M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

BRYANT ELBERT FORD, HENRY HORTON, RAY CHARLES REDMON, LIBRADO RIVAS, JR.,	BY: KELLY, J
	DATED: October 23, 2006
Petitioners,	
	INDEX NUMBER: 8409/2006
- against -	
	MOTION
PULMOSAN SAFETY EQUIPMENT CORPORATION,	DATE: June 20, 2006
Respondent.	

The petitioners have commenced this special proceeding, pursuant to Business Corporation Law §1008, for a judgment "declaring that Pulmosan continues to exist for the purpose of winding up its affairs and remains subject to suit in actions brought by Silicosis Plaintiffs". The petitioners are or were plaintiffs who commenced personal injury actions, presently part of multi-district litigation pending in the District Court of Harris County, Texas ("Texas MDL"), against Pulmosan Safety Equipment Corporation ("Pulmosan") and other companies to recover for injuries allegedly sustained as the result of contracting silicosis.

Pulmosan has moved, pre-answer, to dismiss the petition pursuant to CPLR §3211[a][7] on the basis that the petition "fails to state a valid claim" and pursuant to CPLR §3211[a][4] contending that a prior

action for the same relief is pending between the parties.

Additionally, seven co-defendants in the Texas MDL have moved for leave to intervene in this special proceeding and seek a judgment suspending Pulmosan's dissolution, directing that the court supervise the winding up of Pulmosan's affairs and directing that "Pulmosan maintain in full force and effect the insurance policies pursuant to which it has received or may receive defense and indemnity coverage in connection with present and future Silicosis cases".

The basic underlying facts are summarized as follows. Pulmosan was duly incorporated under the laws of New York State in 1926 and, as is pertinent here, was engaged in the manufacture and sale of protective equipment intended to prevent users from exposure to pneumoconiosis producing dusts, including silica. Thereafter, numerous users of these products filed suit against Pulmosan and other entities alleging that the equipment placed into the stream of commerce did not provide adequate protection from the toxic dusts the equipment was designed to block and were the cause of injuries sustained by these users. The proposed intervenors, distributors of Pulmosan's products who are also defendants in the Texas MDL, have asserted cross-claims against Pulmosan in those actions seeking, inter alia, indemnification and/or contribution.

As a result of mounting potential liabilities – nearly 100 lawsuits were pending against Pulmosan by the end of 1985 – the cost of

maintaining liability insurance became prohibitive, and eventually Pulmosan determined to dissolve.

Eschewing the option of commencing a judicially supervised dissolution pursuant to Article 11 of the Business Corporation Law, Howard Weiss, the president and holder of all the voting shares in Pulmosan at the time, chose to proceed with a non-judicial dissolution under Article 10 of the Business Corporation Law by executing a certificate of dissolution which was filed with the New York State Secretary of State on August 1, 1986. Additionally, in an attempt to shield itself from future liability, Pulmosan elected to avail itself of the notice provisions under BCL §1007 in order to establish a date after which claims against it would be foreclosed. It is undisputed that a notice was published in the Queens Tribune, a newspaper of general circulation in Queens County and indicated, in accordance with the statute, that all creditors and claimants should present their claims against Pulmosan no later than February 24, 1987.

It is uncontroverted that in the ensuing twenty years Pulmosan not only continued to vigorously defend claims that were pending at the time the certificate of dissolution was filed but also participated in new actions and proceedings that were commenced subsequent to the 1987 bar date.

However, late last year in the Texas MDL, Pulmosan moved to dismiss all plaintiffs' claims and all cross-claims on the ground that

the Texas district court lacked subject matter jurisdiction in cases involving Pulmosan. In those motions, Pulmosan claimed that, under New York Law, it was exempt from suit except for claims that both existed before its dissolution on August 1, 1986 and that were filed before the February 24, 1987 bar date established in Pulmosan's notice to creditors and claimants. In this proceeding Pulmosan asserts that it has been raising this defense since 1988, and that prior to the institution of the Texas MDL, courts in that state dismissed at least sixteen actions against Pulmosan grounded on this dissolution defense.

In response, the petitioners moved in the Texas MDL to "abate" the action insofar as Pulmosan was concerned, essentially requesting a stay of a ruling on Pulmosan's motion, so that a ruling from a New York court as to the viability of petitioners' opposition to Pulmosan's motion and Pulmosan's underlying legal theory of insulation from suit could be obtained. Although it is not particularly clear from the excerpts of the April 24, 2006 proceedings provided to this court what the express ruling of the Texas court was in response to the petitioner's motion to abate, it is clearly apparent that the petitioners were afforded leave to make an application to this court.

Thereafter, the petitioners commenced this special proceeding seeking a ruling from the court which, in essence, would hold that Pulmosan is still subject to suit in the Texas MDL as well as any other suits based upon claims of injury originating from products Pulmosan

manufactured. The petitioners and intervenors argue that this court has the statutory authority to supervise and/or direct the manner in which Pulmosan conducts the winding up of its affairs, including the adequacy of the notice to claimants given in 1986. Moreover, the petitioners and intervenors contend this court can direct a finding that Pulmosan continues to exist for the limited purpose of defending actions brought by plaintiffs alleging their silicosis injuries were caused by Pulmosan.

Turning first to the motion by the co-defendant/intervenors, the court finds that the motion for leave to intervene in this proceeding is granted. Section 1013 of the Civil Practice Law and Rules affords a court the discretion to permit intervention "when the person's claim or defense and the main action have common questions of law or fact". In interpreting this standard, the court must consider whether the intervenor has "a real and substantial interest in the outcome of the proceeding" (Plantech Housing, Inc. v Conlan, 74 AD2d 920). Other factors identified in the statute that are relevant to whether the court should exercise its discretion and permit intervention are the timeliness of the application to intervene, the possibility of "undue delay [in] the determination of the action" and the potential the intervention will "prejudice the substantial rights of any party" (CPLR §1013). Overall, these principles are liberally interpreted to favor intervention (See, Jiggetts v Dowling, 21 AD3d 178, 185).

Here, the intervenors' claims undoubtably present common questions of law and fact with those raised by the petitioners. The intervenors will certainly be affected if the special proceeding is dismissed since Pulmosan and the intervenors are co-defendants in the Texas MDL. Moreover, as their claims against Pulmosan will effectively rise or fall depending upon whether a judgment pursuant to BCL §1008 is granted, the intervenors could not possess a more real and substantial interest in the outcome of this special proceeding.

In opposition to the motion to intervene, the respondents failed to demonstrate that granting intervention would not be a proper exercise of the court's discretion. The assertion that the intervenors are attempting to impermissibly interject new issues in this proceeding is without merit. Contrary to the respondents assertion, intervenors are not prohibited from raising "new issues", but rather from seeking relief that has "no relation" to the action (McGee v Horvat, 23 AD2d 271, 276). The mere fact that the intervenors and petitioners proffer differing facts and rely on disparate sections of the Business Corporation Law to support their claims for a judgment under BCL §1008, is of no moment as the relief requested by the petitioners and intervenors in this proceeding is, for all intents and purposes, identical.

There is also no proof that appreciable delay will result from the intervention. By its nature a special proceeding is an expedited

process the hallmarks of which are "[s]peed, economy and efficiency" (See, CPLR §401; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §401:1). Leave of court is necessary before joinder of any additional parties is permitted or prior to discovery being sought (See, CPLR §401, §408). In addition, the court is required to make a summary determination upon just the "pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR §409[b]). The petitions and supporting papers presented to the court do not reveal that the relief the intervenors seek is distinct or would necessarily further cloud what is already a complex set of factual and legal circumstances. Lastly, the respondent's claim that it will sustain prejudice from the intervention is wholly conclusory.

Insofar as Pulmosan's requests for relief in its motion are concerned, the branch of Pulmosan's motion to dismiss the petition for failure to state a cause of action pursuant to CPLR §3211[a][7] is denied. On a motion to dismiss a pleading for failure to state a cause of action "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275). The allegations contained in the pleading must be presumed to be true and liberally construed (See, Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174).

Initially, Pulmosan seeks to caste this proceeding as one for declaratory relief or a request that the court issue an advisory opinion. Such characterizations are a clear misconstrual of the petition presented. The relief requested in the petition, irrespective of any perception by the respondent of inartful construction, plainly establishes that the petitioners are seeking a judgment from this court which is obtainable, at a minimum, under BCL §§1008[a][1] to [4] and [6]. While it is true that a judgment in this special proceeding can, ultimately, resolve the question of whether the respondent is still a corporate entity subject to suit and, therefore, determine whether the plaintiffs' claims in the Texas MDL remain viable, these potential results are simply collateral consequences which flow from any judgment issued pursuant to BCL §1008 and do not render the petition defective.

In any event, the petition submitted on behalf of the intervenors does not suffer from the ambiguity respondent argues exists in the petitioners' pleading and expressly prays for a judgment suspending or annulling Pulmosan's dissolution or continuing its liquidation.

The branch of the respondent's motion to dismiss the petition on the basis of a prior action for the same relief pending between the parties pursuant to CPLR §3211[a][4] is also denied. To be entitled to a dismissal pursuant to this section, the earlier action must involve the "same cause of action" as the one sought to be dismissed (See, CPLR §3211[a][4]; Kent Dev. Co. v Liccione, 37 NY2d 899, 901). The relief

sought by the petitioners in the Texas MDL, money damages for personal injuries, can not be construed as the relief prayed for in this special proceeding, namely a judgment pursuant to BCL §1008. The fact that a court of competent jurisdiction in Texas might have the authority to issue a ruling on this issue does not render this proceeding defective as a matter of law. Indeed, the judge in the Texas MDL expressly decided not to address this issue and instead abated the proceedings before it in order to, presumably, conserve its judicial resources by not engaging in duplicative proceedings. In essence, this branch of the motion is an invitation to "punt" the issues submitted herein which the court declines to accept. If the respondent is displeased with the decision of the judge in the Texas MDL to defer to the judgment of this court, Pulmosan should avail itself of the appellate process in Texas.

Addressing the merits of the underlying petition, Business Corporation Law §1008, provides "[a]t any time after the filing of a certificate of dissolution..." a special proceeding may be commenced under this section. Thus, the fact that the certificate of dissolution was filed by Pulmosan over twenty years ago is not a per se bar to this proceeding. Section 1008 affords the court broad and various powers to make such orders as to a voluntarily dissolved corporation "as it may deem proper", including, but not limited to, annulling or suspending the dissolution, determining "the validity of the authorization of the dissolution", "[t]he adequacy of the notice given to creditors and

claimants" and authorizing the "payment, satisfaction or compromise of claims against the corporation".

Parties permitted to commence a proceeding under section 1008, in addition to corporate officers and shareholders, include creditors and claimants. The central issue before the court, therefore, is whether the petitioners or intervenors can qualify as either creditors or claimants.

Pulmosan's argument that the claims of the petitioners and intervenors were barred upon the filing of its certificate of dissolution is erroneous. While the respondent's assertion may find support in ancient English common law, "the New York courts long ago rejected it" (Independent Investor Protective League v Time, Inc., 50 NY2d 259, 262). This principle is codified in Business Corporation Law §1006[a][4] which provides, in pertinent part, that a "dissolved corporation . . . may sue or be sued in all courts and participate in actions and proceedings".

However, the availability of the dissolved corporation to suit is not limitless. Section 1006[b] of the Business Corporation Law provides that the dissolution of a corporation does not affect remedies against the corporation for any "claim existing or any liability incurred before such dissolution". BCL §1004 establishes that a corporation is dissolved upon the filing of a certificate of dissolution. Thus, contrary to the assertions of the petitioners and

intervenors, although a dissolved corporation may continue to exist for the purpose of winding up its affairs, it may only be sued in conjunction with claims that "arose" prior to dissolution (See, Milton L. Ehrlich, Inc. v Unit Frame & Floor Corp., 5 NY2d 275 ["'the Legislature of this State did not intend voluntary dissolutions to be a vehicle for the avoidance of *pre-existing* contractual obligations and liabilities'"(emphasis added)]; New York v New York & South Brooklyn Ferry & Steam Transp. Co., 231 NY 18, 24 ["Dissolution or bankruptcy does, indeed, draw a dividing line as the result of accidents of time between claims capable of being proved, and those required to be rejected . . . The principle of division is the existence of a present right to liquidate"]; Tedesco v A.P. Green Indus., Inc., 21 AD3d 1418 [claim for indemnification permitted based upon "the underlying claim of plaintiff for damages based upon her husband's exposure to asbestos, which occurred *prior* to the dissolution" (emphasis added)]; Gutman v Club Mediterranee Int'l, 218 AD2d 640 [Corporate defendant's dissolution did not affect tort plaintiff's claim since cause of action "arose before" the dissolution]; Fernandez v Kinsey, 205 AD2d 448 [Tort plaintiffs' claims of exposure to lead based paint viable since they "arose prior" to dissolution]; Briere v Barbera, 163 AD2d 659 [Construction worker's accident occurred before dissolution]; Rodgers v Logan, 121 AD2d 250 [Dissolved corporation permitted to be sued upon contract entered into prior to dissolution]).

With respect to claims that arise after a corporation dissolves, liability may attach "if the corporation continued its operations, operated its premises, and held itself out as a de facto corporation, notwithstanding its dissolution" (Bruce Supply Corp. v New Wave Mech., Inc., 4 AD3d 444, 445). In this case, there is no proof before the court that Pulmosan continued to operate its business of manufacturing safety equipment after the filing of the certificate of dissolution. Defending existing lawsuits, including asserting viable defenses and affirmative claims therein, are not indicative of continued corporate operations, but merely of the winding up of existing affairs.

The cases cited for authority by the petitioners and intervenors do not demonstrate an interpretation of the statutory and common law contrary to that reviewed here by this court (See e.g., Town of Oyster Bay v Occidental Chemical Corp., 987 F.Supp. 182, 210 ["the law in New York is that a claim that accrues prior to a corporation's dissolution may be interposed against the dissolved corporation"]; Expomotion, Ltd. v Heidepriem-Santandrea, Inc., 101 Misc2d 593 [The dissolved corporation "carried on its affairs as usual, exercising its corporate powers, entering into leases, maintaining bank accounts, filing Federal tax returns, withholding taxes from employees, and filing subsequent State tax returns"]).

CPLR §214-c does not dictate a contrary result. This statute did not modify traditional substantive tort law which provides that an

individual suffers injury giving rise to a claim for recovery upon exposure to a toxic substance (See generally, Thorton v Roosevelt Hospital, 47 NY2d 780). The object of the Legislature in passing CPLR §214-c was simply to effect a procedural change in the law by modifying the accrual date of the statute of limitations for causes of action based upon exposure to toxic substances. The Legislature's intent was to ameliorate the harsh effects of the then existing law which foreclosed recourse in almost every case where the sequella of exposure to toxic substances did not become apparent virtually immediately (See, Rothstein v Tennessee Gas Pipeline Company, 87 NY2d 90, 93).

Consequently, as discussed above, all that is necessary for a tort claim to survive a corporation's dissolution is for the claim to have "arose" prior to the dissolution (See, Gutman v Club Mediterranee Int'l, supra; Fernandez v Kinsey, supra; Briere v Barbera, supra). In the case of toxic substances it is enough that the "exposure" occurred prior to the dissolution (See, Tedesco v A.P. Green Indus., Inc., supra).

The petitioners' argument that Pulmosan is completely precluded from asserting dissolution on the basis of judicial estoppel is without merit as this principle, sometimes referred to as the doctrine of inconsistent positions, is applicable only where a party "successfully assumed a certain position in a prior legal proceeding and secured a judgment therein" (Lowinger v Lowinger, 303 AD2d 723, 724; see also,

State Farm Mut Auto Ins Co v Allston, 300 AD2d 669; Bono v Cucinella, 298 AD2d 483). Although the application of judicial estoppel is not limited exclusively to "to cases where the legal position at issue was ruled upon in the context of a judgment" (D & L Holdings, LLC v RCG Goldman Co. LLC, 287 AD2d 65, 72), the position must, nevertheless, result in some ruling or finding from a judicial tribunal (See, Environmental Concern, Inc. v Larchwood Constr. Corp., 101 AD2d 591, 593; see also, Excelsior 57th Corp. v Kern, 218 AD2d 528). Here, the petitioners fail to identify any express finding or ruling by a court or tribunal wherein Pulmosan was determined to exist as a legal entity on the basis of a position taken by Pulmosan.

Accordingly, as concerns the case at the bar, the viability of the petitioner's claims against Pulmosan, and necessarily those of the other plaintiffs in the Texas MDL, will depend upon when these plaintiffs were first exposed to silica dust or, more accurately, upon the initial use of Pulmosan's defective safety equipment. Moreover, any claims for indemnification and/or contribution made by the intervenors who are also co-defendants via cross-claims in the Texas MDL and other underlying personal injury actions are also viable provided the underlying claim of the plaintiff for which indemnification or contribution is sought relates to use of Pulmosan's defective equipment before the dissolution (See, Tedesco v A.P. Green Indus., Inc., 21 AD3d 1418).

Finally, Pulmosan argues that the petitioners and intervenors do not qualify as claimants nor creditors of Pulmosan regardless of the date of alleged injury as all their claims are barred by Business Corporation Law §1007. Under that section, a dissolved corporation, "may", at its option, attempt to extinguish all outstanding or potential claims against it by serving a notice "requiring all creditors and claimants, including any with unliquidated or contingent claims and any with whom the corporation has unfulfilled contracts, to present their claims in writing and in detail at a specified place and by a specified day".

BCL §1007 specifies that the dissolved corporation must serve the notice by mail at the "last known address" of "each person believed to be a creditor of or claimant against the corporation whose name and address are known to or can with due diligence be ascertained by the corporation". Additionally, the notice is required to be published in a newspaper of general circulation.

Any person who fails to submit notice of their claim in writing to the corporation prior to the date established in the notice is "forever barred" from asserting it against the dissolved corporation. Excepted from giving notice to the dissolved corporation are those whose claims "are the subject of litigation on the date of the first publication of such notice".

Pulmosan contends it fully complied with BCL §1007 and proffers in

support of this claim affidavits from its former president, Howard Weiss, and former attorney, Howard L. Weinreich, as well as proof that a notice was published in the Queens Tribune in its weekly issues for the periods August 14-20, 1986 and August 21-27, 1986.

However, the court finds that the proof submitted by Pulmosan to establish satisfaction of the requisites of BCL §1007 is patently insufficient. There is no proof, by affidavit or otherwise, from the individual or individuals who actually performed the service of the notice by mail. The affidavit of Howard L. Weinreich simply indicates that he delegated the responsibility of serving the notice to an unidentified attorney at his firm and that this mysterious attorney "caused [the notices] to be sent". Weinreich's affidavit also fails to indicate exactly whom was served, where the notices were sent, that these locations were the recipients' last known addresses, the method of delivery, and the precise date of service. This most basic information is required in affidavits of service of even the most mundane legal papers (See generally, CPLR §306[a]).

The proof submitted to the court does not even demonstrate that Weinreich was in possession of the names and addresses of "each person believed to be a creditor of or claimant against the corporation". Although Howard Weiss, in an affidavit dated September 17, 1990, claims to have sent a list of such names to Wenreich "[i]mmediately prior to August 8, 1986", that list was not incorporated by reference into the

affidavit nor annexed thereto. Pulmosan's attempt to remedy this defect with the submission of another affidavit from Weiss, dated March 19, 1986, which references a purported list of names in compliance with BCL §1007 is unavailing as that affidavit indicates it was prepared pursuant to Uniform Commercial Code §6-104 as part of Pulmosan's sale of its assets to another company, WGM Safety Corp. UCC §6-104 only requires the disclosure of the names of creditors and claimants "known to the transferor". Section 1007 is broader than UCC §6-104 and requires a dissolving corporation to serve persons "believed" to be claimants and creditors.

Pulmosan further failed to demonstrate the precise nature of the diligent efforts it made to determine the names and addresses of creditors and claimants against the corporation. The affidavit of Weiss is distinctly conclusory on this point in that he offers no specifics as to the efforts made by him personally or the corporation as a whole.

Pursuant to section 1008[a][2] of the Business Corporation Law, the court is empowered to assess "[t]he adequacy of the notice given to creditors and claimants and if it is determined to have been inadequate, the requirement of such further notice as the court may deem proper". Here, in addition to the failings in Pulmosan's proof of service set forth above, the particular circumstances of this case require the court to find that notice by given by Pulmosan, as a whole,

was insufficient.

At the time of its dissolution, Pulmosan was admittedly a defendant in nearly 100 lawsuits related to its manufacture and sale of defective safety equipment. Indeed, it was the crushing burden of these potential monumental liabilities that precipitated Pulmosan's voluntary demise. There can be no doubt that Howard Weiss, Pulmosan's president and holder of all voting shares on the corporation, was keenly aware, based upon the nature of the claims asserted against the company and the volume of safety equipment it had produced and sold, that the number of actions pending against Pulmosan at that time were merely the tip of the proverbial iceberg.

It is in the context of that looming litigation that the court must evaluate the notice, or more specifically the lack thereof, given by Pulmosan of its intended dissolution. Any reasonable corporate officer in the position of Pulmosan's officers faced with these liabilities should have "believed" that virtually any of the end users of its products were claimants, even if only contingent ones, who were required to be notified pursuant to BCL §1007.

The court has only two pieces of evidence that could conceivably constitute proof of notice to the users of Pulmosan's products. One is a sixteen year-old wholly conclusory affidavit from Pulmosan's then president that diligent attempts were made to ascertain the names of "believed" claimants and the second is a legal notice contained in a

local newspaper published in Queens, New York.

The affidavit is, as a practical matter, demonstrative of nothing as the court is unable to evaluate what efforts were made by Pulmosan to comply with the statute. The publication, while technically compliant with the statute, in actuality failed to provide notice to anyone. Indeed, Weiss testified that at the time of the dissolution the majority of the silicosis cases pending against Pulmosan were venued in Texas and Louisiana. Consequently, publication in a weekly newspaper with circulation limited to a location easily over one thousand miles from the situs of the litigation at issue can not be considered reasonable or justifiable notice.

Therefore, the court finds that the notice provided by Pulmosan pursuant to BCL §1007 was inadequate, defective and, as a consequence, the failure of the petitioners and intervenors to serve notices upon Pulmosan by the bar date is irrelevant.

In light of all the foregoing analysis, the court directs that Pulmosan's dissolution is suspended as to those petitioners, as well as the petitioner/intervenors with cross-claims for indemnification and/or contribution arising out of these claims, whose first use of Pulmosan's products predates the filing of the certificate of dissolution on August 1, 1986. Since the moving papers do not present the requisite information to resolve the factual query regarding the initial use of Pulmosan's products by the petitioners and co-petitioners, a hearing on

this issue is required.

While cognizant of the fact that the respondent has not filed an answer at this juncture, the voluminous papers submitted and thorough arguments presented have established to this court's satisfaction, that summary disposition of this proceeding is warranted since the sole issue to be determined is the factual inquiry set forth above (See, CPLR §409). For the convenience of parties, witnesses, counsel, as well as considering the potential impact this decision may have on other plaintiffs and co-defendants in the Texas MDL, said hearing most properly should be held therein. However the parties, as always, are free to chart their own procedural course.

Additionally while BCL §1008[a][2] permits this court to require further notice of Pulmosan's dissolution be given to claimants in such manner as it deems proper, clearly the parties in this proceeding do not require notice of Pulmason's dissolution, nor will the court require further notice until the issue of petitioner's standing to continue their underlying personal injury claims have been resolved.

Accordingly, the petition and cross-petition are granted to the extent set forth above and denied in all other respects.

Settle judgment.

Peter J. Kelly, J.S.C.