

Matter of Cippitelli v Cippitelli
2009 NY Slip Op 33122(U)
December 1, 2009
Supreme Court, Queens County
Docket Number: 786/2009
Judge: Orin R. Kitzes
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In the early 1950s John Cippitelli opened a gasoline station in Jamaica, Queens. John Cippitelli's brothers, Claudio, Enzo, and Bruno joined the family business. The family business expanded from a gasoline station to a towing and auto body shop, which evolved into Cippitelli Bros. Towing & Collision, Inc. (CBT&C). Commercial real estate was purchased to be held and managed by Cippitelli Bros. Realty Corp. (CBRC). The Cippitelli brothers also invested in a vacation resort in Greene County, New York, and a new business, Green Lake Homestead, Inc. was formed. Each of the Cippitelli brothers owned a 25% interest in the capital stock of each of these entities. Claudio Cippitelli passed away in 1991 and his wife Josephine was brought in as a shareholder, officer and director in his place. Josephine took the responsibility for the bookkeeping for CBT&C. After the purchase of the Greene County property, John and Enzo relocated to Greene County with their families and Claudio and Bruno remained in charge of CBT&C. The corporations own various real estate holdings including, "Shops" 1, 2, 3, 4, and 5, which consist of parcels of land at 175-16, 175-10, 173-14, 173-08, and 173-04 Liberty Avenue, Queens, New York; a property in Catskill, New York on which the Green Lake Homestead is located; two commercial real estate properties in Florida, a ten acre parcel of land in Catskill, New York located down the street from the Green Lake Homestead, and a twenty to thirty acre parcel of land in Catskill, New York, approximately a mile from the Green Lake Homestead.

The petitioners allege that since the death of Bruno Cippitelli, the petitioners' father, the respondents have shut out the petitioners from the operation of the corporations and have removed the petitioners from any management decisions of the corporations. The petitioners allege that the respondents have destroyed the towing and automobile collision business. The petitioners allege that the respondents cancelled pre-existing long-term and lucrative contracts with the Metropolitan Transit Authority and the Port Authority. Additionally, the petitioners allege that the respondents refused to open the Green Lake Homestead Resort, which was a viable business as of October 2006 and which still has between \$75,000 to \$100,000 worth of equipment and furniture. They further allege that the respondents have misappropriated corporate assets for themselves. The respondents have allegedly used corporate assets to pay for their personal cellular phones and services plans. The petitioners allege that respondent Enzo Cippitelli expressed his intention of taking a pickup truck and tractor and that other items from the Green Lake Homestead Resort were given by the respondents to their children. The petitioners further allege that the respondents have made clear their intentions to take for themselves alleged back salary for at least two years relating to services purportedly provided concerning the Green Lake Homestead Resort and the respondents have intended to be paid for undocumented loans that they allegedly made to the corporation. The petitioners allege that the respondents are claiming that Bruno Cippitelli owes an unpaid debt of \$60,000 to the corporations. The petitioners allege that the respondents have not acted in the best interest of the corporations and have lost business

opportunities including the sale of the Green Lake Homestead Resort and the sale of certain other properties.

The respondents on the other hand allege that after the death of Bruno Cippitelli, the petitioner Robert Cippitelli, an attorney at law, approached the respondents Josephine Cippitelli, John Cippitelli and Enzo Cippitelli to discuss the management of CBT&C. The respondents allege that Robert Cippitelli promised that he would assume his father's responsibilities at CBT&C and would run it as his father had before his father became ill. Robert Cippitelli agreed that he would be paid the same compensation and receive the same benefits as his father had received before him. Relying on Robert Cippitelli's promise the respondents agreed to his offer. The respondents allege that from the time that Robert Cippitelli took control of the management of CBT&C his actions were limited to self-interest. The respondents submitted the affidavit of their accountant. The accountant alleged that once the petitioner Robert Cippitelli took over the management of the towing and automobile collision business enterprise, the average monthly revenues declined by 69.2% between 2006 and August 2008. During this time period gross revenues declined from \$808,171.35 for the 12 months of 2006 when Bruno Cippitelli was in control to \$648,861 for the 16 months that Robert Cippitelli was in control. The respondents allege that Robert Cippitelli did not operate CBT&C for the benefit of all the shareholders of CBT&C, but instead attempted to negotiated a sweetheart deal for the purchase of CBT&C and the parcels of real property on which it was situated. They further allege that when the individual respondents became aware of the declining finances they asked Robert Cippitelli to solicit new business. They allege that Robert Cippitelli responded by refusing to solicit business and asking the respondents why he should try to get new work when the business was not even in his name. The respondents allege that as a result of Robert Cippitelli's waste and mismanagement CBT&C ceased business operations on September 26, 2008.

Turning first to the petition, Business Corporation Law § 1104-a, Petition for Judicial Dissolution Under Special Circumstances, states in relevant part:

The 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 may 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.

In the case at bar, the conflicting allegations of the parties have raised issues of fact as to whether the respondents have been guilty of oppressive action or whether the assets of the corporations are being wasted, looted or diverted. In this situation it is appropriate to hold a hearing to resolve these disputed factual issues (*see Matter of WTB Props.*, 291 AD2d 566 [2002]; *Matter of Steinberg (Cross Country Paper Prods. Corp.)*, 249 AD2d 551 [1998]). The parties are directed to appear for a hearing on these issues on February 4, 2010 at 9:30 A.M. in this part.

Turning next to the appointment of a receiver. The provisional remedy of receivership is only appropriate in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interest (*see Kristensen v Charleston Square*, 273 AD2d 312 [2000]). The appointment of a temporary receiver is only warranted where the applicant establishes by clear and convincing evidence that such a drastic remedy is needed (*see Beatty v Williams*, 227 AD2d 912 [1996]). Here, the petitioners failed to demonstrate that the appointment of a receivership is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties (*Matter of Steinberg*, 249 AD2d at 553).

The court has broad discretion under BCL §§ 1113 and 1115 to issue orders deemed protective of corporate assets pending dissolution. This court in the order to show cause dated, January 16, 2009, temporarily ordered the corporations to deposit any remaining proceeds from the sales of any assets of the corporations, including, but not limited to, any assets, income, account receivables, etc. of the corporations, in an escrow account; and restrained the respondents from transferring any monies derived from the sale of any corporations, including but not limited to, any assets, income, account receivables, of the corporations, to any persons, except in the ordinary course of business. Petitioner's request for said injunctive relief is extended pending the outcome of the hearing on February 4, 2010.

Accordingly, the petitioners' request for judicial dissolution is denied, and a hearing on the issue of judicial dissolution shall be held on February 4, 2010 at 9:30 A.M. in IAS part 17, courtroom 116, at the Supreme Court Queens County, located at 88-11 Sutphin Boulevard, Jamaica, New York 11435. The temporary injunction previously requiring the corporations to deposit any remaining proceeds from the sales of any assets of the corporations, including, but not limited to, any assets, income, account receivables, etc. of the corporations, in an escrow account; and restraining the respondents from transferring any monies derived from the sale of any corporations, including but not limited to, any assets,

income, account receivables, of the corporations, to any persons, except in the ordinary course of business is extended pending the outcome of the hearing on February 4, 2010. The petitioners' request for the appointment of a receiver is denied.

Dated: December 1, 2009

J.S.C.