Matter of Taboon Rest. Corp. v Ruham
2020 NY Slip Op 33829(U)
November 17, 2020
Supreme Court, New York County
Docket Number: 655403/2019
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

INDEX NO. 655403/2019

MOTION DATE N/A, N/A, N/A, N/A, N/A

MOTION SEQ. NO. 001 002 003 005 006

In the Matter of the Petition for Dissolution pursuant to BCL 1104(a) of TABOON RESTAURANT CORP.,

By DANIEL HODAK AS FORTY PERCENT SHAREHOLDER OF THE CORPORATION,

Petitioner,

- v -

GADI RUHAM AS FORTY PERCENT SHAREHOLDER OF THE CORPORATION, EFRAIM NAON AS A TWENTY PERCENT SHAREHOLDER OF THE CORPORATION,

Respondents.

----------X

ORDER - INTERIM AS TO MS002 and DECISION AND ORDER AS TO MS 001, 003, 005 and 006

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 9, 10, 12, 13, 38, 39, 40, 42, 66, 120, 125

were read on this motion to/for APPOINT RECEIVER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 11, 14, 15, 16, 17, 67, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 121, 126, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 147, 148

were read on this motion to/for DISSOLUTION.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 68, 122, 127

were read on this motion to/for INJUNCTIVE RELIEF.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 115, 116, 117, 118, 119, 123, 128

were read on this motion to/for APPOINT - FIDUCIARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 143, 144, 145, 146, 165, 166, 167, 168, 169, 170

were read on this motion to/for APPOINT – FIDUCIARY.

Motion sequence Numbers 001, 002, 003, 005 and 006 are consolidated for disposition.

Petitioner brings this petition seeking a judicial dissolution pursuant to Business Corporation Law § 1104-a. He contends that he owns 40% of Taboon Restaurant Corp. ("Taboon"), respondent Ruham owns 40% and respondent Naon owns 20%. Petitioner seeks a receiver during the judicial dissolution process.

He claims that Ruham had little to no involvement with Taboon and Naon was hired in 2004 to be the head chef. Petitioner asserts that Naon left in 2008 and returned in 2014. After his return, he and Ruham allegedly engaged in a campaign to undermine petitioner's authority over the business.

Petitioner claims there has been an ongoing dispute between he and Ruham regarding the operation of various businesses that they co-own. One point of dissension was the role of petitioner's wife as a bookkeeper at Taboon and, according to petitioner, a potential agreement was floated that would bar involvement of family members in the various businesses. This agreement was never finalized. Petitioner claims that respondents have taken excess compensation for themselves and denied petitioner the benefits of ownership by undermining petitioner's management and forcing his wife out. Petitioner claims that respondents' actions constitute looting and waste of corporate assets.

Petitioner brings motions for the appointment of a receiver (MS001), dissolution of the corporation (MS002, the petition), a temporary restraining order barring a special meeting of shareholders (MS003), to appoint an independent CPA or receiver to oversee use of the Paycheck Protection Program and for declaratory relief with respect to this aid (MS005), and for an order compelling compliance with local labor laws (MS006).

Motions for Receivers (MS001, 005 & 006) and the Petition (MS002)

Motion sequence number 001 seeks a receiver to oversee the business affairs of the corporation. At this stage of the litigation, the Court declines to do so. As an initial matter, petitioner does not identify how the receiver would be paid or whether there are enough funds to pay a receiver from the restaurant's coffers (assuming that would be where the funds would come from). The fact is that there are too many factual disputes at issue here for the Court to grant the appointment of a receiver. It is not clear that such an appointment is necessary based on the submissions from petitioner.

Business Corporation Law § 1113 authorizes the appointment of a receiver to preserve the status quo of the corporation and the Court cannot determine, at this point, that it is necessary. Petitioners must "demonstrate that the appointment of a receiver is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties (*Matter of Steinberg*, 249 AD2d 551, 553, 672 NYS2d 341 (Mem) [2d Dept 1998]). The requests from petitioner here (in MS001, 005 and 006) are based on petitioner's view that respondents have removed him from the operation of the restaurant. The allegations about mismanagement are serious, but petitioner did not submit documentation, for instance, demonstrating that a receiver is required to save the restaurant from failing. The Court declines to take such a drastic step in the affairs of this restaurant where the parties offer such divergent accounts.

Motion Sequence 006 also seeks the appointment of petitioner to oversee the restaurant's compliance with labor laws. That motion is denied. If, as petitioner alleges, the restaurant is engaged in shady business practices, then it should be brought up at the evidentiary hearing (discussed below). The Court declines to appoint petitioner (or another individual such as a receiver or attorney) to ensure that the restaurant does what it is supposed to do: follow the law.

The Court also observes that petitioner seeks a "modest budget allocated from corporate funds" for a labor lawyer to investigate. Rather than spend months waiting for an attorney to investigate, the Court finds that the most efficient route is to hold a prompt hearing on dissolution.

The Court also declines the branch of the motion which seeks a temporary injunction on the "business practice of not paying employees while they are on premise [sic] and working and the business is withholding tips." The Court sees no need to impose injunctive relief directing that the law be followed. The failure to do so might justify dissolution of the corporation and other pecuniary action, although that is outside the scope of this proceeding.

The Court stresses that petitioner raises legitimate grounds for inquiry in these motions. It is certainly important to consider whether the restaurant is following applicable labor laws and how it has handled any PPP funds it was awarded. And the Court is interested in whether there are employees working who are not on the payroll records, whether I-9 forms were properly completed and whether respondents are escrowing tips are all serious issues. In fact, the financial status of the restaurant, particularly in light of the ongoing pandemic, will be an important factor as the Court considers whether to grant the petition to dissolve the restaurant. Respondents' operation of the restaurant (assuming they do, in fact, control the management) and compliance with its legal obligations, especially those relating to its employees, is a critical part of a viable corporate entity.

For similar reasons, the Court finds that the underlying petition (which the Court considers as MS002) must be decided after an evidentiary hearing.

> "This common-law right of dissolution of minority shareholders was supplemented by the Legislature in 1979, when it enacted BCL § 1104–a (L.1979, c. 217, § 1),

> which provided the holders of 20% or more of the outstanding shares of a close corporation with the right to petition for judicial dissolution under certain special circumstances. The specified circumstances are (1) where the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; or (2) where the property or assets of the corporation are being looted, wasted or diverted for non-corporate purposes by the controlling faction. Before dissolution is ordered on either of these grounds, a court is required to consider whether liquidation of the corporation is the only feasible means whereby petitioning shareholders may obtain a fair return on their investment, and whether it is reasonably necessary to protect the rights and interests of a substantial number of shareholders"
>
> (*Fedele v Seybert*, 250 AD2d 519, 521-22, 673 NYS2d 421 [1st Dept 1998] [internal quotations and citations omitted]).

An evidentiary hearing is required where "The conflicting affidavits submitted by the parties raise questions of fact regarding the merits of the petition and the appropriate remedy" (*Steinberg*, 249 AD2d at 552).

Here, as described above, the parties offer dramatically different versions of the current state of the restaurant. Petitioner claims that the restaurant can no longer be effectively operated and that respondent Ruhan has refused a buyout. He claims that respondents have ignored applicable labor laws, particular with respect to unemployment benefits for its workers. Respondents, on the other hand, claim that respondent Naon has been running the restaurant for years and that the real issue is that petitioner is unhappy with how his wife has been treated.

The Court finds that a hearing is necessary (although respondents must first answer the petition) to determine whether there is a legitimate basis to dissolve the corporation and whether that is the appropriate remedy. The Court's inquiry will include, but is not limited to, whether the restaurant is actually being mismanaged or whether this proceeding is merely about petitioner's personal unhappiness with how his wife was treated.

Respondents' Cross-Motions to Dismiss

Respondents cross-move to dismiss the petition under various motion sequence numbers on the ground that there is no basis to dissolve the corporation. They emphasize that petitioner does not claim that he has failed to receive monies he is owed or that he has been denied access to financial information of Taboon. Respondents contend that it was petitioner who deprived respondents from accessing the books and records.

In opposition, petitioner claims that respondents have deprived him of his role in operating and managing Taboon. He explains that respondents have engaged in mismanagement, which includes preparing food at Taboon for another restaurant jointly owned by the parties and not accounting for this transfer with Taboon. Petitioner also claims that respondent Ruham has loaned money from another shared entity to Taboon without petitioner's consent. He contends that respondents have dramatically increased their compensation without explanation or consultation with petitioner.

Clearly, a hearing is required to sort through these various accusations. Petitioner has stated his prima facie case to dissolve the corporation and respondents have raised issues of fact requiring a hearing. The Court cannot, on these papers, summarily dismiss the petition given the affidavits submitted.

MS003- Injunctive Relief

In this motion, petitioner sought injunctive relief barring a special meeting of shareholders scheduled for October 21, 2019. The judge previously assigned to the case granted a temporary restraining order for the October 21, 2019 meeting although the motion was not resolved.

It is not clear from the parties' submissions, of which there are many, whether there was a meeting and whether this motion is moot. In any event, the Court grants the motion to the extent that there shall be no shareholder meetings until after the Court issues a determination on the petition for corporate dissolution. The Court has no interest in permitting the parties the chance to affect the status quo while this proceeding is pending.

Summary

The Court observes that from the papers, it appears that petitioner and respondent Ruham are partners in many financial endeavors. This hearing will only focus on Taboon; references to other disputes are relevant only to the extent that they relate to the management of Taboon. This Court will not offer its opinion on, or seek to resolve, these other disputes.

If the parties wish to reach a global settlement, they are free to do so. But this hearing is not a chance to settle scores or talk about all grievances between the parties. It is only to determine whether this corporation should be dissolved.

The parties are reminded that if they work together, the hearing can be quick and efficient. If they act like the lawyers acted at the conference—preferring to argue every little point (the equivalent of "who gets the teapot" in a divorce proceeding), then this will drag on at great expense to the parties. Of course, the parties will be sworn in and have to testify; the less they agree, the more they will have to testify.

Respondents shall answer on or before December 14, 2020. The hearing shall begin (virtually) on February 25, 2021 at 10:00 a.m. The clerk of this part will follow up with the invitation/link and further details.

The parties shall exchange witness lists on or before January 13, 2021 and provide the Court with agreed-upon exhibits (i.e. exhibits where neither party contests admissibility) for the hearing on or before February 18, 2021; upload to NYSCEF, properly and individually labeled.

Accordingly, it is hereby

ORDERED that the motion (MS001) by petitioner for the appointment of a receiver is denied; and it is further

ORDERED that the petition (MS002) to dissolve the corporation shall be decided after an evidentiary hearing which shall take place on February 25, 2021; and the cross-motion to dismiss the petition is denied and respondents shall answer as set forth above; and it is further

ORDERED that the motion (MS003) for injunctive relief barring respondents from holding a special meeting of shareholders is granted to the extent that there shall not be any shareholder meetings for the subject corporation until after the Court issues a decision on the petition to dissolve the corporation; and it is further

ORDERED that the motion (MS005) by petitioner for the appointment of a receiver or independent CPA to oversee the use of Paycheck Protection Program funds obtained by Taboon is denied; and it is further

ORDERED that the motion (MS006) by petitioner for the appointment of petitioner or some other individual to oversee compliance with certain labor laws is denied.

Remote Hearing. February 25, 2021 at 10 a.m.

11/17/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE