

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 13050/10

MOTION DATE: Feb. 17, 2012
Motion Sequence # 005,006

In the Matter of the Application of
SHMOUEL TOLEDANO, individually, and as
50% shareholder of Home Tower Group, Inc.,
Prestige Equities, Inc., First Stage, Inc.,
Second Stage, Inc., Third Stage, Inc., Gross
Group Inc., Strong Equities, Inc., Singer
Equities, Inc., Rose Equities, Inc. and Sterling
State, Inc.,

Petitioner-Plaintiff,

For the Judicial Dissolution of
HOME TOWER GROUP, INC.; PRESTIGE
EQUITIES, INC., FIRST STAGE, INC.,
GROSS GROUP, INC., STRONG EQUITIES,
INC., SINGER EQUITIES, INC., ROSE
EQUITIES, INC. and STERLING STATE, INC.,

-against-

YORAM ELIYAHU, STRAIGHT GROUP, INC.,
SUPER POWER HOMES, INC. and
JOHN DOE CORP./ENTITIES "1" through "25",
the names of which are unknown to Petitioner-Plaintiff
but are intended to be entities that are owned by
YORAM ELIYAHU,

Respondents-Defendants,

-and-

DREW R. LONTOS, ESQ. as Escrow Agent,

Nominal Defendant.

The following papers read on this motion:

Notice of Motion.....	XX
Affidavit/Affirmation in Opposition.....	XX
Reply Affirmation.....	XX
Memorandum of Law.....	XX

Motion by petitioner-plaintiff Shmouel Toledano for partial summary judgment on his fourth cause of action is **denied**. Motion by petitioner-plaintiff for leave to reargue his motion to disqualify defendant’s counsel is **denied** with leave to renew upon the accounting proceeding.

This is a hybrid action for judicial dissolution of a group of jointly held corporations and for an accounting. Petitioner Shmouel Toledano and respondent Yoram Eliyahu each own 50 % of Home Tower Group, Inc, Prestige Equities, Inc., First Stage, Inc., Second Stage, Inc., Third Stage, Inc., Gross Group, Inc., Strong Equities, Inc., Singer Equities, Inc., Rose Equities, Inc., and Sterling State, Inc. The corporations were engaged in real estate development and, as of November 2006, they owned 120 commercial properties, almost all of which were located in Brooklyn and Queens County.

On November 3, 2006, Toledano and Eliyahu entered into a “dissolution agreement,” whereby the parties would attempt to liquidate their holdings for 18 months and then distribute most of the remaining properties to the shareholders. The method of distribution was that Eliyahu would divide the properties into two lists, or “pools,” and that Toledano would chose one of the lists, and the other would become Eliyahu’s properties. Additionally, Eliyahu was to buy out Toledano’s interest in the corporate offices located at 138-15 Jamaica Avenue in Queens for \$600,000.

However, after the dissolution agreement was executed, the real estate market began to decline. According to Eliyahu, the properties could not be marketed as rapidly as the

parties anticipated and, as of June 2008, 75 properties remained unsold. Thus, Eliya proposed extending the dissolution agreement for one year. Although it appears that no formal extension agreement was reached, the parties continued to market the properties.

This action was commenced on July 8, 2010. Toledano alleges that as of that date there were 41 properties remaining and Eliyahu refused to divide the remaining properties into two lists as he was required to do pursuant to the terms of the dissolution agreement. Toledano further alleges that Eliyahu refused to buy out his interest in the corporate offices as required by the agreement. Finally, Toledano alleges that Eliyahu misappropriated funds of the jointly held companies to pay expenses of his own companies, as well as his personal expenses.

In his first cause of action, Toledano seeks specific performance of the dissolution agreement, including an order directing Eliyahu to divide the properties into two lists and to purchase Toledano's interest in the Jamaica property. In the second cause of action, petitioner seeks judicial dissolution of the jointly held corporations on the ground of deadlock pursuant to Business Corporation Law § 1104. It appears that the deadlock concerns the parties' approaches to marketing the properties, namely Eliyahu wishes to wait out the market, whereas Toledano wishes to promptly dispose of the properties.

The third cause of action is for an accounting. The fourth cause of action is for breach of the dissolution agreement. Toledano also asserts causes of action for breach of fiduciary duty, diversion of assets, misappropriation of assets, and unjust enrichment. In their answer, respondents asserted counterclaims for breach of contract, breach of the duty of good faith and fair dealing, and an accounting.

By order dated July 25, 2011, the court granted petitioner summary judgment on his second cause of action for judicial dissolution and directed petitioner to submit final orders of dissolution for each of jointly held corporations. Respondents' sixth counterclaim for rescission of the dissolution agreement on the ground of mutual mistake was dismissed in the July 25, 2011 order.

By order dated December 7, 2011, the court denied petitioner's motion to disqualify respondent's counsel. Although defendants' counsel had previously represented the real estate corporations, petitioner had not established that legal matters concerning operation of

the real estate companies were substantially related to the dissolution proceeding.

Petitioner moves for partial summary judgment to the extent of liability on his fourth cause of action for breach of the dissolution agreement. Petitioner also moves for leave to reargue his motion to disqualify respondent's counsel.

In opposition to petitioner's motion for summary judgment, respondent argues in effect that the parties modified the dissolution agreement, so that the properties did not have to be marketed at any specific time. Thus, respondent argues that he is not responsible for any decline in the value of the properties subject to the date of the dissolution agreement. Additionally, it appears that the parties have continued to sell the properties, as respondent alleges that there were only 29 properties remaining unsold as of December 12, 2011.

In a final order of dissolution of a corporation, the court may, in its discretion, provide therein for the distribution of the property of the corporation to those entitled thereto (Bus Corp Law § 1111[c]). In distributing the property, the court may be guided by an agreement among the shareholders (*In re Penny Preville, Inc.*, 303 AD2d 508 [2d Dept 2003]).

The dissolution agreement of November 3, 2006 was a binding contract which provided a basis for distribution of the assets of the various companies to the shareholders. However, respondent has raised an issue of fact as to whether the dissolution agreement was modified by the parties' course of conduct so that the properties would be marketed within a commercially reasonable time. Petitioner has failed to establish prima facie that respondent's delay has resulted in the properties not being sold in a commercially reasonable manner. Eliyahu was not obligated to buy out Toledano's interest in the corporate offices until after the marketing or distribution of the properties. Accordingly, petitioner's motion for partial summary judgment on his fourth cause of action for breach of the dissolution agreement is **denied**.

Petitioner has failed to establish that the court overlooked or misapprehended any matter of fact or law in deciding the prior motion to disqualify respondent's counsel (CPLR 2221[d]). As the court noted, legal matters concerning operation of the real estate companies are not substantially related to the dissolution proceeding. Nevertheless, legal matters concerning operation of the real estate companies may be substantially related to petitioner's claim for an accounting. Accordingly, petitioner's motion for leave to reargue his motion to disqualify respondent's counsel is **denied** with leave to renew upon the accounting proceeding.

Finally, the court notes that despite the direction to submit final orders of dissolution for each company, final orders of dissolution have not been submitted to the court. Until the final orders are filed by the Department of State, the real estate corporations are not dissolved (Bus Corp Law § 1111[d]). If final orders of dissolution for each corporation are not submitted within 30 days of the date of this order, petitioner's claim for dissolution will be deemed abandoned by the court.

So ordered.

Dated MAR 20 2012


J.S.C.

ENTERED
MAR 22 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE