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

PRESENT: Hon. MARILYN SHAFER *Justice* **PART** 8

OMROM, BOLL

- v -

DEVINGTON TECHNOLOGIES

INDEX NO. 103953/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to attached Rem

FILED
OCT 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 10/13/2009

MARILYN SHAFER
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------X

PAUL AMBAR,

Petitioner,

-against-

Index № 103959/09

DEVINGTON TECHNOLOGIES, LTD., TIBOR KLEIN and GERSHON KLEIN,

Respondents.

----------X

MARILYN SHAFER, J.:

Petitioner Paul Ambar (Ambar), as holder of 30% of the outstanding shares of respondent Devington Technologies, Ltd. (Devington), commenced this special proceeding, by order to show cause, seeking an order of judicial dissolution of Devington on grounds of illegal, fraudulent and oppressive actions, and corporate waste (Business Corporation Law [BCL] § 1104-a). Respondents Devington, Tibor Klein and Gershon Klein (together, the Kleins) responded by moving for an order, pursuant to CPLR 3211 (a) (1), (7), and CPLR 3016 (b), dismissing the petition.

The facts underlying this special proceeding are as follows. Devington is a closely held New York corporation which, at all relevant times, was in the business of providing financial management computer software and programming to offices of medical providers. Devington's prior incarnation, a New York corporation called Debington, Inc., which was founded and/or owned by Ambar and non-party Alan Rajlevsky (Rajlevsky), also provided computer-based financial services to medical providers. Ambar and Rajlevsky held 100% of Debington, Inc.'s closely held stock.

By August 28, 2000, the Kleins had invested in the company, Rajlevsky had resigned, his

shares of stock had been redeemed, and the new entity, which Ambar and the Kleins named Devington Technologies, Ltd. was incorporated in New York. In or about December 2002, Ambar and the Kleins (the stockholders) executed a Devington stockholder's agreement (Agreement). The Agreement sets forth the arrangements for corporate management and the arrangements for the ownership and disposition of the closely-held stock. Ambar was apportioned 12 shares (30% of the shares), Gershon Klein was apportioned 14 shares (35% of the shares), and Tibor Klein was apportioned 14 shares (35% of the shares).

Among its provisions, the Agreement provides that: (1) "[a]ll previously executed Stockholder Agreements are hereby terminated and of no further force and effect (¶ 1); (2) stockholders "shall use their best efforts" to elect each other to the Devington board of directors and to vote for Ambar as president and Gershon as secretary (¶ 2 [a - c]); (3) no officer or director is permitted, without the unanimous consent of the board, to withdraw sums from the operating account or to incur any obligation on behalf of the corporation in an amount exceeding $5,000.00, except for Gershon, whose cap is set at $150,000.00 (¶ 2 [c]); and (4) stockholders employed by Devington will not receive compensation for acting as a "Director," however, stockholders "shall each receive from the Corporation for their services as officers and employees a salary to be agreed upon from time to time by the Board of Directors" (¶ 2 [e]). With respect to corporate stock, the Agreement provides, in relevant part:

> [s]hould Paul desire to sell or otherwise dispose of his stock . . . or retire from the active participation in the affairs of the Corporation . . . Paul shall first be obligated to offer all of the Shares of stock owned by him to Gershon and Tibor who may purchase same in whatever proportions they may agree upon, provided they purchase all of Paul's Shares at the price and upon the terms provided for in Paragraphs "9" and "10." In the event that Gershon and Tibor shall not purchase all of the Shares offered, Paul shall be able to offer all of his stock . . . to any third

> party . . . provided the price and terms shall not be less than those provided for in Paragraphs "9" and "10" (¶ 4 [a] [i])
>
> * * *
>
> The value of a Stockholder's Shares of stock of the corporation, until changed by unanimous agreement of the Stockholders, shall be ($8,335.00) . . . per Share . . . . (¶ 9).

Finally, the stockholders agreed that:

> except as otherwise provided in Paragraph "14" above, any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in New York City by and in accordance with . . . the American Arbitration Association . . . (¶ 15).

Approximately five years later, due to their dissatisfaction with his job performance, the Kleins attempted to buy out Ambar, offering him an "Amendment to Stockholders' Agreement" (Amendment) which, if agreed to, would solely and negatively impact Ambar (Exhibit C to Ambar Sur-reply). In addition to reducing the board of directors to only two, Gershon and Tibor Klein (¶ 2 [a]), the proposed Amendment sought to eliminate paragraph 4 [a] (redemption of Ambar's stock), paragraph 5 (a) and (b) (life insurance for Ambar), and paragraph 6 (a) (death of stockholder Ambar). The language of paragraph 9: *Value of Stock,* which valued a share of issued and outstanding stock at $8,335.00, was to be replaced with "The value of a Stockholder's shares of stock of the Corporation, until changed by unanimous agreement of the Stockholders, shall be . . . [$125.00] per share of issued and outstanding stock."

Finally, the Amendment added the following language to paragraph 10:

> Paul has agreed to sell and does hereby sell, thereby terminating his stockholder interest in the Corporation, all of his twelve (12) shares of stock owned in the Corporation for a total consideration of Five Thousand ($5,000.00) Dollars paid by Gershon and Tibor, each purchasing six (6) shares from Paul for Two Thousand Five Hundred ($2,500.00) Dollars each.

Ambar refused to sign the Amendment.

A few months later, a special meeting of Devington stockholders and directors was noticed for April 15, 2008. Present at that meeting were Ambar and his attorney, Ivan Saperstein, Esq., and Gershon and Tibor Klein with their attorney, Meyer Rosh, Esq. As a result of motions made and votes taken at that meeting, Gershon Klein was elected president, Tibor Klein was elected secretary, and Ambar was removed from Devington's board of directors and relieved of his employment.

In the ensuing months, Ambar tried to remedy his situation, including his unsuccessful attempt to redeem his Devington stock for $8,335.00 per share. Frustrated, in March 2009, Ambar commenced this special proceeding for a judicial dissolution of Devington. Service of the petition, by order to show cause, triggered the instant motion to dismiss.

Specifically, the petition, which contains six causes of action and culminates in a demand for a judicial dissolution, asserts that: respondents wrongfully severed petitioner from Devington without providing him with the compensation to which he was, and is, entitled under Agreement ¶ 2 (e); the Kleins are receiving compensation from Devington which is equitably due petitioner; the Kleins are looting, wasting, or diverting corporate property or assets for non-corporate purposes; the Kleins refused petitioner's November 26, 2008 tender of his Devington shares which are worth, minimally, $100,020.00, and by their wrongful and oppressive actions, have rendered his shares unmarketable and worthless; and the Kleins encouraged petitioner to make corporate expenditures during the course of his employment and then refused to reimburse him, despite having reimbursed him for similar expenditures in the past. These expenditures include approximately $100,000.00 in credit card purchases and approximately $9,000.00 in legal fees

which stem from a federal court action between Devington and non-party herein Somasundaram & Sanrosys Info. Pvt., Ltd., in which petitioner was subpoenaed to testify at a deposition. Finally, petitioner seeks full access, examination and copying, of corporate books and records, and copies of tax form 1065, schedule K - 1 (Partner's Share of Income, Deductions, Credits, etc.) for the years 2006, 2007, and 2008, as part of his demand for reimbursement and judicial dissolution of the respondent corporation.

BCL § 1104 (a) empowers:

> holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . .entitled to vote in an election of directors [to] . . . present a petition of dissolution on one or more of the following grounds:
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
> (2) The 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.

The New York Legislature's purpose in creating this involuntary dissolution statute was to protect minority shareholders in closely held corporations from illegal, fraudulent, or oppressive treatment by majority shareholders. Unlike shareholders of publicly traded stock,

> "the shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sold source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In has capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment, because earnings of a close corporation, as is well known, are distributed in major part in salaries, bonuses and retirement benefits"

(*Matter of Kemp & Beatley [Gartstein], Inc.*, 64 NY2d 63, 71 [1984], quoting O'Neal, Close Corporation [2d ed], § 1.07, at 21-22 [n omitted]).

While they acknowledge the court's authority to involuntarily dissolve Devington, the Kleins deny the impropriety of their actions and seek an order dismissing the petition on the grounds that there is a defense to the charges founded upon documentary evidence (CPLR 3211 [a] [1]), that petitioner's allegations fail to state valid causes of action (CPLR 3211 [a] [7]), and that the petition is devoid of the particularity required under CPLR 3016 (b) to support a fraud claim.

The gravamen of the respondents' dismissal motion is that there exists no legal basis for judicial dissolution because the Kleins were acting in the best interest of the corporation when they terminated Ambar's employment and removed him from the board of directors. Furthermore, respondents aver that they were forced to take these steps because Ambar's job performance was not only poor, but because the decisions he made were counterproductive to corporate objectives.

Respondents back up these assertions with examples of Ambar's unacceptable work habits. They also explain how Ambar's management of a particular new computer program,[1] which was intended to facilitate billing procedures for medical offices and hospital facilities (Devington's principal business), actually caused Devington to lose over $300,000.00. They claim that Ambar failed to manage a timely completion of the project and that the actual program, when completed, was ultimately found to be unsuccessful in its function and its application.

Respondents also claim that during the six-year period during which Ambar held the position of company president, Devington was rarely profitable. They assert that under his

[1]The parties often referred to the new program as the "Somasundaram Project."

leadership, Devington often lost, approximately, the same amount of money on a yearly basis that it paid Ambar in annual compensation. Finally, respondents allege that Tibor Klein, more than once, had to advance money into Devington in order to cover cash shortfalls and to keep the company afloat. Accordingly, it was due to their continued dissatisfaction and their belief that Ambar's job performance was actually detrimental to the company, that the Kleins voted to remove him from Devington entirely.

In opposition to the dismissal motion, Ambar details a different set of facts as to how and why Devington declined during the same six-year period. However, for the purpose of the motion, it is not necessary for the court to evaluate or decide who or what triggered the corporate failures. It is sufficient to say that petitioner and respondents present diverse interpretations as to the factors that led the business to lose money, and submit dueling affidavits blaming each other for poor business decisions and incompetent day-to-day management. What is relevant to the court at this juncture is whether the petition sufficiently alleges that respondents, as the directors in control of Devington, engaged in conduct toward Ambar which entitles him to seek a judicial dissolution of the corporation.

Respondents contend that the Agreement constitutes documentary evidence which conclusively establishes a defense to petitioner's claims for certain benefits as a matter of law (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]). Specifically, paragraphs 2, 4 and 5 of the Agreement establish that Ambar was an at-will employee without a guarantee of lifetime employment, salary, benefits, or position on the board of directors. Therefore, there is no merit to Ambar's claims that he was entitled to continued employment and to a position on the board of directors, with benefits, because of his lengthy

commitment to the corporation. Respondents also offer the Agreement as proof that Ambar is not entitled to "reimbursement" of his claimed business expenses, including legal fees, because the amounts sought ($100,000.00, $9,000.00, and $100,020.00 under his fourth, fifth, and sixth causes of action, respectively) exceed the $5,000.00 cap which he agreed to in paragraph 2.

Paragraph 2 (c) provides:

> No officer or Director of the Corporation may, without the unanimous consent of the Board of Directors of the Corporation, incur any obligation on behalf of the Corporation or in any other way commit the Corporation to any contract or purchase exceeding the sum of FIVE THOUSAND ($5,000.00) DOLLARS, except Gershon, who may commit the Corporation to a contract or purchase not to exceed ONE HUNDRED FIFTY THOUSAND ($150,000.00) DOLLARS.

Based on this language, respondents argue that it is of little import whether the claimed expenses stem from credit card usage, legal fees, or otherwise, because petitioner was at all times aware of the limitations on his ability to incur obligations on behalf of the corporation.

With respect to the reimbursement issues, petitioner asserts that, during the course of his tenure at Devington, he was called upon to use his own money, via credit cards and other forms of credit expenditures, to pay for various corporate expenditures and that he was routinely reimbursed by the company. Therefore, he reasonably relied on this practice of financial exchange when he continued to extend his money and credit, including his payment of legal fees, on behalf of Devington, even as the parties' working relationship deteriorated. Specifically, he alleges that Devington "had an obligation to defend . . . [and/or] to indemnify petitioner, including the obligation to pay the reasonable cost of representation" incurred when he was called to testify at a deposition on Devington's behalf in the matter of *Devington Technologies Ltd. v Arul Nambi Rajan Somasundaram and Sanrosy Info Pvt Ltd.* (*see* Fifth Cause of Action).

Ambar argues that he was fraudulently induced to continue paying, via credit and otherwise, for expenditures on behalf of the corporation at a time when respondents had no intention of reimbursing him.

While the question of whether respondents ratified Ambar's expenditures by accepting their benefits may state a valid cause of action, it does not state a cause of action for fraud. However, to the extent that respondents rely on paragraph 2 (c) to preclude Ambar's reimbursement claims exceeding $5,000.00, the Agreement does not, as it must, "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). A review of paragraph 2 (c) and the balance of the Agreement fails to reveal language directing how the $5,000.00 limitation was intended to be applied, or whether the cap applied to any one transaction or to a series of transactions within any particular time frame. Nor do respondents adequately respond to allegations of on-going corporate practices which contradict their interpretation of paragraph 2 (c).

Defined as conduct by majority shareholders which substantially defeats the reasonable expectations of minority shareholders, oppressive actions can be a ground for judicial dissolution of close corporations. To this end, the petition, while not artfully drafted, does state a cause of action for oppressive conduct. "It is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation" (*Matter of Kemp & Beatley [Gartstein], Inc.*, 64 NY2d at 71). When majority and minority shareholders can no longer work together in their day-to-day decision-making and management, judicial dissolution becomes an option. However, the court evaluating a BCL §

1104 (a) petition must also consider whether liquidation is the only feasible means of protecting the complaining shareholder's expectation of a fair return on his investment (*id.* at 73 - 74).

In that regard, Ambar's assertion that respondents refused his November 26, 2008 tender of his Devington stock and/or offered to buy out his shares at a severely discounted price ($125.00 rather than $8,335.00 per share) supports his claim of mistreatment by the majority shareholders and states a ground for involuntary judicial dissolution.

Accordingly, it is

ORDERED that the motion to dismiss the petition is denied; and it is further

ORDERED that respondents are directed to serve an answer to the petition within 10 days after service of a copy of this order with notice of entry.

Dated: 10/13/09

ENTER: MARILYN SHAFER J.S.C.

J.S.C.

FILED
OCT 16 2009
COUNTY CLERK'S OFFICE
NEW YORK