

Decision and Order of the Hon. Anthony A. Scarpino, Jr. dated September 29, 2006 (14-24)

9/29/06

**SURROGATE'S COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER**

DECISION and ORDER

In the Matter of the Application of Robert Prialux,
as Administrator of the Estate of

File No. 0083/04

**HUMBERT CARL VERDESCHI
a/k/a H. CARL VERDESCHI,
CARL VERDESCHI,**

Deceased,

Pursuant to SCPA 2103 and Business Corporation
Law 1104-a.

SCARPINO - S.

The petitioner, as administrator of the decedent's estate, has commenced this proceeding, *inter alia*, pursuant to Business Corporation Law 1104-a to dissolve respondent G.B. Tepper & Associates, Ltd. ("Tepper & Associates"), a closely held corporation, and pursuant to SCPA 2103, to compel the respondents to turn over to the estate the value of the decedent's interest in that corporation. Presently before the court are: (1) a motion for partial summary judgment by the petitioner; and (2) a cross motion for summary judgment by the respondents, the surviving shareholders of Tepper & Associates, dismissing the petition in its entirety.

The decedent was (and his estate now is) a 35% shareholder in Tepper & Associates, a New York closely-held corporation which provided accounting services to businesses and individuals. The other shareholders are respondents Gerald B. Tepper (a 35% shareholder); Monte Tepper (a 15% shareholder); and Jay Samuels (a 15%

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shareholder). It is undisputed that the parties had no shareholders' agreement.

Until 2003, each shareholder received a weekly salary and a year-end "bonus." Each shareholder's bonus was a percentage of the corporation's approximate profit or taxable income, with the percentages corresponding to each shareholder's respective ownership interest in the corporation. At the start of each succeeding year, the shareholders then loaned back money to Tepper Associates.

The decedent died in November, 2003. Apparently, he had stopped performing work for Tepper & Associates sometime before that. At the end of 2003, the decedent's estate did not receive 35% of the corporation's approximate profit or taxable income. According to Jay Samuels, Tepper & Associates did pay the decedent's estimated income tax liability of approximately \$15,000 for that year.

Although Tepper & Associates is still in existence (Carney Affirm., Exhibit 7, p 17), the surviving shareholders do not conduct business under that corporate name, except to collect any outstanding accounts receivable. Rather, in or about February, 2004, Monte Tepper and Jay Samuels established Tepper Tax Associates, Inc. (hereinafter "Tepper Tax"), which provides the same type of accounting services as Tepper & Associates. Tepper Tax, which employs Gerald B. Tepper, occupies the same offices as used by Tepper & Associates, and uses all of its office equipment, computers, and furnishings. According to Monte Tepper, "a good portion" of the clients of Tepper Tax were formerly clients of Tepper & Associates (Carney Affirmation, Exhibit 6, p 19).

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The petitioner commenced this proceeding pursuant to SCPA 2103 and BCL 1104-a to dissolve Tepper & Associates and to compel the respondents to turn over to the estate the decedent's interest therein. In his verified petition, he alleges that the respondents "have been guilty of illegal, fraudulent and oppressive actions toward the estate" (Verif. Petition, ¶ 22). Alternatively, the petitioner requests common law dissolution of Tepper & Associates or dissolution pursuant to New York Partnership Law (*id.*, ¶ 24). The respondents have filed an answer in which they deny that the estate is entitled to any relief. They also assert a counterclaim against the estate.

The petitioner now moves for "partial summary judgment" (Petitioner's Notice of Motion). The Notice of Motion fails to more particularly specify the nature of the relief sought, but in the "Wherefore" clause of his affirmation in support of the motion, petitioner's counsel requests "partial summary judgment on the issue of liability" (Carney Affirmation, p. 5). Again, counsel's affirmation is no more specific than that. Based upon its reading of the petitioner's motion papers, the court can only conclude that he requests a determination that the respondents have engaged in oppressive action toward the estate pursuant to Business Corporation Law § 1104-a (a)(1), or that the respondents have looted, wasted or diverted property of Tepper & Associates for non-corporate purposes pursuant to Business Corporation Law § 1104-a (a)(2).

The court notes that the petitioner's failure to specify the relief demanded and omission of the grounds therefor in his Notice of Motion contravenes the terms of CPLR 2214 (a). Nevertheless, because the respondents have not raised the issue, the court

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deems it waived. It is noted solely to highlight the fact that the court must determine the exact relief sought by the petitioner and the grounds therefor based upon its interpretation of the petitioner's moving papers, and the petitioner should not be heard to complain that the court's interpretation is incorrect.

The respondents oppose the petitioner's motion and cross-move for summary judgment dismissing the petition. They claim that, as a matter of law, there are no facts to support the petitioner's request for dissolution of Tepper & Associates pursuant to Business Corporation Law § 1104-a. They state that the decedent himself did not want either a shareholders' agreement or any death benefits for any shareholders, and that he had no reasonable expectation of receiving a bonus in 2003 because he did not work most of the year. Moreover, the respondents claim that the petitioner himself may have compromised the goodwill of the corporation by revealing to others information regarding Gerald B. Tepper's criminal conviction.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering evidence in admissible form which demonstrates the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557). If the moving party makes such a prima facie showing, the opposing party can defeat the motion by submitting evidence in admissible form which raises a material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, *supra*).

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Subject to certain conditions not relevant herein, a shareholder (or shareholders) of 20% of the shares of a closely held corporation may bring a petition for dissolution of the corporation (Business Corporation Law § 1104-a [a]). Dissolution may be requested on the grounds that: (1) "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;" and/or (2) "[t]he 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" (Business Corporation Law § 1104-a [a][1], [2]).

The statute does not define the term "oppressive actions," but the Court of Appeals has stated it refers "to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise" (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 72). The Court has further stated that "oppression 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.* at 73). "Waste has been held to include misappropriation of corporate assets for private purpose" (*Matter of Gunningham v 344 6th Ave. Owners Corp.*, 256 AD2d 406, 407).

Even when the court finds oppressive conduct or waste, "[t]he appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application" (*Matter of Kemp & Beatley [Gardstein]*, *supra*, at 73, citing Business Corporation Law § 1111 [a]), and "[e]very order of dissolution . . . must be

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conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value" (*id.* at 74, citing Business Corporation Law § 111B). Finally, the Court of Appeals has made clear that dissolution is not available to a "minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression" (*id.*; see *Matter of Cassata v. Brewster-Allen-Wichert, Inc.*, 248 AD2d 710, 711).

Applying the foregoing to the facts of this case, the court grants the petitioner's motion for partial summary judgment to the extent that the court determines that the respondents have looted, wasted or diverted property of Tepper & Associates for non-corporate purposes pursuant to Business Corporation Law § 1104-a (a)(2). Specifically, it is undisputed that Monte Tepper and Jay Samuels established a new corporation for which they, along with Gerald B. Tepper, solicited Tepper & Associates clients, and that they have used the offices and assets of Tepper & Associates in working for that new corporation. This establishes a prima facie case that they looted, wasted and/or diverted the property or assets of Tepper & Associates, in that they misappropriated corporate assets for their own private purposes (see Business Corporation Law § 1104-a [a](2)).

In their Memorandum of Law in support of their cross motion, the respondents state that the petitioner (not the decedent) steered and/or attempted to steer Tepper & Associates clients away from using Tepper & Associates as their accountants. Had the respondents offered any evidence in admissible form to support such a claim, it would have raised a triable issue of fact as to whether such acts were undertaken with a view

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toward forcing a judicial dissolution of the corporation sufficient to defeat the petitioner's motion (*see Matter of Cassata v Brewster-Allen-Wichert, Inc., supra*). However, they offered no such evidence.

The court concludes that a hearing must be held to determine the appropriate remedy for the estate (*see Matter of Kemp & Beatley [Gardstein], supra*, at 73-74).

The respondents' cross motion for summary judgment dismissing the petition is also denied. First, it is noted that the only "evidence" which the respondents submit in support of their cross motion is the affidavit of respondent Jay Samuels. However, rather than setting forth a detailed statement of facts, he merely "adopt[s] the statement of facts as set forth in [respondents'] Memorandum of Law dated April 26, 2006, as if more fully set" forth in his affidavit (Samuels Affidavit, ¶ 1). However, nowhere does Mr. Samuels indicate, much less expressly state, that he has personal knowledge of all of the facts set forth in the Memorandum of Law (*see* CPLR 3212 [b]), and the Memorandum of Law cites a number of sources, including the deposition testimony of various parties, for the facts contained therein. The respondents, however, have not submitted copies of the deposition testimony to the court in support of the cross motion. On this basis alone, their cross motion should be denied.

Moreover, the respondents' contention that they are entitled to summary judgment because the decedent had no reasonable expectation, as a matter of law, of receiving any type of death benefit from Tepper & Associates, or that it was contemplated that his 35% interest in Tepper & Associates would essentially become worthless upon his death is

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without merit. Their contention is based upon the following: (1) their alleged conversations with the decedent regarding the decedent's desire that the corporation provide no death benefit to any shareholder; and (2) the lack of any conversation to the contrary between the decedent and the petitioner. However, any such conversations between the respondents and the decedent are barred by the Dead Man's Statute (CPLR 4519), and the absence of any such conversations between the decedent and the petitioner is insufficient to establish a prima facie case that there was no such expectation.

The parties' remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that the petitioner's motion for partial summary judgment is granted to the extent that the court determines that the respondents have looted, wasted or diverted property of Tepper & Associates for non-corporate purposes pursuant to Business Corporation Law § 1104-a (a)(2); and it is further,

ORDERED that the respondents' cross motion for summary judgment dismissing the petition is denied.

The matter is restored to the court's calendar of Wednesday, October 11, 2006. Counsel for the respondents is directed to file a Statement of Issues with respect to the respondents' counterclaim against the petitioner on or before that date. Further, counsel for both parties are directed to appear in court at 9:30 a.m. on that date.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

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The following papers were considered on these motions:

1. The petitioner's Motion for Partial Summary Judgment, filed April 25, 2006, and all exhibits and papers submitted in support thereof;
2. The Affirmation in Opposition of Robert S. Markfield, Esq., dated May 17, 2006;
3. The Reply Affirmation of John F. Carney, Esq., dated May 23, 2006, and all exhibits and papers submitted in support thereof, and
4. The respondents' Motion for Summary Judgment dated April 26, 2006, and all exhibits and papers submitted in support thereof.

Dated: White Plains, NY
September 29, 2006



HON. ANTHONY A. SCARPINO, JR.
Westchester County Surrogate

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