 287391 *see* , *Matter of Pace Photographers, Ltd. [Rosen]*, 71 NY2d 737, 745-746 [1988]; *Matter of Kemp & Beatley, Inc., supra,* at 74; *Cassata v. Brewster-Allen-Wichert, Inc.*, 248 AD2d 710, 711 *cf., In re Verdeschi*, 63 AD3d 1084, 1085).

It is settled that "[t]the appropriateness of an order of dissolution pursuant to Business Corporation Law § 1104-a 'is in every case vested in the sound discretion of the court considering the application'" (*Matter of Fancy Windows & Doors Mfg. Corp.*, 244 AD2d 484, *quoting from, Matter of Kemp & Beatley, Inc., supra*, 64 NY2d 63, 73; *In re Parveen, supra*, 259 AD2d at 391-392), and also that "[a] corporation should be dissolved only as a last resort" (*In re Maybaum, supra*; *Application of Ng*, 174 AD2d 523, 526).

Here, and upon the relatively barren, pre-discovery factual record presented, the Court agrees that factual issues exists with respect to the petitioner's allegations and claims or improper

and oppressive conduct (*see generally, In re WTB Properties, Inc.*, 291 AD2d 566, 567; *Matter of Steinberg*, 249 AD2d 551, 552; *Cassata v. Brewster-Allen-Wichert, Inc., supra*, 248 AD2d at 711; *Matter of Kournianos*, 175 AD2d 129, 130; *Autz v. Fagan*, ___Misc.3d___, 2007 WL 2701305, at 2 [Supreme Court, Nassau County 2007]; BCL §1109). More specifically, and at this juncture, there are hotly disputed claims and credibility issues relating to the parties' respective actions – including the petitioner's own pre-petition conduct (*see, Application of Glamorise Foundations, Inc., supra*, 228 AD2d 187, 189) – which cannot be summarily resolved as a matter of law (*see, Matter of Rosen*, 102 AD2d 855; *In re Maybaum, supra*, 2005 WL 287391 *see also, Cassata v. Brewster-Allen-Wichert, Inc., supra*, 248 AD2d at 711; *Matter of Ricci v First Time Around*, 112 AD2d 794). In sum, "[t]he conflicting affidavits submitted by the parties raise questions of fact regarding the merits of the petition and the appropriate remedy," if any, to be granted (*Matter of Steinberg, supra,* 249 AD2d 551, 552; *Matter of Fancy Windows & Doors Mfg. Corp., supra*, 244 AD2d 484, 485; *Cassata v. Brewster-Allen-Wichert, Inc., supra*; *Giordano v. Stark, supra,* 229 AD2d 493, 494; *Matter of Rosen, supra*, 102 AD2d 855; *Autz v. Fagan, supra,* at 2; *Ziffer v. Tapper*, ___Misc.3d ___, 2011 WL 5325719 [Supreme Court, Nassau County 2011]).

That branch of the motion which is for the appointment of a temporary receiver is similarly denied. It is settled that "courts of equity exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits" (*Application of Androtsakis*, 139 AD2d 471, 472 *see, Hoffman v. Hoffman,* 81 AD3d 600; *Quick v. Quick,* 69 AD3d 828; *Matter of Steinberg, supra,* 249 AD2d 551 *see also*, CPLR 6401[a]; BCL §§ 1113, 1202[a][1]).

More specifically, the drastic remedy of the appointment of a receiver will be granted upon "[a] detailed evidentiary showing" of irreparable loss (*Scharff v. SS & K Partnership*, 187 AD2d 645, 646-647 *see, Quick v. Quick, supra,* 69 AD3d 828; *In re Armienti*, 309 AD2d 659, 661), *i.e.*, upon "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (*Natoli v Milazzo*, 65 AD3d 1309, 1310; *Vardaris Tech, Inc. v. Paleros Inc.*, 49 AD3d 631, 632; *Schachner v.*

Sikowitz, 94 AD2d 709).

The Court in its discretion finds that the petitioner has failed to demonstrate that the "appointment of a receiver is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties" (*Matter of Steinberg, supra*, 249 AD2d 551, 553 *see also, Hoffman v. Eagle Box Company, Inc.*, 305 AD2d 544, 545; *Matter of Kristensen v Charleston Sq.*, 273 AD2d 312; *Schachner v. Sikowitz, supra*, 94 AD2d 709; *Marciano v. Champion Motor Group, Inc.*, ___Misc.3d ___, 2007 WL 4473342 [Supreme Court, Nassau County 2007]; BCL §§ 1113, 1202[a]). It bears noting that insofar as discernable from the petition's allegations, the subject corporations are currently profitable going concerns (*Matter of Rosen, supra,* 102 AD2d 855 *see, Matter of Steinberg, supra*, 249 AD2d at 551-553 *cf., Application of Glamorise Foundations, Inc., supra*, 228 AD2d 187, 189). The petition's allegations that, *inter alia*, there is "reason to be concerned about the financial well being" of the corporations, are unsubstantiated and conclusory in nature (Pet., ¶¶ 18, 43-46).

Lastly, if they have not done so already, the respondents shall produce the documents and information referenced in the first decretal paragraph of the original order to show cause signed by the Court.

The Court has considered the petitioner's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the order to show is granted to the extent that the respondents shall produce the documents and information referenced in the first detrital paragraph of the original order to show cause, and it is further,

ORDERED that the petitioner's order to show cause is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 28, 2011

J.S.C.

ENTERED
DEC 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE