[*1]

Pappas v Fotinos
2010 NY Slip Op 51300(U)
Decided on July 23, 2010
Supreme Court, Kings County
Battaglia, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 23, 2010

Supreme Court, Kings County

Theano Pappas, as Executrix of the Estate of Eleftherios Pappas, Plaintiff,

against

Paul Fotinos, Adriatic Management Corp. and Theodoros Kalogiannis, Defendants.

7799/04

Petitioner/Plaintiff Theano Pappas, Executrix of the Estate of Eleftherios Pappas, was represented by George Coffinas, Esq. of the Coffinas Law Firm, PLLC in both the dissolution proceeding and the partition action. Respondent/ Defendant Theodoros Kalogiannis was represented by Chris Georgoulis, Esq. of Georgoulis & Associates, PLLC in both the dissolution proceeding and the partition action. Respondents/ Defendants Corfian Enterprises, Ltd. and Paul Fotinos were represented by Stuart S. Zisholtz, Esq. of Zisholtz & Zisholtz, LLP in the dissolution proceeding. Respondents/ Defendants Paul Fotinos and Adriatic Management Corp. were represented by Seymour Brieterman, Esq. in the partition action.

Jack M. Battaglia, J.

With a Verified Complaint dated February 26, 2004, plaintiff Theano Pappas, as Executrix of the Estate of Eleftherios Pappas, seeks sale in lieu of physical partition of property located at 577 Baltic Street, Brooklyn, and an accounting of rent and profits (the "Partition Action.") The defendants are Theodoros Kalogiannis, Adriatic Management Corp., and Paul Fotinos, the sole shareholder of Adriatic. Until the death of Mr. Pappas, Plaintiff's husband, in December 2000, he, Mr. Kalogiannis, and Adriatic were tenants in common of 577 Baltic, each holding a one-third undivided interest. In a Verified Answer and Cross-Claims, Mr. Kalogiannis also seeks sale of the property and an accounting.

With a Verified Petition dated February 26, 2004, Ms. Pappas seeks judicial dissolution pursuant to Business Corporation Law §1104-a of Corfian Enterprises, Ltd. (the "Dissolution Proceeding") "because respondent [Paul] Fotinos, who is the person in control of the corporation is guilty of gross continuing, oppressive action toward the Petitioner" (*see* Verified Petition ¶ 19.) In addition to Mr. Fotinos, the corporation and Theodoros Kalogiannis are named respondents. In a Verified Answer and Cross Claims, Mr. Kalogiannis joined Ms. Pappas in seeking judicial dissolution of Corfian Enterprises, Ltd.

With a Decision After Hearing dated January 23, 2009, this Court found and concluded that Mr. Pappas's estate and Mr. Kalogiannis each hold one-third of the shares of Corfian Enterprises, Ltd., with standing to seek judicial dissolution pursuant to Business Corporation Law §1104-a. (*See Matter of Pappas v Corfian Enters., Ltd.*, 22 Misc 3d 1113 [A], 2009 NY Slip Op 50109 [U] [Sup Ct, Kings County 2009].) With a Decision and Order dated July 16, 2009, the Court denied motions for reconsideration, and denied a request by respondents Fotinos and Corfian for a stay of proceedings pending appeal.

From March 15 through 19, 2010, the Court held a hearing addressed to any factual issues that required resolution in order that the Partition Action and Dissolution Proceeding might be determined. Before the hearing, the Court had conferred with counsel, and disclosure had proceeded for the most without dispute. Nonetheless, by Order to Show Cause returnable on March 15, Ms. Pappas and Mr. Kalogiannis, now fully joined in interest, moved for an order "striking the answers of respondents Paul Fotinos and Corfian

Enterprises, Ltd. for their spoliation of evidence and violation of CPLR §3126" (*see* Order to Show Cause dated March 11, 2010.)

On the first day of the hearing, the Court in effect denied the spoliation/disclosure motion to the extent that it sought striking of the answers of respondents Paul Fotinos and Corfian Enterprises, Ltd., and indicated that it would consider on its determination of the open issues whether and to what extent adverse inferences should be taken from any failure to produce or introduce into evidence documents or computerized records in Mr. Fotinos's possession. (Ph. II 68, 86-89; the Court adopts the convention suggested by Pappas/Kalogiannis of using the designation "Ph. I — " to refer to pages of the transcript of the May 2008 hearing and "Ph. II — " to refer to pages of the transcript of the March 2010 hearing.) [*2]

Also on the first day of the hearing, the parties stipulated to a number of important matters. As to the Partition Action, they stipulated to amendment of the pleadings to add Corfian Enterprises, Ltd. as a named defendant. (Ph. II 26-29.) As a lessee in possession of the property, discussed below, Corfian is a necessary party to the action (*see* Real Property Actions and Proceedings Law §903 [1].) The parties also stipulated that "a partition [of the property] cannot be made without great prejudice to the owners" (*see* Real Property Actions and Proceedings Law §901[1]), and that the property should be sold under judicial supervision. (Ph. II 14-16.) As to the Dissolution Proceeding, the parties stipulated that no shareholder(s) could or should purchase the shares of any other shareholder(s), either as a matter of right (*see* Business Corporation Law §1118), or as a remedy alternative to dissolution (*see* Business Corporation Law §1104-a [b].) (Ph. II 37-38.)

The Court assumes familiarity with the history of the relationship between and among Messrs. Pappas, Kalogiannis, and Fotinos, as described in the Court's January, 2009 Decision After Hearing. As in that opinion, because of their common interest here, the Court will at times refer to Ms. Pappas and Mr. Kalogiannis as "Petitioners," even in connection with the Partition Action in which they are Plaintiff and Defendant. Similarly, when "Respondents" or "Defendants" is used collectively, it will not include Mr. Kalogiannis.

At the hearing, the Court heard from Ms. Pappas and Messrs. Kalogiannis and Fotinos, as well as two accountants who have performed services for Corfian and related companies, Anthony Incorvaia and Prabir Kumar Roy. No party has moved to conform the pleadings to

the proof (*see* CPLR 3025 [c]), and so the issues will be resolved as framed by the pleadings as filed or served.

It is also important to note at the outset that Petitioners do not assert, in the Partition Action or the Dissolution Proceeding, any cause of action on behalf of Corfian Enterprises, Ltd. for misappropriation of corporate assets or other wrongdoing by Mr. Fotinos (*see* Business Corporation Law §626; *Independent Investors Protective League v Time, Inc.*, 50 NY2d 259, 261-62 [1980]); nor have they sought damages from Mr. Fotinos for breach of fiduciary duty in addition to seeking dissolution of Corfian (*see Collins v Telcon Intl. Corp.*, 282 AD2d 128, 132-33 [2d Dept 2001]; *see also Waldman v 853 St. Nicholas Realty Corp.*, 64 AD3d 585 [2d Dept 2009] [fraud]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007].)

Also, although Ms. Pappas and Mr. Kalogiannis together hold two-thirds of the shares of Corfian, they are not seeking dissolution pursuant to Business Corporation Law §1104; and, as will appear, Petitioners allege dissolution only on the grounds provided for in subsection (a) (1) of Business Corporation Law §1104-a (generally, oppression), and not on the grounds provided for in subsection (a) (2) (generally, diversion.)

Limitations/Laches

Defendants/Respondents assert preliminary objections to further consideration of the Petition Action and Dissolution Proceeding. As to the Partition Action, Defendants are correct that, under Real Property Actions and Proceedings Law §901 (4), the executor or administrator of the estate of [*3]a decedent "may bring a partition action . . . if, upon application duly made, the surrogate approves." As of the March 2010 hearing, the approval of Surrogate's Court, Queens County, had not be obtained. If at judgment in the Partition Action, approval has not been obtained, the Verified Complaint of Ms. Pappas will be dismissed. Since, however, defendant Kalogiannis seeks the same relief in his cross-claim, and there is nothing in the statute that requires approval of a partition action *against* an estate, there is no bar to judgment in his favor in this action.

Respondents further assert that the Dissolution Proceedings must be dismissed as barred by the applicable statute of limitations and the equitable doctrine of laches. Contrary to Respondents' characterization of the proceeding (*see* Respondents' Post-Trial Memorandum at 1-6, 11-12), it is neither an action for breach of a contract to issue shares of stock to

Petitioners, nor alleging damages in tort for fraud or conversion. (*Compare Waldman v 853 St. Nicholas Realty Corp.*, 64 AD3d at 587-88; *Welwart v Dataware Elecs. Corp.*, 277 AD2d 372 [2d Dept 2000]; *Stern v BSL Dev. Corp.*, 163 AD2d 35 [1st Dept 1990]; *Bernstein v LaRue*, 120 AD2d 476 [2d Dept 1986].) "The involuntary dissolution statute (Business Corporation Law §1104-a) permits dissolution when a corporation's controlling faction is found guilty of oppressive action' toward the complaining shareholders." (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 68 [1984].)

A claim for dissolution pursuant to Business Corporation Law §1104-a is governed by the "so-called residual six-year period of limitation" (*see State of New York v Cartelle Corp.*, 38 NY2d 83, 89 [1975]), found in CPLR 213 (1). (*See Di Pace v Figueroa*, 223 AD2d 949, 952 [3d Dept 1996]; *Kermanshah v Kermanshah*, 580 F Supp 2d 247, 270 [SDNY 2008].) The period of limitation is measured from the "instances of alleged wrongdoing adverted to by [the petitioner] as grounds for dissolution." (*See Di Pace v Figueroa*, 223 AD2d at 952.)

Here, therefore, Petitioners may legitimately support their claim for dissolution with evidence of "oppressive action" (*see* BCL §1104-a [a] [1]) during the six-year period prior to commencement of the Dissolution Proceeding on March 9, 2004.

The equitable doctrine of laches apparently applies in a proceeding seeking judicial dissolution of a corporation. (*See Paris v Anthony Ave.*, 160 AD2d 541, 542 [1st Dept 1990].)

"The doctrine of laches is an equitable doctrine which bars enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party . . . The mere lapse of time without a showing of prejudice will not sustain a defense of laches . . . In addition, there must be a change in circumstances making it inequitable to grant the relief sought . . . Prejudice maybe established by a showing of injury, change in position, loss of evidence, or some other disadvantage resulting from the delay." (*Skrodelis v Norbergs*, 272 AD2d 316, 316-17 [2d Dept 2000]; *see also Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003]; *Matter of Barabash*, 31 NY2d 76, 81-82 [1972].)

"[L]aches must be pleaded and proved by the party asserting it." (*Matter of Linker*, 23 AD3d 186, 190 [1st Dept 2005].) Here, Respondents pled laches as an affirmative defense. (*See* Verified [*4]Answer to Petition ¶ 12.)

It is at best doubtful that Respondents have proven Petitioners' "unreasonable and

inexcusable delay" (*see Skrodelis v Norbergs*, 272 AD2d at 316) in bringing the Dissolution Proceeding. Until Mr. Pappas's death in December 2000 and Mr. Kalogiannis's retirement in the latter part of 2003, there would not have been reason to know that Mr. Fotinos would assert sole ownership of Corfian Enterprises. Ms. Pappas testified that she first learned that Mr. Fotinos disputed her late husband's one-third ownership approximately a year after his death. Mr. Kalogiannis testified that he first learned that Mr. Fotinos disputed his claim of ownership in September 2003. Respondents point to no evidence, written or oral, to the contrary. A period of less than four years, well within the applicable six-year statute of limitations, does not constitute "unreasonable and inexcusable delay" in the circumstances here. (*See Cort v Campbell*, 82 NY 509, 514 [1880] ["[I]t is a well-established principle of equity, that where there is a discretion to bar a right on the ground of delay, the courts will, in the exercise of that discretion, use the statute of limitations as a rule to guide their action."].)

In any event, "the essential element of laches, namely prejudice, is not spelled out by the mere lapse of time" (*see Matter of Barabash*, 31 NY2d at 82), and Respondents point to no evidence of prejudice (*see* Respondents' Post-Trial Memorandum at 7-10.) That Mr. Fotinos "for over eighteen years, . . . contributed his time, effort and personal finances towards developing and sustaining Corfian Enterprises, Ltd." (*see id.* at 9) does not constitute prejudice, particularly in the absence of any showing that Mr. Fotinos did anything more than would have been expected of him consistent with the "high degree of fidelity and good faith" that he owed the other shareholders in this close corporation (*see Fender v Prescott*, 101 AD2d 418, 422 [1st Dept 1984], *aff'd* 64 NY2d 1079 [1985]; *see also Stein v McDowell*, ___ AD3d ___, 2010 NY Slip Op 5755, * 2 [2d Dept June 29, 2010]; Brunetti v Musallam, 11 AD3d 280, 281 [1st Dept 2004]; *Matter of Cassata v Brewster-Allen-Wichert, Inc.*, 248 AD2d 710, 711 [2d Dept 1998].)

Loss or destruction of records "critical to determining the issues" might well constitute or contribute to prejudice (*see Matter of Linker*, 23 AD3d at 189-90; see also Romero v Smith, 63 AD3d 644, 645 [1st Dept 2009].) Here, the absence of records was significant to this Court's ruling on the standing issue (*see* 2009 NY Slip Op 50109 [U], at * 5- * 6, * 14, * 15), and, as will appear, Petitioners argue the absence of records should be given determinative significance here. Nonetheless, the Court finds no evidence that Mr. Fotinos's document retention and destruction policies were affected by the absence of a proceeding by Petitioners seeking an ownership interest in Corfian.

Partition Action

As to the merits of the Partition Action, the parties' stipulation on the record for judicial sale resolves, of course, the primary issue. The only remaining question is whether anything more in the way of an accounting is required. There is no dispute that, since at least April 1, 1994, Corfian Enterprises, Ltd. has occupied 577 Baltic Street pursuant to a written lease with the three tenants in [*5]common, and that the lease is still in effect. There is no fixed rent; rather, Corfian agrees to pay as rent "an amount of money necessary to pay all expenses of the landlord to retain ownership of 577 Baltic Street, Brooklyn, NY and to maintain and repair the building, including mortgage payments and taxes." The lease also provides, "Tenant to pay all expenses resulting from operation of the tenants [*sic*] business." Presumably, in light of the lease and the absence of any contention or evidence that Corfian as lessee has not complied with its terms, there should be no rents, profits, or allocable expenses for purposes of an accounting.

Petitioners maintain, however, that three corporate businesses have occupied 577 Baltic from at least 2003 - - namely, DSL Enterprises, Ltd., DSL Ventures, Inc., and DSL Management, Ltd. (the "DSL Entities.") Petitioners contend that "[t]he DSL Entities did not pay rent to Corfian for the use of 577 Baltic, although the entities made payments to Adriatic for so-called rent escrow' and loans,' which were nothing more than thinly disguised rent payments." (*See* Joint Post Trial Proposed Findings of Fact and Conclusions of Law of Petitioner/Plaintiff Theano Pappas and Respondent/Defendant Theodoros Kalogiannis ["Petitioners' Post-Trial Memorandum"] at 10, ¶ 71.) Paul Fotinos is the sole shareholder, officer and director of Adriatic Management, Inc., and its only "business" is to hold a one-third interest in 577 Baltic.

For purposes of the Partition Action, Petitioners contend that "[i]t is undisputed that Fotinos and the DSL Entities occupied 577 to the exclusion of Pappas and Kalogiannis since at least 2003," Mr. Fotinos having "changed the locks on the premises in 2003 after [an] alleged burglary, and never provid[ing] access to Kalogiannis or Pappas after that," such that Mr. Fotinos is liable to Petitioners "for the fair-market rental value of the 577 [*sic*] because he excluded them from the property while using and occupying it for his own personal benefit." (Petitioners' Post-Trial Memorandum at 31, 32.)

"One tenant in common is generally not liable to another for use and occupancy, in the

absence of an agreement or ouster . . . Although one cotenant is unquestionably required to account to . . . his [or her] cotenant, for an amount of rent he [or she] may have received in excess of "his [or her] own just proportion," ' this only applies to rents actually received." (*Degliuomini v Degliuomini*, 12 AD3d 634, 635 [2d Dept 2004] [*quoting Goldberg v Ochman*, 143 AD2d 255, 257 (2d Dept 1988) (*quoting* RPAPL 1201)]; *see also Jemzura v Jemzura*, 36 NY2d 496, 503 [1975]; *Zapp v Miller*, 109 NY 51, 57-58 [1888]; *McIntosh v McIntosh* 58 AD3d 814, 814 [2d Dept 2009].)

Generally, "an accounting is a necessary incident of a partition action and should be had as a matter of right before entry of the interlocutory or final judgment and before any division of monies between the parties." (*McCormick v Pickert*, 51 AD3d 1109, 1110 [3d Dept 2008] [internal quotation marks and citations omitted]; *see also Donlon v Diamico*, 33 AD3d 841, 842 [2d Dept 2006].)

Here, despite Petitioners' assertion that they were "excluded" from the property, there is no proof of an "ouster" that would give rise to an obligation on Mr. Fotinos's part to pay use and occupancy, based upon fair-market rental value or otherwise. "[I]n order to prove an ouster it is not [*6]necessary to prove a violent ejectment, or as one of the cases has it, it is not necessary to prove the party was set out by the shoulders"; "[i]t may be inferred from the circumstances." (*Zapp v Miller*, 109 NY at 58.) But there must be some evidence or "circumstances" that amount to an "ouster," and here there is none. Neither Ms. Pappas nor Mr. Kalogiannis testified to any instance in which access to, or use of, any part of 577 Baltic was refused by Mr. Fotinos.

In the Partition Action at least, Petitioners are only entitled to receive their proportionate shares of "rents actually received" (*see Degliuomini v Degliuomini*, 12 AD3d at 635) by Mr. Fotinos or Adriatic Management. As evidence of "rents actually received," Petitioners point to Adriatic's tax returns for 2004 and 2005, reporting rents as income, respectively, at $7,000 and $10,000; and five paid checks from one or another of the DSL Entities to Adriatic, totaling $22,800. The checks are dated, respectively, March 16, 2006, for $1,000; December 21, 2006, for $11,500, memo "loan"; April 24, 2009, for $700; June 15, 2009, for $4,800, memo "rent escrow for June"; and September 4, 2009, for $4,800, memo "escrow July."

Mr. Fotinos is the sole shareholder, director, and officer of Adriatic Management Corp., and the Court finds based upon the evidence, including Mr. Fotinos's deposition testimony

read into the record, that Adriatic Management has no business other than its one-third interest in 577 Baltic, and receives no income from any other source. DSL Enterprises Ltd. and DSL Venture Inc. are corporations wholly-owned by Paul Fotinos's brother, John Fotinos; DSL Management Ltd. is apparently owned by Peter Petris, a former business associate of Messrs. Paul Fotinos, Kalogiannis and Pappas.

DSL Enterprises and DSL Venture, at least, use the address 577 Baltic Street as their respective places of business; the address appears on the tax returns for the two corporations for 2007 and 2008, and appears on the two DSL Enterprises checks to Adriatic in 2006. For tax years 2007 and 2008, DSL Enterprises reported total gross receipts or sales of $362,241; DSL Venture reported gross receipts or sales of $356,836. Neither corporation shows any deduction for "rents" in any year. The record does not contain similar documentary evidence as to DSL Management, but since Mr. Fotinos testified that he was authorized to sign checks for the corporation, and indeed signed the September 2009 check for $4,800, a fair inference is that DSL Management also did business from 577 Baltic Street.

Mr. Fotinos attempted in his testimony to avoid any inference that the amounts paid to Adriatic Management by the DSL Entities was consideration for use and occupancy of 577 Baltic Street for the purpose of generating substantial receipts or sales, *i.e.*, in excess of $700,000 in two years. For example, he contends that the amounts shown as rents on Adriatic's 2004 and 2005 tax returns were instead reimbursement to Adriatic for amounts paid by that corporation that were the responsibility of Corfian under its lease with the three tenants in common (Ph. II 518); but no documentation is presented to support the contention. In any event, there is no explanation for why reimbursement would be characterized as rent, or as income of any sort.

Similarly, Mr. Fotinos testified that the $4,800 paid to Adriatic Management by DSL [*7]Management in September 2009, with the characterization "escrow July," was actually a loan to alleviate a cash flow problem Corfian was experiencing in making the payments required of it under the lease (Ph. II 540-42.) (There is also the 2006 check from DSL Enterprises to Adriatic for $11,500, characterized as a "loan" on the memo line.) Here, again, however, no documentation is presented to establish that a loan was made, and no evidence, documentary or otherwise, as to whether any loan was repaid.

It is worth noting that all of the documents on which Petitioners might fairly rely to

show that Adriatic received rent from the DSL Entities, *i.e.*, tax returns for 2004, 2005, 2007, 2008 and checks written in 2006 and 2009, were all created after the commencement of the Partition Action and Dissolution Proceeding in March 2004. Mr. Fotinos certainly should have been aware that he might be called upon to account for - - and, if necessary, explain - - his management of 577 Baltic Street. Not only is there no documentary evidence to support his contention that none of the DSL Entities (nor any other business that he operated from 577 Baltic) ever paid rent for use and occupancy of the premises, there was no testimony from John Fotinos or Peter Petris to support his contention, perhaps by filling the gaps in recollection he testified to on important matters (such as repayment of an $11,500 loan.)

"In the context of lease agreements, rent' is defined as the amount paid for use and occupation of land or other property." (*Matter of Dahen Corp.*, 469 F Supp 135, 141 [DPR 1979]; *see also Stecher v 85th Estates Co.*, 43 AD3d 732, 743 [1st Dept 2007] [McGuire, J., dissenting]; *2657 East 68th St. Corp., v Bergen Beach Yacht Club*, 161 Misc 2d 1031, 1033 [Civ Ct, Kings County 1994].) Although regularity of payment in fixed amounts is common in commercial lease arrangements, the essential nature of "rent," at least for purposes of a partition action, is consideration for the use and occupancy of real property. The nature of the payment, and not the characterization given it by the tenant in receipt, should govern.

Here, Adriatic Management received $39,800 that may be fairly inferred to be consideration for use and occupancy of 577 Baltic Street by one or more of the DSL entities. Ms. Pappas as Executrix and Mr. Kalogiannis are each entitled to one-third of that amount. There is no evidence of any expense that need be offset against it, nor any evidence of any other rents actually paid. There is no reason to expect that anything more is required in the way of an accounting up to the period of the hearing.

Dissolution Proceeding

The governing statute provides that "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . may present a petition of dissolution on one or more of the following grounds: (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation." (*See* Business Corporation Law §1104-a [a].) [*8]

The Verified Petition alleges that Paul Fotinos "is guilty of gross continuing, oppressive action" in that:

"(a.)Fotinos has assumed complete control over the operation and management of Corfian and refuses to divulge to Petitioner any of its dealings and business affairs;

(b.)Fotinos has for several years and continuing into the present collected income and profits from Corfian and has refused to distribute any part thereof to Petitioner, or Petitioner's Decedent while the latter was alive;

(c.)Fotinos has for several years and continuing into the present failed to account to Petitioner, or Petitioner's Decedent while the latter was alive, for the income and profits from Corfian so collected;

(d.)Fotinos has diverted and converted to his own use funds which properly represent the income and profits of Corfian;

(e.)Petitioner is not treated by Fotinos as a business associate, has been effectively precluded from participating in the management of Corfian to which corporation Petitioner's Decedent devoted all of his time and energy over twenty-two years, and to which Decedent's heirs look for current and future financial security." (Verified Petition ¶ 19.)

Despite the single references to diversion and conversion in the quoted subparagraph (d), the Verified Petition limits Petitioner's claim for dissolution to the ground of "oppressive actions" under BCL §1104-a (a) (1). (*See* Verified Petition ¶ ¶ 14, 19, 21, 22.) Respondent Kalogiannis's cross-claim for dissolution is limited to "oppressive and illegal actions as stated in the petition." (*See* Verified Answer and Cross-Claims ¶ 42, 46.) Nowhere do allegations of "looting" or "waste" appear.

Similarly, in their Joint Pre-Trial Memorandum of Law, Ms. Pappas and Mr. Kalogiannis state that they "are entitled to judicial dissolution under BCL 1104-a (a) (1) based on Fotinos' oppressive conduct" (Joint Pre-Trial Memorandum of Law of Petitioner/Plaintiff Theano Pappas and Respondent/Defendant Theodoros Kalogiannis at 5.) Although they also allege "looting, wasting and divesting of assets for non-corporate purposes" (*id.* at 6), there is no statement that dissolution is sought pursuant to BCL §1104-a (a) (2), and the allegations, cast in terms of breach of fiduciary duty, appear directed to an

asserted claim for damages in excess of $1.5 million (*see id.* at 8), which also appears in no prior pleading. At no time have Ms. Pappas and Mr. Kalogiannis moved to amend their respective pleadings (*see* CPLR 3025 [b]), and, as previously noted, there is no motion to conform the pleadings to the proof (*see* CPLR 3025 [c].)

The words "illegal" and "fraudulent" as they appear in Business Corporation Law §1104-a (a) (1) "are familiar words that are commonly understood at law." (*See Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 70-71.) The phrase "oppressive actions," however, "does not enjoy the [*9]same certainty gained through long usage." (*See id.* at 71.) "As in other areas of the law, much will depend upon the circumstances in the individual case." (*Id.* at 73.)

"Given the nature of close corporations and the remedial purposes of [BCL §1104-a (a) (1)], . . . utilizing a complaining shareholder's reasonable expectations' as a means of identifying and measuring conduct alleged to be oppressive is appropriate." (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 73.) "[O]ppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." (*Id.*)

"Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment." (*Matter of Maybaum [Stony Creek Ind., Inc.]*, 6 Misc 3d 1019 [A], 2005 NY Slip 50122 [U], * 3- * 4 [Sup Ct, Nassau County 2005] [Austin, J.] [*citing Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63]; *Matter of Dissolution of Upstate Med. Assocs. P.C.*, 292 AD2d 732 [3d Dept 2002]; *Matter of Gunzberg v Art-Lloyd Metal Prods. Corp.*, 112 AD2d 423 [2d Dept 1985]; *Matter of Weidy's Furniture Clearance Ctr. Co.*, 108 AD2d 81 [2d Dept 1985]; *Matter of Topper v Park Sheraton Pharmacy*, 107 Misc 2d 25 [Sup Ct, NY County 1980]; *see also Matter of Cassata v Brewster-Allen-Wichert, Inc.*, 248 AD2d 710 [2d Dept 1998]; *Matter of Burack [I. Burack, Inc.]*, 137 AD2d 523 [2d Dept 1988].)

In contrast to these "freeze out" or "squeeze out" cases (*see Matter of Weidy's Furniture*

Clearance Ctr. Co., 108 AD2d at 84), are those where the claim for dissolution is asserted by a merely "passive shareholder," or is based upon a failure to declare dividends when dividends were never previously paid. (*See Matter of Brickman v Brickman Estate at the Point, Inc.*, 253 AD2d 812, 813 [2d Dept 1998]; *Matter of Schlacter [Ideal Handbag Frame Mfg. Corp.]*, 154 AD2d 685, 685 [2d Dept 1989]; *Matter of Smith [Koslowitz Constr. Co.]*, 154 AD2d 537, 538-39 [2d Dept 1989]; *see also Matter of Burack [I. Burack, Inc.]*, 137 AD2d at 526; *but see Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 74-75 [*de facto* dividends]; *Matter of Smith [Koslowitz Constr. Co.]*, 154 AD2d at 539 ["salaries . . . in lieu of dividends"].)

Neither "irreconcilable differences and animosity" (*see Matter of Honecker & Luttati, P.C.*, 271 AD2d 362, 362 [1st Dept 2000]), nor "dissatisfaction with the management of the corporation" (*see Matter of Brach [88-15 Executive Arms Realty Corp.]*, 135 AD2d 711, 712 [2d Dept 1987]), can be the basis for dissolution under Business Corporation Law §1104-a.

This case does not fit the mold of a "freeze out" or "squeeze out" as described in the decided cases. Messrs. Pappas and Kalogiannis would have had a reasonable expectation of continued employment by Corfian until death, as to Mr. Pappas, and retirement because of disabling injury, as to Mr. Kalogiannis. As to management of the business, it is not necessary to doubt the significant valuable contributions made by Messrs. Pappas and Kalogiannis to Corfian's business over two [*10]decades, more or less, to also conclude that Mr. Fotinos has run the business from the beginning. Indeed, that was the role assigned to him in the triumvirate, and the basis, at least in part, for Petitioners' allegations of breach of duty. There is no evidence of any request by Mr. Pappas, Ms. Pappas, or Mr. Kalogiannis for access to the books and records of the business that was refused by Mr. Fotinos.

Petitioners' contention that "Fotinos terminated Kalogiannis' employment and excluded him from the operation, management and control of Corfian in or about July 2003" (Petitioners' Post-Trial Memorandum at 2, ¶6) is based upon testimony Mr. Fotinos gave at the first hearing, which was admitted for a limited purpose unrelated to the reason for Mr. Kalogiannis's departure from the business. In any event, Mr. Kalogiannis maintains that he retired because of a disabling injury in July 2003, and the Court sees no reason not to accept Mr. Kalogiannis's own testimony, in effect, that he was not fired.

There is no basis to conclude on the record that Messrs. Pappas and Kalogiannis had a

reasonable expectation that Mr. Fotinos would have provided a formal, or even a written, accounting of Corfian's revenues and expenses, profits or losses. As far as the records shows, the only documentation Mr. Fotinos provided the other shareholders were those required for preparation of their respective tax returns. As noted in this Court's January 2009 Decision After Hearing, a review of the limited number of individual tax returns that are part of the record reveals that none of the individuals' tax returns, including Mr. Fotinos's, report any dividends from Corfian Enterprises, Ltd., or otherwise reveal any of the three to be a shareholder of Corfian.

To the extent that the tax records contain copies of the W-2 statements given to Messrs. Pappas and Kalogiannis, they confirm an awareness of the widespread commingling of finances that took place at 577 Baltic, also noted in the Decision After Hearing. In 1999, 2000, and 2001, Mr. Kalogiannis received a W-2 statement for part of his income from Corfian and another from Cema Construction, an entity about which there is nothing in the record from any party. In 2002, Mr. Kalogiannis received W-2 statements from Corfian and Cema, and also from PF Consultants, Inc., a corporation apparently wholly-owned by Paul Fotinos since 2003. In 2003, Mr. Kalogiannis only received a W-2 from PF Consultants, but also received a 1099 from Corfian reporting "nonemployee compensation" of $5,000.

Despite any evidence of declaration or payment of dividends at any time, the record allows the conclusion that Messrs. Pappas and Kalogiannis had a reasonable expectation of sharing in the "profits" of the business, as they might be realized by Corfian. As noted by the Court of Appeals, "earnings of a close corporation, as is well known, are distributed in major part in salaries, bonus and retirement benefits." (*See Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 71 [internal quotation marks and citation omitted]; *see also Matter of Smith [Koslowitz Constr. Co.]*, 154 AD2d at 539 ["as is common with closely held corporations, no policy of declaring dividends appeared to exist"].)

At the first hearing, Mr. Kalogiannis testified that the three shareholders would meet monthly [*11]to review the finances of the business and decide how much, if anything, would be paid to the shareholders as a distribution of profits. Mr. Fotinos did not dispute the meetings, which in any event were confirmed by the testimony of a disinterested witness, but Mr. Fotinos testified that the meetings were for the purposes of his employees' reporting to him. That same disinterested witness, who for six years was responsible for preparing the payroll checks for the employees of the 577 Baltic business, testified that she never wrote a

payroll check to either Mr. Pappas, Mr. Kalogiannis, or Mr. Fotinos. There is no evidence to contradict Mr. Kalogiannis's contention in effect that it was understood by the three shareholders that the earnings of the business would be distributed primarily as salary. Indeed, Mr. Fotinos acknowledged that Mr. Pappas and Mr. Kalogiannis received "bonuses" "from time to time."

There was no evidence as to the shareholders' expectations if one of them should die, but Mr. Kalogiannis testified to a discussion with Mr. Fotinos about retirement. According to Mr. Kalogiannis, "if I were to retire . . . I would still get the profits from the company, from the shop, but not the weekly salary" (Ph. II 108.) There is no other evidence on the subject.

Finally as to "oppressive actions," and to this Court most importantly, is Mr. Fotinos's denial that Messrs. Pappas and Kalogiannis were equal stockholders with him in the business conducted from 577 Baltic Street. Although this Court is not aware of any authority that holds denial of shareholder status to be "oppressive" in itself, several opinions at least suggest it. (*See Stein v McDowell*, ____ AD3d ___, 2010 NY Slip Op 5755, * 2; *Matter of Parveen*, 259 AD2d 389, 391 [1st Dept 1999]; *Matter of Pickwich Realty*, 246 AD2d 863, 866 [3d Dept 1998].) It is difficult to recognize a more reasonable shareholder expectation than that its interest will not be repudiated in its entirety, and that legal action would be required to compel its acknowledgment.

The Court concludes that Petitioners have made a sufficient *prima facie* showing of "oppressive actions" warranting dissolution pursuant to Business Corporation Law §1104-a (a) (1). The statute provides that "[t]he court, in determining whether to proceed with involuntary dissolution . . . , shall take into account: (1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or the

petitioners." (*See* Business Corporation Law §1104-a [b].) Once a petitioner has set forth a *prima facie* case, "it should be incumbent upon the parties seeking to forestall dissolution to demonstrate to the court the existence of an adequate, alternative remedy." (*See Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 73-74; *see also Matter of Gunzberg v Art-Lloyd Metal Prods. Corp.*, 112 AD2d at 426-27.) Here, Mr. Fotinos "has failed to suggest any

alternative remedy, adequate or otherwise." (*See id.* at 426.)

"Business Corporation Law §1118 is a corollary to section 1104-a." (*Matter of Penepent Corp.*, 96 NY2d 186, 191 [2001].) "It grants non-petitioning shareholders, as well as the corporation itself, the right to avoid dissolution by timely electing to purchase the petitioning shareholder's shares [*12] at their fair value'." (*Id.* [*quoting* Business Corporation Law §1118 (a)]; *see also Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 744-45 [1988].) "Whatever the true facts regarding oppression or wrongdoing, the corporation and the remaining shareholders have the unconditional right . . . to avoid the potential drain and risk of dissolution proceedings by simply offering to buy out the minority interest; the minority is protected by a court-ordered determination of fair value and other terms and conditions of the purchase." (*Id.* at 745.)

Generally, "[e]very order of dissolution . . . must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value." (*See Matter of Kemp & Beatley [Gardstein],* 64 NY2d at 74; *see also* Business Corporation Law § 1104-a [b].) Here, however, because of the parties' stipulation that none of them is seeking a buy-out, and the absence of any evidence that dissolution will have any adverse consequence for a third-party employee or creditor (*see Matter of Burack [I. Burack, Inc.]*, 137 AD2d at 527), the judgment need not make dissolution subject to any shareholder's election to purchase shares (*see Matter of Meischer [Hamil Realty Corp.]*, 288 AD2d 129, 130 [1st Dept 2001].)

Dissolution here, where one of the three shareholders has died, and another has retired because of injury, is consistent with the real-world similarity between closely-held corporations and partnerships. Indeed, the Court noted in its January 2009 Decision After Hearing that, at the time 577 Baltic Street was purchased and the three shareholders commenced business from the property, Mr. Fotinos and Mr. Pappas described the enterprise to third parties as a partnership. Had Messrs. Pappas, Kalogiannis, and Fotinos chosen to conduct business as a partnership, the result would be clear.

It is "elemental" (*see Cohen v Lord, Day & Lord*, 75 NY2d 95, 101 [1989]) that, in the absence of agreement to the contrary, the death or withdrawal of a partner dissolves the partnership by operation of law, and a right to an accounting accrues to any partner or the partner's personal representative in connection with the winding up of the partnership's

affairs. (*See* Partnership Law §62 [1] [b], §62 [4]; §74; *Cohen v Lord, Day & Lord*, 75 NY2d at 101; *Stern v Warren*, 227 NY 538, 546 [1920]; *Mashihi v 166-25 Hillside Partners*, 51 AD3d 738, 738-39 [2d Dept 2008]; *Gaentner v Benkovich*, 18 AD3d 424, 427 [2d Dept 2005].) "The title to partnership property . . . is in the firm as an entirety subject to the right of the partners to have it applied to the payment of the debts of the firm and the equities of the partners, and surviving partners succeed to the exclusive possession and control of the assets and the right within the limits of good faith, of disposing of the assets and closing the partnership affairs." (*Costello v Costello*, 213 NY 252, 259-60 [1913].)

That the same result obtains here would not offend the purpose or policies of Business Corporation Law §1104-a.

The Court has noted Petitioners' contention, in response to Mr. Fotinos's about Corfian's lack of profitability, that "Corfian's tax returns do not show a profit because Fotinos paid the would-be profits to himself as salary and officer compensation, and to PFC, his so-called personal corporation,' which was allocated as a subcontractor cost' for purposes of taxes" (Petitioners' Post-[*13]Trial Memorandum at 13.) (Petitioners use "PFC" to refer to PF Consultants, Inc.) Petitioners compute "officer compensation" at $428,400 during the years 2003-2009, and point to "subcontracting costs" of $149,771 paid in 2002 to PF Consultants, which Mr. Fotinos did characterize as his "personal corporation" in deposition testimony quoted at the hearing (Ph II 289, 443.)

As to amounts paid directly to Mr. Fotinos, Petitioners make no effort to compare the payments made during the years 2003-2009, when both Mr. Pappas and Mr. Kalogiannis, for the most part, were no longer present at 577 Baltic, with payments made to Mr. Fotinos during the previous two decades when the three were regularly meeting, according to Mr. Kalogiannis, to decide on the distribution of earnings. Nor do Petitioners make any other showing that the amounts paid to Mr. Fotinos as compensation were otherwise unfair or unreasonable as a business matter (*see Matter of Smith [Koslowitz Constr. Co.]*, 154 AD2d at 539-40.)

As to PF Consultants, in its January 2009 Decision After Hearing, this Court found that there was "sufficient evidence of commingling of finances and personnel" among the various corporations nominally doing business from 577 Baltic "for the Court to conclude, at least for purposes of the current inquiry, that these "separate corporations were in reality treated as a

single entity" (*see Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d at 82-83.) The evidence at the second hearing only further supports the finding of commingling. This evidence will be addressed further below. Suffice it for now to say that Petitioners do not show, with expert proof or otherwise, that payments made by Corfian to PF Consultants were unfair or unreasonable as a business matter.

It must be stressed, moreover, that neither Ms. Pappas nor Mr. Kalogiannis claims shareholder status with respect to PF Consultants, nor is there a claim of shareholder status with respect to any of the other corporations doing business from 577 Baltic Street (except Epiros Realty, Ltd., addressed in the January 2009 Decision After Hearing.)

The Court has also noted Petitioners' contention that "Fotinos engaged in looting, waste, and diversion of assets under BCL 1104-a (2)" (*see* Petitioners' Post-Trial Memorandum at 15-19.) Even assuming, contrary to the Court's view, that a claim of dissolution pursuant to Business Corporation Law §1104-a (2) is properly before the Court, the contention is mooted by the Court's holding that dissolution is warranted pursuant to §1104-a (1.) Again, however, comments on Petitioners' evidence with respect to the allegations of looting, waste, and diversion of assets appear below.

There can be no disputing, however, Petitioners' assertion that "[t]he relationship between Fotinos, Kalogiannis and Ms. Pappas has deteriorated entirely" (*see id.* at 27.) "[W]hen there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." (*See Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 74.) Whatever the legitimacy, moreover, of the manner in which Mr. Fotinos has managed the financial affairs of Corfian Enterprises, or Petitioners' allegations of spoliation, also addressed below, there is no evidence that his methods or conduct will change if Corfian is not dissolved, and no reason to expect anything but continued and repeated dispute about Petitioners' return on investment. [*14]

Damages/Surcharge

In addition to dissolution of Corfian Enterprises, Ltd., Petitioners seek "a money judgment against Fotinos and in favor [of] Kalogiannis and Pappas in the amount of $1,646,682.52, representing the amount which Fotinos wrongfully dissipated from Corfian" (*see* Petitioners' Post-Trial Memorandum at 31.) The total amount claimed has four components: $617,944.46, "representing two-thirds of the fair market rent [of 577 Baltic

Street] from 2003 through 2010, plus interest at the statutory rate," in that Mr. Fotinos "allow[ed] the DSL Entities (as well as PFC) to use the 577 Baltic [*sic*] rent-free since at least 2003" (*see id.* at 29); $73,758.14, "representing two-thirds of the amount Fotinos improperly paid for his own personal benefit," in that Mr. Fotinos "spent . . . Corfian's cash for legal fees in this action" (*see id.* at 29-30); $572,593.92, representing two-thirds of the estimated amount Corfian paid PF Consultants between 2002 and 2007, plus interest (*see id.* at 30); and $382,386.00, representing two-thirds of the estimated amount "Corfian and PFC paid to Fotinos as officer compensation'," plus interest (*see id.* at 30.)

The Court notes in the first instance that the amounts claimed are purportedly further elaborated in Schedules A, B, C, and D annexed to the Petitioners' Post-Trial Memorandum, but no such Schedules are included in or with the document delivered to the Court. Although the Court will allow Petitioners to supplement the record with copies, assuming that the Schedules were included in the document delivered to Defendants/Respondents, as will appear the Schedules would not affect any determination of the Court at this time.

"For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." (*Abrams v Donati*, 66 NY2d 951, 953 [1985].) "[A] llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." (*Id.; see also Elenson v Wax*, 215 AD2d 429, 429 [2d Dept 1995].) There is no difference for closely-held corporations. (*See Glenn v Hoteltron Sys.*, 74 NY2d 386, 392-93 [1989]; *see also Brancaleone v Mesogna*, 290 AD2d 467, 469 [2d Dept 2002].)

Here, where Petitioners do not sue derivatively (*see* Business Corporation Law § 626), allegations in support of a single claim for dissolution do not support an award of damages. (*See Matter of Brooklyn Resources Recovery, Inc.*, 309 AD2d 931, 931 [2d Dept 2003].) The Court offers no opinion on the viability at this time of a shareholder's derivative claim or an individual claim for damages for breach of fiduciary duty. They are not pled here.

Petitioners attempt to avoid the consequences of not having commenced a shareholder action on behalf of the corporation or alleging an individual claim for breach of fiduciary duty by resting their claim for a money judgment on the adjustment/surcharge provision of

Business Corporation Law §1104-a (d.) The statute provides: "The court may order *stock valuations* be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of *[*15]wilful or reckless* dissipation or transfer of assets or corporate property *without just or adequate compensation* therefor." (Business Corporation Law §1104-a [d] [emphasis added].) Petitioners allege in summary that "Fotinos willfully dissipated Corfian's main asset — the lease — by permitting the DSL Entities and other companies' use of 577 Baltic without receiving just or adequate compensation, and diverted cash from Corfian for his personal attorney's fees, to himself as officer compensation,' and to PFC, his personal corporation'." (Petitioners' Post-Trial Memorandum at 28.)

First, there is no reference in Ms. Pappas's Verified Petition or Mr. Kalogiannis's cross-claim to the adjustment/surcharge provision in Business Corporation Law §1104-a, and no allegation of "wilful or reckless" conduct by Mr. Fotinos. Indeed, a cause of action based upon breach of trust "shall be stated in detail" (*see* CPLR 3016 [b]; *see also Fitzgerald v Eaton*, 265 AD2d 374, 376 [2d Dept 1999].)

Even if the possibility of adjustment or surcharge is deemed a necessary incident of a dissolution proceeding pursuant to §1104-a (a), the provision by its express terms is limited to "stock valuations." Here, as described above, share valuation is not before the Court either by reason of Business Corporation Law §1118 or as alternative to dissolution pursuant to §1104-a (b.) Petitioners do not show that the adjustment/surcharge provision, again §1104-a (d), should be interpreted to allow an award in the nature of damages, particularly in the absence of a shareholder derivative action or a claim for breach of fiduciary duty.

Indeed, there is at least a question as to whether any adjustment or surcharge pursuant to § 1104-a (d) is permissible where, as here, dissolution is based solely upon "oppression" pursuant to subsection (a) (1) of §1104-a, and not upon misappropriation or other wrongdoing described as grounds for dissolution in subsection (a) (2) of the statute. (*See Matter of Pace Photographers [Rosen]*, 71 NY2d at 746 ["Fixing blame is material under 1104-a, but not under 1118"]; *Matter of Dissolution of Exterior Delite, Inc.*, 14 Misc 3d 910, 917 [Sup Ct, Bronx County 2006] [Renwick, J.].)

Perhaps most importantly, although Petitioners fairly recognize that imposition of a surcharge requires "a finding of wilful or reckless" conduct "without just or adequate

compensation," they make no direct showing as to any of those requirements, relying instead on inference and rhetoric. Although both inference and rhetoric have their place, and inference at least contributed to the foundation of the Court's determination of shareholder status, in matters involving the exercise of expertise and judgment they cannot substitute for the evidence supplied by a knowledgeable witness. The Court heard from no forensic accountant or other expert who provided any evidence that Mr. Fotinos's practices in managing the financial affairs of Corfian Enterprises were unfair or unreasonable as a business matter.

Petitioners fail to acknowledge, and therefore to address, the evidence that, with respect to each item of alleged dissipation or diversion, except for the use of Corfian's funds to pay legal fees, the practices complained about have, at least in general, been endemic to the management of Corfian and the other businesses operating from 577 Baltic Street, with the awareness and acquiescence, if [*16]not approval, of Messrs. Pappas and Kalogiannis for two decades. Putting aside questions of limitations and laches, this evidence suggests that, without more, the practices cannot be deemed necessarily inappropriate.

Looking separately at each of the four items of alleged wrongdoing, starting with use of 577 Baltic Street by the DSL Entities without paying rent, the Court concluded above that Adriatic Management is not required in the Partition Action to compensate the other tenants in common for fair market rental value. That conclusion does not preclude a claim that the value of Corfian's lease was "dissipated" by the failure to collect rent from the DSL Entities for their use and occupancy. But Petitioners provide no expert opinion that there is a market for the minimal use made of the premises, as revealed by the evidence, or as to the fair market rental value for that use. The suggestion that Mr. Fotinos's estimate of the fair market rental value of the entire property in connection with refinancing in 1996 can support a monetary award of $617,944.46 is rejected by the Court. Petitioners make no attempt, moreover, to reconcile their claim in the Dissolution Proceeding for fair market rental value based upon the failure of the DSL Entities to pay for their use and occupancy of some part of 577 Baltic Street with their claim in the Partition Action for a share of rent paid by the DSL Entities, so at least to avoid a duplicative recovery.

As to the use of Corfian funds for payment of legal fees, in the absence of the schedule that purportedly shows "an itemization of amounts Corfian paid for Fotinos' litigation costs in this action" (*see* Petitioners' Post-Trial Memorandum at 29), the Court cannot know whether

or the extent to which the amount claimed represents fees paid in connection with the Partition Action, which at first glance do not appear appropriately paid by Corfian (although it does have an interest), or paid in connection with the Dissolution Proceeding, which at first glance might well be appropriately paid by Corfian, at least in part. Moreover, Petitioners cite no legal authority for their contention that Corfian's payment of such fees under the circumstances here would constitute "loot[ing], waste, or diver[sion] for non-corporate purposes" (*see* Business Corporation Law §1104-a [a] [2]), or "dissipation or transfer of assets or corporate property" (*see* Business Corporation Law §1104-a [d].)

The Court has addressed above in another context Petitioners claim that "Fotinos dissipated cash assets to himself as officer compensation" (*see* Petitioners' Post-Trial Memorandum at 30.) The claim is not supported by evidence as to either fact or amount. That "[b]etween 2003 and 2007 . . . Fotinos paid himself an estimated sum of $428,400.00 from Corfian's accounts as officer compensation,' without making an equal distribution to Kalogiannis and Ms. Pappas" (*id.*) is meaningless in itself, since there is no evidence that either Mr. Kalogiannis or Ms. Pappas rendered any services to warrant compensation, and there is evidence that Mr. Fotinos did render management services of at least some value.

As for the claim that "Fotinos dissipated Corfian's cash assets for unsubstantiated payments to PFC" (*id.*), that a payment is characterized as "unsubstantiated" does not make it wrongful. Although in arguing that "Fotinos engaged in looting, waste, and diversion of assets under BCL 1104-a (2)" (*see* Petitioners' Post-Trial Memorandum at 15-19), Petitioners contend that "payments from Corfian to Epiros [Realty, Ltd.] constitute looting and waste" (*see id.* at 17-18), and that [*17]"Fotinos diverted assets and opportunities to the DSL Entities" (*see id.* at 18-19), Petitioners do not seek a "surcharge" for any payments, assets, or opportunities Fotinos may have directed to Epiros or the DSL Entities (*see id.* at 28-31.) The only stated basis for Petitioners' claim that $598,363.02 "must be disgourged and awarded" to them is that PF Consultants is Fotinos's "personal corporation" (*see id.* at 30.)

Using as a basis 2002, "the only year in which Fotinos produced records showing amounts paid from Corfian to PFC," a schedule (again, not included in or with the papers delivered to the Court) "estimate[s] the percentage of Corfian's *gross sales* that were paid to PFC" (*see id.* [emphasisadded].) The financial relationship and transactions between Corfian and PF Consultants is obscure, with Fotinos testifying that he relied on his accountants, Roy Prabir and Anthony Incorvaia, in allocating receipts and expenses for the corporate tax

returns, and the accountants testifying that all information for the returns came from Mr. Fotinos or his bookkeeper, Elizabeth Kocielec.

Mr. Fotinos testified that PF Consultants served as a subcontractor on certain Corfian projects, as he determined, but also did work for others. There is no documentation in the record that further elaborates the relationship or transactions between Corfian and PF Consultants. The corporate tax returns in the record for 2002-2007, the period for which Petitioners seek a "surcharge," report that PF Consultants had no taxable income for any year during the period, and report that Corfian had no taxable income more than $3,500 for any year. Petitioners acknowledge that, for practical purposes, "[n]either Corfian nor PFC ever earned a profit according to the tax returns of each entity." (*See* Petitioners' Post-Trial Memorandum at 5, ¶ 31.)

Petitioners present no expert evidence to question the *bona fides* of the corporate tax returns, or that would suggest a different standard of profitability for present purposes. There is no evidence, expert or otherwise, to support a conclusion that, had all of the business of PF Consultants been conducted under the Corfian corporate umbrella, the bottom line would have been any different. Indeed, Petitioners themselves introduced evidence of a claim in the amount of $82,354.26 by the State Insurance Fund for workers' compensation premiums that, according to Mr. Fotinos at the hearing, had not been satisfied. Certainly the "play[ing] with the numbers," as Mr. Fotinos characterized it, made Petitioners' task more difficult, but that, in itself, provides no exemption from the requirements of burden of proof and admissible evidence. (*See Matter of DeAngelis v AVC Servs., Inc.*, 57 AD3d 989, 990-92 [2d Dept 2008].)

Disclosure/Spoliation/Adverse Inference

Petitioners attempt to carry their burden of proof with disclosure penalties pursuant to CPLR 3126, and conclusive inferences based upon spoliation of evidence and, although not so characterized, the failure to produce a material witness. (*See* Petitioners' Post-Trial Memorandum at 7-9, 20-26.) Although not relieving Respondents of their obligations, in assessing Petitioners' position their own failure or delay in obtaining disclosure is not immaterial. [*18]

The dissolution statute provides, "In addition to all other disclosure requirements, the directors or those in control of the corporation, no later than thirty days after the filing of a

petition hereunder, shall make available for inspection and copying to the petitioners under reasonable working conditions the corporate financial books and records for the three preceding years." (Business Corporation Law §1104-a [c].) Although, given the history of the Dissolution Proceeding, strict enforcement of the 30-day requirement might not be deemed appropriate, it does not appear that Petitioners ever sought access to Corfian's books and records pursuant to the statute. Such an inspection may well have resolved many of the problems and deficiencies of which Petitioners now complain.

After this Court's ruling on July 16, 2009 on the respective motions of the parties for reconsideration of the January Decision After Hearing, the parties and the Court agreed upon a disclosure schedule targeting a hearing to begin on March 15, 2010. Neither during subsequent conferences in person or by telephone, nor by motion or other application, did Petitioners contend that Respondents were not complying. Indeed, the Court was repeatedly advised that disclosure was proceeding as agreed. It was not until March 11, 2010, less than two business days before the scheduled hearing, that the Court was advised, by delivery of the Order to Show Cause for signature, of Petitioners' contention that Respondents had not complied.

From the perspective of disclosure, however, the matter is somewhat moot. Petitioners' motion sought a striking of the answers of respondents Paul Fotinos and Corfian Enterprises, Ltd., with the result that they would be treated as in default on the claim for dissolution of Corfian pursuant to Business Corporation Law §1104-a (a) (1), which, of course, would give Petitioners no more than the Court's determination on the evidence. Even on default, Petitioners would have been required to prove their damages, denominated by them now as "surcharge," assuming that the Verified Petition were deemed to include the claim. (*See Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *Abbas v Cole*, 44 AD3d 31, 33 [2d Dept 2007].)

Spoliation, of course, is a different matter, and there are also inferences that may be drawn against a party who does not proffer an available witness or document.

"A party that destroys essential evidence such that its opponent is prejudicially bereft of appropriate means to either present or confront a claim with incisive evidence is subject to severe sanctions . . . As a matter of fairness, this is true even in cases where the destruction of the evidence was not willful or contumacious if the other party has been severely prejudiced

by the destruction . . . Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate." (*Awon v Harran Transp. Co., Inc.*, 69 AD3d 889, 890 [2d Dept 2010] [internal quotation marks and citations omitted]; *see also Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Gotto v Eusebe-Carter*, 69 AD3d 566, 568 [2d Dept 2010] ["adverse inference charge at trial"]; *Certified Elec. Contr. Corp. v City of New York [DOT]*, 23 AD3d 596, 599 [2d Dept 2005] [preclusion of evidence regarding loss profits]; *Playball at Hauppauge, Inc. v Narotsky*, 296 AD2d 449, 450 [2d Dept 2002] [dismissal of breach of fiduciary duty claim].) [*19]

Spoliation principles apply to financial and other business records, whether in hard copy or computer database form, particularly when a party was "on notice that this evidence might be needed for future litigation" (*see Huezo v Silvercrest*, 68 AD3d 820, 821 [2d Dept 2009].) (*See E.W. Howell Co., Inc. v S.A.F. LaSala Corp.*, 36 AD3d 653, 655 [2d Dept 2007]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 44 AD3d 975, 976 [2d Dept 2007]; *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007]; *Certified Elec. Contr. Corp. v City of New York [DOT]*, 23 AD3d at 599; *Kerman v Freidman*, 21 AD3d 997, 999 [2d Dept 2005]; *Playball at Hauppauge, Inc. v Narotsky*, 296 AD2d at 450; *Einstein v 357 LLC*, 2009 NY Slip Op 32784 [U], * 21- * 30 [Sup Ct, NY County 2009]; *Davydov v Zhuk*, 23 Misc 3d 1129 [A], 2009 NY Slip Op 51003 [U], * 6- * 8 [Sup Ct, Kings County 2009].)

Mr. Fotinos testified that, with the exception of payroll and tax documents, any "source documents" (Petitioners' phrase) for computer data entry, *i.e.*, contracts, purchase orders, vendor invoices, cancelled checks, bank statements, and bank deposit slips, were destroyed one year after Corfian completed the project to which the documents relate. Although he also testified that documents were not destroyed if a claim was pending about the project, he acknowledged that no change in the destruction practice was made after he became aware of the claims of Ms. Pappas and Mr. Kalogiannis.

Mr. Fotinos's testimony shows that financial and other business records were destroyed after information was entered into the computer database, and that those records were destroyed after Mr. Fotinos was "on notice that this evidence might be needed for future litigation" (*see Huezo v Silvercrest*, 68 AD3d at 821) with Ms. Pappas and Mr. Kalogiannis. There is no showing, however, through an expert or otherwise, that Corfian's document destruction policy is inappropriate in light of a general accounting or business standard, or

common practice in Corfian's industry, or, most importantly, that any of the destroyed documents were essential to the proof of Petitioners' claims.

Specifically, there is no showing that any of the destroyed documents would have allowed Petitioners to prove that Mr. Fotinos was over-compensated for his services to Corfian; that the amounts Corfian paid PF Consultants were not in fact legitimately paid; or that Corfian or PF Consultants in fact operated profitably each year from 2002 through 2007 such that only Mr. Fotinos, and not Ms. Pappas and Mr. Kalogiannis, benefitted. The essence of a spoliation claim is demonstrated prejudice, which is not established by the destruction itself, and which is not found here in the testimony or Petitioners' argument.

Finally, "where an adversary withholds evidence in his possession and control that would be likely to support his version of the case, the strongest inference may be drawn against him which the opposing evidence in the record admits." (*Noce v Kaufman*, 2 NY2d 347, 353 [1957]; *see also Bleecker v Johnston*, 69 NY 309, 312 [1877].) The principle applies to so-called "missing witnesses" (*see LaGrasta v Ettayyin*, 5 AD3d 737, 737 [2d Dept 2004]), and "missing documents" (*see McGloin v Golbi*, 49 AD3d 610, 611 [2d Dept 2008].)

Generally, a missing witness inference requires a *prima facie* showing that "there is an [*20]uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness would naturally be expected to give noncumulcative testimony favorable to the party against whom the [adverse inference] is sought. . . , and that the witness was available to that party who has failed to call him to testify." (*See Buttice v Dyer*, 1 AD3d 552, 552-53 [2d Dept 2003]; *see also LaGrasta v Ettayyin*, 5 AD3d at 737.) A missing document inference depends upon *prima facie* showings "that the document in question actually exists, that it is under the opponent's control, and that there is no reasonable explanation for failing to produce it." (*See Jean-Pierre v Touro College*, 40 AD3d 819, 820 [2d Dept 2007]; *see also Scaglione v Victory Mem. Hosp.*, 205 AD2d 520, 520-21 [2d Dept 1994].)

Petitioners do not in terms seek either a missing witness or a missing document inference, and do not, in any event, make the required *prima facie* showings. Petitioners complain that Mr. Fotinos hindered their efforts to obtain information from Elizabeth Kocielec, who was employed as the bookkeeper at 577 Baltic Street for 7 or 8 years until 2006, and who entered data into and printed reports from Corfian's computer programs.

(Petitioners served Ms. Kocielec with a deposition subpoena, but she did not appear.) Petitioners' contention that Ms. Kocielec "is apparently the only person who . . . has personal knowledge of the accounting records maintained by Corfian and the related entities, as well as the loans' and other transactions among the family of corporations' Fotinos was operating from 577 Baltic" (*see* Petitioners' Post-Trial Memorandum at 22) is at best an overstatement. Despite the disclaimers of Messrs. Fotinos, Prabir, and Incorvaia, somewhat disingenuous particularly as to Mr. Fotinos, there is no reason to believe that Ms. Kocielec has any information, not otherwise available, that would be material to Petitioners' claim for a "surcharge," and Petitioners do not describe any.

Similarly, Petitioners do not identify any document in existence, either in hard copy or computerized form, that would be material to their "surcharge" claim, and that Respondents have not offered as evidence. Accepting Petitioners assertion that they were unaware until February 2, 2010 that "Corfian maintained computerized records for more than payroll and taxes" (*see id.* at 23), and that the situation was not of their own doing, no application was made to the Court, for adjournment of the March 15 hearing date or otherwise, to address the situation.

The Court could easily agree with Petitioners that Mr. Fotinos has not been particularly forthcoming with records or testimony, and the Court has been mindful of that in assessing the evidence presented at the hearing and the contentions and arguments of the parties. The Court continues to accept, moreover, as it did on its determination of shareholder status, that Mr. Fotinos was in the better position to provide documentation material to the issues, particularly in light of the statutory obligation to keep "correct and complete" books and records of account (*see* Business Corporation Law §624 [a].)

But Petitioners bear the burden of proving their claims, and an adverse inference can only be "the strongest . . . the opposing evidence in the record admits" (*see Noce v Kaufman*, 2 NY2d at 353.) The evidence in this record, even enhanced by adverse inference, does not support a monetary award of damages or "surcharge." Petitioners' claims are based upon little more than payments made [*21]to Mr. Fotinos and a corporation of which he is sole shareholder. It may be that in some cases evidence of payments made to, or for the sole benefit of, a controlling shareholder, one with the ability and responsibility to create and maintain correct and complete corporate records, would be sufficient to shift the burden of production, and require the controlling shareholder to come forward with evidence of the

fairness and reasonableness of the payments. Here, the allegedly suspect payments appear to continue practices that marked the way business was done from 577 Baltic for more than two decades, with the acquiescence, if not the approval, of Messrs. Pappas and Kalogiannis. At least there is no evidence to the contrary.

Dispositions

The real property known as 577 Baltic Street, Brooklyn, shall be partitioned through judicial sale pursuant to and in accordance with Article 9 of the Real Property Actions and Proceedings Law and the respective one-third interests as tenants in common of Theano Pappas, as Executrix of the Estate of Eleftherios Pappas, Theodoros Kalogiannis, and Adriatic Management Corp. There shall be an accounting as to rents actually paid after March 15, 2010, and as to expenses due or to become due on or after March 15, 2010. A referee will be appointed by the Court to take and state the account, complete the sale, make conveyance, and distribute the proceeds. (*See Eldridge v Wolfe*, 129 Misc 617, 620 [Sup Ct, Chautauqua County 1927].) The account shall include an adjustment in favor of Ms. Pappas and Mr. Kalogiannis in the amount of $13,266.67 each, representing one-third of rents actually paid and received by Adriatic Management Corp.

Corfian Enterprises, Ltd. shall be dissolved pursuant to and in accordance with Article 11 of the Business Corporation Law and the one-third interests as shareholders of Theano Pappas, as Executrix of the Estate of Eleftherios Pappas, Theodoros Kalogiannis, and Paul Fotinos. A referee will be appointed by the Court to close the business of the corporation, marshall its assets, and determine and discharge its liabilities. (*See Ahmed v Corines*, 265 AD2d 266 [1st Dept 1999].)

In accordance with §202.48 of the Uniform Rules for Supreme Court and County Court, Theano Pappas and Theodoros Kalogiannis shall submit on notice a proposed order and interlocutory judgment. Ms. Pappas and Mr. Kalogiannis may act separately or together as they may be advised, keeping in mind that Ms. Pappas is not entitled to any judgment in the Partition Action without the approval of the Surrogate, Queens County (*see* RPAPL 901 [4].) The proposed order and interlocutory judgment shall provide for the appointment of the same referee in the Partition Action and Dissolution Proceeding, but any party may apply for the appointment of separate referees or the appointment of a receiver instead of a referee.

The proposed order and interlocutory judgment shall recognize the interest of Corfian

Enterprises, Ltd. as lessee of 577 Baltic Street, and shall provide for the value of that interest, if any, in the Partition Action, the Dissolution Proceeding, or both. The proposed order and interlocutory judgment shall also address interest and attorney fees, as appropriate.

The caption on the Partition Action shall be amended to read:

Theano Pappas, as Executrix of

the Estate of Eleftherios Pappas,

Plaintiff,

v

Index No. 7799/04

Paul Fotinos, Adriatic Management

Corp., Theodoros Kalogiannis, and

Corfian Enterprises, Ltd.,

Defendants.

July 23, 2010

Jack M. Battaglia

Justice, Supreme Court

Return to Decision List