

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

TODD B. ROSENFELD, AMY G. LERNER,
STEVEN E. ROSENFELD and EDITH ZELMAN,

INDEX No. 011965/07

Petitioners,

MOTION DATE: Sept. 25, 2007
Motion Sequence # 001, 002

-against-

ANTHONY LUCCARO, LURO HOLDING
CORP. and TOM'S POINT MARINA, INC.,

Respondents.

The following papers read on this motion:

Order to Show Cause.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	X
Reply Affidavit....	XX
Memorandum of Law.....	X
Reply Memorandum of Law.....	X

This motion, by petitioner, brought on by an Order to Show Cause, for an order: (i) requiring the Corporations to be dissolved through a sale of the Corporations' assets with the proceeds to be distributed to the corporations' creditors and shareholders; (ii) enjoining Luccaro from managing the Corporation's business; and (iii) appointing a

receiver to conduct a sale of the Corporations' assets and to manage the affairs of the Corporations until the sale process is completed and the proceeds distributed, is determined as hereinafter set forth.

PETITIONERS' CONTENTIONS

Petitioner is seeking dissolution pursuant to BCL § 1104 for the following reasons: that dissolution is warranted because (i) Corporations are split into two competing shareholder factions that are hopelessly deadlocked over the most fundamental business issues; (ii) that the level of dissension between the two factions has reached a point where continuing conduct of the business is simply not possible; (iii) that the respondent has engaged in illegal and oppressive conduct towards the petitioners; (iv) that the respondent has exercised control over the Corporations' finances, and its books and records, unlawfully denying the petitioners the opportunity to inspect those books and records; (v) that the respondent has refused to provide the petitioners with copies of the Corporations' bylaws; (vi) that the respondent has denied and continues to deny to the petitioners the benefits of the business, which they own jointly with him; and (vi) that conduct has resulted in dissension, and complete and irresolvable deadlock between these two shareholder factions concerning the issue of how to conduct business of the corporations generally and, in particular, whether to sell the Corporations assets.

The petitioners are also seeking dissolution pursuant to BCL §1104-a because the respondent has engaged in illegal and oppressive conduct towards the petitioner and the petitioner's reasonable expectations as 50% owners of the closely held corporations have repeatedly been defied as a result of the respondent's wrongful conduct. This oppressive conduct included: (i) threatening the life of Steven Rosenfeld if he were to set foot on Marina property; (ii) operating the Marina as a cash business without any proper controls or accounting; (iii) employing family members without proper accounting; and (iv) refusing to issues required K-1 tax forms to the petitioners for the 2006 tax year.

The petitioners also request that a receiver be appointed for the corporations in order to oversee the dissolution process.

RESPONDENT'S CONTENTIONS

The respondent argues that the petitioners are not shareholders of either

Corporation and were previously paid in full by Walter Rosenfeld's Estate, which had sold the interest in both Corporations to the respondent. The proceeds of this purchase of shares was deposited in Walter Rosenfeld's Estate and were distributed to the petitioners pursuant to his Last Will and Testament.

As a prerequisite and condition of the respondent purchasing his father's 50% interest, his father insisted that the respondent protect himself and his ownership interest in both companies by obtaining a buy/sell cross-purchase agreement with Walter Rosenfeld. The purpose was that survivor would buy, and the heirs, executor, or administrator of the decedent's estate would sell all of the interest in the corporations owned by the decedent at the time of his death to the survivor, herein the respondent.

PETITIONERS' REPLY

The petitioners argue that they are 50% owners of the Corporations and submit documentary evidence showing such. This evidence included tax returns, Walter Rosenfeld's Last Will and Testament, stock certificates, and proof that Judith Rosenfeld sold her 7.5% interest in the Corporations to the petitioners. They also argue that the buy/sell cross-purchase agreement does not exist. The petitioners reiterate the request for dissolution.

RESPONDENT'S REPLY

The respondent repeats his assertion that he is the 100% owner, operator and shareholder of the Corporations. The respondent argues that the petitioners have introduced falsified documents, and claims that the documents are fraudulent and that the respondent's signature on various documents is not, in fact, his signature.

DECISION

The respondent's cross motion for summary judgment is **denied**. A party may not move for summary judgment until after issue has been joined. (CPLR § 3212(a)). No answer has yet been served.

Business Corporation Law § 1104 is designed to allow dissolution of a corporation

where the directors are deadlocked. Permissible grounds include: "That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." (§ 1104[a][3]).

Business Corporation Law § 1104-a is designed to allow dissolution of a corporation if "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders." (§ 1104-a [1]).

Both of these laws have basic pre-requisites: § 1104 (a) gives rights to "holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors" and § 1104-a gives rights to "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation." Because the respondent alleges that the evidence presented by the petitioners is fraudulent, an evidentiary hearing is necessary on the issue of whether the petitioners are, in fact, shareholders, and the percentage of such holding, if any.

Further, inasmuch as the respondent is contesting the legitimacy of the evidence presented by petitioners, the respondent carries the burden of proving such at the hearing.

This court holds that petitioners' motion to dissolve the corporations cannot be determined on this record, and must await the outcome of the hearing.

The hearing, pursuant to BCL §§1108 and 1109, shall be conducted by Hon. Frank Schellace, as referee to hear and report, on November 27, 2007 at 9:30 a.m.

Dated OCT 29 2007

Stephen A. Sacca

ENTERED

NOV 01 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**