

Matter of Ziffer (Tower Isles Frozen Foods, Inc.)

2011 NY Slip Op 32896(U)

October 24, 2011

Sup Ct, Nassau County

Docket Number: 010846--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

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In the Matter of the Application of

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**JANE LEVI ZIFFER, JEANETTE PRINGLE, and
STEVEN LEVI, as collective 50% Shareholders
of Tower Isles Frozen Foods, Ltd.,**

Petitioners-Plaintiffs,

**Index No: 010846-11
Motion Seq. Nos: 1 and 2
Submission Date: 10/7/11**

**For an Order pursuant to § 1104 of the Business
Corporation Law Judicially Dissolving
TOWER ISLES FROZEN FOODS, LTD.,**

Respondent,

- and -

**ISAAC TAPPER, as Executor of the Estate of
Beryl Joy Levi, PATRICK JOLLY and JAMES
JOBSON, individually and as Co-Trustees under
a Voting Trust Agreement dated August 20, 2010,**

Respondents-Defendants,

- and -

**HELENIA WHITTER, FRANK GORDON, JASPER
EDWARDS, INA LYSLOFF, JOHAR LOCKWALA,
ALI GOKHAN, GERALDINE CAMPBELL,
EMMANUEL PECORARO, LEMBERT PEART,
ISAAH CLARK, ANGELO PECORARO, CLIVE
CARVER, CARLTON CAMPBELL, ASLIM
SOMARU, TREVOR SMITH, ALEXIS BARNSTORE,
HYACINTH EDWARDS, and TED JACKSON,**

Additional Respondents.

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The following papers having been read on these motions:

Order to Show Cause.....	X
Summons, Combined Verified Petition and Exhibits.....	X
Memorandum of Law in Support.....	X
Affidavits in Opposition and Exhibits.....	X
Notice of Cross Motion, Affirmation in Support/Opposition and Exhibits.....	X
Affidavit of B. Levi.....	X
Affidavit of P. Jolly and Exhibit.....	X
Respondents' Memorandum of Law in Support/Opposition.....	X
Petitioners' Memorandum of Law in Opposition.....	X
Respondents' Reply Memorandum of Law.....	X
Correspondence of counsel dated October 13, 14 and 19.....	X

This matter is before the Court for decision on 1) the Order to Show Cause filed by Petitioners on July 22, 2011, and 2) the cross motion filed by Respondent-Defendants Isaac Tapper, as Executor of the Estate of Beryl Joy Levi, Patrick Jolly and James Jobson ("Respondents") on September 13, 2011. Oral argument was held on both motions on October 7, 2011, at which time counsel raised the issue of the propriety of the Court appointing a temporary receiver. Accordingly, the Court invited further submissions regarding the financial state of the company at issue.

For the reasons set forth below, the Court refers the Order to Show Cause and cross motion to a hearing.

BACKGROUND

A. Relief Sought

Petitioners moves for an Order 1) pursuant to Business Corporation Law ("BCL") § 1104, judicially dissolving Respondent Tower Isles Frozen Foods Ltd. ("Tower Isles") on the grounds, *inter alia*, that there is shareholder deadlock and internal dissension between two factions of shareholders who are so divided that dissolution would be beneficial to the shareholders, and on the grounds that there is director deadlock such that dissolution is necessary, upon such terms and conditions as the Court may direct; 2) pursuant to BCL §§ 1113 and 1202, appointing a Receiver to preserve the assets and manage and operate Tower Isles pending dissolution, having such powers and upon such terms and conditions as the Court may

direct; 3) pursuant to BCL § 1115, enjoining and restraining the “purported directors” (OSC at p. 2) from attempting to control Tower Isles, from continuing to schedule and hold “sham” Board of Directors meetings (*id.*) where there is no quorum present, and from approving expenditures and taking any other actions “purportedly” on behalf of Tower Isles (*id.*); and 4) pursuant to CPLR § 7801 *et seq.*, entering a judgment a) declaring that the March, April, May and July 2011 “purported Board Meetings” (*id.* at p. 3) were unauthorized, *ultra vires*, in violation of the by-laws, and null and void; and b) annulling all actions “purportedly approved” at the March, April, May, and July 2011 “Board Meetings” (*id.*) as null and void as a matter of law.

Respondents oppose Petitioners’ application, and cross move for an Order, pursuant to CPLR § 3211(a)(3) and BCL § 1104, dismissing the Combined Verified Petition for Judicial Dissolution, Article 78 Relief, and Complaint (“Petition”) in its entirety.

B. The Parties’ History

The parties’ dispute, which centers on the operation of Tower Isles, has been the subject of prior actions, including an action titled *Rony Kessler et al. v. Beryl Joy Levi et al.*, Nassau County Index Number 15598-03 (“2003 Action”). The parties in the 2003 Action entered into a stipulation (“Stipulation”) dated November 26, 2003 (Ex. D to Petition) which was so-ordered by the Court (Austin, J.). The Stipulation resolved an order to show cause filed in the 2003 Action in which the plaintiffs sought injunctive and declaratory relief. Pursuant to Section C of the Stipulation, the shareholders of Tower Isles consented to the election of the following directors: 1) Rony Kessler, on behalf of the 50% shareholder the Estate of Earl Levi, 2) Beryl Joy Levi (“Joy”), and 3) “a neutral director appointed by the Court.” Justice Austin subsequently appointed M. Kathryn Meng (“Meng”) as the “neutral” director of Tower Isles.

The Petition alleges that the parties subsequently sought to find potential purchasers of Tower Isles. A company named Meadow Ridge expressed interest in the purchase, and Tower Isles invested substantial time and resources in negotiating the sale. The Petition alleges that Joy “abruptly and unilaterally” (Pet. at ¶ 29) cancelled the deal, resulting in litigation between Meadow Ridge and Tower Isles.

Petitioners subsequently filed an action in 2010 in which they sought, *inter alia*, to remove Joy as director of Tower Isles. The parties engaged in the negotiation of a resolution that involved the sale of Petitioners’ 50% interest in Tower Isles to Joy. Shortly before the closing of that transaction, Joy passed away.

The Petition alleges that Respondents have acted improperly by, *inter alia*, 1) appointing Isaac Tapper (“Tapper”) as a director of Tower Isles in a manner that was unauthorized and in violation of the by-laws; 2) attending a Board meeting in March of 2010 (“March Meeting”), which Meng conducted, at which no owner was present and which did not contain a quorum; 3) making unauthorized decisions at the March Meeting, including the approval of a \$100,000 expenditure and the appointment of Patrick Jolly (“Jolly”) as the new president of Tower Isles; 4) participating in an unauthorized Board meeting in May of 2011 (“May Meeting”); 5) making unauthorized decisions at the May Meeting including the approval of up to \$100,000 for renovations and improvements to Tower Isles’ physical plant and approval of an increase in insurance coverage; 6) spending \$200,000 on repairs to an apartment building near the Tower Isles’ factory, despite the fact that the Board had approved only \$10,000 towards those repairs; 7) spending unauthorized sums on a new computer system; 8) failing to advise Petitioners that cocaine had been found in peppers shipped to Tower Isles from Jamaica, resulting in an investigation by the Federal Bureau of Investigation, Drug Enforcement Agency and Department of Homeland Security; and 9) failing to disclose the specifics of Tower Isles’ employment of a named individual, who receives significant payments from Tower Isles despite the fact that he is not an employee and is not paid through the company’s payroll system.

Respondents contend that Petitioners are not valid shareholders of Tower Isles and, therefore, lack standing to pursue the instant action. Respondents further contend that, assuming *arguendo* that Petitioners have standing, Petitioners’ application lacks merit. Respondents submit that Jane Ziffer (“Ziffer”), Petitioners’ representative on the Board, has refused to participate in Board meetings, while Respondents have attempted to maintain the value of Tower Isles to benefit its shareholders and employees.

In his Affidavit in Support of Respondents’ motion, Jolly affirms that he has been employed by Tower Isles since 1975, served as its bookkeeper from 1975 to 1984, and acted as its General Manager from 1984 until he became President in 2011. As General Manager, he participated in the day-to-day operation of Tower Isles and was responsible for its financial management which included overseeing issues related to payroll, accounts payable, capital expenditure and the preparation of financial statements.

Jolly affirms that, over the last several years, Tower Isles has been profitable and continues to grow. In the year to date, sales have increased \$700,000 from this time last year

and, as a result, Tower Isles has maintained the same net income, despite an increase in costs, as reflected by the Statement provided (Ex. A to Jolly Aff.). Jolly also avers that, both before and after Joy's death, Steven Levi ("Levi"), Ziffer and Jeannette Pringle ("Pringle") have been given access to Tower Isles, and Jolly has overseen the provision of detailed financial information to their counsel, as required by the Stipulation.

With respect to the allegedly unauthorized expenditures alleged in the Petition, Jolly affirms that those expenditures were either discussed with the Board, or are "simply part of Tower Isles' traditional business practices of which Petitioners are fully aware" (Jolly Aff. at ¶ 12). The Board also approved the new computer system to which the Petition refers, which Jolly describes as "the type of capital expenditure that is likely to pay immediate dividends for the company" (*id.* at ¶ 24). With respect to the cocaine discovered in a shipment from Jamaica, Jolly affirms that Tower Isles contacted the police immediately, no Tower Isles employee was implicated in any wrongdoing, and no fine or penalty was assessed against Tower Isles.

C. The Parties' Positions

Petitioners submit that 1) dissolution of Tower Isles is warranted under BCL § 1104; 2) the actions taken by Meng and the other "purported" Board members were unauthorized and should be annulled; and 3) the Court should appoint a receiver to preserve the assets of Tower Isles and carry on its business pending a determination of the dissolution petition.

Respondents submit that 1) the Court should dismiss the Petition due to Petitioners' lack of standing because they are not valid shareholders of Tower Isles; and 2) assuming *arguendo* that Petitioners have standing, the Court should deny the Petition in light of the fact that a) there is no deadlock or dissension warranting dissolution, and Petitioners are simply attempting to create the appearance of dissension; b) Ziffer's lack of participation in Board matters is entirely of her own doing, and attributable to her refusal to participate in Board meetings; and c) Petitioners' claims regarding the validity of the Board's actions lack merit, in light of Petitioners' agreement to abide by the Stipulation which governs the makeup of the Board.

The parties present vastly different descriptions of Tower Isles' financial condition. Petitioners assert that the company is "dysfunctional" and beset with mismanagement, as confirmed by the company's financial statements. The Respondents, by contrast, describe Tower Isles as "financially healthy," and note that the company has had increased sales in the past year. Respondents further assert that Tower Isles' economic performance is all the more

remarkable given that competitors in its industry have not recently fared as well. Attorney Schlesinger, who is counsel for the company in a limited capacity, notes that, upon his limited review, “further analysis” needs to be completed regarding various financial and operational issues at the company.

RULING OF THE COURT

A. Judicial Dissolution

BCL §§ 1104(a)(1) and (3) 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.

(3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Judicial dissolution pursuant to BCL § 1104 is appropriate where the dissension between shareholders poses an irreconcilable barrier to the continued functioning and prosperity of the corporation. *Matter of Dream Weaver Realty, Inc. (Poritzky-DeName)*, 70 A.D.3d 941, 942 (2d Dept. 2010) (2d Dept. 1996), quoting *Matter of Kaufmann*, 225 A.D.2d 775 (2d Dept. 1996). In determining whether dissolution is in order, the issue is not who is at fault for the deadlock, but whether a deadlock exists. *Id.*, quoting *Matter of Kaufmann, supra*. The underlying reason for the dissension is of no moment, nor is it relevant to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs. *Id.*, quoting *Matter of Goodman v. Lovett*, 200 A.D.2d 670, 670-671 (2d Dept. 1994), *app. dismissed*, 84 N.Y.2d 850 (1994). A hearing is only required where there is some contested issue determinative of the application. *Id.*, quoting *Matter of Goodman, supra*, at 670. In *Matter of Dream Weaver Realty*, the Second Department held that the trial court properly granted the petition without a hearing,

in light of the fact that there was no genuine dispute as to the existence of deadlock and dissension. 70 A.D.3d at 942.

B. Appointment of Receiver

BCL § 1202(a)(1) permits the Court to appoint a receiver of the property of a corporation in an action or special proceeding brought under Article 11, which relates to judicial dissolution. BCL § 1113, titled “Preservation of assets; appointment of receiver,” provides as follows:

At any stage of an action or special proceeding under this article, the court may, in its discretion, make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under article 12 (Receivership), who may be a director, officer or shareholder of the corporation.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party’s interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis, supra*, the Second Department reversed the trial court’s order granting plaintiff’s motion for appointment of temporary receiver in light of plaintiff’s failure to make the required evidentiary showing. *Id.* at 631-632.

C. Injunctive Relief

BCL § 1115, titled “Injunction,” provides as follows:

(a) At any stage of an action or special proceeding under this article, the court may, in its discretion, grant an injunction, effective during the pendency of the action or special proceeding or such shorter period as it may specify in the injunction, for one or more of the following purposes:

(1) Restraining the corporation and its directors and officers from transacting any unauthorized business and from exercising any corporate powers, except by permission of the court.

(2) Restraining the corporation and its directors and officers from collecting or receiving any debt or other property of the corporation, and from paying out or otherwise transferring or delivering any property of the corporation, except by permission of the court.

(3) Restraining the creditors of the corporation from beginning any action against the corporation, or from taking any proceedings in an action theretofore commenced, except by permission of the court. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

As the Supreme Court is vested with inherent plenary power with original jurisdiction in law and equity, it is authorized to render such relief as may be necessary to protect the rights of any party. *Matter of Schwartzreich*, 136 A.D.2d 642, 643 (2d Dept. 1988).

D. Application of these Principles to the Instant Action

An evidentiary hearing is required with respect to the Order to Show Cause and cross motion because the conflicting affidavits submitted by the parties raise questions of fact as to the merits of the application and the appropriate remedy. *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). *See also Matter of Mizrahi*, 2010 N.Y. Misc. LEXIS 4284 (Sup. Ct. 2010) (in light of factual issues, matter submitted to referee on issues of whether petitioner had standing to bring dissolution proceeding, whether dissolution was necessary and whether receivership was necessary pending the resolution, or further order of the court, of the petition). An evidentiary hearing is similarly required regarding the necessity of appointing a receiver, in light of the conflicting allegations regarding Tower Isles' financial condition.

All matters not decided herein are hereby denied.

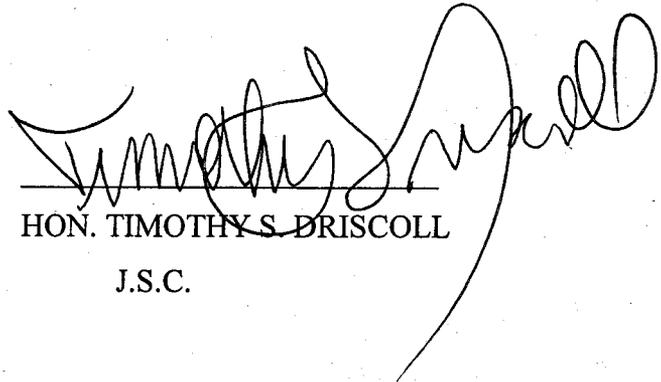
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear at a conference before the Court on November 9, 2011 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

ENTER

DATED: Mineola, NY

October 24, 2011



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

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE