To be Argued by:
WILLIAM F. MACREERY
Time: 15 Minutes

New York Supreme Court

Appellate Division - Second Department

Docket Nos. 2009-5307
2009-5309

In the Matter of the Application of
HERMAN I. PORITZKY, Holder of
One-Half of all Outstanding Shares
Entilted to Vote in an Election of
Directors,

Petitioner-Respondent,

For the Dissolution of DREAM WEAVER
REALTY, INC., A Domestic Corporation

Pursuant to Section 1104 of the
New York Business Corporation Law,

STEPHEN T. DeNAME and DREAM
WEAVER REALTY, INC.,

Respondents-Appellants.

BRIEF FOR RESPONDENTS-APPELLANTS

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON – SECOND DEPARTMENT

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In the Matter
of
The Application of Herman I. Poritzky,
Holder of One-Half of All Outstanding
Shares Entitled to Vote in an Election
Of Directors,

Petitioner-Respondent,

Docket Nos. 2009-5307
2009-5309

For the Dissolution of Dream Weaver,
Realty, Inc., a Domestic Corporation,

Pursuant to Section 1104 of the New York
Business Corporation Law,

Stephen T. DeName and Dream Weaver
Realty, Inc.,

Respondents-Appellants,

-and-

Robert David Goodstein, Receiver-Respondent.

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STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 1336/09.

2. The full names of the original parties are as set forth above. There have been no changes except that Robert David Goodstein was appointed receiver.

3. These proceedings were commenced in the Supreme Court of the State of New York, County of Westchester.

4. These proceedings were commenced by the filing and service of an order to show cause and petition on or about January 20, 2009. Issue was joined on or about February 23, 2009.

5. This is a proceeding seeking to dissolve Dream Weaver Realty, Inc., a domestic corporation.

6. The appeal is from two Orders of Hon. Kenneth W. Rudolph dated April 21, 2009.

7. The appendix method is not being used. The appeal is upon a fully reproduced record.

8. The Orders on appeal were not rendered after a hearing or trial.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON – SECOND DEPARTMENT

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BRIEF OF THE RESPONDENTS-APPELLANTS STEPHEN T. DeNAME AND DREAM WEAVER REALTY, INC.

PRELIMINARY STATEMENT

This is an appeal from two separate orders of Hon. Kenneth W. Rudolph that were entered on April 23, 2009 in the above captioned proceeding (4-7, 9-10)[1]. The proceeding was brought by the petitioner Herman I. Poritzky (the "Petitioner" or "Mr. Poritzky") pursuant to Section 1104 of the Business Corporation Law against the respondents Steven T. DeName ("Mr. DeName") and Dream Weaver Realty, Inc. ("Dream

[1] Numbers in parentheses refer to pages in the record on appeal, unless otherwise indicated.

Weaver" and collectively referred to with Mr. DeName as the "Appellants"), seeking judicial dissolution of Dream Weaver and the appointment of a receiver. One of the orders on appeal granted the petition over the Appellants' opposition, without a hearing, and appointed Robert David Goodstein as receiver (the "Receiver") of the dissolved corporation to liquidate Dream Weaver's assets (4-7). The second order on appeal denied, as moot, the Appellants' motion seeking to disqualify Kenneth Gunshor ("Mr. Gunshor") as the petitioner's attorney based on conflict of interest and his prior representation of Dream Weaver and the advocate witness rule, in view of the court's decision and order granting the petition (9-10).

This brief is submitted on behalf of the Appellants. For the reasons that follow, we respectfully submit that both orders should be reversed, the case should be remanded for a hearing on contested issues of fact regarding the grounds alleged for dissolution and the petitioner's good faith and oppressive conduct, and that Mr. Gunshor should be disqualified from acting as Mr. Poritzky's attorney in the proceeding.

STATEMENT OF FACTS

Dream Weaver is a real estate holding corporation organized under the laws of the State of New York, having its principal office and place of business located in Westchester County, New York (18, 42).

In July 1996, the Petitioner hired Mr. DeName to work for Mr. Poritzky's lending business and to manage properties owned by the Petitioner or real estate companies in which Mr. Poritzky had an interest.[2] At all times thereafter Mr. DeName occupied himself in seeking out opportunities to extend loans secured by real property, and to locate investors willing to advance monies to fund such loans. Mr. DeName was also responsible for the day to day operations of 3-D Funding and real estate companies, including Dream Weaver, which the Petitioner was unwilling or unable to perform (92).

The Appellants contend that when Mr. Poritzky hired Mr. DeName, 3-D Funding's and Dream Weaver's income was insufficient to pay Mr. DeName compensation comparable to that paid by similar businesses for the type of work performed by Mr. DeName[3]. The Appellants claim that in order to keep Mr. DeName associated with the business and to perform

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[2] The lending business was formerly know as Poritzky Funding, Inc. and is now know as 3-D Funding, Inc. ("3-D Funding"). 3-D Funding is involved in a separate lawsuit brought by Poritzky seeking an accounting and payment of any amounts found to be owed to him by DeName and 3-D Funding.

[3] The Petitioner has disputed the claims and contentions made by the Appellants in the court below.

duties that Mr. Poritzky was unwilling or unable to perform, on July 27, 2000, Mr. Poritzky, Mr. DeName and Mr. Poritzky's wife, Elaine Hartel, entered into a written Shareholders' Agreement (93). In addition to other matters, the Shareholders' Agreement provided that Mr. DeName and Mr. Poritzky would be equal shareholders of the capital stock in the corporations specified therein, including Poritzky Funding, Inc., now known as 3-D Funding, and Dream Weaver (20, 29-32).

Subsequent to July 27, 2000, and up until approximately mid 2004, Mr. DeName performed all of his duties for Dream Weaver without compensation from Dream Weaver. From between mid 2004 and March 2008, Mr. DeName received only approximately $1,700 per month from Dream Weaver as management fees, and at all times subsequent to March 2008, Mr. DeName has received no compensation of any kind from Dream Weaver for the duties he has performed for Dream Weaver (93-94).

Subsequent to July 27, 2000, and up until approximately July 2005 when their relationship in 3-D Funding changed, Mr. Poritzky also received distributions from 3-D Funding, and Dream Weaver, on an equal basis with Mr. DeName (94).

Dream Weaver's only significant assets at the present time consist of four parcels of real property (collectively, the "Four Parcels"), which were

all acquired by Dream Weaver after Mr. DeName became an officer, director and fifty percent shareholder of Dream Weaver (19, 42, 94).

One of the Four Parcels is located at 542 North Main Street in Brewster, New York (the "Brewster Property"), and is improved with a building that is operated as a restaurant by Rincon Chapin Corp. ("Rincon"). The Brewster Property was purchased by Dream Weaver from Bruno and Maria Ballessarre on September 11, 2001 for $133,400, which was contributed by the Petitioner (27, 94). Shortly after the closing on that sale, Mr. DeName and Mr. Poritzky executed an agreement (the "Modification Agreement") modifying the Shareholder's Agreement to take into account the contribution to the purchase price made by Mr. Poritzky. In addition to other matters, the Modification Agreement provides that upon the sale or transfer of the Brewster Property, Mr. Poritzky would be entitled to the return of the $135,000 he had contributed to purchase the property, and that the parties would otherwise share equally in all proceeds of such sale or transfer in excess of $135,000 and would also otherwise share in the profits and losses and income and expenses from the Brewster Property on an equal basis (94, 104-5).

The Brewster Property has monthly rents of approximately $3,000 and monthly expenses of approximately $2,100 for real property taxes and insurance (95).

The second of the Four Parcels is improved by a building located at 1380 Albany Post Road, in Croton-on-Hudson, New York (the "Post Road Property"), which is currently rented to Mr. Poritzky's son-in-law, Ronald Weinheim on a month to month tenancy at a rental of approximately $1,400 per month and has expenses of approximately $3,500 per month, for a monthly operating loss of approximately $2,100 (95).

The Post Road Property was purchased by Dream Weaver in 2002 for $275,000, which was financed by private investors. It was subsequently refinanced with a conventional bank mortgage that was guaranteed by both Mr. Poritzky and Mr. DeName. The mortgage is now held by Hudson City Savings Bank with a current outstanding principal balance of approximately $265,813, and has a monthly payment of approximately $3,375.00 (95).

The third of the Four Parcels is located on Route 301 in the Town of Kent, New York (the "Route 301 Property"), and was purchased by Dream Weaver in December 2004 from Edward and Barbara Klein for $175,000, financed ultimately by individual private investors who are still owed approximately $178,000 (95).

A delicatessen business was conducted on the Route 301 Property until approximately two years ago, when both Mr. Poritzky and his attorney, Mr. Gunshor, demanded that the business cease operations due to ongoing losses. The Appellants contend that prior to the cessation of business, Mr. DeName contributed approximately $50,000 worth of equipment to the Route 301 Property that he had purchased from his own funds in the hopes of attracting a purchaser for the land and business as a going concern (95-6). The Petitioner disputes this contention (136-7).

The last of the Four Parcels consists of an unimproved lot located at 1325 Lincoln Terrace in Peekskill, New York (the "Lincoln Terrace Lot"), which Dream Weaver purchased from Barbara Shuler in May 2003 for approximately $5,000 in cash and the satisfaction of approximately $10,000 in accrued real property taxes, using funds that were contributed equally by Mr. DeName and Mr. Poritzky (96).

The Appellants contend that DeName expended considerable time and personal resources for more than two years to manage and maintain all Four Parcels currently owned by Dream Weaver, which at present have a net operating loss (96).

During the last two one-half years, Dream Weaver's principal business activity was devoted towards the sale of its properties. Mr.

DeName and his attorney, Gerald Klein, Esq., and Mr. Poritzky and his attorney, Mr. Gunshor, attended meetings, had numerous discussion, conducted extensive negotiations and exchanged correspondence in attempting to sell the Four Parcels (96).

Mr. Klein assumed primary responsibility for the sale of the Post Road Property, and conducted negotiations with ARSA, LLC, the proposed purchaser of the Post Road Property; and its attorney, Philip Hersh, Esq. The Appellants claim that Mr. Gunshor assumed responsibility for the sale of the Brewster Property. To that end, Mr. Gunshor conducted all of the negotiations on behalf of Dream Weaver with the proposed buyer, Rincon Chapin Corp. and its attorney, John Savoca, Esq. for the sale of the Brewster Property to the operator of the restaurant business conducted on that property. Mr. Gunshor reported on the progress of the negotiations (42-3). He advised DeName and Mr. Klein that the sale had been fully negotiated, and prepared a draft contract and consents for the sale of the Brewster Property (50-65) identifying himself as the attorney for Dream Weaver (57-8, 60).

From June to December 2008, further progress was made toward selling both the Brewster Property and the Post Road Property, and by then, it appeared that Rincon Chapin Corp. and ARSA, Inc. were prepared to

purchase those properties on terms that had been negotiated between Dream Weaver and the respective purchasers (43).

In early December 2008, Mr. Gunshor requested a meeting to discus those sales and possible sales of the Lincoln Terrace Lot and the Route 301 Property. According to Mr. DeName, both Mr. Gunshor and Mr. Poritzky represented that they had received offers of $225,000 from a prospective purchaser of the Route 301 Property and $80,000 from a prospective purchaser of the Lincoln Terrace Lot (43).

The Appellants claim that Mr. Klein sought and received assurances from Mr. Gunshor that agreements reached with respect to the Brewster Property and the Post Road Property would not be held up by a failure to reach agreement as to all of the details for the sales of the Route 301 Property and/or the Lincoln Terrace Property, as a prelude to the meeting. After receiving those assurances, a meeting was held on December 12, 2008 as requested by Mr. Gunshor, which was attended by Mr. Klein, Mr. Gunshor, Mr. Poritzky and Mr. DeName (44).

The Appellants contend that at the meeting held on December 12, 2008, both Poritzky and DeName agreed to all of the terms for the sales of the Post Road Property to ARSA, LLC and the Brewster Property to Rincon Chapin Corp., as well as all credits, debits and distributions that should be

made with the proceeds of those sales among Dream Weaver, Mr. Poritzky and Mr. DeName. The Appellants further contend that the parties also formed an outline or plan for selling the Lincoln Terrace Lot and the Route 301 Property, and agreed on the purchase prices that would be acceptable to Mr. Poritzky and Mr. DeName on those sales, namely $225,000 for the sale of the Route 301 Property and $80,000 for the sale of the Lincoln Terrace Lot (44, 97-8).

Following the meeting held on December 12, 2008, Mr. Klein prepared an agreement for the sale of the Post Road Property and the Brewster Property incorporating everything that the Appellants contend had been agreed to at the meeting, and sent the agreement to Mr. Gunshor on December 18, 2008 (44, 66-71, 97-8).

On December 22, 2008 Mr. Gunshor responded. Contrary to the assurances that the Appellants claim had been given, Mr. Poritzky insisted on an all or nothing agreement, encompassing all four properties. Furthermore, Mr. Poritzky subsequently retracted on parts of the agreements that the Appellants claim had been reached at the meeting held on December 12, 2008 with respect to sales of the Brewster Property and the Post Road Property (44-5). The Appellants claim that Mr. Poritzky simply repudiated those agreements, just as he had refused to honor his word and other oral

promises he made to Mr. DeName concerning other business dealings in the past. Furthermore, Mr. Poritzky demanded that Mr. DeName pay the Petitioner interest on the amount that Mr. Poritzky contributed to acquire the Brewster Property, and to forego his claim for the value of improvements that Mr. DeName made to the Route 301 Property. According to Mr. DeName, Mr. Poritzky made these demands on the threat that the Petitioner would commence this dissolution proceeding. The Appellants contend that when Mr. DeName refused to acquiesce in Mr. Poritzky's demands, the Petitioner made good his threat and commenced this proceeding (44-5).

THE QUESTIONS PRESENTED

1. Were disputed issues of material fact presented by the Appellants which required a hearing?

The court below implicitly answered this question in the negative.

2. Should Mr. Gunshor be disqualified from acting as the Petitioner's attorney in this case?

The court below did not reach this question on the merits, holding that the Appellants' motion to disqualify Mr. Gunshor was rendered moot by the court's decision granting the petition.

ARGUMENT

Point I

THE COURT BELOW WAS REQUIRED TO HOLD A HEARING ON THE CONTESTED ISSUES OF FACT CONCERNING THE PETIUTIONER'S BAD FAITH IN BRINGING THIS PROCEEDING

Section 1109 of the Business Corporation Law provides, as follows:

> At the time and place specified in the order to show cause, or at any other time and place to which the hearing is adjourned, the court or the referee shall hear the allegations and proofs of the parties and determine the facts. The decision of the court or the report of the referee shall be made and filed with all convenient speed.

This section requires a hearing whenever there are disputed material issues of fact, where the parties' allegations and proof will be considered. *In re WTB Properties, Inc.*, 291 A.D.2d 566 (2nd Dep't 2002); *Matter of Allchester Development Co., Inc.*, 34 AD2d 660 (2nd Dep't 1970).

The court below did not conduct a hearing on any issue of fact. Instead, the court accepted the crux of the Petitioner's argument that grounds for dissolution based on a purported deadlock between the two shareholders and directors of Dream Weaver were established as a matter of law. In reaching this decision, the court apparently relied on the conceded facts that the Mr. Poritzky and Mr. DeName were the sole officers, directors and fifty percent shareholders of Dream Weaver, and disagreed strongly on a number

of matters that would ultimately require judicial intervention of some kind to resolve.

However, not every disagreement between shareholders or directors is sufficient to cause a deadlock, or serve as sufficient grounds for dissolving a corporation. Grounds for dissolution exist only where the disagreements are such that the corporation can not function or conduct business. *Matter of Wollman v. Littman,* 35 A.D.2d 935 (1st Dep't 1970); *In re Clemente Bros., Inc.* 12 A.D.2d 694 (3rd Dep't 1960); See also *In re Rosen,* 102 A.D.2d 855 (2nd Dep't 1984).

We respectfully submit that the areas of disagreement relied on by the court below did not involve the conduct of business which had been pursued by both sides, namely the sale of Dream Weaver's assets, the Four Parcels. Instead the areas of disagreement involved how the proceeds of sale of Dream Weaver's assets should be distributed between the two shareholders. Based on the Appellant's version of the facts, dissolution and receivership, with all of their attendant costs and expense, were not required in connection with the sale of the Four Parcels. Indeed, judicial intervention to determine how the proceeds of sale should be distributed would only come into play after the sales were consummated. The parties could just as easily continue on the course that had already been agreed on, namely the sale of the Four

Parcels, so long as both sides acted in good faith. This is particularly important when the benefit or harm caused by the additional expense of dissolution and receivership are considered.

Dissolution should not be ordered unless it is established that dissolution will be beneficial to the stockholders. See, *In re Seamerlin Operating Co.*, 307 N.Y. 407 (1954); In *re Clemente Bros., Inc.*, 19 A.D.2d 568 (3rd Dep't 1963), affd. 13 N.Y.2d 963. As noted by the court below in its decision, if the sales of the Four Parcels were consummated at the prices agreed to by both DeName and Poritzky, the sales would generate more than a net total of approximately $540,000 for Dream Weaver and distribution to the parties. The result sought by the Petitioner within the context of dissolution proceedings, namely the sales of the Four Parcels with a receiver, could not possibly produce a greater return than concluding the sales that were already negotiated before this proceeding was commenced without a receiver.

The only thing to prevent the sales would be bad faith failure to pursue what had been agreed upon by the parties. The Appellants have accused the Petitioner of precisely this type of bad faith. This accusation of bad faith, supported by sworn statements of fact, presents a material issue of fact that requires a hearing. As stated by the court in *In re Clemente Bros.,*

Inc., supra, 19 A.D.2d 568 (3rd Dep't 1963) at page 569, "As between contesting stockholders the good faith of petitioner is an issue in the proceeding." See also, *Matter of Hayes v. Festa*, 202 A.D.2d 277 (1st Dep't 1994) and *In re Rosen*, supra, 102 A.D.2d 855 (2nd Dep't 1984).

Good faith required Mr. Poritzky to keep his word and pursue sales that had been agreed on. Even the morals of the marketplace require a party to act with honesty in fact as a threshold standard of good faith. See, UCC §1-201(19). By failing to adhere to his word, the Petitioner breached the duty of good faith that he owed to Mr. DeName.

The Petitioner's conduct, as presented by the Appellants, was worse than a failure to act in simple good faith. The coercive threat to bring about harm if Mr. DeName refused to accede to his demands is precisely the type of conduct that was condemned in *Matter of Hayes v. Festa*, supra, 202 A.D.2d 277 (1st Dep't 1994). If a deadlock in proceeding with the orderly sale of Dream Weaver's assets existed, then the Appellants have put forth proof to show that the deadlock was created by the Petitioner's bad faith and misconduct. At the very least, the Appellants were entitled to a hearing on this issue, and the court's summary decision to grant the petition was error.

Point II

MR. GUNSHOR SHOULD BE DISQUALIFIED FROM ACTING AS THE PETITIONER'S ATTORNEY IN THE ONGOING PROCEEDINGS IN THIS CASE

In denying the Appellants' motion to disqualify Mr. Gunshor from acting as the Petitioner's attorney, the court below did not reach the merits of the claims made by the Appellants in support of the motion. Instead, the court denied the motion as moot, in light of its decision and order judicially dissolving Dream Weaver, and appointing a receiver to sell Dream Weaver's real property.

We respectfully submit that the court's conclusion that the motion was moot was plainly wrong. The proceeding is ongoing, and will remain so until after Dream Weaver's Four Parcels are sold. Furthermore, the Appellants' counterclaims based on the Petitioner's breach of contract, breach of good faith and coercive conduct remain to be decided in the proceeding, as well as the parties' respective claims to the proceeds of the sales. As stated by the court in its decision and order on appeal granting dissolution, it was ordered that "further application may be made to this Court under the provisions of this order as the receiver may be advised as proper and necessary for his instruction in the collection, administration, and

distribution of the assets of the corporation, and any of the parties hereto may make such application to this Court as they may deem necessary and proper for the full and equitable distribution of the assets of the corporation" (7).

Turning to the merits of the Appellants' motion, we respectfully submit that a proper showing was made to require Mr. Gunshor's disqualification on the grounds of conflict of interest.

It is well settled that a lawyer may not both appear for and oppose a client on substantially related matters when the client's interests are adverse. *Solow v. Grace & Co.,* 83 N.Y.2d 303, 306 (1994). Section 1200.27 of the Disciplinary Rules of the Code of Professional Responsibility condemns such conduct in the following terms:

> **§1200.27. Conflict of interest – former client.**
>
> (a) Except as provided in section 1200.45 (b) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. 22 N.Y. CCRR, §1200.27.

The papers submitted by the Appellants conclusively showed that Mr. Gunshor had represented Dream Weaver in connection with the negotiation and proposed sale of the Brewster Property. The draft contract of sale which

Mr. Gunshor prepared for that purpose identified him as the attorney for Dream Weaver. Instead of following through on that agreement, Mr. Gunshor acted on behalf of Mr. Poritzky in bringing this dissolution proceeding and obtaining the appointment of a receiver for a sale of all of Dream Weaver's assets, including the Brewster Property. He has continued to act on behalf of the Petitioner during the proceeding. Consequently, the Appellants established: (1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related. As a result, the motion to disqualify Mr. Gunshor should have been granted. *Solow v. Grace & Co.*, supra, 83 N.Y.2d 303, 308 (1994).

It also appears that Mr. Gunshor personally participated in all that transpired in relation to the parties' attempts to sell Dream Weaver's assets. In particular, he participated in the meeting held on December 12, 2008, when the Appellants claim an enforceable agreement was reached for the sale of the Brewster Property and the Post Road Property. He was a witness to all of the material events that gave rise to the counterclaims raised in this proceeding, and should be called to testify regarding the same. He is, therefore, disqualified to act as the advocate for the Petitioner where it is likely he will be called as a witness on significant issues of fact. See,

Section 1200.21 of the Disciplinary Rules of the Code of Professional Responsibility. 22 N.Y. CCRR, §1200.27; *Elizabeth Street, Inc. v. 217 Elizabeth Street Corp.*, 301 A.D.2d 481 (1st Dep't 2003).

CONCLUSION

For all of the foregoing reasons, the orders appealed from should be reversed, Mr. Gunshor should be disqualified to act as the Petitioner's attorney, and the matter should be remanded for a hearing on the petition for dissolution of Dream Weaver.

Dated:Granite Springs, New York
November 23, 2009

Respectfully submitted,

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