

# MEMORANDUM DECISION

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Supreme Court, Nassau County, IAS Part 3

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

Petitioners,

-against-

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

Respondents.

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HON. STEPHEN A. BUCARIA, J.S.C.

INDEX NO. 011965/07

MOTION SUBMISSION DATE:

April 7, 2009

MOTION SEQUENCE # 006

This motion, by petitioners Todd B. Rosenfeld, Amy G. Lerner, Steven E. Rosenfeld and Edith Zelman, pursuant to CPLR 3212 for summary judgment dissolving Luro Holding Corp. and Tom's Point Marina, Inc. pursuant to New York Business Corporation Law §1105, appointing a receiver for the Corporations pursuant to Business Corporation Law §1113, and awarding fees pursuant to CPLR 3123(c) is **granted** in its entirety and a receiver shall be appointed to conduct a sale of the Corporations, and to secure an accounting and manage the business of the Corporations until the sale and dissolution process are completed. The court will choose a receiver, unless, in the order to be submitted hereon, the parties have agreed upon one of the shareholders to act as receiver. The order is without prejudice to the parties, within thirty days after service of a copy of this order upon respondents, agreeing to a private sale of the Corporations either among themselves or to a third party.

The petition asserts causes of action for dissolution of two closely held corporations, Luro Holding Corp. and Tom's Point Marina, Inc., pursuant to Business Corporation Law §§ 1104 and 1104-a. Petitioners Todd B. Rosenfeld, Amy G. Lerner, Steven E. Rosenfeld and Edith Zelman aver that they hold 50% of the shares of the named respondent corporations, and that respondent Anthony Luccaro owns the remaining 50%.

With regard to BCL § 1104, the petition avers that the corporations should be dissolved because there is a deadlock between the two factions of shareholders such that the votes required to elect directors cannot be obtained. Petitioners also aver that Luccaro refuses to abide by the election of director Todd Rosenfeld. They aver that internal dissension exists to such a degree that dissolution would be beneficial

to the shareholders.

With regard to BCL 1104-a, the petition alleges that the corporations should be dissolved because Luccaro has engaged in illegal, fraudulent and oppressive actions toward petitioners. The actions include threatening the life of Steven Rosenfeld if he were to set foot on Marina property, operating the Marina as a cash business without proper controls or accounting, employing family members without proper accounting, refusing to issue required K-1 tax forms to the Rosenfelds, and taking cash and other valuable distributions for himself from the Corporations without making any such distributions to the Rosenfelds.

The petition seeks an accounting by a professional selected by petitioners including a statement of all assets and liabilities, and all payments made by the Corporations to Luccaro, and the appointment of a Receiver. Petitioners allege that because of the fraudulent, illegal and oppressive conduct of Luccaro, and the dissension outlined above, a receiver is necessary to preserve the property of the Corporations and carry on the business until it is finally dissolved. Finally the petition seeks a declaration that Todd Rosenfeld is the sole director of the Corporations.

The petition seeks an order providing the following relief: that all interested persons show cause why the Corporations should not be dissolved through a sale of the Corporations' assets; requiring Luccaro to provide an accounting and a current statement of the Corporations' assets and liabilities and the names and addresses of claimants and creditors; directing Luccaro to provide petitioners with access to the books and records; enjoining Luccaro from managing the Corporations' business; 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; until the appointment of a receiver, declaring that Todd Rosenfeld is the Corporations' sole director; and awarding damages.

### **PROCEDURAL HISTORY:**

On petitioners' prior application by order to show cause for the same relief returnable September 25, 2007, Luccaro contended by affidavit dated August 30, 2007 that petitioners are not shareholders of either corporation and that the estate of Walter Rosenfeld, a previous 50% owner of Tom's Point and Luro Holding, sold the decedent's interests to Luccaro, and that the proceeds of the sale were deposited in Walter Rosenfeld's estate and distributed pursuant to his Last Will and Testament. Luccaro's affidavit contends that his father, as a prerequisite of his purchasing his father's 50% interest, insisted that he protect himself with a buy/sell cross purchase agreement with Walter Rosenfeld. The purpose was for the survivor to buy, and the estate of the decedent to sell, all of the decedent's interest in the Corporations to the surviving shareholder.

Petitioners submitted evidence including tax returns, Walter Rosenfeld's Last Will and Testament, stock certificates and proof that Judith Rosenfeld sold her interest in the Corporations to the petitioners. They averred that there was never a buy/sell cross purchase agreement and that Luccaro has not and cannot produce one.

Luccaro replied that the evidence submitted by petitioners was falsified and fraudulent, and that his signature on various documents was forged.

By order dated October 29, 2007, the prior motion by order to show cause for judgment was denied as issue had not been joined. Further, based upon Luccaro's sworn statements that petitioners were not shareholders and had no standing, the order directed a hearing to determine "whether the petitioners are, in fact, shareholders, and the percentage of such holding, if any." The order declared that the motion to dissolve the corporations "cannot be determined on this record, and must await the outcome of the hearing." A hearing was directed for November 27, 2007 with a court attorney referee.

Before the hearing was held, petitioners served Luccaro with a Notice to Admit. They sought an admission that none of the tax returns from 1985 to 2005 showed Luccaro as anything other than a 50% shareholder. They also sought an admission that petitioners' evidence in support of the application for dissolution were true and correct copies of the Corporations' tax returns. Luccaro denied the Notice. The hearing directed by the 10/29/07 order went forward. Luccaro failed to appear and no documentary evidence was submitted to sustain his burden of proof at the hearing.

Court Attorney Referee Thomas Dana granted a continuance of the hearing, to allow petitioners to seek discovery of the fully executed corporate documents and tax returns. Respondents objected, and this court authorized Referee Dana to order such discovery as he deemed appropriate.

Referee Dana directed respondents to produce, for the years 1983 through the present, all Federal, State and Local tax documents for Tom's Point Marina, Inc. and Luro Holding Corp., all certificates concerning ownership of shares in Tom's Point and Luro Holding, all minute books reflecting any meetings of directors and/or shareholders, all documents concerning the formation and incorporation of the Tom's Point and Luro Holding, and all documents concerning any changes in the corporate status of Tom's Point and Luro Holding.

Upon respondents' refusal to produce the documents notwithstanding Referee Dana's direction, by motion returnable January 17, 2008 petitioners sought an order compelling respondents to produce and compelling them to consent to release of the Corporations' tax returns maintained by Edward Leuschner, the Corporations' accountant, or compelling Leuschner to release.

By order dated March 14, 2008, respondents were directed to produce, for an in camera inspection by Referee Dana, the documents that referee Dana had previously directed be produced. The court also ordered respondents to direct Edward Leuschner to release the Corporations' Federal and State tax records and returns to Referee Dana "under the same conditions."

After the in camera inspection, respondents were directed to turn over tax returns and various corporate records. Referee Dana indicated that before any continuance of the hearing a summary judgment motion would be appropriate based upon the records produced.

**DISCUSSION:**

“Where dissolution is sought, the stability of the corporation, the financial security of its stockholders and the ends of justice require that the action or proceeding be disposed of with utmost dispatch, as expeditiously as reasonably practicable” (*Matter of T.J. Ronan Paint Corp.*, 98 AD2d 413, 420, 1<sup>st</sup> Dept., 1984). Petitioners have established their status as shareholders and their right to bring this proceeding, and well over one and a half years have been wasted on a defense which is utterly without support. No point is served by continuing the hearing to determine standing prior to entertaining petitioners’ motion for summary judgment. Nor are respondents entitled to submit an answer prior to petitioners’ summary judgment motion having challenged petitioners’ standing (CPLR § 404; *Application of Cunningham*, 75 AD2d 521, 522, 1<sup>st</sup> Dept., 1980).

Petitioners have established that they are 50% shareholders by the following evidence: the Stock Ledger of the Corporate books of Tom’s Point show that Anthony Luccaro owns ten shares, Steven Rosenfeld owns three shares, Todd Rosenfeld owns three shares, Amy Rosenfeld owns three shares, Edith Rosenfeld owns one share. Luccaro was issued stock for 50% of the shares, and petitioners 50% as well. The Stock Ledger of the corporate books of Luro show the same percentage ownership although the shares owned are in greater numbers. In addition, there are documents listing shareholders in a Subchapter S corporate election, tax returns, both federal and state, from 2001 through 2005 show a 50% ownership of the two corporations in petitioners. Thus, in the absence of any documentary or persuasive evidence contesting the showing made by the corporate books, records and tax returns, as a matter of law petitioners are 50% shareholders in both corporations.

Nevertheless the hearing testimony of Judith Rosenfeld must be addressed. She is the second wife and a distributee of Walter Rosenfeld, father of petitioners Todd, Amy and Steven. Petitioners have submitted a notarized sworn statement dated August 4, 1986 indicating that she assigned her inherited 7½% interest in the Corporations equally to the three Rosenfeld children. In contrast, at the hearing before Referee Dana she testified that, although she maintained a friendly relation with the Rosenfeld children, the signature on the Assignment was not hers (T68). However, she also testified that she had a stroke twelve years prior to the hearing (T82), her handwriting changed since the stroke (T68), the stroke affected her memory (T79), and that she did not inherit any shares in any corporations from her husband’s estate, only a life insurance policy (T73, 82). No exemplar of Judith Rosenfeld’s signature prior to her stroke was produced.

With regard to the notarized assignment, a document which on its face “is properly subscribed and bears the acknowledgment of a notary public” is entitled to a “presumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary” (*Smith v. Smith*, 263 AD2d 628, 629, 3<sup>rd</sup> Dept., 1999; quoting *Spilky v. Bernard H. La Lone Jr. P.C.*, 227 AD2d 741, 743, 3<sup>rd</sup> Dept., 1996). Here Judith Rosenfeld’s testimony is not clear and convincing, indeed it is confused as she even avers that she did not inherit any interest in the Corporations. It is thus insufficient to refute petitioners’ prima facie evidence of assignment. Moreover, Judith Rosenfeld did not raise any objection to petitioners’ corporate ownership at any time prior to her testimony in this proceeding. As it was

respondents' burden of proof to show that petitioners' were not 50% shareholders and this burden has not been met, petitioners are entitled to summary judgment regarding their standing under the Business Corporation Law.

Turning to the statutory grounds for dissolution, Luccaro has shown a complete disregard for the rights of petitioners, going so far as to refuse recognition of their ownership interests altogether, offering sworn statements averring that he and he alone owns the Corporations. There can be no doubt that the corporate shareholders are hopelessly deadlocked with regard to the operation of the business. Under Business Corporation Law § 1104(a)(3), a corporation may be dissolved if "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders". The affidavits of Luccaro refusing to recognize petitioners' rights show a high degree of hostility. This dissension "poses an irreconcilable barrier to the continued functioning and prosperity of the corporation, a hopeless deadlock which mandates dissolution as the only viable remedy" (*In the Matter of the Dissolution of T.J. Ronan Paint Corp.*, 98 AD2d 413, 421, 1<sup>st</sup> Dept., 1984). As in *T.J. Ronan*, in order to "protect the business and the financial interests of the parties and to advance the ends of justice by a speedy resolution of this impasse" it is imperative that the court direct an immediate dissolution. Said dissolution by a public sale of the corporations is required "unless the parties can reach an agreement as to the terms of a private sale" in the order to be settled on this motion.

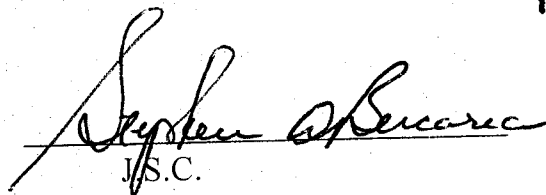
Business Corporation Law § 1113 permits the appointment of a receiver at "any stage of an action or special proceeding" under article eleven who may be a shareholder of the corporation. Such order is necessary to preserve the property and carry on the business of the corporation.

Finally, as Luccaro unreasonably refused to admit to petitioners' ownership interests in response to their Notice to Admit, they must be compensated for "the reasonable expenses incurred in making such proof, including reasonable attorney's fees" (CPLR 3123[c]). Such compensation shall be determined as part of the accounting.

Submit order on notice

Dated

23 April 2009

  
J.S.C.