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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 10

In the Matter of the Petition of JEANIE HOLLAND, Holder of One-Half of all Issued and Outstanding Shares Entitled to Vote in an Election of Directors, and as a One-Half Member of the Limited Liability Company,

Petitioner,

INDEX NO.: 008871/2007
MOTION DATE: 08/29/2007
MOTION SEQUENCE: 001

For the Judicial Dissolution of ROMPER NURSERY, INC., a New York Corporation, Pursuant to Business Corporation Law Section 1104; and the Judicial Dissolution of ROMPER REALTY, LLC, a New York Limited Liability Company, Pursuant to Section 702 of the Limited Liability Company Law,

-against-

MARGARET A. ZACK,

Respondent.

The following papers read on this motion:

Order to Show Cause, Affirmation, Verified Petition, Affidavit & Exhibits Annexed.... 1
Memorandum of Law in Support..... 2
Affidavit of Margaret A. Zack, Affirmation in Opposition of Charles A. Singer, Verified Answer in Opposition to Petition for Dissolution and Cross-Petition for an Accounting of Shareholder & Exhibits Annexed..... 3
Reply Affirmation of Joshua M. Jemal, Affidavit of Jeanie Holland & Exhibits Annexed..... 4

Before the court is a petition brought pursuant to B.C.L § 1104(a)(3) and LLC § 702 for the judicial dissolution of a nursery school and the limited liability corporation which owns real property from which it, in part, operates. Also sought is the appointment of a receiver.

The parties each own 50% of the shares of Romper Nursery, Inc. and Romper Realty, LLC. The parties have run Romper Nursery since 1975. As of the date of bringing this petition in 2007, it was a successful nursery school, Pet. Memo of Law, p.2, in terms of enrollment and liquidity located in Great Neck and at the property on Hillside Avenue in East Williston owned by Romper Realty, LLC. During the summer a day camp operates on the same locations. Transportation by a school bus, under the control of Romper Nursery, is available.

There is no written shareholder agreement. Nevertheless the parties have delineated their duties clearly; petitioner hires and contracts with employees, registers students, fixes classroom operations, implements new programs, interviews parents and oversees parental relations. Respondent is responsible for the busing, accounting and bookkeeping. Each works on two separate days of the week. Respondent apparently also works from home. Each draws an equal salary and equal distributions when appropriate. Between 1989 and 2001 the parties did not speak to each other.

The petitioner seeks a dissolution pursuant to Business Corporation Law § 1104(a)(3) on the grounds that "intense, irreconcilable internal dissension" between the parties- the only two shareholders - dictates that dissolution would be beneficial to the share holders. Petitioner alleges the following divisive acts: waste of corporate assets and property; permitting child transportation on unsafe busses; dereliction of payroll duties; keeping school open in the presence of inclement weather; involving employees in management disputes.

Each allegation is denied or explained by respondent. The court is constrained to comment that the cause of certain irregularities, such as a delay in getting a payroll out, can be as readily explained by a sudden change in the historical allocation of responsibilities as by the described irresponsible conduct by respondent.

It is plain that the communications arrangement between the parties is unusual. Less so, the segregation of work days, which it is shown in the record makes meetings inconvenient to one owner or the other. The parties have not historically held Board or Directors meetings; now

that petitioner wishes to have a meeting respondent ignores the "notice." Yet, the system has inured to the benefit of the corporation according to the record now before me. Seemingly, each generation of new parents sends their children to the nursery school they attended.

However, it cannot be disputed that in or about 2004 or 2005 petitioner began to experience dissatisfaction with the arrangement. She commenced a proceeding that year which was withdrawn without prejudice so the parties could negotiate a resolution that was mutually acceptable.

The resolution focused on a buyout, not on adjusting their methodology for conducting business. When it became clear that neither was willing to pay fair consideration for the other's share, nor what a fair valuation might be, nor, even more importantly, which wanted to be the seller, this second proceeding for a judicial dissolution was commenced in early 2007. Since then the calendar nursery school year has completed and another session of summer camp has passed. It appears that while there is dissension, there is not deadlock. It appears that the public is not suffering. It appears that respondent does not want to divest herself of her interest in the business, or the real estate, but that she believes petitioner wants to work without her.

There is no evidence, nor factual proof, before the court that the personal animus between the shareholder-directors prevents efficient management and corporate success. Fazio Realty Corp. v Neiss, 10 A.D.3d 363 (2d Dept 2004). There is no basis for accepting petitioner's allegations of malfeasance as true; they have been sufficiently explained with the result that petitioner's good faith begins to look suspect. See Application of Glamorise Foundations, Inc., 228 A.D.2d 187 (1st Dept. 1996). That having been said, this proceeding is brought pursuant to section 1104(a)(3) of the Business Corporation Law which addresses the needs of the shareholders. It is of no moment why it exists. Matter of Validation Review Associates, Inc., 236 A.D.2d 477 (2d Dept. 1997); Weiss v Gordan, 32 A.D.2d 279, 281 (1st Dept 1969). It was in that later case that the law was laid down that a closely held corporation is akin to a partnership so that the although the corporation may outwardly exist, the shareholders need relief from internal dissension. Id.

Section 1104(a) of the B.C.L., in a section titled "Petition in case of deadlock among directors or shareholders," allows the court to dissolve a corporation where there is internal

dissension and two or more factions of shareholders are so divided that dissolution would ne beneficial to the share holders.

Section 1111(b) instructs that in making the decision whether to dissolve a corporation in a situation such as this, the benefit to the shareholders of a dissolution is of paramount importance, and it shall not be denied "merely because it is found that the corporate business has been or could be conducted at a profit." B.C.L. § 1111(b)(3).

Each case turns on its facts. The court cannot make a determination on the facts in the record whether this is a case of a business which is profitable, but the dissension is so pervasive that dissolution is warranted for the benefit of the shareholders. Wagner v. Dowbrowsky, 6 Misc. 3d 1041 (A) N.Y. Supp. 2004.

Accordingly, a hearing shall be held before Court Attorney/Referee Thomas Dana (Room 206, Second Floor) on April 21, 2008, at 10:00 A.M. The parties shall contact the court if they need assistance in preparing for the aforesaid hearing.

Counsel for petitioner shall serve respondent and file with the Clerk of the Court a Note of Issue and pay all appropriate fees for the filing thereof on or before April 7, 2008.

Dated: January 10, 2008

J.S.C.