

Matter of Steinberg v Brothers Realty of N.Y., Inc.

2008 NY Slip Op 32483(U)

September 4, 2008

Supreme Court, Nassau County

Docket Number: 8472-08/

Judge: Stephen A. Bucaria

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of the Application of the Estate of
JACK STEINBERG, Petitioner and Shareholder in
BROTHERS REALTY OF N.Y., INC.,
WORLDWIDE FOREIGN AUTO PARTS, INC.,
IAJ AUTO PARTS CORP., SWIFT AUTO
PARTS III, INC. and SWIFT AUTO PARTS IV,
INC.,

INDEX No. 008472/08

MOTION DATE: July 11, 2008
Motion Sequence # 001

Petitioner,

-against-

BROTHERS REALTY OF N.Y., INC.,
WORLDWIDE FOREIGN AUTO PARTS, INC.,
IAJ AUTO PARTS CORP., SWIFT AUTO PARTS
III, INC. and SWIFT AUTO PARTS IV, INC. as
well as IRA STEINBERG, ADAM MAHL,
ROBERT LICAUSI,

Respondents.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Affidavit in further Support..... X
- Supplemental Affirmation in Support..... X
- Reply Affidavit..... X
- Memorandum of Law..... X

STEINBERG v BROTHERS REALTY OF N.Y., INC., et al **Index no. 008472/08**

This petition, brought on by order to show cause, for an order:

1. Pursuant to N.Y. Bus. Corp. Law §§ 1104 and 1104(a) determining the rights of the petitioner and directing the liquidation of the Corporations;
2. Pursuant to N.Y. Bus. Corp. Law §§ 1113 and 1202(a)(1), and N.Y. C.P.L.R. 6301 appointing a receiver for Respondent Corporations on the grounds that the Respondent Corporations' assets cannot be properly safeguarded, preserved and protected, and the Respondent Corporations cannot be dissolved without a temporary receiver;
3. Pursuant to N.Y. Bus. Corp. Law §§ 1113 and 1115(a)(1) enjoining and restraining Respondent Corporations from transacting any unauthorized business and from exercising any corporate powers, except by permission of court and collecting or receiving any assets, cash for sale of inventory, rents or other debt or other property and assets of the Respondent Corporations, and from paying out or otherwise transferring or delivering any property of the Respondent Corporations;
4. For such other and further relief as may be just and proper together with the costs and expenses of these proceedings, including reasonable attorneys' fees to Petitioner,

is determined as hereinafter set forth.

The petitioner, initially, avers that she is a shareholder of at least 20% of the outstanding shares in the respondent corporations. She asserts that her husband, Jack Steinberg ("Jack") died and she was issued Letters Testamentary on December 18, 2006 in New Jersey. She argues that any shareholders' agreements entered into by her deceased husband is null and void as her husband acted with diminished mental capacity and signed them under fraud, misrepresentation, duress and undue influence due to his illness and weakened physical state. She further asserts that there is a deadlock in the election of a Board of Directors and the surviving Directors of the Corporations; and that she has been deprived of her ownership interest; that business and assets of one of the respondent

STEINBERG v BROTHERS REALTY OF N.Y., INC., et al **Index no. 008472/08**

corporations has been wrongfully transferred. Petitioner contends that upon dissolution, a receiver should be appointed to conduct the winding up of the respondent corporations. She further contends that injunctive relief is required because the corporations are her principal source of income and she was offered an inadequate value for her ownership interest.

In opposition, the respondents' counsel points out that the decedent never had any pecuniary interest in the respondent corporation Worldwide, and that no proof has been submitted to substantiate ownership. Counsel asserts that, with respect to the corporate respondents Brothers Realty, IAJ Auto Parts, Swift Auto Parts III and Swift Auto Parts IV, that he refers to collectively as "the Entities", the shareholders (which included the decedent) executed Shareholders' Agreements which provided for a mandatory buyout of a shareholder's interest upon the death of any shareholder. He further asserts that the petitioner is only entitled to the formulated buyout and her demand is far in excess of that; and that any possible damages is calculable and rectifiable by money damages, which precludes injunctive relief. Counsel argues that the petitioner has not proven that she is a shareholder in the Entities by showing the purported invalidity of the shareholders' agreements; and that the petitioner's decedent showed that he, at the execution of the shareholders' agreements, was a sophisticated businessman because at that time he entered into other transactions by which he acquired other assets. Counsel contends that the petitioner seeks to renegotiate the buyout agreement with no basis for the alleged nullity, no showing of irreparable harm, no showing of a likelihood of success on the merits, and with the interference in the respondents' business affairs, a balancing of the equities favors the respondents, and this precludes injunctive relief.

The respondent Ira Steinberg asserts that, with respect to the respondent Worldwide, while the original contract, dated July 20, 1994, listed both he and the decedent as transferees, in fact it was he who ran Worldwide and the decedent had nothing to do with Worldwide; that the Subchapter S tax returns listed Ira as 100% owner of Worldwide; and that the decedent never questioned that. With respect to the remaining entities, Ira contends that the sole dispute is over the value of the corporations on the date of the decedent's death, in that the petitioner disputes the validity of the respective shareholders' agreements. He further asserts that neither the petitioner nor the estate is a shareholder, merely a creditor. He further contends that the entities are viable businesses that are ongoing concerns with a total of 21 employees with families that are dependent upon the day-to-day business of the entities, and the petitioner's allegation that the entities are deadlocked and unable to transact business is inaccurate. With respect to the respondent IAJ, circumstances have dictated a lesser value of those shares at the present time, as compared to the decedent's date of death, but the individual respondents have guaranteed payment of the date of death value of IAJ.

STEINBERG v BROTHERS REALTY OF N.Y., INC., et al **Index no. 008472/08**

As to the record keeping of the entities, he argues that, as on-going businesses, written records are not necessarily complete and formal, but that does not constitute oppression or that the entities are not being properly run. He argues that, with respect to the re-financing of the real property owned by Brothers, it was the decedent who proposed that re-financing and the decedent received ½ of the proceeds, and that the decedent had his own attorney and accountant who advised him and agreed to the content of the shareholders' agreements long before the onset of his fatal illness. Moreover, the shareholders' agreements were signed at his home when he (Ira) was not present and the petitioner saw those agreements before his demise and did not challenge them. He argues that:

“100. While I was helping Jack through his illness, winding down his store, spending time in Brooklyn away from my own stores and family, paying bills out of my own funds, paying my sister-in-law \$2,000 a week plus medical insurance, I was good.

101. Now that I drew the line in the sand, I'm bad”. (Steinberg aff., ¶'s 100-101).

In reply, the petitioner asserts that the respondents have failed to submit opposing documentation that supports their opposition and she disputes that her deceased husband was not a shareholder of Worldwide. She argues that the entities paid \$2,000 per week and health benefits for the benefit of the estate and the decedent's surviving children and then stopped those payments; that no access to Worldwide's books and records have been provided; that no meeting records of any of the entities have been provided; and that little financial documentation has been produced for the entities, and for these reasons, oppressive action has been demonstrated. She further asserts that relief pursuant to BCL 1104-a is appropriate to the entities because cash transactions are common in the entities' businesses, cash records are incomplete and the financial records are an insufficient basis upon which to formulate a buyout figure. She further argues that it is the respondent Ira who is the bully, not her; that other financial arrangements are irrelevant to this proceeding; that she disputes that her husband was fully aware of the financial impact of the shareholders' agreements that he signed and doubts the authenticity of his signatures. She contends that the opposition asserts conclusions but not facts and that the procedure to acquire the petitioner's interest has not been commenced as no payment has been tendered for the shares. The petitioner's attorney, inter alia, asserts that the instant petition seeks only a dissolution of the entities, not to

not to enforce or set aside the shareholder agreements, and the petitioner acts as the representative of Jack Steinberg. Counsel argues that the respondents' assertion, that the "petitioner is seeking a buyout number greater than that provided in the stockholders [sic] agreements" (Marsh affirm., ¶20), is wrong because the petitioner has not had access to adequate books and records of the corporate respondents. He also argues that this proceeding was not commenced until after the petitioner's benefits had been stopped. He contends that assets of IAJ have been diverted or transferred to an entity in which the estate has no interest.

DECISION

In this special proceeding, initially with respect to a determination of the rights of the parties and whether there are obligations due to the petitioner, as the representative of the estate of Jack Steinberg, from the entities and/or other shareholders of the entities, it must be determined whether the petitioner has standing, as a shareholder of the various entities, to commence this action. With the disparate points of view of the parties on this threshold question of whether, in fact or de jure, the petitioner is a shareholder of the entities, such cannot be determined upon this record.

"One method by which shareholders of a close corporation may protect their rights and establish their relationship is through a shareholders agreement (see, Landorf v Glottstein, 131 Misc 2d 432, affd 127 AD2d 1016; 3 White, New York Corporations, Business Corporation Law ¶ 620.01 [13th ed]). A shareholders agreement is a contract and is to be construed pursuant to general contract principles (see, Lama Holding Co. v Smith Barney, 215 AD2d 314; Schmidt v Magnetic Head Corp., 97 AD2d 151; 3 White, New York Corporations, Business Corporation Law ¶ 620.01 [2] [13th ed]). In general, parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation, or violative of public policy. . .".

(Matter of Dissolution of Validation Review Associates, Inc., 223 AD2d 134, 646 NYS2d 149, 2nd Dept., 1996).

While it is permissible to utilize a shareholders' agreement to protect the various shareholders, such determination is dependent upon a factual and legal analysis of those documents, and fundamental to that analysis and determination is the critical issue of whether Jack Steinberg signed those documents, whether his ultimately-fatal disease so impaired his execution of those agreements as to nullify any consent in the agreements, and whether he had the assistance of any personal professionals at or prior to such execution. It is clear that the petitioner herein has made Jack Steinberg's mental competence an issue, inasmuch as his mental and emotional state is alleged to have been affected by his terminal illness-brain cancer- and the attendant medications. The respondents' clear assertion, that the petitioner's lack of standing based upon non-ownership of shares is contingent upon the respective shareholders' agreements, is concomitantly contingent upon the decedent's mental competence at the time of his execution of the several agreements. This Court, without a determination of the effectiveness of those several executions, cannot make such determination.

That threshold issue, i.e., standing of the petitioner and viability of the shareholders' agreements, is set down for a hearing before Hon. Thomas V. Dana, Court Attorney Referee for hearing and determination pursuant to BCL §§ 1108 and 1109 (see, **Matter of Bon Neure Realty Corp.**, 196 AD2d 694, 601 NYS2d 491, 1st Dept., 1993). While the issue of standing and ownership in the entity Worldwide has an additional focus, that issue shall also be determined by the Referee, i.e., that of ownership in the initial instance by Jack Steinberg, if any.

With respect to that part of the instant application seeking the appointment of a receiver, and preliminary injunctive relief, it is appropriate to apply the standards for preliminary injunctive relief.

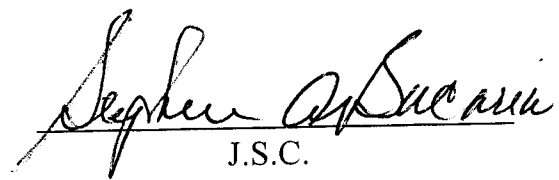
“To be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (see **Hightower**

v Reid, 5 AD3d 440; Evans-Freke v Showcase Contr. Corp., 3 AD3d 549). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (cf. Rattner & Assoc. v Sears, Roebuck & Co., 294 AD2d 346)".

(Moy v Umeki, 10 AD3d 604, 781 NYS2d 684, 2nd Dept., 2004). Inasmuch as the focal point of this proceeding is the valuation of the shares, and the amount of money due to the petitioner, a preliminary injunction is unavailable (see Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541, 708 NYS2d 26, 2000); that part of the application is **denied**.

The hearing before Hon. Thomas V. Dana shall be held on October 30, 2008.

Dated SEP 04 2008


J.S.C.

ENTERED
SEP 05 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE