

Matter of Kaufman v L.I. Yellow Cab Corp.

2010 NY Slip Op 32567(U)

September 15, 2010

Supreme Court, Nassau County

Docket Number: 001486-09

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

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In the Matter of

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**The Application of WILLIAM B. KAUFMAN,
Holder of not less than Thirty Percent of All
Outstanding Shares of L.I. YELLOW CAB CORP.
and KAK ENTERPRISES, INC.,**

**Index No: 001486-09
Motion Seq. No: 2
Submission Date: 7/27/10**

Petitioner,

**For the Dissolution of L.I. YELLOW CAB CORP.
and KAK ENTERPRISES, INC., Domestic Corporations,**

Stephen Kaufman, Leonard Pollack, and Keith Kaufman,

Respondents.

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The following papers have been read on this Order to Show Cause:

- Order to Show Cause, Affirmation in Support and Exhibits.....x**
- Respondents' Memorandum of Law in Support.....x**
- Affirmation in Opposition and Exhibits.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Respondents on July 8, 2010 and submitted on July 27, 2010. For the reasons set forth below, the Court grants Respondents' motion to vacate and set aside Petitioner's Notice to Take Deposition upon Oral Examination of Respondent Keith Kaufman.

BACKGROUND

A. Relief Sought

Respondents move for an Order, pursuant to CPLR §§ 408 and 3103, vacating and setting

aside Petitioner's Notice to Take Deposition upon Oral Examination of Respondent Keith Kaufman ("Deposition Notice").

Petitioner opposes Respondents' application.

B. The Parties' History

In the Verified Petition (Ex. 2 to Aff. in Supp.), Petitioner alleges as follows:

L.I. Yellow Cab Corp. and Kak Enterprises, Inc. ("Corporations") are New York corporations with their place of business at 100 New South Road, Hicksville, New York. Petitioner William B. Kaufman ("William" or "Petitioner") resides in Nassau County, New York.

The Corporations are authorized to issue 100 shares, of which 100 shares are issued and outstanding. Petitioner holds not less than 30%, and as much as 33 1/3%, of the outstanding shares. Petitioner is entitled to vote in an election of Directors of the Corporations.

Respondents Stephen Kaufman ("Stephen"), Leonard Pollack ("Leonard") and Keith Kaufman ("Keith") are officers and/or directors of the Corporations. Stephen and Leonard hold 30% of the outstanding shares, and Keith holds 10% of the outstanding shares, although Petitioner questions the validity of his claim to those shares. There is no Shareholders' Agreement regarding the operation of the Corporations.

L.I. Yellow Cab Corp. operates as a taxicab company, and Kak Enterprises, Inc. acts as the payroll company for L.I. Yellow Cab Corp. The two companies are interrelated and issue joint financial statements. William and Stephen have been involved in the taxicab business since in or about 1963. Leonard joined the business in or about 1978 and Keith, the son of Stephen and nephew of William, joined the family business in or about 1980. Leonard is retired and is not actively involved in the business. In addition to the Corporations at issue here, the parties also hold the same stock ownership interests in other interrelated companies.

Petitioner seeks dissolution of the Corporations on the grounds that 1) Keith has been guilty of illegal, fraudulent or oppressive action towards Petitioner; 2) liquidation of the Corporations is the only feasible means by which Petitioner may reasonably expect to obtain a fair return on his investments; and 3) liquidation of the Corporations is reasonably necessary for the protection of the rights and interests of the Petitioner.

Petitioner alleges improper conduct by the Respondents including but not limited to:

1) misappropriating or otherwise converting income and assets of the Corporations for the personal use of Keith; 2) failing to remit sales taxes in the proper amounts, thereby subjecting the Corporations to sales tax audits and other potential liabilities and penalties; and 3) falsifying lease agreements with independent contractors (drivers), thereby jeopardizing the Corporations and subjecting them to potential liabilities and penalties.

Subsequent to the filing and service of the Petition, Respondents served and filed their Notice of Election dated August 19, 2009 (Ex. 3 to OSC), pursuant to Business Corporation Law (“BCL”) § 1118. Respondents submit that, in light of that Notice of Election and pursuant to BCL § 1118, the sole issue before the Court is the fair value of the shares owned by Petitioner in the Corporations. The parties previously exchanged valuation reports (“Valuation Reports”) of their experts, and Petitioner has been furnished with all relevant financial information regarding the Corporations. In addition, Petitioner has been actively involved in the business of the Corporations.

Respondents also argue that, as this is a Special Proceeding, disclosure is limited pursuant to CPLR § 408, and the Court should not permit the deposition at issue to go forward. Respondents also contend that the Court should grant its motion because Petitioner did not seek permission of the Court, as required by CPLR § 408, prior to issuing the Deposition Notice.

In his Affirmation in Opposition, counsel for Petitioner opposes Respondents’ application, submitting that the Valuation Report provided by Respondents, which values the Respondent Corporations at a total value of \$650,000, is “without basis in reality” (Aff. in Opp. at ¶ 8). Counsel for Petitioner affirms that the Corporations conduct business at seven (7) different locations and that the parties recently met with a purchaser who offered to pay the sum of \$600,000 just for the Lindenhurst location. Thus, Petitioner submits, the Valuation Reports are unreliable.

Moreover, while Petitioner is involved in the operation of the Corporations, Keith has “intimate knowledge regarding the income and expenses of the Corporations” (Aff. in Opp. at ¶ 11) which operate a cash business. Counsel for Petitioner affirms that Petitioner recently learned that, at or about the time of the issuance of the Valuation Report, Keith purchased a new home valued at \$1 million.

Finally, with respect to Respondents’ objection to Petitioner’s failure to obtain the

Court's permission to issue the Deposition Notice, counsel for Petitioner affirms that he advised the Court at a recent conference of Petitioner's intention to attempt to depose Keith.

C. The Parties' Positions

Respondents submit that, pursuant to Business Corporation Law ("BCL") § 1118, the sole issue before the Court is the fair value of the shares owned by Petitioner in the Corporations. The parties previously exchanged the Valuation Reports, and Petitioner has been furnished with all relevant financial information regarding the Corporations. In addition, Petitioner has been actively involved in the business of the Corporations. Respondents argue that, as this is a Special Proceeding, disclosure is limited pursuant to CPLR § 408, and the Court should not permit the deposition at issue to go forward. Respondents also argue that the Court should grant its motion because Petitioner did not seek permission of the Court, as required by CPLR § 408, prior to issuing the Deposition Notice.

With respect to Respondents' objection to Petitioner's failure to seek the Court's permission with respect to the Deposition Notice, counsel for Petitioner affirms that he advised the Court at a recent conference of Petitioner's intention to attempt to depose Keith.

Petitioner opposes Respondents' application, submitting that the deposition of Keith should proceed because it will provide information relevant to the impact of the alleged misconduct on the Corporations' fair value and citing, *e.g.*, 20A Carmody-Wait 2d § 121:529.

RULING OF THE COURT

A. Disclosure in Special Proceedings

CPLR § 408 provides, with exceptions not relevant here, that leave of court shall be required for disclosure in special proceedings. Although the case law interpreting the statute is somewhat sparse, the Court is guided by the Second Department's decision in *Gargano v. V. C. & J. Construction Corp.*, 148 A.D.2d 492 (2d Dept. 1989). There, plaintiffs-appellants' former attorneys applied for an order, pursuant to Judiciary Law § 475, fixing an interim attorney's lien. *Id.* The appellants appealed from the trial court's order, *inter alia*, denying their motion 1) to compel their former counsel to provide certain discovery; and 2) to compel their former counsel to appear for an examination before trial.

The Second Department modified the trial court's order by deleting the provision that denied the branch of appellants' motion which was for discovery and inspection of time sheets

and disbursement records of the applicant and substituting a provision granting that branch of the motion. *Id.* at 492. In so holding, the Second Department noted that, although the granting of discovery is generally looked upon with disfavor in summary proceedings, it was an improvident exercise of discretion to deny the branch of appellants' motion seeking discovery and inspection of the time sheets and disbursement records of the attorney-applicant. *Id.* at 493. The Second Department concluded that appellants had demonstrated an ample need for the discovery and noted that 1) the production of the information would not be unnecessarily burdensome to the applicant; 2) the documents requested were readily capable of being produced in a relatively short period of time; and 3) discovery of the requested time sheets and disbursement records would expedite, rather than delay, the hearing. *Id.*

The Second Department, however, affirmed the trial court's denial of appellants' motion to compel the attorney-applicant to appear for an examination before trial. *Id.* The Second Department held that the trial court had properly denied that branch of the appellants' motion because appellants had failed to demonstrate an ample need for the requested deposition.

B. Application of these Principles to the Instant Action

Guided by *Gargano*, the Court concludes that Petitioner has not demonstrated the requisite need for the proposed deposition of Keith Kaufman. The Court reaches its conclusion in light of the facts that 1) discovery is generally looked upon with disfavor in summary proceedings; 2) the parties have exchanged Valuation Reports; and 3) the parties will have the opportunity to present witnesses, and conduct cross examination of adverse witnesses, at the trial of this matter, regarding the fair value of Petitioner's interest in the Corporations. Accordingly, the Court grants Respondents' motion to vacate the Notice of Deposition of Keith Kaufman.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a conference on September 21, 2010 at 9:30 a.m.

DATED: Mineola, NY
September 15, 2010

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
SEP 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE