

**Matter of Breslow v Frank**

2010 NY Slip Op 30804(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 005549-03

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**Application of**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**ALLEN BRESLOW,**

**Petitioner,**

**Index No: 005549-03  
Motion Seq. Nos: 14, 15 & 16  
Submission Date: 2/4/10**

**For the Judicial Dissolution of and the  
Appointment of a Receiver for FRANK &  
BRESLOW PC,**

**-against-**

**NEIL M. FRANK and FRANK & BRESLOW PC,**

**Respondents.**

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**The following papers have been read on these motions:**

- Notice of Motion and Affirmation in Support.....X**
- Notice of Motion, Affirmation in Support and Affidavit in Support...X**
- Notice of Cross Motion, Affidavit in Support,  
Attorney Affidavit and Exhibits.....X**
- Reply Affidavit and Affirmation in Opposition/Further Support.....X**
- Affirmation in Opposition/Further Support and Exhibit.....X**
- Attorney's Reply Affidavit, Petitioner's Reply Affidavit and Exhibit..X**

This matter is before the Court for decision on 1) the motion filed by Respondent Frank & Breslow PC on August 11, 2009, 2) the motion filed by Respondent Neil M. Frank on August 11, 2009, and 3) the cross motion filed by Petitioner Allen Breslow on September 3, 2009, all of which were submitted on February 4, 2010. For the reasons set forth below, the Court 1) denies the motions and the cross-motion; and 2) directs that the Petition and Counterclaims will be the subject of a hearing before the Court.

## BACKGROUND

### A. Relief Sought

Respondent Frank & Breslow PC (“PC”) moves for an Order, 1) pursuant to CPLR § 3212, granting summary judgment to the PC, dismissing the Amended Verified Petition (“Petition”), denying the request by Petitioner Allen Breslow (“Petitioner” or “Breslow”) for a dissolution of the PC and denying Petitioner’s eight (8) requests for relief; 2) pursuant to CPLR § 3212, in granting summary judgment to the PC, determining that a) Petitioner’s rights and obligations to the PC are those set forth in the parties’ Shareholder’s Agreement dated April 5, 2002 or any such Agreement that the Court concludes is in effect; and b) by virtue of his violation of the Shareholder Agreement and his fiduciary duty to the PC, Breslow is not entitled to compensation under the terms of the Shareholder Agreement; and 3) pursuant to CPLR § 3212, granting Respondent PC summary judgment on its First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Counterclaims of its Amended Answer and Counterclaims (“PC Answer”), determining that Petitioner breached the Shareholder Agreement and his fiduciary duty to the PC and directing that a hearing be conducted on damages.

Respondent Neil M. Frank (“Frank”) moves for an Order 1) pursuant to CPLR § 3212, granting summary judgment to Frank dismissing the Petition, denying Petitioner’s request for a dissolution of the PC and denying Petitioner’s eight (8) specific requests for relief; 2) pursuant to CPLR § 3212, in granting summary judgment to Frank, determining that a) Petitioner’s rights and obligations to Frank and the PC are those set forth in the Shareholder Agreement dated April 5, 2002 or any such Agreement that the Court concludes is in effect; and b) by virtue of his violation of the Shareholder Agreement and his fiduciary duty to Frank, Breslow is not entitled to compensation under the terms of the Shareholder Agreement; and 3) pursuant to CPLR § 3212, granting Frank partial summary judgment on his counterclaim as set forth in his Amended Verified Answer to Amended Petition with Counterclaim (“Frank Answer”), determining that Petitioner breached the Shareholder Agreement and his fiduciary duty to Frank and directing that a hearing be conducted on damages.

Petitioner moves for an Order 1) dissolving the PC pursuant to Business Corporation Law (“BCL”) § 1104-a(a)(1); 2) directing Frank and the PC to pay Petitioner the sum of \$80,000, plus

interest, for amounts wrongfully withheld from his salary in addition to other sums that the Court determines are owed to Petitioner; and 3) determining Petitioner's true percentage of stock ownership in the PC.

B. The Parties' History

In a prior decision by the Honorable Leonard B. Austin dated January 10, 2005 that addressed several earlier motions ("Prior Decision"), Justice Austin outlined the background of this action as follows:

Petitioner commenced this special proceeding, pursuant to BCL § 1104-a, for the judicial dissolution of the PC. The PC is a professional corporation through with Frank and Breslow practiced law. Frank and Breslow began practicing law as partners in 1990. The relationship evolved from a handshake agreement, to a partnership with a written partnership agreement, to a limited partnership and, finally, to a professional corporation.

Frank owns a majority of the shares in the PC. Breslow seeks dissolution in part based on his allegation that Frank never consulted him regarding the management of the firm. Breslow also alleges that he had significant and irreconcilable disputes with Frank regarding the firm's future and Frank's involvement with other law practices. The PC's practice was almost exclusively involved in representing employers in employment related matters.

The PC is governed by a shareholder agreement ("Agreement") that provides that a shareholder who resigns from the firm and accepts employment in another firm as an employee, partner, shareholder or owner that practices in the employment or labor related field forfeits his share of all termination proceeds.

After the commencement of this proceeding, Breslow and Frank continued to practice law in the office ("Office") that the PC previously occupied. Two events, in 2002 and 2004, are of significance in this litigation.

In late 2002, Breslow and Frank discussed dissolving the PC. Breslow expressed his dissatisfaction with the existing arrangement and the firm's direction, and said that he wanted to open his own office. In anticipation of that arrangement, Breslow obtained office space for his separate practice and began to take steps necessary in opening his own office, including obtaining a telephone number. Breslow asserts that, although he continued to rent separate office space, he

did not occupy that space. Instead, he continued to operate his entire practice through the PC. Frank disputes this assertion.

During the weekend of March 6-7 of 2004, in anticipation of opening his own office, Breslow went to the Office, downloaded material from the PC's computer and took numerous files. On March 8, 2004, Breslow opened his own office. Almost immediately after Breslow opened his office, several PC clients executed letters or consents to change attorneys advising Frank to transfer their files to Breslow.

Breslow asserts that the working conditions at the PC had become so intolerable that he was constructively expelled from the firm. He claims that his actions during the weekend of March 6-7 of 2004, and the opening of his own office on March 8, 2004, were precipitated by his constructive expulsion. Frank submits that Breslow was not constructively expelled but rather that Breslow had been planning his departure from the firm for some time.

The allegations in the Petition of oppressive conduct and waste include the following:

- (1) Frank's appointment of his daughter Ilana Sudock as the office manager at an excessive salary, plus \$500 per week for expenses,
- (2) the creation of Somma Zabell & Associates LLP ("Somma Zabell") to practice employee-based labor law, funded entirely by the PC, and operated out of the same office, using the same staff and office equipment without payment to the PC,
- (3) Frank's unilateral decision to devote much of his time to Somma Zabell, to the detriment of the PC,
- (4) Frank's decision to invest PC money with his son-in-law without accounting to Breslow for such investments,
- (5) Frank's decision to lend money to and become a partner in, Fine Fine & Berman without advising Breslow, and
- (6) Frank's decision to withhold \$80,000 from Breslow's salary in 2000, without explanation.

The Petition seeks the following relief: 1) dissolution of the PC, 2) appointment of a permanent Receiver of the PC's property, 3) appointment of a temporary Receiver of the PC's property, 4) an accounting, 5) determination of Petitioner's true percentage of stock ownership in

the PC, 6) directing Frank and the PC to pay Petitioner money due him, 7) ordering that the PC's assets be sold, its debts and liabilities paid and the surplus divided among the parties according to their respective stock ownership in the PC, and 8) enjoining Frank and the PC from taking certain actions including the removal of Petitioner as an officer and director of the PC.

In its Answer, the PC asserts eleven (11) counterclaims. The PC asserts numerous relevant facts in support of those counterclaims, including 1) in or about December of 2002, Petitioner secretly opened his own law practice in competition with the PC's practice; 2) in or about December of 2002 and continuing thereafter, Petitioner endeavored to solicit and obtain retainer agreements with the PC's clients; and 3) beginning in or about December of 2002, Petitioner provided legal services to other lawyers and law firms without causing bills to be generated on Respondent's behalf. The counterclaims allege breach of the duty of loyalty and fiduciary duty, breach of contract, tortious interference with contract, diversion of business opportunities, breach of BCL § 715(h) by Petitioner's neglect of his responsibilities, breach of BCL § 717 by Petitioner's failure to act as a prudent person in his position as director of the PC, breach of the duty to act in the PC's best interests and wilful conduct by Petitioner warranting punitive damages.

In his Answer, Frank asserts a single counterclaim. Frank alleges that, in light of Breslow's position as shareholder, officer and employee of the PC, there exists a fiduciary relationship between Breslow, and Frank and the P.C. Frank alleges that Petitioner, by soliciting the firm's clients for his own benefit, breached his fiduciary duties to Frank and the P.C.

### C. The Parties' Positions

Frank submits that Breslow has not demonstrated his entitlement to judicial dissolution of the P.C. because, in light of the terms of the Shareholder Agreement which reflects Breslow's understanding of Frank's exclusive authority to manage the PC, none of Frank's alleged conduct constitutes shareholder oppression under BCL § 1104-a, or waste or misappropriation of assets. Frank denies all allegations of wrongdoing and seeks damages from Breslow for alleged breaches of both the Shareholder Agreement and fiduciary duties owed to him. Frank submits that 1) until the commencement of this action Breslow never expressed any interest in the PC's management or finances; 2) his daughter is paid a fair and competitive wage as office manager; and 3) for a

full year prior to his departure, Breslow wrongfully used PC documents to create his own client/solicitation list, solicit PC clients, and then abandoned the PC without the 90-day notice required by the Shareholder Agreement. Frank makes specific reference to Breslow's hiring a secretary named Elaine Ozner to digest client and other information from the PC and produce a mailing list that was used to send out announcements to solicit clients.

The P.C. joins in, and seeks the same relief requested in, Frank's motion. The P.C. also submits that the motion papers demonstrate that Petitioner breached his contractual and fiduciary obligations to the P.C. and Frank by Petitioner's 1) surreptitious entry into the Office on March 7, 2004 and removal of numerous floppy discs containing hundreds of documents and other proprietary information of the PC, 2) solicitation of the PC's clients prior to his alleged abandonment of the PC, and 3) compilation of PC client lists and client information months in advance of his departure from the PC.

Petitioner submits that he has demonstrated his right to dissolution pursuant to BCL § 1104-a by establishing that 1) he owns 20% or more of the voting shares of the PC; and 2) Frank has engaged in oppressive conduct consisting of a) changing the corporate purpose of the firm, b) denying Breslow a role in corporate management, c) unreasonably and arbitrarily withholding \$80,000 in salary from Breslow; d) unreasonably and arbitrarily changing Breslow's ownership interest in the corporation without compensating him for those decreases; and e) demanding that Breslow sign agreements that clearly favored Frank.

### RULING OF THE COURT

#### A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Judicial Dissolution Pursuant to BCL § 1104-a

BCL § 1104-a(a) and (b) provide as follows:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, 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.

(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

(1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

(2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

A corporation should be dissolved only as a last resort. *Matter of Parveen*, 259 A.D.2d 389 (1st Dept. 1999); *Matter of Imperatore*, 128 A.D.2d 707 (2d Dept. 1987). Nevertheless, the appropriateness of an order of dissolution pursuant to BCL § 1104-a is within the sound discretion of the court considering that application. *Matter of Fancy Windows & Doors*, 244 A.D.2d 484 (2d Dept. 1997), citing *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63 (1984).

In construing BCL 1104-a, courts are to give the terms "illegal" and "fraudulent" their common meaning. *Id.* The term "oppressive" is not defined in the statute. Courts have, however, held that a minority shareholder is subject to oppression when the majority or controlling parties' conduct defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. *Matter of Kemp*, 64 N.Y.2d at 73. *See also In the Matter of Charleston Square, Inc.*, 295 A.D.2d 425

(2d Dept. 2002); *In re Dissolution of Upstate Medical Associates, P.C.*, 292 A.D.2d 732 (3rd Dept. 2002); *Application of Rambusch*, 143 A.D.2d 605 (1st Dept. 1988).

Oppressive conduct is generally found where (a) a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, (b) an employee/shareholder is discharged without cause and thus deprived of his or her salary or (c) corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment. *See Matter of Weidy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d 81 (2d Dept. 1985) (minority shareholder fired from family business because of family dispute); *Kemp & Beatley, supra* (corporate policy changed after petitioners terminated employment to deny them distribution of corporate earnings); *Gunzberg v. Art-Lloyd Metal Products Corp.*, 112 A.D.2d 423 (2d Dept. 1985) (shareholders who were long term employees and officers who ran the corporation were removed from their office, fired and denied compensation); *In re Dissolution of Upstate Medical Associates, P.C., supra* (petitioner discharged from employment and excluded from operation of corporation for no legitimate business reason); *Matter of Topper v. Sheraton Park Pharmacy, Inc.*, 107 Misc. 2d 25 (Sup. Ct. N.Y. Co. 1980) (minority employee-shareholder who was most active member of business fired, removed as officer, removed as co-signer on corporate bank account, excluded from corporate offices and denied compensation).

Waste includes misappropriation of corporate assets for private purpose. *Cunningham v. 344 6<sup>th</sup> Ave Owners Corp.*, 256 A.D.2d 406, 407 (2d Dept. 1998).

### C. Application of these Principles to the Instant Action

The Court concludes that the allegations in the Petition present *prima facie* evidence of conduct by Frank designed to defeat Breslow's reasonable expectations that 1) Frank's time and the PC's assets would be used in the best interests of the PC generally; and 2) Breslow would receive payment for services provided.

The Court also determines that the Shareholder Agreement is not dispositive of Frank's rights with respect to the operation of the PC. A majority shareholder in a close corporation owes a minority shareholder a fiduciary duty, *O'Neill v. Warburg, Pincus & Co.*, 39 A.D.3d 281, 282 (1<sup>st</sup> Dept. 2007), and shareholders of a close corporation owe each other a duty to act in good

faith, *Matter of Cassata v. Brewster-Allen-Wichert Inc.*, 248 A.D.2d 710, 711 (2d Dept. 1998).  
*See also Brunetti v. Musallam*, 11 A.D.3d 280, 281 (1<sup>st</sup> Dept. 2004).

Summary judgment is inappropriate, and thus an evidentiary hearing is required, because the conflicting affidavits submitted by the parties raise questions of fact as to the merits of the petition and the various counterclaims, and the appropriate remedy. *See Matter of Steinberg*, 249 A.D.2d 551, 552 (2d Dept. 1998) (where conflicting affidavits raise questions of fact regarding merits of petition for dissolution and appropriate remedy, court erred in granting petition and directing buy-out without hearing). *Accord In re WTB Properties, Inc.* 291 A.D.2d 566 (2d Dept. 2002); *Matter of Fancy Doors & Windows Mfg. Corp.*, 244 A.D.2d 484 (2d Dept. 1997).

Should the Court determine after the hearing that Petitioner has met his burden of demonstrating that Respondents have committed conduct proscribed by BCL § 1104-a, the Court will then have to determine whether liquidation is the only feasible means by which Petitioner may reasonably expect to obtain a fair return on his investment. *See, e.g., Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 75; *Gold v. Gold*, 229 A.D.2d 495 (2d Dept. 1996) (dissolution inappropriate remedy where appellant had available buy-out procedure that would provide him with fair return on his investment).

In light of the foregoing, the Court 1) denies the motions and the cross-motion; and 2) directs that the Petition and Counterclaims will be the subject of a hearing before the Court.

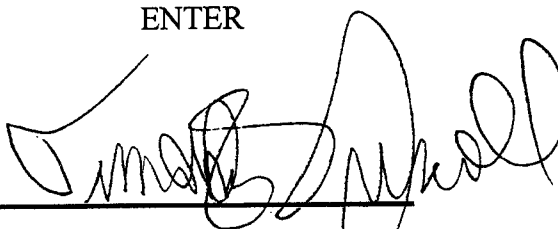
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on April 29, 2010 at 9:30 a.m. at which time the Court will schedule the hearing as provided herein and direct the filing of a note of issue.

DATED: Mineola, NY  
March 31, 2010

ENTER



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
APR 05 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE