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Matter of Zulkofske v Zulkofske
2012 NY Slip Op 51210(U)
Decided on June 28, 2012
Supreme Court, Suffolk County
Pines, J.
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Decided on June 28, 2012

Supreme Court, Suffolk County

In the Matter of the Application of Virginia Zulkofske, the holder of fifty percent of all outstanding shares of the stock of THE BROOKHAVEN AGENCY, Petitioner, For the Judicial Dissolution Pursuant of BCL § 1104-a of THE BROOKHAVEN AGENCY, INC.

against

Peter Zulkofske, Respondent.

9563-2010

Attorney for Petitioner

Carsey & Associates, PC

230 Hilton Avenue

Hempstead, New York 11550

Attorney for Respondent

Benjamin D. Russo, Esq.

73 Benson Avenue

Sayville, New York 11782

Emily Pines, J.

Petitioner brought this proceeding, pursuant to BCL § 1104-a, to dissolve the Brookhaven Agency, Inc., a retail/property casualty insurance agency located in East Setauket, New York. Petitioner, who claimed she was a 50% shareholder of the subject entity also sought relief in the form of an accounting, with an ultimate distribution of assets. Respondent initially opposed all relief sought and asserted that Petitioner lacked standing, denying her ownership interest in the Brookhaven Agency. By this Court's Decision and Order dated June 3, 2010, based upon stock certificates indicating Petitioner's ownership of 50% of the subject shares of the corporation pursuant to the clear terms of a Trust, this Court found that Petitioner had the requisite standing to bring this proceeding and ordered discovery to proceed. Petitioner has now asked that rather than an order of dissolution, based on the facts presented, that the Court consider ordering the Respondent to purchase Petitioner's shares at 50% of the value of the corporation.

The matter was set for trial, on the issues of whether grounds for dissolution existed, and, if so, the appropriate remedy to be directed by the Court, including, if feasible, a purchase of Petitioner's shares by the corporation. Literally, on the eve of trial, the Court received a faxed letter from Respondent's counsel, agreeing that grounds for dissolution under BCL § 1104-a existed; stating that there was no need for trial and that the matter should proceed to an accounting and ultimate liquidation. Petitioner vehemently objected, as she had obtained a valuation and was ready to produce an expert witness on this issue at the trial, which this Court did not bi-furcate. Petitioner, moreover, while agreeing that the requisite BCL § 1104-a "oppression" had occurred, took the position that a remedy other than dissolution, should be considered by the Court, if it found that the subject corporate entity was a going concern.

As set forth by the Court at the outset of the trial, BCL § 1104-a (b) vests broad discretion in the court to determine whether and when dissolution should proceed. The court has the ability to order resolutions appropriate for a particular case, such as a buyout in lieu thereof. **See, Matter of Burack**, 137 AD2d 523, 527, 524 NYS 2d 457 (2d Dep't 1988); **Matter of William Harris**, 118 AD2d 646, 500 NYS 2d 5 (2d Dep't 1986); **Matter of Wiedy's Furniture Clearance Ctr. Inc.**, 108 AD2d 81, 85, 487 NYS 2d 901, 904 (1985). The court is required to evaluate if any remedy [*2]short of dissolution is appropriate. **Matter of Kemp & Beatley, Inc.**, 64 NY2d 63, 73, 484 NYS 2d 799, 473 NE 2d 1173 (1984). Respondent cited the case of **Matter of Sternberg (Osman)**, 181 AD2d 899, 582 NYS 2d 208 (2d Dep't 1992) in which the court set forth that a court ordered buy out was inappropriate, except as an alternative agreed upon remedy, where dissolution is sought under BCL § 1104 . This case was brought under BCL § 1104-a, which specifically contemplates a buyout as an alternative to dissolution and the only applicable cases specifically find that the Court can order the buyout in a BCL § 1104-a case, where grounds are found and the parties cannot agree on a remedy. **Matter of William Harris, supra**; **Matter of Wiedy's Clearance Ctr Inc, supra**. This Court has not yet reached the determination of whether dissolution is appropriate.

Because dissolution is considered a last resort, ordering such relief without a factual hearing is precipitous. **Matter of 168 ½ Delancey Corp**, 174 AD2d 523, 572 NYS 2d 295 (1st Dep't 1991). Issues such as the value of the corporation are helpful to the court to determine whether it is an ongoing concern, that should be allowed to continue rather than be dissolved. Thus, it is this Court's belief that the request by either party for dissolution is placed before the Court.

During two days, two witnesses testified and several exhibits were placed into evidence. Al Diamond, President of the Agency Consulting Group, Inc., who has valued thousands of similar insurance concerns in the past, testified as an expert witness in the field of insurance agency valuations. His valuation of the Brookhaven Agency Inc., dated December 31, 2011, was admitted in evidence as Petitioner's 1. He set forth that he considered his main task to determine what the potential future earnings of the subject corporation were likely to be. In order to perform that function, Mr. Diamond reviewed the type of insurance policies written, the condition of the owners; the financial conditions of the corporate employers and the client base. The witness stated that he believed that the

subject corporation was an ongoing concern. He set forth that it was a somewhat typical small agency with an ability to pay its expenses over an extended period, a valuable book of business, a lack of long term debt, and a lack of sufficient cash on hand. Based upon three years of past financial data, he stated that he was able to project the corporation's earnings over the next several years. Based upon historical data and his projections in the future, Mr. Diamond valued the Brookhaven Agency Inc. at $764,287. This figure (Petitioner's 1) consisted of the addition of the witnesses' value of the Book of Business and Goodwill as an ongoing concern plus a figure representing tangible net worth. From [*3]this he subtracted the working capital requirement, representing what a new owner would be required to invest upon a purchase. The resulting figure, as set forth came to $764,287.

No expert was provided on behalf of the Respondent at trial. One major objection raised to the witness' figures concerned his reduction in the commission percentages he attributed to the "producers" of business. While the bulk of the agency workers were family members, according to the expert, the commissions they were receiving (some, such as Respondent's son as high as 75%) were considered by the expert to be far in excess of what was typical in the insurance industry. In addition, Respondent's counsel ser forth that a reduction in value of approximately 30% for lack of liquidity should have been applied. Mr Diamond disagreed stating that a lack of liquidity discount is only applied where the entity seeking relief is a minority shareholder.

It was Mr. Diamond's opinion that all the business contained within his report belonged to the corporation and not to the "producers", such as the Respondent's son. He set forth that the corporate profit and loss statements of the corporation, which were provided to him, will specifically state that certain business is owned by its producers as opposed to the corporation where that is the case. There were no such statements on the profit and loss statements provided to Mr. Diamond. Based upon Mr. Diamond's valuation, he stated that the Petitioner as 50% shareholder, would be entitled to $382,000, if Respondent were to purchase her interest in the Brookhaven Agency.

Nicholas Zulkofske, the son of Respondent Peter Zulkofske, testified on behalf of the Respondent. He stated that he is a licensed insurance broker of property and casualty insurance and is self employed. It is his assertion that the customers he serves are all his own rather than belonging to the Brookhaven Agency Inc and that he believes he is free to take the business with him to another insurance agency. However, he stated that the Brookhaven

Agency pays his health insurance, pays him commissions based upon what he sells, that his office is located at the corporate headquarters; that his business card says "Brookhaven Agency"; that his telephone is located at the corporate offices; and that the personnel at the corporate offices provide him with clerical assistance. According to his own calculations, set forth in Respondent's A, he himself produced and owns business amounting to 61% of the total value of all the corporation's accounts. [*4]

The parties in this matter, as stated, have stipulated to the existence of grounds for dissolution under BCL § 1104-a. However, even in those instances where it is demonstrated that oppressive conduct exists, the Court, as stated, is not limited to ordering a dissolution of the corporation. Rather, the Court is directed to view the totality of the circumstances in order to determine whether a remedy short of dissolution can be found to satisfy both the Petitioner's rightful expectations and the rights and interests of the other shareholders. **Matter of Kemp & Beatley, supra**. Thus, the court is afforded broad latitude in fashioning an alternative remedy, such as requiring the buyout of the petitioner's interest even where the Respondent has not set forth his statutory right to do so under BCL § 1118. **Id.; Matter of William Harris**, 118 AD2d 646, 500 NYS 2d 5 (2d Dep't 1986); **Matter of Wiedy's Furniture, supra.**

In this case, based upon the credible testimony of Petitioner's expert, the Court finds that the Brookhaven Agency, Inc is a profitable, ongoing concern. The valuation set forth was made by a valuator with years of experience in the insurance industry and based upon financial records provided him by the subject corporation. The witness's adjustments based upon the commissions paid the agency's producers was sensible in light of the fact that the bulk of these employees were found to be family members and were not being paid the type of commissions that are common in the industry. In addition, based upon the facts presented, this Court finds credible the expert's opinion that all of the business contained within the corporate book of business belongs to the Brookhaven Agency Inc. It is simply not credible that the Respondent's son, who has worked in this field only at this agency, where he has his office telephone, business card with the agency name, and his health insurance paid, owns any of the corporate business. Since the business is, as stated by the Petitioners's expert, valuable and ongoing, the Court finds his valuation to be credible. This Court offered the Respondent an opportunity to delay presentation of Respondent's case, with his own expert on valuation; the offer was declined on the record.

In addition, as the business is profitable, dissolution is not a favored resolution of the matter. Rather, the Court believes that the Petitioners's request for a buyout of her shares by the corporation, is a better solution for the familial acrimony that has developed between Petitioner and the Respondent and permits the lucrative business to continue. This determination is also based upon another consideration. Respondent has taken the position that his son owns over 60% of the ongoing [*5]customer base and is free to leave the corporation and bring it with him. This Court has now found that the customer base is indeed an asset of Brookhaven Agency Inc. It is the Court's belief that the buyout remedy will better protect the Petitioner's interests under all of the circumstances.

Based upon the above, the Court directs the Brookhaven Agency, Inc. to purchase the Petitioner's shares in the corporation for 50% of the corporate value-that being $382,000. Petitioner is directed to provide her corporate shares to her counsel, to be held in escrow and transferred to the corporation upon payment as directed herein.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit Judgment in accordance herewith.

Dated: June 28, 2012 Riverhead, New York

EMILY PINES J. S. C.

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[Return to Decision List]