

Matter of Ullger v Ullger
2007 NY Slip Op 30504(U)
March 23, 2007
Supreme Court, Suffolk County
Docket Number: 0011876/2006
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

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In the Matter of the Application of WAYNE ULLGER,
individually and as a shareholder of Lancer Packaging
Lithography Corp. and Lancer Realty Holding Corp.,

Petitioner,

-against-

LANCE ULLGER and DAREN ULLGER,

Respondents.

For an order dissolving Lancer Packaging Lithography
Corp. and Lancer Realty Holding Corp., pursuant to
Section 1104-a of the New York Business Corporation
Law.

CALENDAR DATE: December 13, 2006
MNEMONIC: Mot D.

PLTF'S/PET'S ATTORNEY:

RUSSO, FOX & KARL
400 Townline Road
Hauppauge, NY 11788

DEFT'S/RESP ATTORNEY:

BJORN J. HOLUBAR, ESQ.
575 Madison Ave.
New York, NY 10022

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Upon the following papers numbered 1 to 36 read on this motion for corporate dissolution;
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 9-32; Replying Affidavits
and supporting papers 33-36; Other _____; and after hearing counsel in support of and opposed
to the motion it is,

ORDERED that this petition seeking dissolution of Lancer Packaging
Lithography Corp., and Lancer Realty Holding Corp., by petitioner, a minority shareholder in
both corporations pursuant to Business Corporation Law §1104-a (hereinafter BCL), alleging
oppressive actions, is hereby decided as follows.

The petitioner, Wayne Ullger, is a one third (1/3) shareholder in Lancer
Packaging Lithography Corp., and Lancer Realty Holding Corp., along with his two brothers,
respondents, Lance Ullger and Darren Ullger, who each are one third (1/3) shareholders also.
They hold the offices of President and Vice President, respectively, in the two (2)
corporations. Lancer Packaging Lithography Corp., is in the business of manufacturing
printed carton boxes and cartons and Lancer Realty Holding Corp., owns the land and
facilities from which Lancer Printing operates at 151 Remington Boulevard in Lake
Ronkonkoma, Suffolk County on Long Island, New York. The petitioner alleges that the
entities were originally founded by their father, Parker Ullger. On approximately November 5,
2005, the petitioner was removed from his employment with the corporations, the locks were
changed and he has been denied access to the books and financial records of the
corporations. The petitioner claims that the respondents' actions carry all the trademarks of a
classic minority shareholder freeze-out, including removal of the petitioner/minority
shareholder from employment, removal from the corporate office, a physical lockout from the
corporate offices, looting of the corporations' assets and restricting petitioner's access to the
corporate books and records.

Respondents, Lance Ullger and Darren Ullger, claim that the petitioner was removed as an employee because he was incompetent and they point to a report by a consultant, Edward Rapp, who was hired to assist the business in its financials and business model so as to make it more competitive and improve its "bottom line." Respondents' claim the petitioner was grossly negligent, costing the business upwards of \$300,000.00, was abusive, combative and was terminated for cause and malfeasance. The respondents also argue that the petitioner is not entitled to dissolution of the corporations, yet they have not at this time asserted any rights under BCL §1118 to buy out the minority shareholder. As a result of the petitioner's termination, the present lawsuit was instituted with a temporary restraining order preventing the corporations from refinancing or assuming any further debt pending further order of this Court.

The purpose of BCL §1104-a is to provide minority shareholders with a mechanism whereby they can receive a fair return on their investment when the conduct of the majority shareholders is such that their reasonable expectations in joining the venture have been defeated. *Cassata v. Brewster-Allen-Wichert, Inc.*, 248 AD2d 710, 670 NYS2d 552 (2nd Dept. 1998); *Matter of John Imperatore*, 128 AD2d 707, 512 NYS2d 904 (2nd Dept. 1987). The relief of dissolution afforded under BCL §1104-a is discretionary and involves a two (2) part analysis and finding by the Court:

First, the Court must find that there has been oppressive conduct toward the petitioner, if he is found to be a shareholder holding a minimum of 20% of the stock in the corporation and that corporate assets are being wasted or looted for non-corporate purposes; and

Second, that liquidation is the only feasible means whereby the petitioner can receive a fair return on his investment, *Matter of Kemp & Beatley*, 64 NY2d 63, 484 NYS2d 799 (1984). Furthermore, the Court is free to fashion alternative equitable relief depending on the factual circumstances. *Matter of Brach*, 135 AD2d 711, 522 NYS2d 612 (2nd Dept. 1987); *Matter of Wredy Furniture Clearance Center*, 108 AD2d 81, 487 NYS2d 901 (3rd Dept. 1985).

Even in the event of a buyout, the valuation of the stock and the petitioner's interest must be determined as of the day before the institution of the dissolution proceeding under certain approved valuation methods. *Langer v. Miller*, 305 AD2d 270, 762 NYS2d 346 (1st Dept. 2003); See also, *Matter of Taines v. Barry Photo*, 123 Misc. 2d 529, 474 NYS2d 362 (1983), aff'd 108 AD2d 630, 486 NYS2d 699 (1st Dept 1985) lv den. 67 NY2d 602, 499 NYS2d 1098 (1986).

In light of the complexities of this case dealing with the petitioner's status as an alleged one-third (1/3) shareholder as well as both a claim of oppressive conduct warranting judicial dissolution, remedies available in lieu of dissolution and a valuation of the corporations and each shareholder's percentage of that value, the Court, pursuant to CPLR §4212 and

BCL §§1108 and 1109, hereby appoints Kenneth C. Butterfield, Esq. of the law firm of Butterfield & Butterfield, 168 Laurel Avenue, Northport, New York 11768 (631-261-9463; fax: 631-757-2664) as Referee to hear and report all allegations and proofs of the parties and determine the facts as to petitioner's status as a shareholder and prior employee of the corporation [see, *In Re Williamson*, 259 AD2d 362, 687 NYS2d 53 (1st Dept 1999) and *Gallagher v. Lambert*, 74 NY2d 562, 549 NYS2d 945 (1989)], his percentage in the corporations and the valuation of the petitioner's shares in the event of a mandated buyout pursuant to BCL §1118. The Referee shall make his report in writing and file his report with all convenient speed. The report shall contain a statement of the effects, credits, and other property of the corporation, the number of shareholders and their respective holdings in both corporations, the viability of the corporations' existence, their debts and other matters pertaining to their affairs.

The Referee is also directed to take proof of the facts and circumstances as stated in the petition and opposing papers for dissolution of the corporation. In this regard, the referee initially should, upon immediate execution of his duties, review the need for additional financing or restructuring of the corporations' debt as set forth in the majority shareholders' request to refinance the debt of the corporations. The referee should undertake an immediate examination of the corporations' debt structure and needs and report such examination to the Court in order to determine the need to modify and/or remove the Court's temporary restraining order, originally dated April 24, 2006, and continued on December 13, 2006.

Under the Uniform Rules for New York Trial Courts, §203.43(d), it is further ordered that if the trial of the issue or action hereby referred is not begun within sixty (60) days from the date of this order, or such later date as the Referee may fix, upon good cause shown, this order shall be cancelled and revoked, shall be remitted by the Referee to the Court from which it was issued and the matter hereby referred shall immediately be returned to the Court for trial.

The action for dissolution pursuant to Business Corporation Law §110-4-a is hereby stayed pending the Referee's findings and report and further order of this Court.

The foregoing constitutes the decision of this Court.

Date: March 23, 2007



J.S.C.