

**Simone v Zahralban**

2007 NY Slip Op 30113(U)

February 27, 2007

Supreme Court, Suffolk County

Docket Number: 0000511

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 10/31/06 (#001)  
MOTION DATE 11/22/06 (#002)  
ADJ. DATES 12/1/06  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MD

-----X	:	
FRANK SIMONE and GABRIEL ZAHRALBAN,	:	ANTHONY L. MASCOLO, ESQ.
	:	Atty. For Plaintiffs
Plaintiffs,	:	123-60 83 <sup>rd</sup> Ave.
	:	Kew Gardens, NY 11415
-against-	:	
	:	PLATZER, SWERGOLD, KARLIN ET AL
RAYMOND ZAHRALBAN and BABYLON	:	Attys. For Defendants
IRON WORKS, INC.,	:	1065 Avenue of the Americas
	:	New York, NY 10018
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 20 read on these motions for dismissal and to appoint a temporary receiver; Notice of Motion/Order to Show Cause and supporting papers 1-3; 14-16; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 6-7; 17-20; Replying Affidavits and supporting papers 8-13; Other 4-5 (memorandum) \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by defendants for an Order dismissing plaintiffs' complaint pursuant to CPLR 3211(a)(7) upon the grounds that plaintiffs failed to state a cause of action upon which relief may be granted, is denied; and it is further

**ORDERED** that the Order To Show Cause (#002) by plaintiffs for an Order appointing a temporary receiver, is denied; and it is further

**ORDERED** that a compliance conference is scheduled for **April 3, 2007**, at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York; and it is further

**ORDERED** that counsel defendants is directed to serve a copy of this Order with Notice of Entry upon counsel for plaintiffs, within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This action, brought by plaintiffs, seeks judicial dissolution of the defendant corporation as minority shareholders. Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a)(7) and plaintiffs move to have a receiver appointed during the pendency of this action. Each party opposes the others respective motion.

Regarding defendants' motion to dismiss, the Appellate Division, Second Department has restated the rules governing a motion to dismiss in *State of New York v Grecco*, 13 AD3d 350, 786 NYS2d 197 [2d Dept 2004]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, that a cause of action against one or more defendants has been stated (see *Sirlin v Town of New Castle*, 35 AD3d 713, 826 NYS2d 676 [2d Dept 2006]; *Dunleavy v Hilton Hall Apts. Co., LLC*, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]).

In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see *Fast Track Funding Corp. v Perrone*, 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; *Paterno v CYC, LLC*, 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; *McGee v City of Rensselaer*, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Morone v Morone*, 50 NY2d 481, 429 NYS2d 592 [1980]; see also *511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 746 NYS2d 131 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 729 NYS2d 425 [2000]).

The Court finds that under this liberal approach and upon a review of the complaint, plaintiffs have set forth a cognizable legal theory for common law dissolution of the defendant corporation and defendants' application to dismiss is denied.

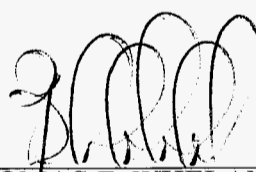
Regarding plaintiffs' motion to appoint a temporary receiver, Article 64 of the CPLR sets forth the statutory grounds for the appointment of a receiver. Under said Article, a court may appoint a receiver to take control of designated property and see to its care and preservation during litigation (see *Decker v Gardner*, 124 NY 334 [1891]) where there is a danger that the property will be removed from the state or lost, materially injured or destroyed (see *Greene v New York United Hotels*, 236 AD 647, 260 NYS 405 [1<sup>st</sup> Dept 1932]; *affd.* 261 NY 698 [1933]). The appointment of a receiver is a drastic and intrusive remedy which may only be invoked in cases where there is a clear, evidentiary showing of the necessity of conserving the property and protecting the interests of the parties (see *Secured Capital Corp. of New York v Dankster*, 263 AD2d 503, 694 NYS2d 409 [2d Dept 1999]; *Genuth v First Div. Ave. Realty Corp.*, 88 Misc2d 586, 387 NYS2d 793 [Sup Ct., Kings County 1976]) and with extreme caution in the exercise of a court's equity powers because of the drastic nature of the remedy (see *First Natl. Bank of Glen Falls v Caputo*, 124 AD2d 417, 507 NYS2d 516 [3d Dept 1986]). This is especially so involving the appointment of a receiver for a corporation.

Here, plaintiffs have failed to satisfy the requirements of CPLR 6401(a) and establish, by clear and convincing evidence, that there is a danger of irreparable loss (see *Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379, 755 NYS2d 664 [2d Dept 2003]; *Kristensen v Charleston Sq., Inc.*, 273 AD2d 312, 709 NYS2d 853 [2d Dept 2000]) and therefore, the application to appoint a receiver, is denied.

Accordingly, plaintiffs' and defendants' motions are denied as indicated herein. This constitutes the Order and decision of the Court.

DATED: \_\_\_\_\_

2/27/07



THOMAS F. WHELAN, J.S.C.