

**Matter of Faye v 321 E. 84th St. Owners, Inc.**

2009 NY Slip Op 31314(U)

June 15, 2009

Supreme Court, New York County

Docket Number: 110209/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LING-COHAN  
Justice

PART 36

ELIZABETH FAYE  
-v- Ralph Ward  
321 East 84th St Owners, Inc

INDEX NO. 110209/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 9 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for dissolution of a corporation

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>42</u>
<u>3, 4, 5</u>
<u>6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for dissolution of a corporation  
is decided in accordance with the attached  
memorandum decision.

**FILED**  
JUN 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/15/09 \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
In the Matter of  
ELEANOR E. FAYE and RALPH WARD,  
Petitioners,

Index No.: 110209/08

-against-

For the Judicial Dissolution of  
321 EAST 84<sup>TH</sup> ST. OWNERS, INC. and  
the Board of Directors JOSEPH MARINO,  
EMILY MARINO, and MICHAEL MARINO,  
Respondents.

-----x  
LING-COHAN, J.

DECISION/ORDER  
**FILED**  
JUN 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Discourage litigation. Persuade your neighbors to  
compromise whenever you can. Point out to them how the  
nominal winner is often a real loser-in fees, expenses,  
and waste of time."

Abraham Lincoln, Notes for a Law Lecture, July 1850.<sup>1</sup>

**FACTUAL BACKGROUND**

Petitioners, as alleged shareholders of the respondent  
cooperative corporation, move, pursuant to Business Corporation  
Law (BCL) § 1104-a, for the judicial dissolution of the  
corporation, the appointment of a receiver, and for the  
production of the corporation's financial books and records.

The subject premises is divided into seven units: petitioner  
Eleanor E. Faye (Faye) is the proprietary lessee of one unit,  
allegedly owning shares in the cooperative that equal 10.43% of  
the total number of outstanding shares; petitioner Ralph Ward  
(Ward) is the proprietary lessee of two combined units, allegedly  
owning shares in the cooperative that equal 19.55% of the total

<sup>1</sup> <http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>

number of outstanding shares; and respondents Joseph and Emily Marino are the joint proprietary lessees of the combined four remaining units, allegedly owning shares in the cooperative that equal 70.02% of the total number of outstanding shares. The present action is but the most recent in a long series of legal disputes between the parties.

The petition alleges that, since May of 2005, respondents have been the only officers and members of the board of directors of the corporation. The petition further alleges that respondents have used corporation funds to repair and upgrade their individual units, have wasted corporate assets, have failed to hold shareholder meetings, and have commingled corporate funds with their own personal funds. Furthermore, according to the petition, verified by Faye, respondents have refused to provide petitioners with an annual report, in violation of the corporation's by-laws. Petitioners assert that these actions of respondents have lessened the value of their shares.

In opposition, respondent Joseph Marino affirms that Ward no longer owns any voting shares in the corporation because, pursuant to the corporation's by-laws (Article VI, § 6, Ex. I), Ward has failed to fulfill his obligations under the proprietary lease. Ward allegedly owes in excess of \$130,000 in rent and related charges, and has been subject to several housing court actions for chronic non-payment and illegal sublets. (Ex. D, F, G, H and K). As a consequence, since Faye only owns 10.43% of the shares of the corporation, petitioners lack standing to bring this suit. Further, respondents claim that the work performed on

the building was done with the knowledge and consent of petitioners, and they deny that they used corporate funds for personal benefit.

The court notes that previous orders to show cause by petitioners have been denied by this court.

#### **DISCUSSION**

In *Fedele v Seybert* (250 AD2d 519, 521-522 [1<sup>st</sup> Dept 1998]), the court said that BCL § 1104-a provides that

"the holders of 20% or more of the outstanding shares of a close corporation [have] the right to petition for judicial dissolution under certain 'special circumstances.' The specified circumstances are (1) where the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; or (2) where the property or assets of the corporation are being looted, wasted or diverted for non-corporate purposes by the controlling faction [citations omitted]."

Respondents have argued that, pursuant to the corporation's by-laws, Ward has forfeited his shares because of continuing violations of the proprietary lease. In support of these contentions, respondents have provided a copy of said by-laws, as well as housing court documents and so-ordered stipulations from the housing part of the civil court. In reply, Ward alleges that he is current with all of his proprietary lease obligations.

Based on these conflicting allegations, the court must first conduct a hearing to determine the threshold matter as to whether petitioners have standing to initiate a judicial dissolution of the corporation based on share ownership. *Matter of Ruivo (Brightside Homes, Ltd)*, 305 AD2d 688 (2d Dept 2003); *LaBarbara v D'Amico*, 240 AD2d 640 (2d Dept 1997); *Matter of Singer (Evergreen*

*Decorators, Inc.*), 205 AD2d 694 (2d Dept 1994).

Additionally,

"[i]n their petition for judicial dissolution of the subject cooperative apartment corporation, the petitioners alleged that the other shareholders engaged in 'oppressive conduct' towards them and that corporate assets were 'looted, wasted or diverted for non-corporate purposes.' Oppressive conduct has been defined as thwarting the minority shareholder's reasonable expectations. Waste has been held to include misappropriation of corporate assets for private purposes [internal citations omitted]."

*Cunningham v 344 6<sup>th</sup> Avenue Owners Corp.*, 256 AD2d 406, 407 (2d Dept 1998).

Although petitioners have alleged facts sufficient to meet the initial requirements of BCL § 1104-a, since there are conflicting affidavits regarding the underlying facts, the court must first have a hearing to determine the validity of the allegations. *Id.*; *Matter of Fancy Windows & Doors Mfg. Corp. (Wu)*, 244 AD2d 484 (2d Dept 1997).

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the issues of petitioners' standing and the validity of the underlying allegations are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further


ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the petitioner shall, within 30 days from the date of this order, serve a copy of this order with

notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date. Failure to comply with this order may result in the denial of this motion and/or the dismissal of this proceeding, as appropriate; and it is further

ORDERED that this matter is scheduled for a control date to confirm compliance with this order on August 19, 2009, at 10 o'clock a.m., Room 428, 60 Centre Street, New York, New York.

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: June 15, 2009



Doris Ling-Cohan, J.S.C.

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**FILED**  
JUN 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK