

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index
IN THE MATTER OF ARISTOTELIS		Number <u>307</u> 2006
(a/k/a TELLY) VAGIANDERIS		
- against -		Motion
		Date <u>May 2,</u> 2007
		Motion
JOANNA (a/k/a NANA) LOISELLE, et al.		Cal. Number <u>71</u>
	x	Motion Seq. No. <u>4</u>

The following papers numbered 1 to 14 read on this motion by petitioner-plaintiff for an order granting renewal of (1) a prior motion to substitute Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis, in place of Aristotelis (Telly) Vagianderis, deceased, and upon renewal, substituting the Estate for the deceased petitioner-plaintiff, (2) a prior motion pursuant to BCL § 1104 for a judicial dissolution of respondent Kalamaki Taverna, Inc., and (3) a prior motion for a preliminary injunction and for the appointment of a temporary receiver pursuant to BCL §§ 1113 and 1115, and upon renewal granting the relief requested in these prior motions. Respondents Joanna Loiselles and Taverna cross-move in opposition and seek an order substituting Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis as the respondent in an action entitled Loiselle v Vagianderis, Index Number 2778/06, and consolidating that action with the within proceeding and action.

	<u>Papers</u> <u>Numbered</u>
Amended Notice Motion-Affirmation-Affidavit-	
Exhibits (A-D)-Appendix (1-3).....	1-6
Opposing Affirmation-Exhibit (A).....	7-9
Amended Notice of Cross Motion-Affirmation.....	10-12
Reply Affirmation.....	13-14

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

This court in an order dated January 31, 2007 denied petitioner-plaintiff's motion of October 11, 2006 to substitute Ioannis "John" Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis, in place of Aristotelis (Telly) Vagianderis, deceased, on the grounds that the preliminary letters testamentary issued on June 14, 2006 had expired and were not extended, thereby divesting the court of jurisdiction until a duly appointed representative was substituted for the deceased. On February 28, 2007, letters testamentary appointing Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis were issued. Therefore, petitioner-plaintiff's motion to renew is granted, and upon renewal Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis, is substituted in place of petitioner-plaintiff Aristotelis (Telly) Vagianderis, deceased.

This court in a prior order dated January 22, 2007 denied the prior motion of October 11, 2006 which sought judicial dissolution of Kalamaki Taverna, Inc. (the Corporation) pursuant to BCL § 1104, and the separate motion for preliminary injunctive relief and the appointment of a temporary receiver for the corporation, pursuant to BCL §§ 1113 and 1115, on the grounds that the preliminary letters testamentary issued on June 14, 2006 had expired and were not extended, thereby divesting the court of jurisdiction until a duly appointed representative was substituted for the deceased. In view of the fact that Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis, has been substituted in place of the deceased petitioner-plaintiff, the request to renew these prior motions is granted.

The Business Corporation Law sets forth the procedure to be followed when seeking a judicial dissolution of a corporation. (BCL § 1106). Here, petitioner-plaintiff commenced the within hybrid special proceeding and action by filing the RJI, summons, combined petition and complaint, and an unsigned order to show cause on January 5, 2006. The order to show cause dated January 9, 2006, directed service on the named respondents-defendants and the publication of a copy of the order to show cause in a local newspaper. Petitioner has submitted affidavits of service which establish that respondents, and the Department of Finance and Taxation, were served in accordance with the order to show cause, that the order to show cause was published as directed in Newsday, and that the summons and combined petition and complaint were also personally served on the respondents-defendants. Therefore, the within hybrid proceeding and action was properly commenced by filing, that the order to show cause complied with BCL § 1106, and that service was made pursuant to the order to show cause and CPLR 308. The court notes that there is nothing in BCL § 1106

which prohibits such a hybrid special proceeding and plenary action.

The prior order to show cause dated January 9, 2006 was originally returnable on February 8, 2006, and the February 8, 2006 order to show cause was originally returnable on February 22, 2006. Aristotelis (Telly) Vagianderis died on March 7, 2006. Aristotelis (Telly) Vagianderis and Joanna (Nana) Loiselle, were each 50% shareholders in Kalamaki Taverna Inc. (the Corporation). This Corporation was formed in January 2001 and Telly and Nana entered into a written shareholders' agreement, dated February 19, 2001.

Petitioner-plaintiff's request for the ultimate relief of judicial dissolution and an order directing respondents to turn over all books and records of the corporation and to account to the petitioner, is denied. In view of the sharply conflicting statements set forth in the verified petition, and in Ms. Loiselle's opposing affidavit, particularly as to the claimed misconduct, as well as the shareholder's agreement which provides for limited disability payments, an election for the sale of shares upon withdrawing and retiring from the corporation, and for the termination of a shareholder's interest upon death and valuation of the deceased shareholder's interest, a hearing is required as questions of fact exists regarding the merits of the petition and the appropriate remedy (see Matter of WTB Props., 291 AD2d 566, 567 [2002]; Matter of Steinberg [Cross Country Paper Prods. Corp.], 249 AD2d 551 [1998]; Matter of Fancy Windows & Doors Mfg. Corp. [Fei Wu], 244 AD2d 484 [1997]; Giordano v Stark, 229 AD2d 493, 493-495 [1996]; Matter of Kournianos [H.M.G., Inc.], 175 AD2d 129 [1991]; see also Matter of Hochberg v Manhattan Pediatric Dental Group, P.C., ___ AD3d ___ [2007], 836 NYS2d 615; Matter of Johnsen v ACP Distrib. Inc., 31 AD3d 172, 178-179 [2006]). The parties are directed to appear for a hearing on these issues on October 5, 2007 at 9:30 A.M. in this part.

This court in the order to show cause dated February 8, 2006, directed respondents Joanna Loiselle and Dianna Loiselle to make all corporate financial books and records available to petitioner or his counsel. Petitioner, as a shareholder has a common-law right to inspect the books and records of a corporation so long as the inspection is sought in good faith and for a proper purpose (see Matter of Crane Co. v Anaconda Co., 39 NY2d 14 [1976]; Matter of Steinway, 159 NY 250, 263 [1899]; Wisniewski v Polish & Slavic Ctr., Inc., 309 AD2d 869 [2003]; Matter of Tatko v Tatko Bros. Slate Co., 173 AD2d 917, 917 [1991]). The corporation bears the burden to show bad faith or an improper purpose and, when such a showing is made, a hearing must be held to resolve these issues (see De Paula v Memory Gardens, 90 AD2d 886, 887 [1982]; cf. Matter

of Troccoli v L & B Contr. Indus., 259 AD2d 754, 755 [1999]). Petitioner alleges that respondents have diverted corporate funds and seeks to inspect the books and records in connection with the proceeding for judicial dissolution, as well as the causes of action for an accounting, conversion and breach of fiduciary duties. Although respondents deny these allegations, they have not demonstrated that the request to inspect the books and records was made in bad faith or for an improper purpose. Therefore, petitioner is entitled to examine the Corporation's books and financial records.

This court has broad discretion under BCL § 1113 and § 1115 to issue orders deemed protective of corporate assets pending dissolution. This court in the order to show cause dated February 8, 2006, temporarily enjoined the respondents from engaging in any business or transactions on behalf of the Corporation, except in the ordinary course of business and except upon prior notice to the petitioner. Petitioner's request for said injunctive relief is extended pending the outcome of the October 5, 2007 hearing.

That branch of petitioner's motion which seeks the appointment of a receiver, is denied. Petitioner, in an affidavit submitted to the court prior to his death, alleged that Joanna Loisselle misappropriated funds belonging to the corporation, failed to make payments on a promissory note and claimed that there had been a decline in the deposits made to the Corporation's bank accounts. Ms. Loisselle in her affidavit denied any wrongdoing. The court finds that as petitioner's claims are contested, and as there has been an insufficient showing that the corporation's property and assets are in danger of being materially injured or destroyed, the appointment of a receiver at this time is unwarranted.

That branch of petitioner's motion which seeks to enjoin the use of the Corporation's funds for the payment of legal fees is granted to the extent that respondent Joanna Loisselle is enjoined from using corporate funds to pay counsel fees incurred in defending this dissolution proceeding, and in defending the plenary action (see Business Corporation Law § 1115; Matter of Park Inn Ford, Inc., 249 AD2d 307 [1998]; Matter of Rappaport [Jileen Sec. Corp.], 110 AD2d 639 [1985]; Matter of Reinschreiber [Lipp], 70 AD2d 596 [1979]). Dianna Loisselle is also enjoined from using corporate funds to pay for counsel fees she may have incurred in this hybrid proceeding and action. As to the Corporation, it has been recognized that, in a dissolution proceeding, a corporation is a proper jural party "for the limited and passive purpose of rendering it amenable to the orders of the court" (Matter of Clemente Bros., 19 AD2d 568 [1963], affirmed 13 NY2d 963 [1963]).

The Corporation has a nominal and limited status in a dissolution proceeding but may not, and, as far as appears in this case, has not, assumed a "militant alignment on the side of one of two equal, discordant stockholders" (Matter of Clemente Bros., supra, at p 568). Therefore, to the extent that counsel fees have been or will be incurred by the Corporation in its own defense, the Corporation as a party respondent, may utilize corporate funds for such purpose (Matter of Public Relations Aids, Inc., 109 AD2d 502, 510-511 [1985]).

Respondents Joanna Loiselle and Kalamaki Taverna's cross motion for an order substituting Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis as the respondent in an action entitled Loiselle v Vagianderis, Index Number 2778/06, is denied, as this cross motion is made in the wrong action. The Corporation, a respondent here and Joanna Loiselle an additional respondent here, are the plaintiffs in the action commenced under BCL §§ 706(d), 716 (c) and 720 in which they seek the removal of Aristotelis (Telly) Vagianderis as a director and officer of the Corporation. This court, in an order dated January 22, 2007, denied the October 11, 2006 motion for substitution and a separate motion for consolidation of that action with the within hybrid proceeding and action, as the preliminary letters testamentary had expired. Contrary to Loiselle and the Corporation's assertions, the motion papers previously submitted under Index Number 2778/06 are no longer before the court. Therefore, either the Executor or Loiselle and the Corporation are required to move to renew the prior motions for substitution and consolidation in the action commenced under Index Number 2778/06, in order to obtain the relief sought.

In view of the foregoing, petitioner-plaintiff's motion to renew its three prior motions is granted, and upon renewal Ioannis Vagianderis, as Executor of the Estate of Aristotelis (Telly) Vagianderis, is substituted in place of petitioner-plaintiff Aristotelis (Telly) Vagianderis, deceased; petitioner's request for judicial dissolution and for an order directing respondents to turn over all books and records of the corporation and to account to the petitioner, is denied, and a hearing on the issue of judicial dissolution shall be held on October 5, 2007 at 9:30 A.M. in this part; petitioner's request to examine the Corporation's books and financial records is granted; the temporary injunction previously enjoining the respondents from engaging in any business or transactions on behalf of the Corporation, except in the ordinary course of business and except upon prior notice to the petitioner, is extended pending the outcome of the October 5, 2007 hearing; petitioner's request for the appointment of a receiver is denied; and petitioner's request to enjoin the use of the Corporation's

funds for the payment of legal fees is granted to the extent that respondents Joanna Loiselle and Dianna Loiselle are enjoined from using corporate funds to pay their legal fees for defending in this proceeding and action, and is denied as to the Corporation. Respondents-defendants' cross motion is denied, as the relief requested must be made in the action commenced under Index Number 2778/06.

Dated: July 31, 2007

J.S.C.