

Matter of Tonche v Original Christine's Rest., Inc.

2008 NY Slip Op 30837(U)

March 20, 2008

Supreme Court, New York County

Docket Number: 0602217/2007

Judge: Shirley W. Kornreich

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCANNED ON 3/25/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Carlos Touche Jr

INDEX NO.

602217/07

MOTION DATE

12/27/07

MOTION SEQ. NO.

1

MOTION CAL. NO.

- v -

The Original Christnec's

The following papers, numbered 1 to 4 were read on this motion to/for Corporate Dissolution

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED
MAR 25 2008

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 3/20/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FOR THE FOLLOWING REASON(S):

IN THIS CASE I RESPECTFULLY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
In the Matter of CARLOS TONCHE, JR., as
Attorney-in-Fact for MILAN GERNAT, holder of
one-half of all outstanding shares entitled to vote
in election of directors,

Petitioner,

Index No.: 602217/07

-against-

DECISION
and ORDER

For the Dissolution of the ORIGINAL
CHRISTINE'S RESTAURANT, INC., a
domestic corporation,

Respondent.

FILED
MAR 25 2008
NEW YORK
COUNTY CLERKS OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is a petition by Carlos Tonche, Jr. ("Petitioner"), Attorney-in-Fact for Milan Gernat, pursuant to BCL § 1104(a), to dissolve The Original Christine's Restaurant, Inc. ("Christine's"), a corporation duly organized under the Business Corporation Law. Christine's was established when it filed its certificate of incorporation with the New York Secretary of State on July 1, 2003. The certificate of incorporation states, inter alia, that "the purpose of the corporation is to operate a restaurant...[and] the aggregate number of shares which the corporation shall have the right to issue is [200]." The certificate does not list or name any officers, directors, or shareholders.

Petitioner and respondent Ewa P. Cohen both aver that Gernat and Cohen are the sole officers and shareholders of Christine's. Petitioner claims that Gernat owns 50% of Christine's shares entitled to vote. Petitioner also states that Cohen and Gernat are so divided regarding Christine's management that it is impossible to regulate the affairs of the corporation.

Specifically, petitioner claims that the parties cannot come to an agreement regarding the sale of the corporation. As a result, petitioner claims that it would be beneficial to the interest of all parties that Christine's be dissolved.

On October 19, 2006, Gernat signed a "General Power of Attorney" which grants petitioner, as Attorney-in-Fact:

full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and proper to be done in the exercise of any of the rights and powers herein granted as to all intents and purposes as [Gernat] might or could do...[including the power]...to ask, demand, sue for, cover, collect, receive, and hold and possess all such sums of money...personal and real property, intangible and tangible property and property rights and demands whatsoever, liquidated or unliquidated, as are now, or shall hereafter become owed by, or due, owing, payable or belonging to [Gernat].

Accordingly, since Gernat owns 50% of Christine's shares entitled to vote, petitioner claims that he has full power and authority to act on Gernat's behalf in seeking to dissolve the corporation.

Cohen originally opposed the petition for dissolution denying that Gernat holds 50% of Christine's stock. She further claimed that petitioner lacked standing to bring this claim on Gernat's behalf.

On November 30, 2007, the Court issued an interim order directing that an evidentiary hearing be held since Cohen denied that Gernat owned 50% of Christine's stock, the certificate of incorporation was silent as to how the 200 shares of Christine's stock were allocated and no other evidence as to stock ownership had been offered. *See In the Matter of Kournianos*, 175 A.D.2d 129, 129-130 (2nd Dept 1991) (hearing required to resolve disputed issues of fact where petitioner failed to submit sufficient evidence to establish that he owned one-half of the shares of the corporation and was thus entitled to commence a proceeding under BCL § 1104). During the

evidentiary hearing on December 27, 2007, both parties stipulated that Gernat and Cohen each hold one-half of Christine's issued and outstanding voting shares.

I. *Conclusions of Law*

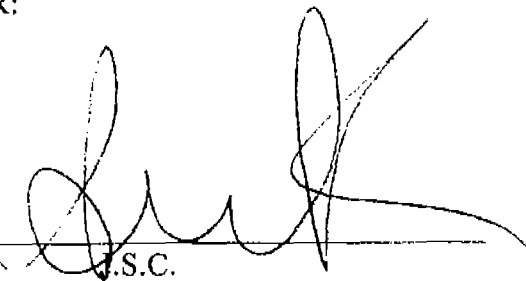
BCL § 1104(a) allows a holder of at least one-half of all outstanding shares entitled to vote, to petition for the dissolution of a corporation where the directors are "deadlocked." BCL 1104(a); *In the Matter of Parveen*, 259 A.D.2d 389, 390 (1st Dept 1999). BCL §1104(a) contains three specific grounds where dissolution will be permitted where: (1) the directors are so divided regarding management of corporate affairs that it is impossible to obtain the necessary number of votes to manage the corporation; (2) the shareholders are so divided that it is impossible to obtain the number of votes required to elect directors; and (3) internal dissension is such that two or more groups of shareholders are so disjointed that dissolution would be beneficial to all shareholders. *See* BCL 1104(a); *Parveen*, 259 A.D.2d at 391.

Here, due to the "General Power of Attorney" executed by Gernat, petitioner clearly has standing to bring this petition on Gernat's behalf. Although Cohen denies petitioner's claims that the shareholders are so divided regarding management and the proposed sale of the corporation, she offers no direct evidence as to why it would be beneficial to keep Christine's intact. In a close corporation, the relationship among the shareholders vis-a-vis each other is akin to that between partners. *In re T.J. Ronana Paint Corp.*, 98 A.D.2d 413, 421 (1st Dept 1984). The law places a high degree of fidelity and good faith in dealings between partners and, thus, the same obligations apply to shareholders in a close corporation. *Id.* Therefore, when the shareholders who are actively conducting the business of the corporation cannot agree, it is in the best interests of those shareholders for a dissolution to take place. *Id.* (where deadlock exists to

extent that dissension becomes order of the day, impasse may effectively destroy loyalty and good faith expected of such stockholders in dealings with each other; inevitable result is downfall of business and, in such case, dissolution affords court an appropriate remedy to judicially direct what in actuality is obvious, that deadlock and dissension have effectively destroyed orderly functioning of corporation). Accordingly, it is

ORDERED that petitioner's motion to dissolve The Original Christine's Restaurant, Inc., is granted.

ENTER:



A handwritten signature in black ink, appearing to be 'J. S. C.', is written over a horizontal line. The signature is stylized and cursive.

Date: March 20, 2008
New York, New York

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE