SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

In the Matter of the Application of
DONALD GOLD,

Petitioner,

INDEX No. 017735/10

MOTION DATE: Sept. 27, 2010
Motion Sequence # 001

for the Judicial Dissolution of

HAZARDOUS ELIMINATION CORP. and
CATHLEEN COLELLA a/k/a CATHY
COLELLA,

Respondents.

Pursuant to §1104-a of the Business Corporation Law.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... XX
Respondents Answer..... X

Petition for the judicial dissolution of Hazardous Elimination Corp is **denied** with leave to renew upon proper papers after December 16, 2010. Petitioner's application for a preliminary injunction is **denied**, except as to the financial disclosure ordered below.

This is a petition for the judicial dissolution of a corporation pursuant to § 1104-a of the Business Corporation Law. Petitioner Donald Gold is the owner of 49% of the stock of

respondent Hazardous Elimination Corp ("HEC"). HEC is engaged in the business of remediating asbestos, lead, and other hazardous substances in commercial and residential buildings.

Gold, who is a civil engineer, joined HEC in 1989. In 1995, Gold purchased the entire company. In February 1996, Gold sold 51% of the stock to respondent Cathleen Colella, who is now HEC's president. At the time Gold sold Colella her stock, he entered into a written employment agreement with HEC. The employment agreement provides that Gold is engaged as HEC's principal engineer. The agreement was to "continue indefinitely fom month to month," unless terminated earlier by Gold or the employer. The agreement further provides that the shareholders, acting by majority vote, may terminate Gold's employment for cause by giving notice of termination. "Cause" is defined as "immoral, illegal, or fraudulent" conduct, disclosure of confidential material, or engaging in a business in competition with the employer. Notice of termination is not effective until the employee has been provided with notice specifying the misconduct alleged and has been given an opportunity to meet with the shareholders.

On September 13, 2010, Colella sent Gold a letter, notifying him that he was suspended with pay, pending a meeting of the shareholders on September 24, 2010. By separate letter, Gold was advised that the purpose of the shareholders meeting was to remove him as a director and officer of the corporation.

On September 17, 2010, Gold commenced this proceeding for the judicial dissolution of HEC. Gold claims that, in addition to suspending him, Colella has been guilty of oppressive conduct and has wasted corporate assets. Gold alleges that Colella on behalf of HEC entered into a consulting agreement with JMB Associates, a company owned by William Battles, who is Colella's brother. In essence, the consulting agreement provides that Battles would replace Colella as head of marketing for HEC for a period not to exceed two years. For these services, JMB was to be paid $7,500 per month, plus travel and other business related expenses. The arrangement was necessary because in January 2010 Colella was diagnosed with breast cancer. In addition to requesting dissolution of HEC, Gold asserts causes of action for an accounting, breach of fiduciary duty, and breach of the employment agreement.

Pending dissolution of HEC, Gold seeks a preliminary injunction, restraining Colella from disbursing corporate funds other than in the ordinary course of business, calling a special meeting of the shareholders or directors, or terminating Gold's employment. Gold

seeks an order directing HEC to provide him with a statement of the corporation's assets and liabilities and to make available to him the books and records of the corporation. Gold seeks an order appointing himself as receiver of HEC and restraining creditors of the corporation from commencing any action against the corporation.

In opposition to the petition, Colella alleges that in 2006 Gold began commuting from Florida and he now devotes insufficient time to his work for HEC. Colella alleges that Gold has overbid on contracts, causing the jobs to be awarded to other remediation contractors. Colella asserts that HEC's customers have complained about Gold's work and requested that he not be assigned to their projects. Finally, Colella asserts that Gold entered into a subcontract with Airtek, a company owned by one of his friends, to perform air monitoring at the Delaware Aqueduct in Westchester. HEC is being sued by Airtek for breach of the subcontract and has incurred significant litigation costs.

Pursuant to Business Corporation Law § 1104-a, the holders of 20% or more of the shares of a corporation may present a petition for dissolution on the grounds that 1) those in control of the corporation have been guilty of illegal, fraudulent, or oppressive actions toward the minority shareholders, or 2) the assets of the corporation are being looted, wasted, or diverted for non-corporate purposes. In determining whether to proceed with involuntary dissolution, the court shall take into account: 1) whether liquidation is the only feasible means whereby petitioners may reasonably expect to obtain a fair return on their investment, and 2) whether liquidation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders (Id). In determining whether those in control have been guilty of oppressive conduct, the court must consider whether they have defeated the "reasonable expectations" held by the minority shareholder in committing his capital to the particular enterprise (***Gardstein v Kemp & Beatley***, 64 NY2d 63, 72 [1984]).

In any proceeding seeking judicial dissolution pursuant to BCL § 1104-a, any other shareholder or the corporation may, at any time within 90 days after the filing of the petition or at such later time as the court may allow, elect to purchase petitioner's shares at fair value and upon such terms as may be approved by the court (Business Corporation Law § 1118[a]). Such an election to purchase the petitioner's shares is irrevocable, unless the court determines otherwise (Id). If a shareholder or the corporation elects to purchase petitioner's shares but the parties are unable to agree on the fair value, the court, upon application of the prospective purchaser or petitioner, may stay the dissolution proceeding and determine the fair value of the shares as of the day prior to the date on which the petition was filed

(Business Corporation Law § 1118[b]).

Petitioner's employment agreement with HEC establishes that he reasonably expected to be employed by the corporation. However, a shareholder who acts in bad faith with a view toward forcing involuntary dissolution may not obtain relief under BCL § 1104-a (***Gardstein v Kemp & Beatley***, **supra** 64 NY2d at 74). Thus, if Gold neglected his responsibility to HEC or knowingly acted against HEC's interest by entering into an unfavorable deal with a friendly subcontractor, his discharge would not be oppressive action. However, the court need not determine whether Gold has acted in bad faith or whether Colella has engaged in oppressive action at this time.

Since the 90 day period for HEC or Colella to elect to purchase petitioner's shares has not expired, it would be premature for the court to order involuntary dissolution before December 16, 2010. Accordingly, petitioner's request for involuntary dissolution is denied with leave to renew after December 16, 2010, unless HEC or Colella offers to purchase petitioner's shares.

In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860 [1990]; see also Business Corporation Law § 1115). Respondent Colella has been ill, and the terms of the consulting agreement appear fair and reasonable. Thus, petitioner has not established a likelihood of success on his claim that respondents have wasted corporate assets. Petitioner's application for a preliminary injunction restraining respondents from disbursing corporate funds other than in the ordinary course of business is **denied**. Since petitioner has not shown that a receiver is necessary to preserve the property and carry on the business of HEC, petitioner's application that he be appointed receiver of HEC is **denied** (Business Corporation Law § 1113).

In view of the evidence of disloyalty and poor job performance, petitioner has not established a likelihood of success on his claim that respondents suspended him in violation of the employment agreement. Nor has petitioner established a likelihood of success that his discharge would be oppressive conduct. Moreover, if petitioner establishes that his termination is unlawful, he has an adequate remedy in the form of money damages. Petitioner's application for a preliminary injunction restraining respondents from calling a meeting of the directors or shareholders or terminating his employment is **denied**.

However, within 15 days of the date of this order, respondents shall serve petitioner with a statement of HEC's assets and liabilities and of each creditor of the corporation, including unliquidated and contingent claims (See BCL § 1106[a]). Within ten days of the date of this order, respondents shall make available to petitioner for inspection and copying under reasonable working conditions the financial books and records of HEC for three years preceding the date the petition was filed (See BCL § 1104-a[c]).

So ordered.

Dated NOV 24 2010

J.S.C.

ENTERED

NOV 29 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE