Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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MARIANTHI MOUZAKITIS and LEONIDAS MOUZAKITIS,

Petitioners,

- against-

Index No. 28420/08
Motion Date: 2/18/09
Motion Cal. No. 32

PEARL NIGHTLIFE, INC., WILLIAM CIOBANU GEORGER MOUKAS, ANAYIOTIS KOUZOUKAS, NICHOLAS KIRIAKIS, THE PEOPLE OF THE STATE OF NEW YORK and JOHN DOE NO. 1-10,

Respondents.

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The following papers numbered 1 to 10 read on this application by respondents for an order, *inter alia*, dissolving the corporate entity **PEARL NIGHTLIFE, INC**, directing a full accounting of all corporate financial affairs be provided, appointing a receiver, and enjoining and restraining respondents from transacting any unauthorized business.

	PAPERS NUMBERED
Order to Show Cause-Petitions-Exhibits.....	1-4
Affidavit of Service.....	5
Affirmation in Opposition-Exhibits.....	6-8
Reply Affirmation.....	9

Upon the foregoing papers it is ordered that the application by respondents for an order, *inter alia*, dissolving the corporate entity **PEARL NIGHTLIFE, INC**, directing a full accounting of all corporate financial affairs be provided, appointing a receiver, and enjoining and restraining respondents from transacting any unauthorized business is decided as follows:

The court notes initially that in an order by Justice Satterfield, dated August 20, 2008, the petition by Marianthi Mouzakitis was denied without prejudice to renewal upon the joinder of Leonidas Mouzakitis as a petitioner. Leonidas Mouzakitis has now been joined as a petitioner and the instant petition for the common-law dissolution of Pearl Nightlife, Inc. and the motion for provisional relief is brought by Marianthi Mouzakitis and Leonidas Mouzakitis.

Petitioners are wife and husband, and they jointly own fifteen shares in Pearl Nightlife, Inc., the operator of a restaurant located at 45-30 Bell Boulevard, Bayside, New York. According to a

shareholder's agreement executed on or about October 9, 2007, the petitioners own their shares as tenants by the entirety. The corporation has issued a total of one hundred shares, and the Mouzakitis allegedly contributed approximately $125,000.00 for their fifteen per cent interest. Nicholas Kiriakis, the holder of thirty shares and the corporation's president, serves as the manager of the restaurant. The restaurant opened for business on or about March 1, 2008, only about six months ago. The petitioners allege that those in control of the corporation have failed to make required contributions to the business, have failed to pay salaries and dividends, have refused to permit an inspection of corporate books and records, and have diverted corporate funds and assets. The amount of liquor purchased by the restaurant allegedly does not match sales, and Kiriakis has allegedly diverted food supplies to his other restaurants, claiming that the food spoiled. On May 4, 2008, the other shareholders allegedly had the petitioner arrested at the restaurant.

Petitioners now seek a common law dissolution of Pearl Nightlife, Inc., on the grounds that respondents have breached their fiduciary duty owed to petitioners. Respondents oppose this petition. It is important to note, as the petitioners emphasize in their papers that they did not commence the instant action pursuant to Business Corporation Law § 1104 since they would not have a cause of action for corporate dissolution based on Business Corporation Law § 1104, "Petition in case of deadlock among directors or shareholders," which generally requires a proceeding to be brought by the holders of 50% of the shares, or based on Business Corporation Law § 1104-a, "Petition for judicial dissolution under special circumstances," which requires a proceeding to be brought by the holders of 20% of the shares. Rather, they have requested common-law dissolution pursuant to Leibert v Clapp, 13 NY2d 313 (1963.) *See*, Kruger v. Gerth, 22 A.D.2d 916 (2nd Dept., 1964); *See also*, Collins v. Telcoa Int'l Corp., 283 A.D.2d 128 (2d Dept 2001.) Fedele v Seybert, 250 AD2d 519 (1st Dept 1998.)

In Leibert, the Court of Appeals recognized a common-law right to dissolution of a corporation where the officers or directors of the corporation are engaged in conduct which is violative of their fiduciary duty to shareholders. Dissolution is appropriate if the directors or those in control of the corporation are looting the corporate assets to enrich themselves at the expense of the minority shareholders; continuing the corporation solely to benefit those in control; or that the actions of the directors or those in control has been calculated to depress the capital of the corporation in order to coerce the minority shareholders to sell their stock at a depressed price. Leibert v. Clapp, *supra.*

The proof required to establish a common law dissolution is greater than is required to sustain a shareholder derivative action for waste. Leibert v. Clapp, *supra*. *See also*, Fontheim v. Walker, 282 A.D. 373 (1st Dept., 1953), aff'd., 306 N.Y. 926 (1954). This is due to the difference in objectives of the two actions: "A derivative stockholders' action seeks to benefit the

corporation by restoring property to it or compensating it for losses suffered. Such an action is aimed at strengthening the corporation. An action for dissolution, however, the aim of which is to end the corporate life, cannot possibly benefit the corporation and can only be judged by a standard of whether it is more to the interest of the stockholders to end the corporation's life than it is to continue it. This is obviously a decision for the majority. A minority may separate themselves from the corporation if they wish. They hardly have standing to compel a dissolution unless a showing is made that the majority of the corporation seek to carry it on for the purpose of enriching themselves at the expense of the minority." Id. at 376.

Here petitioners have set forth sufficient allegations and support to raise an issue that the majority shareholders are enriching themselves at the expense of the minority. Contrary to respondents opposition, there are no issues raised in the instant petition that require this action to be heard by Justice Satterfield. Furthermore, the sworn statements of the petitioners are sufficient to warrant a hearing to determine the validity of these allegations. *See generally*, Shapiro v. Rockville Country Club, Inc.22 A.D.3d 657 (2d Dept 2005.)

The corporate shareholders, are directed to appear for a hearing in Part 17, Room 116 on May 1, 2009 at 9:30 A.M. The Petitioners are to be given access to all corporate books, including those for construction costs and operating the business.

All parties and their agents, employees and representatives are enjoined from transferring or encumbering any assets of Pearl Nightlife, Inc. outside the normal course of business.

Petitioner's request for the appointment of a temporary receiver is denied, as there is insufficient evidence at this time for this Court to make a finding of dissipation or waste of corporate assets.

Dated: February 24, 2009 **.....**

ORIN R. KITZES, J.S.C.