

SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART VI SUFFOLK COUNTY

Present:

Hon SANDRA L. SGROI

MOTION DATE: 11-19-2004

SUBMITTED: 4-7-2005

MOTION NO.: 005 - MotD, 006-MotD

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In the Matter of the Application of DON  
ESTES, Holder of Fifty Percent of All  
Outstanding Shares of SLEEP  
IMPROVEMENT CENTERS, INC.,  
Petitioner

Reilly, Like, Tenety & Mescall  
Attorneys for Petitioner  
179 Little East Neck Road North  
P.O. Box 818  
Babylon, NY 11702

For the Dissolution of  
SLEEP IMPROVEMENT CENTERS, INC.,  
A Domestic Corporation

Kevin G. Mescall  
42 East Main Street  
East Islip, New York 11730

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Law Office of Cartier, Bernstein, Auerbach & Dazzo  
Attorney for Respondent Stephen Federico  
77 Medford Avenue  
P.O. Box 919  
Patchogue, NY 11772

Upon the following papers numbered 1 to 10 read on this order to show cause for dissolution of a corporation and cross petition for dissolution: Order to Show Cause and supporting papers 1-6; Notice of Cross Petition and supporting papers 7-10; it is,

**ORDERED** that this petition commenced by Don Estes for an order dissolving the corporation, Sleep Improvement Centers, Inc and the cross petition by Stephen Federico to compel the Petitioner to account for the assets of the corporation, to impose a surcharge and to dissolve the corporation are denied at this time and the petitioner is directed to comply with Business Corporation Law § 1106 (b) and, after complying with this section, re-notice the Petition and Cross Petition. The Petitioner may use the same index number when the petition is re-noticed.

The petitioner, Don Estes, alleges that Sleep Improvement Centers, Inc., is a closely held corporation consisting of two equal shareholders. Estes further alleges that he has been frozen out of the business through the actions of Steven Frederico, the other shareholder of the business and that differences prevent the shareholders from working together in the operation and management of the business.

This corporation was established in 1997 for the purpose of treating individuals with sleep apnea and other sleep disorders. Don Estes, Steven Frederico and David Z. Israelite, were the founders of the corporation and these three individuals were the sole shareholders and officers of the Corporation. In 1998, David Z. Israelite sold his shares of the corporation back to the corporation and Estes and Frederico became the only shareholders. It is un-controverted that Estes and Frederico now each own fifty (50%) per cent of the outstanding shares.

It is undisputed that Estes is responsible for the majority of the day to day business affairs of the corporation and is responsible for the finances. Frederico had minimal responsibilities for the management of the business and Estes alleges that he conducted a full time practice as a psychotherapist within the physical confines of the corporation's business location and was available on an "as needed" basis for the corporation's business.

Estes further alleges that when the corporation was established, he made the larger initial monetary investment in the business than Frederico and that after the business became profitable, Estes advised Frederico that he was going to have the corporation repay loans made by him to the corporation. According to Estes, Frederico made no provision to have his loans paid back to him by the corporation. Estes stated that prior to the loans being fully paid back, Frederico froze Estes out of the business by changing the locks to the doors of the corporation, taking control of the corporate records and taking other similar actions that prevented Estes from obtaining access to the corporation's records and business facility. He further alleges that Frederico has made unauthorized withdrawals and that Frederico has started a new company.

Frederico states that he and Estes agreed that Estes would handle the business and financial issues with the corporation and Frederico would supervise and manage the diagnostic services. Frederico however states that he contributed most of the initial capital contribution and contributed the office equipment. According to Frederico, Estes never provided him with financial records and in 2002 informed Frederico that the business was having financial difficulty and now owes creditors substantial sums of money.

Business Corporation Law § 1106 requires, among other things, that a copy of an order to show cause seeking dissolution must be published "at least once in each of the three weeks before the time appointed for the hearing thereon" as prescribed in the order, and that a copy of the order be served upon the New York State Tax Commission (hereinafter the Tax Commission) (Business Corporation Law § 1106 [b], [c]). While the Tax Commission has been served with a copy of the Petition, the Order to Show Cause has not been published as mandated by the Business Corporation Law. The Court will exercise its discretion in permitting the petitioner to amend the Order to Show Cause and petition and comply with the statutory requirements by properly publishing the petition (*see*, Business Corporation Law § 1107; *In re Ruivo*, 305 A.D.2d 688, 761 N.Y.S.2d 238, [2d Dep't 2003]; *In re WTB Props.*, 291 A.D.2d 566, 737 N.Y.S.2d 654, [ App. 2d Dep't 2002]).

*Matter of Dissolution of Sleep Improvement Centers, Inc.*

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Since both the Petitioner and the Respondent seek to dissolve the corporation, either party may prepare the order of publication for the Court's signature and the Court suggests that these two (2) parties split the monetary expense of the publication. The order seeking publication must also re-notice the petition and cross petition for a date certain and the Court requests that the parties re-notice the petition for a Tuesday. The Court will expedite this proceeding on the date that it is re-noticed because it has been pending for a period of time. The Petitioner is further directed to serve a copy of this order and the order of publication on the Tax Commission. The attorneys of the parties shall appear for a conference at 9:30 am on the return date of the re-noticed petition.

Dated: 5-12-05

  
SANDRA L. SGROI, J. S. C.