

**Matter of Livolsi v 111 Glen St. Corp.**

2007 NY Slip Op 32911(U)

September 13, 2007

Supreme Court, New York County

Docket Number: 5486-07/

Judge: Stephen A. Bucaria

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# SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

\_\_\_\_\_  
In the Matter of the Application of  
JOSEPH LIVOLSI,

INDEX No. 5486/07

Holder of Fifty (50%) Percent of all  
Outstanding Shares Entitled to Vote,

MOTION DATE: July 30, 2007  
Motion Sequence # 001

Petitioner,

*Seq 2* ✓

For the Dissolution of 111 Glen Street Corp.,  
a domestic corporation, Pursuant to §1104-a  
of the Business Corporation Law,

-against-

111 GLEN STREET CORP. and PHILIP ARFMAN,

Respondents.

\_\_\_\_\_  
The following papers read on this motion:

- Order to Show Cause..... X
- Cross-Motion..... X
- Affirmation in Opposition..... XX
- Reply Affirmation ..... X
- Memorandum of Law..... X

This petition, pursuant to Business Corporation Law § § 1104-a(a)(1), (a)(2) for, **inter alia**, a judgment dissolving 111 Glen Street Corp. is **denied**; and the cross-motion,

by respondents, for an order pursuant to CPLR § 3211(a)(1), (7) dismissing the Petition and imposing sanctions pursuant to 22 NYCRR § 130-1.1 is determined as provided herein.

By way of this proceeding, the petitioner Livolsi seeks the corporate dissolution of 111 Glen Street Corp. Livolsi and the respondent Arfman are 50% shareholders of that corporation. The corporation's sole asset is the property at 111 Glen Street which was acquired in 1999: In fact, the sole purpose of the corporation is to hold title to that property. 111 Glen Street has been leased to 30fps Productions, Inc., a company which is fully owned by Arfman, since the corporation acquired the property.

In his petition, Livolsi alleges that after he stopped working for 30fps Productions in September 2006, Arfman froze him out of 111 Glen Street Corp. entirely: He alleges that Arfman changed the locks at 111 Glen Street and denied him access to the corporate accounts and financial records. Livolsi further alleges that Arfman has misappropriated and/or wasted 111 Glen Street's corporate assets. Judicial dissolution of the corporation is sought. In the Order to Show Cause, Livolsi also seeks the appointment of a Receiver and injunctive relief.

30fps Productions commenced an action against Livolsi in February, 2007, seeking to recover for breach of duties of loyalty and fidelity and conversion. In that action, Arfman alleges that Mr. Livolsi engaged in serious misconduct while he was an employee of 30fps, including, but not limited to, being involved in the formation and operation of competing businesses; misappropriating 30fps' property and equipment; misusing 30 fps' film and video reels and other work by passing them off as his own and making related misrepresentations to certain 30fps customers and other third parties; diverting business from 30fps, and, misusing 30fps confidential information for his personal gain.

Arfman alleges that Livolsi brought this proceeding seeking the dissolution of 111 Glen Street Corp. in retaliation to Arfman's action against him. This proceeding was actually commenced on March 30, 2007, following an alleged failed attempt by Livolsi to sell out his interest in 111 Glen Street to Arfman.

In support of their motion to dismiss pursuant to CPLR 3211(a)(1), (7), Arfman attests that it was discovered that Livolsi had misappropriated 30fps Production's business assets and for that reason, the locks on the building at 111 Glen Street were changed to block Livolsi's access to 30fps Productions' business operations. Arfman, in

any event, asserts that Livolsi has never sought access to the property nor has he asked to review any of the corporate records: If he had, Arfman attests that he would have accommodated him. Furthermore, Arfman, the Operations Manager of 30fps Productions Allison Torres, and an attorney for 111 Glen Street Charles E. Parisi, Esq., all attest that Livolsi has been kept fully apprised of what has been happening with 111 Glen Street Corp. That is, Livolsi has been provided copies of all corporate financial records such as bills, bank statements, payments, etc. and, in fact, upon Livolsi's request in January, 2007, \$21,815.48 of 111 Glen Street's funds were put in escrow with Parisi. Furthermore, 111 Glen Street's Certified Public Accountant, Christina Cammarata, attests that the corporation is solvent. She represents that its assets are not in jeopardy nor are they in danger of dissipation and its financial and tax obligations continue to be met. Furthermore, to the best of Ms. Cammarata, Mr. Parisi and Ms. Torres' knowledge, Arfman has not engaged in any wrongful, illegal, fraudulent or oppressive conduct, nor has he wasted, looked or diverted any assets of the corporation. Ample documentation has been submitted to verify all of these assertions.

In response to Arfman, Torres, Parisi and Cammarata's attestments and the exhibits clearly verifying them, Livolsi makes three arguments: He criticizes Arfman for directing the escrow holder that the escrow funds are only to be disbursed upon his direction; he faults Arfman for failing to keep him apprised of the status of a repair which was necessitated by water damage; and, he continues to complain of the change of locks. He does not deny that he has been kept apprised of the status of 111 Glen Street's business, both financially and otherwise, nor does he dispute that it is not in jeopardy. Furthermore, he does not substantiate his alleged denial of access to the business' records or the property itself.

Pursuant to BCL § 1104-a, a petition for judicial dissolution may be warranted only in special circumstances, such as when "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders," or, where "[t]he property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers, or those in control of the corporation." Judicial dissolution is a drastic remedy. Before granting it, the court is required to consider "[w]hether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment" and "[w]hether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners." (Business Corporation Law § 1104-a(b)(1), (2); see,

**Matter of Kemp & Beatley, Inc.** 64 NY2d 63,73, 1984). "Implicit in this direction is that once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders." (**Matter of Kemp & Beatley, Inc.**, *supra* citing Business Corporation Law § 1111(b)[1]). "In New York State, judicial dissolution is not authorized because the parties no longer get along or that they disagree about how things should be done, even where the party who wants to withdraw is willing to divide the business in the fairest and most generous way. Judicial dissolution is only authorized in New York where there is evidence of conduct which fair-minded people would find objectionable." (**Mardikos v Arger**, 116 Misc2d 1028, 1032 (Supreme Court Kings Co. 1982).

Respondent Arfman's motion to dismiss the petition pursuant to CPLR § 3211(a)(7) for failure to state a claim is **denied**. A claim has been stated.

Respondent Arfman's motion to dismiss the petition pursuant to CPLR 3211(a)(1) is converted to an Answer. Despite the lack of an Answer, the parties have both clearly charted their course for summary judgment here. (**Four Seasons Hotels v Vinnik**, 127 AD2d 310, 1<sup>st</sup> Dept., 1987; see also, **Harris v Hallberg**, 36 AD3d 857, 2<sup>nd</sup> Dept., 2007).

Livolsi has not demonstrated that Arfman has engaged in "conduct that substantially defeats [his] 'reasonable expectation' . . . in committing [his] capital to the particular enterprises." **Matter of Kemp v Beatley, Inc.**, *supra*, at p. 72. Nor has Livolsi demonstrated that Arfman has engaged in "conduct which fair-minded people would find objectionable" (**Mardikos v Arger**, *supra*, at p. 1031), or that Arfman has wasted, looted or diverted any corporate property or assets (see, **Gimpel v Bolstein**, 125 Misc2d 45, 55 [Supreme Court Queens Co. 1984]). Livolsi has similarly not established that the appointment of a Receiver is necessary to preserve the assets of the business, or protect the interests of the parties. See, Business Corporation Law § 1113; **Matter of Steinberg**, 249 AD2d 551, 553, 2<sup>nd</sup> Dept., 1998; **Matter of Hessert v Brooklyn Home Dialysis Training Center** 231 AD2d 719, 2<sup>nd</sup> Dept., 1996). The petition is **dismissed**.

With respect to Arfman's request for sanctions herein, in the exercise of judicial discretion, this Court declines to impose sanctions (**Harris v Hallberg**, *supra*) and the cross-motion is **denied**.

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This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated SEP 13 2007

*Stephen W. Spearin*  
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XXX J.S.C.  
**ENTERED**

SEP 17 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE