

Brandon v D.C. Steel, Inc.

2012 NY Slip Op 30399(U)

February 8, 2012

Supreme Court, Nassau County

Docket Number: 600511-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
KEVIN J. BRANDON,

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Petitioner,

**Index No: 600511-11
Motion Seq. No: 1
Submission Date: 1/25/12**

- against -

**D.C. STEEL, INC., JAMES A. LIUZZO and
KCAM LASERCUT, INC.,**

Respondents.

-----x

The following papers having been read on this motion:

- Order to Show Cause, Affirmation in Support and Exhibit.....x**
- Verified Petition and Exhibits.....X**
- Affidavits in Opposition and Exhibits.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Petitioner Kevin J. Brandon (“Brandon” or “Petitioner”) on June 2, 2011 and submitted January 25, 2012. For the reasons set forth below, the Court refers the Order to Show Cause to a hearing which will be held before the Court on March 28, 2012 at 9:30 a.m. Counsel shall appear before the Court on March 27, 2012 at 11:00 a.m. for a pre-hearing conference.

BACKGROUND

A. Relief Sought

Petitioner moves for an Order 1) pursuant to Business Corporation Law (“BCL”) §§ 1104 and 1104-a, dissolving Respondent D.C. Steel, Inc. (“Steel”); 2) pursuant to BCL §§ 624 and

720, directing Respondents Steel, James A. Liuzzi (“Liuzzi”) and KCAM Lasercut, Inc. (“KCAM”) to give a full and complete accounting to Petitioner; 3) pursuant to BCL § 1104-a, permitting Petitioner to inspect all financial books and records for the three (3) preceding years; 4) pursuant to BCL § 1113, appointing a receiver for Steel; 5) pursuant to BCL §§ 626 and 720, adjudging damages against Respondents Liuzzi and KCAM for the monies and any properties and profits wrongfully misappropriated, gained or received by the Respondents and for all other wrongful acts committed by the Respondents; 6) directing that all monies, properties or profits gained or received from Steel by Liuzzi and KCAM by reason of the acts complained of herein be adjudged to be held in trust for Steel, for the benefit of that corporation; and 7) pursuant to BCL § 626, awarding reasonable attorney’s fees.

Respondents oppose Petitioner’s motion.

B. The Parties’ History

The Verified Petition (“Petition”) alleges as follows:

Steel is a corporation with a principal office (“Office”) located at 43 Central Drive, Farmingdale, New York. Steel is authorized to issue 200 shares of stock and there are a sufficient number of shares issued and outstanding to make Brandon holder of 50% and Liuzzi the remaining holder of 50% of the shares. There are no other shareholders, directors or officers of Steel other than Brandon and Liuzzi. Brandon and Liuzzi are officers and directors of Steel who are both entitled to vote in an election of directors of Steel.

KCAM is a corporation with the same Office location as Steel. Liuzzi is the sole shareholder, officer and director of KCAM.

On February 12, 2008, Brandon and Liuzzi formed Steel. Brandon agreed to provide, *inter alia*, machinery, tools, equipment, inventory and capital for metal cutting, pressing and processing work associated with signs, construction and artwork. Liuzzi agreed, *inter alia*, to operate Steel. Brandon and Liuzzi agreed that each would receive 50% of Steel’s profits.

On October 16, 2009, without Brandon’s knowledge or consent, Liuzzi formed and incorporated KCAM which provided identical services as Steel. Following that incorporation, Liuzzi solicited clients of Steel to retain KCAM and used Steel’s machines, tools, equipment and inventory for the sole benefit of KCAM. Steel has not provided services for compensation since September of 2010.

On or about September of 2010, Brandon and Liuzzi negotiated the sale of Steel's assets to Liuzzi. Those negotiations ceased when Brandon learned that Liuzzi had formed KCAM.

The Petition, verified by Brandon, contains three (3) causes of action: 1) a request for dissolution of Steel pursuant to BCL § 1104 and a distribution of its assets to its shareholders, 2) dissolution of Steel pursuant to BCL § 1104-a based on Liuzzi's allegedly illegal, fraudulent and oppressive actions, and a distribution of Steel's assets to its shareholders, and 3) a shareholder derivative action based on Petitioner's allegation that Liuzzi failed to perform his duties as a director and officer of Steel, that any demand would be futile. With respect to the third cause of action, Petitioner seeks 1) damages, 2) an accounting, 3) a decree that Steel holds KCAM as trustee for the benefit of Steel, that Liuzzi must transfer his shares of KCAM to Steel and that, pending the trial and determination of this action, KCAM and Liuzzi are enjoined from further transferring and wasting the assets of Steel, 4) the appointment of a temporary receiver to conduct the affairs of KCAM and Steel, and 5) attorney's fees.

Liuzzi affirms that he and Brandon formed Steel in 2008 ("Incorporation") and agreed to be equal partners and share equally in the expenses and profits of the business. They also agreed to share in the labor and work associated with running the business. Brandon's responsibilities were to include billing, collections and delivery of goods, and Liuzzi was to take care of manufacturing and production.

Liuzzi affirms that, shortly after the Incorporation, it became apparent that Brandon was not handling his responsibilities satisfactorily. Liuzzi discussed his concerns with Brandon, but affirms that Brandon did nothing to improve the situation. Liuzzi began to assume Brandon's responsibilities, in addition to his own. Brandon and Liuzzi subsequently agreed that Liuzzi would take over Steel and buy out Brandon's interest in Steel. Brandon, however, proposed an "over inflated price" for his share of the business assets (Liuzzi Aff. in Opp. at ¶ 6) and the buy out did not take place.

Brandon became less involved in Steel and began to pursue his own separate business. In October of 2009, when Steel's lease expired, the landlord required Steel to vacate its Office. Liuzzi advised Brandon that he would no longer perform all of Steel's work by itself and only receive 50% of its profits. Brandon and Liuzzi agreed to discontinue Steel's operations, and that Liuzzi would relocate to a new space under a different entity ("New Business") and they would

agree on a fair price for Steel's assets. They also agreed that, until a purchase price was agreed on, the New Business would pay Brandon \$300 weekly until a buyout agreement was reached. Liuzzi also agreed to continue to pay Steel's loan obligations on certain equipment, for which Liuzzi would receive credit when the buy out agreement was reached. Liuzzi provides copies of checks ("Checks") reflecting payments from KCAM to Brandon (Ex. A to Liuzzi Aff. in Opp.) between November of 2010 and July of 2011. Liuzzi affirms that Petitioner's allegations about him are false and asks the Court to deny Petitioner's application in its entirety and conduct a hearing to assess the parties' rights in this action.

By Order dated September 15, 2011, the Court appointed William J. Garry, Esq. as the receiver ("Receiver") in this action. By Order dated November 9, 2011 ("November Order"), the Court, following a conference with counsel for the parties and the Receiver, ordered the Respondents to 1) turn over to the Receiver within twenty (20) days, all books and records relating to the operations and businesses of Steel and KCAM; 2) provide within twenty (20) days a full and complete accounting of all income and expenses of Steel and KCAM; and 3) provide within twenty (20) days all necessary information and records to Steel's accountant so that all necessary returns could be filed. Despite his extensive efforts, the Receiver has been unable to resolve this action.

C. The Parties' Positions

Petitioner submits that the Petition establishes his right to the requested relief.

Respondents oppose Petitioner's application in its entirety and asks the Court to schedule a hearing to address the existing issues of fact. Respondents submit that 1) Petitioner's claims are belied by the fact that Brandon received and negotiated the Checks; 2) Petitioner has instituted this action in bad faith, and mischaracterized Brandon's conduct and the parties' prior agreements in an attempt to extract an unreasonable settlement; and 3) a hearing is required on this dissolution application in light of the fact that the parties' affidavits present conflicting allegations regarding the appropriateness of dissolution.

RULING OF THE COURT

A. Judicial Dissolution

BCL §§ 1104(a)(1) and (2) provide:

§ 1104. Petition in case of deadlock among directors or shareholders

(a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

- (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
- (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

BCL § 1104-a(a) and (b) provide as follows:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

- (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
- (2) The 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.

(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

- (1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and
- (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

A hearing is required on an application for dissolution of a corporation where there is some contested issue determinative of the application. *Goodman v. Lovett*, 200 A.D.2d 670 (2d Dept. 1994), *app. dismiss.*, 84 N.Y.2d 850 (1994). *See Matter of Steinberg*, 249 A.D.2d 551, 552 (2d Dept. 1998) (where conflicting affidavits raise questions of fact regarding merits of petition for dissolution and appropriate remedy, court erred in granting petition and directing buy-out without hearing); *Matter of Lake Mahopac Tailor, Inc.*, 146 A.D.2d 774 (2d Dept. 1989), *app. after remand at* 172 A.D.2d 525 (2d Dept. 1991) (where question of fact existed as to whether

petitioner held one half of outstanding shares giving him standing to maintain proceeding for judicial dissolution and whether grounds existed for judicial dissolution, matter remitted for evidentiary hearing); *Matter of Kournianos*, 175 A.D.3d 129 (2d Dept. 1991) (trial court abused discretion in granting dissolution without a hearing in light of disputed issues of fact).

B. Application of these Principles to the Instant Action

An evidentiary hearing is required with respect to Petitioner’s application for dissolution, and related applications set forth in the Order to Show Cause, because the conflicting affidavits submitted by the parties raise questions of fact as to the merits of the application and the appropriate remedy. The hearing will be held before the Court on March 28, 2012 at 9:30 a.m. Petitioner is directed to file a Note of Issue on or before March 16, 2012.

The Court directs the Receiver to attend the hearing and would anticipate the Receiver being available to testify regarding relevant information including the extent to which the parties have complied with the Receiver’s requests and the November Order.

All matters not decided herein are hereby denied.

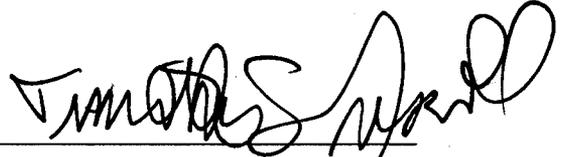
This constitutes the decision and order of the Court.

The Court reminds counsel, the parties and the Receiver of their required appearance before the Court on March 28, 2012 at 9:30 a.m. for the hearing as directed herein. Counsel shall appear before the Court on March 27, 2012 at 11:00 a.m. for a pre-hearing conference, at which all counsel shall fully comply with Commercial Division Rules 25 through 33.

ENTER

DATED: Mineola, NY

February 8, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

FEB 21 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**