Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES PART 17

Justice

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In the Matter of the Application of JOEL Adelstein a holder of Thirty-Three and 1/3 (33.33%) of All Outstanding shares of FINEST FOOD DISTRIBUTING CO. N.Y. INC.

Petitioner,

-against-

Index No. 7162/10
Motion Date: 6/9/10
Motion Cal. No. 1

For the Dissolution of FINEST FOOD DISTRIBUTING CO. N.Y. INC., a Domestic Corporation,

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The following papers numbered 1 to 16 read on this petition by Joel Adelstein, the holder of thirty three and one third of all outstanding shares of **FINEST FOOD DISTRIBUTING CO. N.Y. INC** ("Finest"), pursuant to BCL§1104-a, for an Order dissolving the corporation, directing the corporation to give a full and complete accounting to the Petitioner pursuant to BCL 624, allowing Petitioner to inspect all corporate financial books and records for the three preceding years pursuant to BCL 1104-a, and appointing a receiver pursuant to BCL1113; and motion by proposed respondents-intervenors Steven Adelstein and Lawrence Adelstein ("proposed respondents-intervenors") for an order permitting proposed respondents-intervenors pursuant to CPLR 1012 and or 1013 for leave to intervene in this proceeding as a necessary party for the limited purpose of making a motion to dismiss this proceeding under CPLR 3211 (a)(1), (5), (7) and/or 10, upon leave to intervene being granted, dismissing the instant action pursuant to CPLR 1003 and 3211 (a)(10) for failure to name a necessary party and/or dismissing the action based upon the doctrines of collateral estoppel and res judicata, and upon such dismissal, extending the time for Finest and the proposed respondents-intervenors to make an election to purchase the shares of petitioner Joel Adelstein pursuant to BCL 1118 for a period of 60 days after the determination of this motion.

	Papers Numbered
Order to Show Cause - Petition.....	1-3
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Affirmation in Opposition - Exhibits.....	5-7
Notice of Motion-Affirmation-Exhibits.....	8-11
Memo in Opposition.....	12-13
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Upon the foregoing papers it is ordered that the petition and motion are determined as follows:

This is a special proceeding instituted by Order to Show Cause and Petition dated March 26, 2010, seeking judicial dissolution of Finest. In 1948, petitioner and his brother Sydney started a business purchasing and distributing pickles in Brooklyn, New York. In 1962, their brother Jack joined the company and the business kept expanding and in 1972 the brothers moved the business and purchased a larger building located at 87-21 76th Street, Woodhaven, New York. Each brother was given separate tasks to do in operating the business and they carried on such, but, conferred with each other and jointly made business decisions such as salary, hiring and firing of employees. In 1995, Sydney and Jack brought their sons into the business (Steven and Larry, respectively) In 2006 the three brothers, with Steven and Larry formed Finest. Through Finest, Sydney and Jack gave their sons one third ownership of the business and petitioner held the remaining one third ownership percentage. In 2007, health problems kept petitioner from the business and Larry and Steven assumed all operations of Finest.

Petitioner alleges that when he returned to work, he refused to accept Larry and Steven's offer to purchase his shares of Finest, and thereafter, they began to take actions designed to force petitioner from the business. According to petitioner, Larry and Steven's oppressive actions included, failing to give notice and refusing to give petitioner a vote on the purchase of four new trucks for Finest, and the hiring and firing of Finest employees. They also refused to give petitioner his share of profits from Finest, and took cash distributions without giving petitioner an equal distribution. Petitioner also claims Larry and Steven have refused to fully account or give petitioner all information concerning Finest. Petitioner claims Larry and Steven have committed oppressive actions toward petitioner and such requires dissolution under BCL 1104-a. He also seeks an order allowing inspection of the corporate books and the appointment of a receiver to carry on the business to preserve the property of the corporation pending liquidation.

Respondent Finest and proposed respondents-intervenors Steven Adelstein ("Steven") and Lawrence Adelstein ("Larry") (collectively "proposed respondents-intervenors") have opposed this Petition. Their opposition refers to the motion they have made in which they seek the following relief: permitting proposed respondents-intervenors pursuant to CPLR 1012 and or 1013 for leave to intervene in this proceeding as a necessary party for the limited purpose of making a motion to dismiss this proceeding under CPLR 3211 (a)(1), (5), (7) and/or 10, upon leave to intervene being granted dismissing the instant action pursuant to CPLR 1003 and 3211 (a)(10) for failure to name a necessary party and/or dismissing the action based upon the doctrines of collateral estoppel and res judicata, and upon such dismissal, extending the time for Finest and the proposed respondents-intervenors to make an election to purchase the shares of petitioner Joel Adelstein pursuant to BCL 1118 for a period of 60 days after the determination of this motion. Petitioner has opposed this motion.

The Court shall first address the motion by Finest and proposed respondents-intervenors. The branch of the motion permitting proposed respondents-intervenors pursuant to CPLR 1012 and or 1013 for leave to intervene in this proceeding as a necessary party for the limited purpose of making a motion to dismiss this proceeding under CPLR 3211 (a)(1), (5), (7) and/or 10, is granted, without opposition.

The branch of the motion upon pursuant to CPLR 1003 and 3211 (a)(10) seeking dismissal of this action for failure to name a necessary party is denied. Proposed respondents-intervenors claim that since they are the majority shareholders, directors and officers of Finest, they are necessary parties to the instant action. CPLR 1012 and 1013. According to them, they have a "real and substantial interest in the outcome of this action as their rights will be affected by the relief that petitioner seeks in the Order to Show Cause and Petition. They also claim that since they the remaining two-thirds shareholders of Finest they are necessary parties. Since they are necessary parties and they were not named, this action must be dismissed for the jurisdictional defect.

Petitioner opposes this branch of the motion claiming that since he complied with the statutory notice provisions set forth under BCL 1106(c), this Court obtained jurisdiction over the corporation and the proposed respondents-intervenors since they are persons interested in the corporation. This Court finds that the case of In re Finando, 226 A.D.2d 634 (2d Dep't 1996) is dispositive on this issue. In that case, the petitioner alleged that he was the owner of more than 20% of the outstanding shares of a corporation and commenced a proceeding to dissolve the corporation pursuant to Business Corporation Law § 1104-a. In his original petition, the petitioner averred that he and Robert Sohn, who is the president of the corporation were the corporation's sole shareholders. However, Sohn maintained that his wife Tina Sohn was actually the true owner of the shares claimed by the petitioner. After receiving notice of the proceeding in accordance with Business Corporation Law § 1106, Tina Sohn moved to dismiss the proceeding, contending that she was a necessary party to the court's resolution of the threshold issue of whether the petitioner actually owns at least 20% of the corporation's shares and is thus entitled to seek dissolution of the corporation. The Court held that, petitioner was able to proceed with his application for dissolution despite the fact that the court lacked personal jurisdiction over an individual who claimed to be a shareholder of the corporation. The court had acquired jurisdiction over the corporation and "all persons interested in the corporation" upon compliance with the statutory notice provisions set forth in Business Corporation Law § 1106. The Court stated that, "there is no authority for the appellants' assertion that the court must have personal jurisdiction over all putative stockholders in order to conduct such a hearing." *Id*.

In the instant case, proposed respondents-intervenors make, in essence the same claim regarding the need for this Court to have obtained personal jurisdiction over all stockholders in order to proceed with this dissolution petition. as Tina Sohn did in the Finando case. This Court

has found that authority to support the proposed respondents-intervenors claim still does not exist. Accordingly, since there is no dispute that petitioner gave notice of the proceeding in accordance with Business Corporation Law § 1106, the branch of the motion seeking dismissal pursuant to CPLR 1003 and 3211 (a)(10) for failure to name a necessary party is denied.

The branch of the motion seeking to dismiss the action, pursuant to CPLR 3211 (a) (5) based upon the doctrine of res judicata, is denied. This doctrine holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action. This principle is necessary to conserve judicial resources since it discourages redundant litigation. It is grounded on the premise that once a party has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again. *See*, Barbieri v Bridge Funding, 5 AD3d 414 (2d Dept 2004.) The doctrine of *res judicata* is applicable not only to claims actually litigated and resolved in a prior action but also "claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding." Mahler v. Campagna, 60 A.D.3d 1009 (2nd Dept. 2009.)

Movants claim that the instant action raises the same factual issues, the same occurrences and the same alleged actions taken by Finest and the proposed respondents-intervenors that petitioner alleged in support of his claims in an action he commenced in Nassau County, entitled Joel Adelstein v Finest Food Distributing Co. N.Y. Inc., Index Number 010776-09. This action was dismissed by Court Order, dated January 13, 2010 and thus Petitioner is barred from commencing the instant petition. Petitioner claims that res judicata does not apply since the claim in the Nassau Action and the instant action are separate and distinct.

In the Nassau Action , the first cause of action, was to recover for defendants' breach of the alleged agreement between plaintiff and defendants for plaintiff to work as a salesman for and receive certain compensation from Finest. In the second cause of action, plaintiff alleged that the individual defendants (the proposed respondents-intervenors in the Queens Action) breached their fiduciary duties to plaintiff by terminating his employment, failing to pay money owed to him, and failing to provide him with documentation that he requested, including but not limited to Finest's tax returns. In the third cause of action plaintiff sought to recover against defendants under the theory of unjust enrichment in connection with defendants' alleged failure to distribute profits to Plaintiff. Plaintiff sought compensatory and punitive damages.

Defendants moved to dismiss the Complaint, pursuant to CPLR 3211 (a) (5) and (7), *inter alia* that 1) the allegations in the first cause of action were insufficient to maintain a cause of action for breach of contract; 2) to the extent that the first cause of action was based on an alleged

employment agreement, it was barred by the Statute of Frauds; 3) any employment agreement between Plaintiff and Defendants was an at-will employment agreement, terminable at any time by either party; 4) the allegations in the second cause of action were insufficient to maintain a cause of action for breach of fiduciary duty, because a) the acts complained of did not relate to the individual defendants' fiduciary duties as directors, officers or shareholders of Finest; b) a breach of fiduciary duty claim may not be based on an employer-employee relationship; and c) plaintiff was not entitled to the documentation that, he alleged, defendants failed to provide to him; and 5) the allegations in the third cause of action are insufficient to maintain a cause of action for unjust enrichment because the funds that Defendants allegedly retained did not rightfully belong to plaintiff. Plaintiff opposed this motion.

The Nassau County Court granted the motion and dismissed the plaintiffs three causes of action. The Court found that plaintiff was an at-will employee and thus could not prevail on his breach of contract claim. The Court also found that plaintiff's unjust enrichment claim failed because he could not sue Finest directly on this theory, rather his claims of alleged mismanagement or diversion of assets by officers or directors to their own enrichment, had to be brought by a shareholder derivatively but not individually. The Court also found that defendants did not owe a fiduciary duty to plaintiff as an employee.

Initially, this Court notes that, a general prerequisite to invocation of res judicata is the existence of a final judgment, i.e., a final judicial determination which necessarily decided the very cause of action or issue that a party now seeks to litigate in a subsequent action or proceeding. The dismissal of the Nassau action did not determine the issues petitioner seeks to bring in this action. In the Nassau action, the breach of contract and breach of fiduciary duty causes of action were dismissed based upon plaintiff's status as an employee of Finest. Here, petitioner is seeking to dissolve the corporation based on his status as a shareholder. The acts underlying the breach claims and the alleged oppressive acts that form the dissolution claim are substantially similar. However, the analysis of these acts is substantially different in an action regarding an employee's claims and one regarding a shareholder. An employee's rights and obligations toward his or her employer are substantially different than those a shareholder has toward a corporation in which ownership interests exist. This results in the law treating their relationships very differently in every issue that arises in their respective relationships. Accordingly, the Nassau Action which dealt with petitioner's rights as an employee in no way decided the instant cause of action which involves petitioner's rights as a one third owner of the corporation. Furthermore, regarding the unjust enrichment cause of action in the Nassau Action, the Court did not make a final determination regarding that action since it dismissed it on procedural grounds involving the need to commence a derivative action. That determination did not determine the merits of the claims underlying the

unjust enrichment action. Finally, the motion in the Nassau action was primarily directed at the pleadings, attacking the sufficiency of the complaint as failing to state the causes of action. A dismissal on such motion has preclusive effect only as to a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint. 175 East 74th Corp. v. Hartford Acci. & Indem. Co., 51 N.Y.2d 585 (N.Y. 1980) Accordingly, the Nassau Action's dismissal does not bar the instant petition and the branch of the motion seeking dismissal on res judicata grounds is denied.

Regarding the branch of the motion seeking dismissal on the grounds of collateral estoppel grounds, this doctrine " is grounded in the facts and realities of a particular litigation, rather than rigid rules. Collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity. The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result. Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination. Buechel v. Bain, 97 N.Y.2d 295 (2001) (citations omitted.)

As set forth above, the Nassau action involved actions taken by Finest and the proposed respondents-intervenors against petitioner as related to petitioner's employment with Finest. Here, petitioner seeks dissolution of Finest based on certain oppressive actions taken by Finest and the proposed respondents-intervenors toward petitioner as a shareholder. The issue of whether Finest and the proposed respondents-intervenors committed oppressive acts against petitioner in his capacity as a shareholder was not material in the Nassau Action and as such, the issues raised in the instant petition are not barred by the collateral estoppel doctrine. Kristensen v. Charleston Square, Inc., 295 A.D.2d 404 (2d Dep't 2002.)

The branch of the motion seeking to extend the time for Finest and the proposed respondents-intervenors to make an election to purchase the shares of petitioner Joel Adelstein pursuant to BCL 1118 for a period of 60 days after the determination of this motion is granted to the extent the extension is for 30 days, as set forth in the parties stipulation, dated June 9, 2010.

The Court shall now address petitioner's application for an order dissolving the corporation pursuant to Business Corporation Law § 1104-a. This section 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 July 6, 2010 at 9:30 A.M. in this part. At this hearing the Court shall also resolve the branches of petitioner's application seeking an Order , directing the corporation to give a full and complete accounting to the Petitioner pursuant to BCL624, and allowing Petitioner to inspect all corporate financial books and records for the three preceding years pursuant to BCL 1104-a.

The branch of petitioner's application seeking the appointment of a receiver is denied. 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 petitioner has 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).

Accordingly, the petitioners' request for judicial dissolution is denied, and a hearing on the issue of judicial dissolution, corporate accounting pursuant to BCL624, and inspection of corporate records pursuant to BCL 1104-a, shall be held on July 6, 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 petitioners' request for the appointment of a receiver is denied.

The branch of the motion by proposed respondents-intervenors for an order permitting proposed respondents-intervenors pursuant to CPLR 1012 and or 1013 for leave to intervene in this proceeding as a necessary party for the limited purpose of making a motion to dismiss this proceeding under CPLR 3211 (a)(1), (5), (7) and/or 10, is granted. The branches of the motion seeking to dismiss the instant action pursuant to CPLR 1003 and 3211 (a)(10) for failure to name a necessary party and/or dismissing the action based upon the doctrines of collateral estoppel and res judicata is denied. The branch of the motion seeking to extend the time for Finest and the proposed respondents-intervenors to make an election to purchase the shares of petitioner Joel Adelstein pursuant to BCL 1118 for a period of 60 days after the determination of this motion is granted to the extent the extension is for 30 days, as set forth in the parties stipulation, dated June 9, 2010.

A copy of this Order is being sent to the parties by means of facsimile transmission on June 15, 2010.

DATED: June 15, 2010

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ORIN R. KITZES, J.S.C.