

Matter of Toscano

2002 NY Slip Op 30019(U)

July 22, 2002

Supreme Court, Suffolk County

Docket Number: 0018561/8561

Judge: Donald Kitson

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SHORT FORM ORDER

INDEXNO.: 18561/98

SUPREME COURT - STATE OF NEW YORK
PART 29 SUFFOLK COUNTY

Present:Hon. DONALD KITSON**Justice**

MOTION DATE: 03/18/2002

SUBMIT DATE: 05/02/2002

MOTION NO. : 015 ~~MOT-D~~ CASE DISP

DISPOSITION: FINAL

_____ X
 In the Matter of the Application of ANTHONY
 TOSCANO, one of the Shareholders and Directors
 of SOUTHAMPTON BRICK & TILE, INC. for the
 Voluntary Dissolution of said Corporation,

MUNZEL & NAPOLITANO, LLP
 548 Roanoke Avenue
 Riverhead, New York 11901

RICHARD A. KRASLOW, P.C.
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 Melville, New York 11747

_____ X
RECEIVER
 AURELIUS J. SCLAFANI
 50 Hampton Street
 Sayville, New York 11782

The Court in its deliberations herein has considered;

1. Order to Show Cause and supporting papers;
2. Affidavit in Opposition;
3. Reply Affidavit.

MOTION

ANTHONY TOSCANO, one of the shareholders and directors of SOUTHAMPTON BRICK & TILE, INC. (SOUTHAMPTON), seeks an order removing ANGELO TOSCANO as officer and director and the further appointment of ANTHONY TOSCANO as receiver to operate the tile division on behalf of SOUTHAMPTON.

In this action for a corporate dissolution, ANTHONY TOSCANO, who is the brother of 50% shareholder, ANGELO TOSCANO, claims that ANGELO TOSCANO is diverting corporate assets. ANTHONY operates the masonry division of the corporation while ANGELO operates the tile division of the corporation. ANTHONY states that in January of this year, Elizabeth Barrett, Office Manager for masonry and Diane Downs, CPA were able to access some of the tile records and they noted substantial irregularities.

They state the last known figures for the tile division showed

accounts receivable in the sum of \$981,476.66 and accounts payable of \$1,259,861.60 or a difference of approximately \$278,385. The masonry division is profitable as the accounts receivable far exceed the accounts payable.

Based upon the Supporting Affidavit of Elizabeth Barrett who, with Ms. Downs, spent six hours reviewing the tile division records, it is claimed that ANGELO is diverting some of the corporation's assets to a business known as Tile Works, Inc. now owned by his son, Ryan Toscano, which business it is alleged is in competition with this corporation. In addition, renovations were made to the premises of Tile Works, Inc., but were in fact charged to SOUTHAMPTON.

Ms. Barrett and Ms. Downs also observed that numerous deliveries were being made to Tile Works, Inc. and based on same, it is alleged that inventory is being diverted from SOUTHAMPTON to Ryan Toscano's corporation, Tile Works, Inc. ANTHONY further believes that ANGELO, who has rented a large warehouse in Calverton, has inventory being delivered and shipped to the Calverton warehouse without passing through the inventory records of SOUTHAMPTON. It is noted that Ms. Barrett requested keys to the Calverton warehouse so that a physical inventory could be made; however, said request was not granted.

ANTHONY's counsel, John Munzel, Esq., complains that it is impossible to obtain financial information from ANGELO TOSCANO. It is further alleged that ANGELO will not provide a copy of the program disc for the new computer system, despite the fact that this is one corporation and both brothers are equal shareholders and should have equal access to information. Ms. Barrett also complains that invoices disappeared in between her visits.

ANGELO TOSCANO does admit that certain expenses were paid for by the corporation on behalf of Ryan Toscano and/or Tile Works, Inc.; however, these payments were fully disclosed on the books and records of SOUTHAMPTON. According to ANGELO, both brothers often pay certain personal expenses out of corporate assets. According to ANGELO, these sums have been charged to the Accumulated Adjustment Account of ANGELO TOSCANO; however, the Court has no specifics regarding this alleged account. ANGELO explains that when he took over the tile division, he was already starting in a negative position as payables were higher than receivables. While there is evidence of one of SOUTHAMPTON's employee spending some time working at Tile Works, Inc., ANGELO asserts that it was only for three or four hours.

ANGELO also states that he has been cooperative in disclosing financial information, which is disputed by Ms. Barrett. The Court also notes that ANGELO TOSCANO does not address the Calverton warehouse issue; nor, does he explain why ANTHONY has been denied access to the inventory there, or the corporate records to verify the status of the inventory.

The Court agrees with ANTHONY TOSCANO that a receiver should be appointed in light of the evidence before this Court that reveals:

- 1) corporate checks being written by a stockholder for personal expenses, and what may be for a competitive corporation,
- 2) inability to proceed with discovery on the civil case,
- 3) the hostility between the stockholders.

Accordingly, the Court hereby appoints Aurelius J. Sclafani, Esq., 50 Hampton Street, Sayville, New York, 11782, telephone number (631)588-3000. The Court notes that a neutral receiver is necessary because there are special circumstances present here, notably the extreme hostility between these two brothers/equal shareholders. **(see, in re Border, 265 AD2d 218, 696 NYS2d 459 (1st Dept., 1999))**

Pursuant to **Business Corporation Law 51204**, the Court hereby directs Mr. Sclafani to post a bond in the sum of \$1,000,000. Mr. Sclafani may submit any order to this Court for signature together with a supporting affirmation so as to effectuate his duties as receiver. Mr. Sclafani shall be compensated pursuant to **CPLR 58004**, at a rate of 2.5% in consideration of the size and assets of the corporation. **(see, Dubiner v Goldman, 42 AD2d 483, 346 NYS2d 834 (2nd Dept., 1973))**

BACKGROUND HISTORY

Initially, ANGELO brought an action against ANTHONY based upon conversion, breach of fiduciary duty, dissipation of assets and seeking an accounting. Thereafter, ANTHONY TOSCANO brought an action for dissolution of the corporation. Those actions were joined for trial by Order of this Court dated June 21, 1999.

A second action, under Index Number 29336/00, was brought by ANTHONY TOSCANO and SOUTHAMPTON BRICK & TILE, INC. against ANGELO TOSCANO and RYAN TOSCANO for conversion of corporate assets, breach of fiduciary duty, to impress a trust and for an accounting.

In June of 2000, ANTHONY TOSCANO moved for partial summary judgment, granting dissolution of the corporation. The Court noted in its Order dated September 25, 2000 that there was no necessity for a hearing because the existence of dissension among these two brothers was clear.

As the Court noted in that Order, ANGELO accused ANTHONY of demolishing the tile showroom and displays on August 7, 2000, necessitating a motion for injunctive relief. ANGELO also accused ANTHONY of entering the premises and destroying portions of the tile showroom. In July of 1999, ANTHONY sought an order enjoining his brother from continuing construction on the premises because both brothers could not agree as to whether the premises should be improved for a tile or a tile plus masonry showroom. There have been claims and counter-claims of removal of financial records and non-cooperation with discovery in this case.

Pursuant to the Order of this Court dated September 25, 2000, the Court found that there were no issues of fact precluding summary judgment on the issue of dissolution. That Order remains in full force and effect and is law of the case. Thus, there is no hearing required for dissolution.

In said Order, the Court also granted the application of ANTHONY TOSCANO to appoint a referee. The Court then issued an Order dated February 21, 2001 appointing as Referee, Alan B. Weiner, to determine whether to divide or dissolve the corporation in the best interests of the parties. The parties stipulated that the Referee be compensated on a reasonable hourly basis.

On September 13, 2001, the Referee was directed to retain the services of an appraiser to value the three corporate properties. There were numerous conferences. At the last conference held by this Court on May 14, 2002, it was clear to the Court that although the Referee reported that a division of the assets of the corporation would be in the best financial interests of the parties, ANTHONY would not agree to the proposal.

In this corporation, the shareholders are akin to that of partners and it is evident, based upon the voluminous motion practice that has ensued and the acrimony present in this case, as reflected in these brothers' multiple affidavits, that the deterioration of this business and family relationship is complete. This dissension

is unequivocally impairing the orderly functioning of SOUTHAMPTON BRICK & TILE, INC. (see, *Molod v Berkowitz*, 233 AD2d 149, 649 NYS2d 438 (1st Dept., 1996))

As noted in this Court's Order of September 25, 2000, the mere fact that the dissension present herein has not yet impacted on the firm's profitability does not require denial of dissolution. (see, *Tavlin v Munsey Candlelight Corp.*, 69 AD2d 865, 415 NYS2d 438 (2nd Dept., 1979); *Business Corporation Law* §1111(b)(3)). A corporate dissolution proceeding is no different from any other litigated proceeding wherein summary judgment can be granted when there are no issues of fact. (see, *People v Oliver Schools Inc.*, 206 AD2d 143, 619 NYS2d 911 (4th Dept., 1994)) Accordingly, Court hereby directs that SOUTHAMPTON BRICK & TILE, INC. be dissolved.

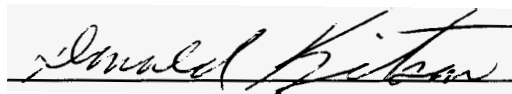
The parties' counsel are directed to contact Mr. Sclafani on or before August 1, 2002.

The Court *sua sponte* severs the case of ANGELO TOSCANO on behalf of himself as shareholder of SOUTHAMPTON BRICK & TILE, INC. and in the right of SOUTHAMPTON BRICK & TILE, INC., and on behalf of all other shareholders similarly situated against ANTHONY TOSCANO, Index No. 29710/1996, from this action.

The Court hereby directs receiver Sclafani to report to the Court by September 12, 2002 on the status of dissolution. The Court further directs counsel for the parties to appear before this Court on October 3, 2002 for the two remaining cases under Index Numbers 29710/96 and 29336/00.

The foregoing constitutes the ORDER of this Court.

DATE: July 22, 2002



J. S. C.