

**Matter of Darvish v Haslacha, Inc.**

2010 NY Slip Op 32339(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 123089/01

Judge: Melvin L. Schweitzer

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

PRESENT: WELVIN L. SCHWEITZER  
J.S.C.  
Justice

PART 45

*In the Matter of the Application of  
Sohail Varnish,*

INDEX NO. 123089/01

MOTION DATE \_\_\_\_\_

*For the dissolution of  
Haskasha, Inc.*

MOTION SEQ. NO. 049

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *of Petitioner is granted  
per the attached  
Decisional Order.*

**FILED**  
AUG 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: August 23, 2010

*W. L. Schweitzer*  
WELVIN L. SCHWEITZER J.S.C.  
J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----x  
In the Matter of the Application of :  
SOHEIL DARVISH holder of one-half of all the :  
outstanding shares entitled to vote in the election of :  
Directors of HASLACHA, INC., URBAN HOMES, :  
INC. and PRIMARY RESIDENCE, INC., :

Petitioner, :

For the dissolution of HASLACHA, INC., :  
URBAN HOMES, INC., and PRIMARY RESIDENCE, :  
INC., domestic Corporations pursuant to :  
§ 1104 of the BCL, :

Respondent. :  
-----x

Index No. 123089/01

DECISION & ORDER

Motion Sequence Nos.  
49, 50, and 51

**FILED**  
**AUG 30 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

**MELVIN L. SCHWEITZER, J.:**

Motion Sequence Nos. 49, 50 and 51 are combined for resolution.

In Motion Sequence 49, Petitioner Soheil Darvish (Petitioner) moves to (a) confirm Special Referee Lancelot Hewitt's June 15, 2010 report to the extent it grants the Receiver's motions under motion sequence nos. 39, 40 and 41 and (b) reject Special Referee Hewitt's reports dated June 15, 2010 and June 25, 2010 to the extent they denied Petitioner's cross-motions under motion sequence nos. 39, 40 and 41 to deduct the Receiver's costs and legal fees from the distributive share of Mr. Shahram David Lavian (Mr. Lavian) in Haslacha, Inc., or the Estates of Primary Residence, Inc. and Urban Homes, Inc. Petitioner also moves for sanctions.

In Motion Sequence No. 50, Receiver moves to confirm Special Referee Hewitt's June 15, 2010 report to the extent it grants the Receiver's motion under Motion Sequence Nos. 39, 40 and 41; and to confirm Special Referee Hewitt's June 25, 2010 report directing the Receiver to pay attorney Lawrence A. Mandelker (Mr. Mandelker) the amount of \$197,435.84

for the period from December 1, 2008 through June 30, 2009, but rejecting the sum of \$257,580.19 calculated by Special Referee Hewitt as based on an inadvertent miscalculation and instead directing Receiver to pay Mandelker \$ 197,435.84, from the monies held by him as the Receiver of Haslacha, and should the Haslacha Estate not have sufficient funds, from the Estates of Primary Residence and Urban Homes.

In Motion Sequence No. 51, Mr. Lavian moves to (a) vacate the court's referral of motion sequence numbers 39, 40 and 41 to Special Referee Hewitt and to reject the portions of Special Referee Hewitt's Reports to the extent the reports granted motion numbers 39, 40 and 41, (b) confirm Special Referee Hewitt's reports dated June 15, 2010 and June 25, 2010 to the extent they denied Petitioner's cross-motions under motion sequence nos. 39, 40 and 41 to deduct the Receiver's legal fees and the costs of settling the mortgage foreclosure proceeding from Mr. Lavian's distributive share of Haslacha, or the Estates of Primary Residence and Urban Homes, and (c) approve the application of attorney Alfred Lui on behalf of French Bistro's lease.

By way of background, by an Order dated November 24, 2008, Mr. Mark Landis was appointed Temporary Receiver of the rents and profits of the improved real property located at 347 East 54<sup>th</sup> Street, New York, New York, and Mr. Mandelker was appointed his counsel. By Order dated November 10, 2004, the Receiver had previously been appointed permanent receiver of the assets and property of respondents Urban Homes, Inc. and Primary Residence, Inc. By Order dated December 22, 2008 dissolving Haslacha, Mr. Landis was appointed Permanent Receiver of Haslacha; and by an Order granted on December 30, 2008, Mr. Mandelker was appointed counsel to the Permanent Receiver.

By Notice of Motion dated February 24, 2009 (motion sequence no.39), the Receiver moved for an Order approving: (a) a lease agreement between Haslacha and Jubilee, Inc.; (b) the Receiver's withdrawal of an appeal from a determination rendered by the Civil Court in a non-payment proceeding that Haslacha had commenced against Jubilee, which was pending in the Appellate Term; and (c) payment of fees for services rendered to the Receiver during the period December 1, 2008 through January 31, 2009 in the sum of \$59,595 and disbursements incurred on behalf of the Receiver in the sum of \$549.35, for a total of \$60,144.35, and authorizing payment of said sum from funds held by the Receiver. By Notice of Motion also dated February 24, 2009 (motion sequence no. 40), the Receiver moved for an Order approving a Stipulation settling an action to foreclose against Haslacha and authorizing the Receiver to use funds collected by the receivership to make the payments called for in the Stipulation. By Notice of Motion dated July 21, 2009 (motion sequence no. 41), the Receiver moved for an Order approving payment of the invoices for fees and disbursements of Mr. Mandelker and authorizing the Receiver to use monies collected by the Receiver to pay the invoices. These three motions were referred to Special Referee Hewitt to hear and report and his reports with respect to them are now the subject of the three motions before the court.

#### Discussion

Courts in New York "will look with favor upon a Referee's report, inasmuch as the Referee, as a trier of fact, is considered to be in the best position to determine the issues presented." *Jan S. V Leonard S.*, 26 Misc3d 243, 249 (Sup Ct New York County 2009) (quoting *Namer v 152-54-56 W. 15<sup>th</sup> St. Realty Corp.*, 108 AD2d 705, 706(1st Dept 1985), quoting *Holy Spirit Assn. For Unification of World Christianity v Tax Commission of the City of New York*, 81

AD2d 64 (1<sup>st</sup> Dept 1981). Special Referee Hewitt read and considered evidence and memoranda submitted by all parties, and conducted an evidentiary hearing with respect to the issue of the appropriateness of Mr. Mandelker's costs and fees, and he made extensive findings in two well reasoned reports supported by the record. Accordingly, the court confirms Special Referee Hewitt's Report of June 15, 2001 to the extent that it found (a) the "amended, restated and extended agreement of lease" between respondent Haslacha, Inc. and Jubilee, Inc. should be approved; (b) the Receiver's proposed withdrawal of an appeal pending in the Appellate Division, Appellate Term, should be approved; and (c) the Stipulation Settling an Action to Foreclose against respondent Haslacha should be approved. The court confirms Special Referee Hewitt's Report of June 25, 2010, which, after an evidentiary hearing, (a) found Mr. Mandelker is entitled to an award of attorneys' fees and disbursements (except to modify the report to reduce the amount of attorneys' fees and disbursements to which he is entitled to \$197,435.84), (b) directed that the Receiver pay to Mr. Mandelker the sum of \$197,435.84, and (c) authorized and directed that the Receiver pay to Mr. Mandelker the sum of \$197,435.84 from the monies held by him as Receiver of Haslacha, and should the Haslacha Estate not have sufficient funds, from the Estates of Primary Residence and Urban Homes.

Mr. Lavian's motion to vacate the court's order referring motion sequence numbers 39, 40 and 41 to Special Referee Hewitt to hear and determine is denied as untimely. Mr Lavian did not seek leave to reargue or appeal the referral order. Moreover, Mr. Lavian seeks to confirm the part of Special Referee Hewitt's reports he likes, Special Referee's Hewitt's decision not to allocate the costs and fees to Mr. Lavian's distributive share of the Estates in issue. The court also denies Mr. Lavian's motion to approve the application made by attorney Alfred Lui on

[\* 6]

behalf of French Bistro to give French Bistro a lease of the property leased by Jubilee. This is in reality a motion to reject Referee Hewitt's Report relating to a purported lease entered into by Mr. Lavian and French Bistro. Special Referee Hewitt correctly approved the lease between Haslacha and Jubilee and found that the leases executed by Mr. Lavian, including the lease with French Bistro, "are without legal significance." See Special Referee Hewitt's Report, dated June 15, 2010, p6.

The court now turns to the issue of how the costs and fees are to be allocated: should they be borne by the Haslacha Estate and/or the Primary Residence and Urban Homes Estates irrespective of share ownership or should they be borne exclusively from Mr. Lavian's distributive shares in those Estates as advocated by Petitioner?

Special Referee Hewitt's June 15 and June 25, 2010 reports leave no doubt that Mr. Lavian's actions – filing numerous motions, refusing to obey the orders of the court and the Receiver, and by engaging in sham lease transactions – necessitated the appointment of the Receiver in the first place and caused him to incur the costs and attorneys' fees awarded to Mr. Mandelker. However, Special Referee Hewitt concluded that Business Corporation Law § 1008 [5], invoked by Petitioner to charge the award to Mr. Lavian's distributive share in the Estates, does not authorize such an allocation. The Special Referee held :

Moreover, petitioner's cross motion must be denied. BCL § 1008 [5] authorizes the court to determine and enforce the liability of "any director, officer, shareholder, or sub-scriber for shares, to the corporation or for liabilities of the corporation," but does not authorize the court to charge an award of attorney's fees to any distributive share of a "director, officer, shareholder, or sub-scriber" of a corporation, upon the grounds of misconduct.

[ 7 ]

See Special Referee Hewitt's Report, dated June 15, 2010, p 7. The court does not agree with the Special Referee that the court lacks authority to allocate the award of costs and attorneys' fees, and thus rejects that part of his reports which refuse to allocate the award to Mr. Lavian's distributive share in the Estates.<sup>1</sup> Pursuant to BCL § 1117 (a), BCL § 1008 applies in judicial dissolution proceedings brought under Article 11. BCL § 1008 invests broad discretion in the court "without limitation" to issue orders with respect to "all matters" in connection with the winding up of the affairs of the corporation. BCL § 1008 provides in pertinent part that:

... the Supreme Court ... may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation, and in particular, and without limitation of the generality thereof, in respect of the following:

- (5) The determination and enforcement of the liability of any director, officer, shareholder or subscriber for shares, to the corporation or for the liabilities of the corporation.
- (6) The payment, satisfaction or compromise of claims against the corporation, the retention of assets for such purpose, and the determination of the adequacy of provisions made for payment of the liabilities of the corporation. (emphasis added)

A reading of the statute reveals that the court has great discretion in fashioning orders it deems proper, in "all matters" in connection with a corporation's winding up, "without limitation." The statute expressly allows the court both to 'determine' and 'enforce' the liability of a shareholder to or for the liability of the corporation. Here, it is clear that the corporation's liability for the Receiver's legal fees (the fees will be paid out of the sale of the corporation's assets) has arisen

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<sup>1</sup> As an alternative, pursuant to BCL Articles 10, 11 and 12 and 22 NYCRR 130-1.1, Petitioner seeks an order assessing sanctions against Mr. Lavian in the form of deducting the Receiver's legal fees and costs from Mr. Lavian's distributive share in the Estates solely as a result of Mr. Lavian's interference with the receivership. The court need not reach that issue in light of its decision to grant relief under BCL § 1008.

due to the acts of a shareholder, *i.e.*, Mr. Lavian. Mr. Lavian's refusal to comply with the court's orders, and his vexatious litigation, is responsible for the corporation's liability to pay legal fees. The court is invested by the statute with the power to "determine" Mr. Lavian's liability and to "enforce" that liability, by ordering Mr. Lavian to pay the liability he caused out of his distributive share.

Counsel for the Receiver's claims for legal fees constitute a claim against the corporation. Under BCL § 1008 (6) the court also has discretion "without limitation," to fashion orders with reference to the payment of the claim. Mr. Lavian's actions have wasted the corporation's assets and he should not benefit by the petitioner's being required to pay one-half the costs. Counsel for the Receiver asserts "that virtually all of our services arise out of the need to deal with Mr. Lavian's frivolous and prolix motion practice, his unwillingness to recognize, comply with and be bound by the orders the Court, and his repeated attempts to game and abuse the legal system." Letter of Lawrence A. Mandelker, dated May 9, 2009, Affirmation of Perry Dean Freedman, dated July 9, 2010, Ex G. The court has examined Mr. Mandelker's firm's bills submitted in support of the Receiver's motion and has identified time charges pertaining to, among others, defending and settling a mortgage foreclosure action against Haslacha which was occasioned by Mr. Lavian's failure to cause Haslacha to repay a loan when he was responsible for Haslacha's affairs; disaffirming leases that Mr. Lavian entered into on behalf of Haslacha, including one for French Bistro restaurant, the validity of which the purported lessees failed to sustain before the court; defending against Mr. Lavian's vexatious motion to remove the receiver; and moving to dismiss various frivolous appeals pursued by Mr. Lavian, all of which appeals were dismissed or

otherwise denied. *See id.*, Ex F.<sup>2</sup> Directors or officers of a corporation who violate their fiduciary may be held responsible for all damages naturally flowing from their wrongdoing or misconduct, even if the precise result could not have been foreseen. The value of any corporate assets wasted and the amount of expenses incurred as the direct and natural result of an officer's acts must be accounted for and the court is given considerable discretion in determining how this is to be done. *See e. g. Venizelos v Oceania Maritime Agency, Inc.*, 268 AD2d 291 (1<sup>st</sup> Dept 2000). Directors, officers and shareholders who divert or appropriate a corporation's assets, are not entitled to share in the distribution of assets recovered on behalf of the corporation. *Ritter v Mountain Camp Holding Corp.*, 252 AD 602 (2d Dept 1932); *Goldstein v Goldsmith*, 235 AD 744 (2d Dept 1932). Even on dissolution, the shareholders owe a continuing duty to one another with respect to dealings affecting the winding up and preservation of the entities assets. *Ajettix Incorporated v Raub*, 9 Misc3d 908, 912 (Sup Ct Monroe County, 2005). It would be unfair to allocate the costs and fees attributable solely to Mr. Lavian's fault or vexatious litigation tactics equally between Mr. Darvish and Mr. Lavian by virtue of the fact that they are each 50% owners in the Estates of Haslacha, Primary Residence and Urban Homes. The court directs that the costs and fees awarded to Mr. Mandelker in the amount of \$197,435.84 thus shall be paid as follows: 65% from Mr. Lavian's distributive share of the Estate of Haslacha, or should the Haslacha Estate not have sufficient funds, from Mr. Lavian's distributive share of the Estates of Primary Residence and Urban Homes, and 35% from Mr. Darvish's distributive share of the

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<sup>2</sup> This court takes judicial notice of its orders sanctioning Mr. Lavian, denying his voluminous applications and its recent direction enjoining him from filing further motions.

Estate of Haslacha, or should the Haslacha Estate not have sufficient funds, from Mr. Darvish's distributive share of the Estates of Primary Residence and Urban Homes.

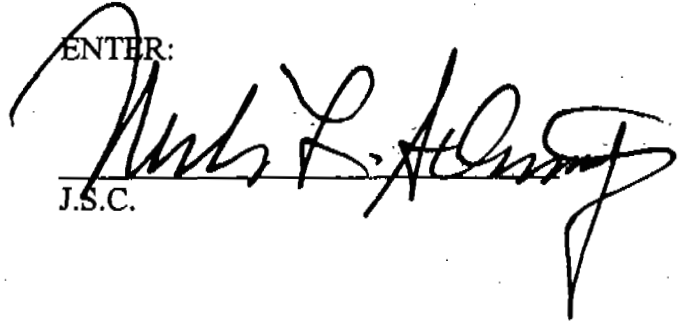
Accordingly, it is

ORDERED that Petitioner's motion to confirm in part and reject in part the reports of Special Referee Hewitt, dated June 15, 2010 and June 25, 2010, (motion seq. 49) is granted and the Receiver is directed to pay Mr. Mandelker from the distributive shares as set forth above; and it is further

ORDERED that the Receiver's motion to confirm the reports of Special Referee Hewitt, dated June 15, 2010 and June 25, 2010, (motion seq. 50) is granted; and is further

ORDERED that defendant's motion (motion seq. 51) is denied.

Dated: August 23, 2010

ENTER:  
  
J.S.C.

**FILED**  
**AUG 30 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**