Matter of Rosenberg v Spatafore
2010 NY Slip Op 30616(U)
March 17, 2010
Supreme Court, Nassau County
Docket Number: 000547/2010
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

In the Matter of the Application of LEE ROSENBERG, individually and as an owner of 50% of the shares of stock of ARS FINANCIAL SERVICES, INC. and R&S PLANNING CORP.,

Petitioner-Plaintiff,

INDEX NO.: 000547/2010
MOTION DATE: 02/23/2010
MOTION SEQUENCE: 001 and 002

For a Judgment pursuant to BCL § 1104, judicially dissolving ARS FINANCIAL SERVICES, INC. and R&S PLANNING CORP.,

Respondents,

-against-

ANTHONY R. SPATAFORE,

Defendant.

The following papers read on this motion:

Order to Show Cause, Affirmation, Combined Petition and Complaint & Exhibits Annexed	1
Emergency Affidavit of Lee Rosenberg in Support of Application for TRO & Exhibits Annexed	2
Affidavit in Support of Application for TRO of Gerard Simonelli	3
Affidavit in Support of Application for TRO of Brian Amato	4
Petitioner-Plaintiff's Memorandum of Law in Support of Petition for Judicial Dissolution	5
Notice of Cross Motion, Affidavit, Affirmation & Exhibits Annexed	6
Reply Affidavit in Support of Petition for Judicial Dissolution of Lee Rosenberg, Reply Affirmation of Robert M. Calica & Exhibits Annexed	7

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Exhibits C and D to Reply Affidavit and Affirmation in Support of Petition for Judicial Dissolution (And Opposing Defendant's Cross Motion) Dated February 4, 2010 8
Petitioner-Plaintiff's Supplemental Memorandum of Law Concerning Provisional Remedies 9
Reply Affirmation in Further Support of Cross-Motion to Compel Arbitration and Stay or Dismiss Action and in Opposition to Further Injunctive Relief of Loretta M. Gastwirth & Reply Affidavit of Anthony Spatafore 10
Supplemental Affirmation Addressing Amex Records of Robert M. Calica & Exhibits Annexed 11

This Petition by the plaintiffs Lee Rosenberg, Individually and as Owner of 50% of the shares of stock of ARS Financial Services, Inc. and R & S Planning Corp. ("Petitioner") for a judgment pursuant to Business Corporation Law § 1104 judicially dissolving ARS Financial Services, Inc. and R & S Planning Corp. and an order pursuant to Business Corporation Law § 1113 appointing him Receiver of those companies is determined as provided herein.

This motion by the Respondent Anthony R. Spatafore for an order pursuant to CPLR 7503(a) staying this proceeding and directing the parties to proceed to arbitration or an order pursuant to CPLR 3211 dismissing the Petition is denied as provided herein.

The Petitioner Rosenberg and Respondent Spatafore are both 50% shareholders in ARS Financial Services and R & S Planning Corp. Rosenberg is the Director and Vice-President of ARS Financial Services and the President of R & S Planning Corp. and Spatafore is a Director and President of ARS Financial Services and the Vice-President of R & S Planning Corp. ARS Financial Services is an investment advisor duly registered with the United States Securities and Exchange Commission ("SEC"). R & S Planning Corp. is an insurance agency/broker licensed by the New York State Department of Insurance.

By Order to Show Cause and Petition, Rosenberg seeks judicial dissolution of ARS Financial Services and R & S Planning Corp. pursuant to Business Corporation Law § 1104 on the ground of shareholder deadlock. He also seeks interim relief appointing him Receiver of both companies. Spatafore seeks to stay this action and to compel arbitration pursuant to the Shareholders' Agreement. In the alternative, he seeks dismissal of the complaint pursuant to CPLR 3211(a)(7) based upon the Petitioner's failure to comply with Business Corporation Law §

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626(c) and/or pursuant to Business Corporation Law § § 1104, 1105 on the grounds that shareholder deadlock is not a ground for corporate dissolution and none of the statutory grounds for dissolution can be established. Spatafore alleges that Rosenberg seeks to usurp all of ARS Financial Services' business and bring it to a new company which he has formed with Louis Grassi, Wealth Solutions Planning, LLC. He also alleges that Rosenberg himself has withheld $78,190.38 in commission payments paid by Cadaret Grant & Co., Inc. to ARS Financial Services, more than offsetting any funds he has allegedly diverted.

In his Petition and Complaint, Rosenberg alleges, *inter alia*, that in recent years, as President and Administrator of ARS Financial Services, Spatafore has wrongfully diverted ARS Financial Services' and R & S Planning Corps' profits for his own benefit and as a result, he himself has had to advance monies to the companies to cover their operating costs. He alleges that Spatafore's misconduct has brought ARS Financial Services and R & S Planning Corp. to the brink of insolvency. He further alleges that he and Spatafore agreed in principle to voluntarily dissolve the companies at a meeting on October 20, 2009, however, Spatafore has nevertheless not cooperated and has instead continued to misappropriate the companies' funds thereby exposing the companies to further liability and deeper insolvency and exposing the individual shareholders to personal liability as well. Rosenberg further alleges that Spatafore suffers from medical and/or personality problems which have impaired his ability to function as President and principal administrator of ARS Financial Services and as a result, he has had to assume those responsibilities and in so doing has deposited both company and personal funds into a separate account to enable ARS Financial Services' payment of bills. He alleges that Spatafore has simultaneously charged massive sums of personal expenses on his American Express account which has been paid by ARS Financial Services, overdrawn against his ARS Financial Services unearned compensation and capital and underpaid his liabilities to the companies and their creditors. He alleges that Spatafore's financial misappropriations exceed one million dollars.

Rosenberg also alleges that the Spatafore has thwarted and continues to impede his efforts to wind up the companies' affairs and that an order pursuant to Business Corporation Law § 1113 conferring exclusive authority on him to do so is imperative and necessary to prevent financial disaster. Rosenberg also seeks an accounting from Spatafore to ARS Financial Services, R & S

Planning Corp. and himself for the substantial sums he allegedly wrongfully diverted from those companies for his personal benefit.

Rosenberg further alleges that neither ARS Financial Services nor R & S Planning Corp. are registered security broker dealers and they are therefore ineligible to be paid commissions attributable to the sale of stocks and/or securities. He alleges that ARS Financial Services, R & S Planning Corp., and himself, Spatafore, and the company employees, are required to place Stock and Security transactions through a registered broker-dealer. They have used Cadaret, Grant & Co., Inc., which is required to pay the commissions earned on those sales only to registered individuals, that is, himself and Spatafore, or their employee representatives. He alleges that of the earned commissions, 40% is paid to the individual and 60% is paid to the "house" for overhead expenses and the balance constitutes company profits. Rosenberg alleges that Spatafore wrongfully had the stock brokerage commission from Cadaret paid directly to ARS Financial Services, enabling his misappropriation and conversion of those funds. He claims that, despite a directive by the SEC to stop this practice, Spatafore continued it, enabling him to misapply commissions to his own benefit. Spatafore's claimed failure to properly allocate the commissions in violation of SEC requirements has caused him to utilize the entire 60% "house" share, as well as his earned commissions and personal funds, to pay business expenses which essentially rendered ARS Financial Services and R & S Planning Corp. insolvent. He additionally claims that the Spatafore has overdrawn, and misappropriated, ARS Financial Services' credit line at TD Bank.

As and for his first cause of action, Rosenberg seeks corporate dissolution of ARS Financial Services and R & S Planning Corp. pursuant to Business Corporation Law § 1104 based on shareholder deadlock. As and for his second cause of action, he seeks an Accounting from Spatafore. As and for his third cause of action, he seeks to be appointed with sole authority for winding up the companies' affairs pursuant to Business Corporations Law § 1113.

On January 12, 2010, the return date of this Order to Show Cause, this court so-ordered a Stipulation requiring both shareholders' signatures on all business checks or authorization by the non-signatory, via e-mail, fax or other method; limiting checking account expenditures to expenses incurred in the regular course of business, including bi-weekly salaries for Rosenberg

and Spatafore, and, requiring Rosenberg and Spatafore to open a new bank account for the deposit of **all** companies' receipts, to be paid over to the ARS Financial Services operating account for payment of expenses.

Two days later, Rosenberg sought an order enjoining Spatafore's destruction of documents. In support of that application, he provided affidavits of two ARS Financial Services' employees who attested to having witnessed Spatafore shredding documents, not at the shredder in his executive office, but at another one located over 100 feet down the hall for some 30-60 minutes on the day after the Stipulation was so ordered. As a result of that application, on January 27, 2010, this court so-ordered a Stipulation governing Retention of Corporate Records and Documents. Essentially, that Stipulation required Spatafore to preserve and produce the businesses' records and for both parties to cooperate in the production and procurement of originals or copies of ARS Financial Services' and R & S Planning Corp.'s records in their entirety and to preserve the handwritten check ledger and Paychex records. Complete cooperation by both parties in the examination of all of these records was directed.

Rosenberg acknowledges that upon review of, *inter alia*, the recently produced records including Spatafore's American Express bills which had been at all times maintained and/or controlled by him, he has learned that sums have been legitimately paid for client seminars, their software license and renewal thereof, and some client entertaining. In fact, with the help of the corporate bookkeeping staff, he acknowledges that between $250,000 and $300,000 of Spatafore's paid expenses from 2004-2009 were related to legitimate business expenses. However, Rosenberg has allegedly found not only additional personal credit accounts maintained by Spatafore, which were paid by ARS Financial Services, but that ARS Financial Services/R & S Planning Corp. has paid a total of $1,444,923.33 between 2004-2009 of Spatafore's expenses, but only $68,423.50 of his. In fact, he alleges that a review of Spatafore's credit card history reveals that $109,519.28 was paid to Thomas Miller, a mens clothing company in Woodbury; close to $12,000 was paid for vacations in just one year; $20,000 was paid to Safavieh Carpets in 2004; close to $15,000 was paid for furniture for his Hamptons home; $4,193.20 was paid to Stressa East Restaurant for his daughter's christening; $3,748.81 was paid to the Wentworth Gallery in Florida for art work; and, that over $11,000 was paid to London Jewelers in December

2007. In addition, he alleges that Spatafore's wife's credit card was paid by ARS Financial Services, as were his supermarket bills and other items. Nevertheless, a review of Rosenberg and Spatafore's paid salaries for the same six-year period reveals that they were paid virtually identical amounts and that Rosenberg was paid only $17,000 more than Spatafore in commissions.

In addition, Rosenberg maintains that his review of the business' records has also revealed that when he commenced this proceeding, the commissioned staff were owed more than $300,000; the 401K plans were underfunded by approximately $70,000; ARS Financial Services owed $162,015.40 on its long-term loan to TD Bank, $96,080.26 on its credit line and $7,939.06 on another bank loan; and, $62,749.78 in rent, $32,000 of which remains owing. He maintains that company car payments had been made late as a result of which employees' credit ratings have suffered; business telephones have been shut off due to late payments; their financial planning software licensing lapsed and was cancelled; and, their service contract with their IT company lapsed on account of outstanding bills. He alleges that employees' paychecks have bounced due to insufficient funds and that the business' health insurance lapsed, too, resulting in increased company expenses. As for his formation of Wealth Planing Solutions, LLP, Rosenberg maintains that he did that as a preventive measure when the IRS placed a lien on Spatafore's commissions so as to avoid placing the companies in complete jeopardy. The company, however, has not been utilized.

Spatafore vehemently denies Rosenberg's characterization and categorization of his expenses allegedly paid by ARS Financial Services. He opines that Rosenberg's numbers are riddled with errors and fail to account for the many expenses that were in fact paid by him personally, like vacations, his daughter's christening, jewelry, etc. He faults Rosenberg for including purchases that were actually for ARS Financial Services, like the artwork. He also faults Rosenberg for not admitting to his own expenses paid by ARS Financial Services, like life insurance premiums totaling $40,000 to $50,000. In addition, Spatafore attempts to explain Rosenberg's reduced travel expenses and the car lease payments.

As for R & S Planning Corp., Spatafore maintains that there are simply no grounds to dissolve it. And as for Rosenberg's request for interim relief, Spatafore maintains that the parties

are working cooperatively under the current temporary restraining order and that the businesses are functioning successfully. Thus, he alleges that the risk of irreparable harm and the need for Rosenberg to single-handedly manage the companies is lacking.

A party seeking arbitration bears the burden of demonstrating that the agreement clearly and unequivocally requires arbitration of the dispute. Gerling Global Reinsurance Corp. v Home Ins. Co., 302 AD2d 118, 123 (1st Dept. 2002), app den., 99 NY2d 511 (2003), citing Matter of Siegel v 141 Bowery Corp., 51 AD2d 209, 212 (1st Dept. 1976). Whether there is an agreement to arbitrate the dispute presents a question of law for the court. Matter of Fiveco, Inc. v Haber, 11 NY3d 140 (2008); Primavera Laboratories, Inc. v Avon Products, Inc., 297 AD2d 505 (1st Dept. 2002). In fact, "a court will not order a party to submit to arbitration absent evidence of that party's 'unequivocal intent to arbitrate the relevant dispute' " and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration. Primavera Laboratories, Inc. v Avon Products, Inc., supra, at p. 505, quoting Matter of Helmsley [Wien], 173 AD2d 280, 281 (1st Dept. 1991); and citing, Matter of Bunzl [Battanta], 224 AD2d 245 (1st Dept. 1996).

Contrary to Spatafore's contention, the parties' 1984 Shareholders' Agreement does not require arbitration of this dispute. The Shareholder Agreement provides for arbitration of "[a]ny controversy, dispute or question arising out of, or in connection with, or in elation [sic] to this Agreement or the interpretation, performance or non-performance or any breach thereof. . ." The Shareholders Agreement addresses the Board of Directors, Officers, Restrictions on Competition and Restrictive Covenant, Sale of Other Disposition of Shares, Restriction of Sale, Right of First Refusal, Insurance, Purchase of Shares on Death, Survivor Benefit, Endorsement of Share Certificates, Term, Arbitration, Legal Remedy Inadequate, Governing Law, Severability, Benefit and Entire Agreement. The matter at hand, i.e., the right to dissolution, let alone pursuant to the Business Corporations Law, is not addressed by the Shareholders Agreement. Therefore, it does not fall under this broad arbitration clause.

Furthermore, "general principles of contract construction . . . require courts to 'adopt an interpretation which gives meaning to every provision of a contract;' in other words, 'no provision of a contract should be left without force and effect.' " McQuade v McQuade, 67

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AD3d 867 (1st Dept. 2009), quoting Mozak Corp. v Hotel Taft Corp., 1 NY2d 42, 46 (1956), citing Zullo v Varley, 57 AD3d 536, 537 (2nd Dept. 2008); Malleolo v Malleolo, 287 AD2d 603, 603-604 (2nd Dept. 2001). The Shareholders Agreement specifically provides that it will terminate upon the **"granting of a petition of corporate dissolution of the Corporation** (emphasis added)." Applying a basic principle of contract construction, the Shareholder's Agreement cannot be interpreted as requiring arbitration of this dispute because to do so would leave the clause declaring its termination upon the "granting of a petition for corporate dissolution of the corporation" without any effect. See, Application of Bunzl, supra,; McQuade v McQuade, supra; see also, Perlbinder v Board of Managers of 411 East 53rd Street Condominium, 65 AD3d 985 (1st Dept. 2009).

The cases relied on by defendant where arbitration of disputes relating to dissension, deadlock, looting or mismanagement was required based on broad arbitration clauses are all easily distinguished as here, the parties' Shareholder Agreement provides that the Shareholders' Agreement shall terminate upon "... the granting of the petition for dissolution. . . ." Compare, Ehrlich v Stein, 143 AD2d 908 (2nd Dept. 1988); Moskowitz v Surrey Sleep Products, Inc., 30 AD2d 820 (2nd Dept. 1968); Matter of Levy, 79 AD2d 684 (2nd Dept. 1980).

As set forth in the caption, Rosenberg "as an Officer and Director" of the corporations, has standing to seek an accounting from Spatafore pursuant to Business Corporation Law § 720(a), (b). Bertoni v Catucci, 117 AD2d 892 (3rd Dept. 1986); Conant v Schall, 33 AD2d 326 (3rd Dept. 1970). None of the traditional rules, including demand on the Board of Directors is required. Conant v Schall, supra, at p. 328. Indeed, the corporation needn't be made a party. See, Conant v Schall, supra. Brown v Brown International Associates, Inc., 143 AD2d 248 (2nd Dept. 1988). In any event, assuming *arguendo* that a demand under Business Corporation Law § 626 was required here, the lack thereof would be excused as "the allegations of the complaint, as amplified [by records produced pursuant to this court's so-ordered stipulation] are that [Spatafore] is directly interested in, and personally benefitting from, the alleged acts of malfeasance and nonfeasance at issue." Hu v Ziming Shen, 57 AD3d 616, 618 (2nd Dept. 2008).

Finally, the Petition clearly sets forth the elements of a claim for corporate dissolution based upon internal dissension under Business Corporation Law § 1104. "There is no absolute

right to dissolution." In re Admiral Rubber Corp., 12 Misc2d 355, 356 (Supreme Court Kings County 1958). Dissolution may be obtained by the holders of one-half of all outstanding shares of a corporation entitled to vote in an election of directors on the ground that "there is dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." Business Corporation Law § 1104(a)(3). In determining a petition for dissolution, fault is irrelevant; the issue is "whether a deadlock exists." Matter of Validation Review Associates, Inc., 236 AD2d 477 (2nd Dept. 1996), rev'd. on other grounds, 91 NY2d 840 (1997); Matter of Kaufmann, 225 AD2d 775 (2nd Dept. 1996); Matter of Goodman v Lovett, 200 AD2d 670 (2nd Dept. 1994). Dissolution "should be granted when competing interests are so discordant as to prevent efficient management and the object of corporate existence unobtainable. The prime inquiry is, always, . . . whether judicially imposed death will be beneficial to the stockholders or members and not injurious to the public." In re Admiral Rubber Corp., supra, at p. 356 citing Matter of Radom & Neidorff, 307 N.Y. 1, 7 (1954). Nevertheless, "[d]issolution is not to be denied merely because the dissension has not yet had an appreciable impact on the firm's profitability." Molod v Berkowitz, 233 AD2d 149 (1st Dept. 1996), citing Matter of Ronan Paint Corp., 98 AD2d 413 (1st Dept. 1984); see also, Neville v Martin, 29 AD3d 444 (1st Dept. 2006). "In the case of a close corporation, the relationships between the shareholders is akin to that of partners, and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation." Greer v Greer, 124 AD2d 707, 708 (2nd Dept. 1986). "Where the record demonstrates sufficient differences and animosity between the shareholders, and dissolution is the only viable alternative, dissolution will be granted." Matter of Patti v Fusco, 10 Misc3d 1058(A) (Supreme Court Nassau County 2005), citing Molod v Berkowitz, supra; Matter of Goodman v Lovett, supra.

Spatafore's motion to dismiss the Petition is denied. Arbitration of this dispute is not required by the parties' Shareholder Agreement; compliance with Business Corporation Law § 626 is not required; and, the grounds for dissolution under the Business Corporations Law have been adequately alleged.

While this Court has the authority under CPLR 404(a) to presently resolve this matter on the merits (Ford v Pulmosan Safety Equipment Corp, 52 AD3d 710 [2nd Dept. 2008]; citing

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Matter of Targee Street4 Internal Medicine Group, P.C. Profit Sharing Trust v Nationwide Assoc., 300 AD2d 497, 498 [2nd Dept. 2002]; Matter of Huber v Mones, 235 AD2d 421, 422 [2nd Dept. 1997]; see also, Matter of Dodge, 25 NY2d 273, 276-277 [1969]), under the circumstances, discovery is warranted though much material that would be subject to discovery has already been produced. In fact, a hearing may be required.

The respondent Spatafore is directed to file and serve his Answer within ten (10) days of service upon him of a copy of this Order with Notice of Entry. The Petition is adjourned until April 26, 2010, at 9:30 A.M., at which time the parties are to appear for a Preliminary Conference. The So-Ordered Stipulations remain in effect, in view of which and the parties' apparent compliance therewith, Rosenberg's motion pursuant to Business Corporation Law § 1113 for an order appointing him Receiver and for other temporary injunctive relief is denied without prejudice to renewal should the need therefore arise.

Dated: March 17, 2010

J.S.C.

ENTERED
MAR 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE