

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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In the Matter of the Application of
VICTOR WEINGARTEN,
Holder of One Third of All Outstanding Shares
Entitled to Vote In Election of Directors,

Petitioner,

Index No. 12584/07
Motion Date: 10/15/08
Motion Cal. No. 55

For the Judicial Dissolution of THIRTY FIRST
STREET REALTY CORPORATION,

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The following papers numbered 1 to 15 read on this motion by respondents Fred Weingarten and the Estate of Jacob Popovic for an order, pursuant to N.Y. Business Corporation Law (hereinafter, "BCL") § 1118, authorizing the purchase of petitioner Victor Weingarten's minority share in Thirty-First Street Realty Corporation (hereinafter, "31st St") and staying the dissolution hearing, and directing the valuation of petitioner Victor Weingarten's minority interest.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Exhibits.....	1-3
Memorandum of Law.....	4-5
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Upon the foregoing papers it is ordered that the motion by respondents Fred Weingarten and the Estate of Jacob Popovic for an order, pursuant to N.Y. Business Corporation Law (hereinafter, "BCL") § 1118, authorizing the purchase of petitioner Victor Weingarten's minority share in Thirty-First Street Realty Corporation (hereinafter, "31st St") and staying the dissolution hearing, and directing the valuation of petitioner Victor Weingarten's minority interest is denied, for the following reasons:

Petitioner Victor Weingarten, Fred Weingarten (his brother), and the Estate of Jacob Popovic are the equal shareholders of Thirty First Street Realty Corporation (the subject corporation) which owns premises known as 34-14 31st Street, Long Island City, New York. Transit System Ltd. (TSL), another corporation owned by Popovic and the Weingartens, occupied the property as a month-to-month tenant and engaged in the management of taxi medallions. Pursuant to a decision and order (one paper) dated May 11, 2004, the Honorable Marguerite Grays directed the judicial dissolution of TSL pursuant to Business Corporation Law § 1104[a]. In a decision dated September 21, 2006, Justice Grays, finding that the shareholders had not been able to reach a negotiated settlement concerning the distribution of

company assets, directed the appointment of a receiver to supervise the liquidation of the assets. The petitioner alleges that TaxiFleet Management LLC, a new corporation formed by Fred Weingarten and Jacob Popovic to engage in the management of taxis, now operates from 34-14 31st Street, Long Island City, New York and that the other shareholders of the subject corporation have not permitted him any use of the property or participation in corporate affairs.

On or about May 16, 2007, petitioner Victor Weingarten began the instant proceeding for the judicial dissolution of the subject corporation pursuant to Business Corporation Law § 1004-a, alleging oppressive conduct. Fred Weingarten and the estate of Jacob Popovic responded to the petition by stating that the subject corporation owns 34-14 31st Street, Long Island City, New York and leases the property to Transit Systems LLC pursuant to a five year lease, dated May 3, 2007. Fred Weingarten and the estate further alleged that Transit Systems LLC subleased the property to TaxiFleet Management, LLC pursuant to a five year sublease dated May 3, 2007. Fred Weingarten and the estate are the sole shareholders of Transit Systems LLC and TaxiFleet. While Fred Weingarten and the estate of Jacob Popovic denied the allegations of the petition pertaining to oppressive conduct, they consented to the dissolution of the subject corporation provided the lease and sublease are not disturbed. Petitioner Victor Weingarten alleges that the majority shareholders of the subject corporation entered into the lease without his knowledge and consent and that he “strongly object[s] to the Lease.”

In an order of this Court dated, April 29, 2008, this Court found that the conflicting allegations of the parties raised issues of fact concerning whether judicial dissolution of the corporation is warranted pursuant to Business Corporation Law § 1104-a. (See, Matter of Steinberg, 249 AD2d 551; Giordano v Stark, 229 AD2d 493; Matter of Kournianos, 175 AD2d 129.) The Court ordered that a hearing was to be held pursuant to Business Corporation Law § 1109 to resolve disputed issues of fact concerning the merits of the petitioner’s application and the appropriate remedy. This hearing was to take place on June 9, 2008, at 10:00 A.M., in IAS Part 17. It was thereafter adjourned until June 12, 2008, and then until July 22, 2008, and then until September 15, 2008. The instant motion was made on or before August 5, 2008.

BCL § 1118, states in pertinent part, as follows:

(a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph c herein. An election pursuant to this

section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable.

(b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, [fig 1] may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares.

The instant motion was made over seven months after Victor Weingarten commenced the petition under BCL§ 1104-a. As such, Fred Weingarten failed to exercise his right of election within the 90-day period prescribed pursuant to Business Corporation Law § 1118, thus leaving the issue of whether to allow his election within the motion court's discretion. BCL. The Court finds that it would not be appropriate to allow this untimely election to purchase Victor Weingarten's shares. First, movants offer no excuse for their failure to timely exercise the right of election. Second, there is no indication that continuing the corporation is a viable and worthwhile endeavor. Third, movants' claims that allowing the election would save further litigation and expense is not supported by any evidence and fails to take into account the work involved with a valuation under an election to purchase shares. Furthermore, movants have also failed to demonstrate irreparable harm, likelihood of success on the merits, or a balance of the equities in their favor in support of their application for a stay of the dissolution proceedings. Accordingly, the motion is denied. *See, Sobol v. Les Pieds Nickels, Inc.* (In re Sobol), 262 A.D.2d 194 (1st Dept 1999.) The parties shall contact the Court to re-schedule the dissolution proceeding.

Dated: October 17, 2008

ORIN R. KITZES, J.S.C.