

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

In the Matter of

| | | |
|---------------------------------------|-----------------|----------|
| The Application for a Dissolution for | Index No.: | 10359-07 |
| SANYOU NEW YORK, INC., | Motion Date: | 8/1/07 |
| a Corporation, | Motion No.: | 50 |
| | Motion Seq. No. | 3 |

- - - - - x

The following papers numbered 1 to 10 on this motion:

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Respondent's Notice of Motion & Petition-Affirmation- Affidavits-Service-Exhibits & Memorandum of Law | 1-5 |
| Petitioner's Affirmations in Opposition-Exhibit(s) | 6-10 |

By notice of motion, respondent, Sanyou New York, Inc., through counsel, seeks an order of the Court, dismissing the petition for dissolution pursuant to CPLR § 3211(1), (3) (5) and (8), and an order vacating the previously filed order to show cause and accompanying restraining orders, and awarding respondent's counsel attorney's fees and costs, and for sanctions against petitioner and petitioner's attorneys.

Respondent files the affidavit of You Zhi Deng in support of the motion.

Counsel for petitioner, Ping Yan, files an affirmation in support of the petition and in reply to the cross-motion (sic). Counsel for petitioner also files an "affirmation of emergency" in support of what appears to be an order to show cause, returnable in Part 12 on July 18, 2007. Counsel maintains that a "new" order to show cause is before the Court, however, no such papers appear among those provided to the Court.

You Zhi Deng (Deng) and Ping Yan (Yan) are former boyfriend and girlfriend, respectively. Sometime in July of 2006, two stock certificates were issued by the subject corporation, Sanyou New York, Inc. Stock certificate number one (1), representing 100 shares was issued in the name of You Zhi Deng. Stock certificate number two (2) representing the remaining 100 shares was issued in the name of Ping Yan.

According to Deng, Ms. Yan's stock certificate was not physically provided to her as it was "conditionally" issued to be delivered upon payment by her of one hundred sixty-five thousand dollars (\$165,000). Ms. Yan maintains that the stock was issued and registered in the corporate records, making her a 50 percent owner of the corporation without regard to payment of any money.

Ms. Yan's payment was not forthcoming. When she failed to provide the money, Mr. Deng maintains "the corporation" cancelled, voided and rescinded, stock certificate number two (2) in Ms Yan's name and in its place issued stock certificate number three (3) in Deng's name for the same 100 shares.

Sometime in July 2006, the corporation purchased a residence located at 34 Miller Place, Syosset, New York, where Ping Yan has resided since August of 2006. On or about April 10, 2007, Ms. Yan was served with a notice of the corporation's intention to evict her from the premises. It is unclear from the papers before the Court whether or not she has been evicted.

Respondent and You Zhi Deng maintain that the petition must be dismissed because petitioner, Ping Yan, is not a shareholder and therefore has no standing to seek dissolution of the corporation.

Ping Yan maintains that she is a 50 percent shareholder and therefore has standing to bring a petition for dissolution on grounds that Deng has "...looted, wasted, or diverted for non-corporate purposes assets of the corporation..., and engaged in oppressive acts toward the complaining shareholder..." (See Exh. D, Petition, paragraphs 13 and 14; see also, BCL § 1104-a(1) and (2)). Yan maintains that Deng's action to evict her from the premises is diverting corporate assets for non-corporate purposes and acting in an oppressive manner towards her as a shareholder. The Court notes that although petitioner cites BCL § 1104, the language of the petition comports more closely to BCL § 1104-a, known as Petition for judicial dissolution under special circumstances.

In any case, before petitioner Ping Yan can be deemed to

have standing to even bring this action, the Court must find that she is indeed a shareholder.

Petitioner maintains that the corporate records, that is the stock ownership register of the corporation will show that petitioner Ping Yan and You Zhi Deng are listed as the only two shareholders with 100 shares of stock each. Petitioner relies upon BCL § 624, and Matter of Carroll, 100 AD2d 337, 474 NYS2d 340 (2d Dep't 1984) for the proposition that the corporation's register is prima facie evidence of ownership by Yan and that delivery of the stock certificate was unnecessary to prove ownership.

Petitioner's reliance on Matter of Carroll, *supra*, in this instance, however, is unwarranted. In Matter of Carroll, the Court notes "[t]he issue is whether a valid inter vivos gift of securities can be made by registering the securities on the books of the corporation in the name of the donee without a physical delivery of the certificates." Id. at 338.

It was for the Court a question of donative intent that was answered when "symbolic delivery" occurred "...in the case of a gift (see Uniform Commercial Code § 1-201. subds. [32], [33], when appropriate entries are made on the corporate records. (Uniform Commercial Code §§ 8-313, 8-320))." Id. at 330, 340.

Moreover, "[a]lthough the stock books and books of account of said corporation are prima facie evidence of the facts therein stated in favor of a plaintiff in any action or special proceeding against it or any of its officers, directors, or shareholders (Business Corporations Law § 624), they are not conclusive as to who is a stockholder nor as to the ownership of stock. (Matter of Ringler & Co., 204 NY 30; Campbell v. American Zylomite Co., 122 NY 455; Davis v. Fraser, 121 NYS2d 643 aff'd 283 App Div 657 aff'd 307 NY433; 11 NY Jur. Corporation, § 128)." Matter of Porco, 32 AD2d 983, 302 NYS2d 219 (3rd Dep't 1969).

In this instance, petitioner makes no claim that the shares were a "gift." Deng maintains that BCL § 504(h) applies instead and that Yan's failure to pay the agreed upon price of \$165,000, allowed him to cancel the stock certificate to Yan and reissue a new certificate in his own name. BCL § 504(h) states, in part, "Certificates for shares may not be issued until the amount of the consideration therefor determined to be stated capital pursuant to section 506 (Determination of Stated Capital) has been paid..."

Deng maintains that Yan failed to pay an agreed upon

consideration of \$165,000 by July 25, 2006. "When the consideration for shares has been paid in full, the subscriber is considered a holder of the shares and is entitled to all rights and privileges thereof (Business Corp. Law § 504[i])." Matter of Rappaport, 110 AD2d 639, 641, 487 NYS2d 376 (2d Dep't 1985).

Accordingly, upon all of the foregoing, respondent's motion to dismiss the petition pursuant to CPLR § 3211(3) is granted; and, it is

ORDERED, that the petition is dismissed with costs and disbursements to respondent as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York
September 25, 2007

JOSEPH P. DORSA
J.S.C.