

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33  
NASSAU COUNTY

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In the Matter of the Application of STEPHAN  
B. GLEICH, Beneficial Owner of One-Half  
of All Outstanding Shares Entitled to  
Vote in an Election of Directors ,

Petitioner(s),

MOTION DATE: 2/15/11

INDEX NO.: 19767/10

For the Dissolution of ICELAND  
INCORPORATED, A Domestic Corporation,  
and STEPHAN J. HAENEL,

SEQ. NOS. 1-3

Respondent(s).

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The petitioner's motions, pursuant to BCL §§1104 and 1202, for a) a judicial dissolution of the respondent Iceland Corporation (hereinafter Iceland) and b) the appointment of a receiver and the respondents' motion, pursuant to CPLR §404(a) and 3211(a), to dismiss the petition due to a lack of standing are determined as hereinafter provided.

The respondent Iceland was incorporated on March 13, 1991 for the purpose of operating an ice skating rink at 3345 Hillside Avenue in New Hyde Park. Upon incorporation, its stock was divided between the respondent Stephen J. Haenel's wife, Jacqueline (47%), the petitioner (3%) and two non-parties, Allan S. Eisinger (47%), and Robert Baron (3%) (see petition, para.9).

The petitioner is an attorney who had previously represented Mr. Haenel in a variety of matters. He and Mr. and Mrs. Haenel subsequently became social friends as well. Unfortunately, Iceland floundered and on or about March 11, 1994 a receiver (Thomas DeMaria, Esq.) was appointed and a bankruptcy petition (Chapter 11) was filed. It is undisputed that the petitioner performed considerable legal work for the corporation's benefit. While he contends that he was merely an employee (see 1/28/11 affirmation, para.3), the respondents assert that he was Iceland's counsel ( see 12/29/10 affirmation of Richard L. Goldberg, Esq., paras. 5 & 8) but that his retention was never approved or authorized by the bankruptcy Trustee (see 12/20/10 affidavit of Stephan J. Haenel, para.8).

In any event, the petitioner alleges, in sum, that as consideration for his prior legal services (which Mr. and Mrs. Haenel otherwise could not afford to pay) and the one-half (or \$15,000.00) he contributed to the \$30,000.00 necessary to effectuate Iceland's reorganization, "in addition to legal fees to be paid in the future, that [the respondent] Haenel and Petitioner would be equal partners in Iceland, if Haenel and Petitioner would be successful in saving it" (pet., para.20). Moreover, even though the subsequent (12/21/95) Second Amended Plan of Reorganization (see respondents' Exhibit C) recites that, upon reorganization, the sole shareholders were Jacqueline Haenel, president (81%) and Stephen Haenel, secretary/treasurer (19%), "[i]t was also [allegedly] agreed between petitioner and Haenel that Petitioner's 50% interest in Iceland would be held by Haenel and/or Jacqueline Haenel until such time as Petitioner would request issuance of the stock to [him] or [his] nominee" (pet., para.21). In addition, the petitioner asserts that Mr. Haenel was understood to be the "real" owner of Iceland and that Mrs. Haenel was simply awarded a majority interest for "liability purposes" (see petitioner's 1/28/11 affirmation, para.9, fn 3). He also reportedly received a \$10,000.00 distribution of profits during the end of 2008 before Mr. Haenel is alleged to have, in effect, locked him out of Iceland's management and control (see pet., paras.38 & 41). On or about December 28, 2009 the petitioner forwarded a proposed "memorandum of agreement" to Mr. Haenel to formalize his purported 50% interest but it was rejected on March 1, 2010 (see respondents' Exhibit D).

Conversely, Mr. Haenel has characterized the petitioner's contributions as pro bono legal services and an extension of credit (see 7/23/07 affidavit, para.16) which Iceland later repaid on April 15, 2008, October 17, 2008 and December 8, 2008, respectively (see respondents' Exhibit E). Mrs. Haenel died on July 11, 2009 and her 81% interest reportedly passed through her estate to Mr. Haenel who therefore asserts that he is the corporation's sole shareholder.

When considering a motion pursuant to CPLR 3211(a)(7), the Court must accept the facts as alleged in the complaint as true, accord the plaintiff every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Sokol v Leader, 74 AD3d 1180,1181). "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense

to the claims as a matter of law" (Granada Condominium III Assoc. v Palomino, 78 AD3d 996).

Here, the December 21, 1995 Second Amended Plan of Reorganization (Hall, J.) identifying Mr. and Mrs. Haenel as Iceland's sole shareholders (see respondents' Exhibit C) is sufficient to establish the respondents' prima facie entitlement to dismissal of the petition on the ground that the petitioner lacks standing (see CPLR §404[a]; BCL §1104[a]; cf. Ruivo v Brightside Homes, Ltd., 305 AD3d 688,689). Even liberally construing the facts in his favor and according the petitioner every favorable inference, he has failed to create a triable issue of fact warranting disclosure (see CPLR 3211[d]; Ruivo supra at 689). More specifically, in addition to the restriction imposed by CPLR §4519 (i.e., the Dead Man's statute) following Mrs. Haenel's July 11, 2009 passing, the alleged oral agreement (which is reportedly to have been consummated on December 13, 1995 when the petitioner allegedly invested, rather than loaned, \$15,000.00 to Mr. and Mrs. Haenel [see petitioner's Exhibit C]) is in direct contravention of the subsequent December 21, 1995 Second Amended Plan of Reorganization approved by the Bankruptcy Court (Hall, J.) and therefore unenforceable.

Accordingly, the respondents' motion, pursuant to CPLR 404(a) and CPLR 3211(a), to dismiss the petitioner's petition due to a lack of standing is granted and the petitioner's motions, pursuant to BCL §§1104 and 1202, for judicial dissolution of Iceland and the appointment of a Receiver are denied.

Dated: APR 06 2011

  
A.J.S.C.  
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**ENTERED**  
APR 08 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE