

**Mizrahi v Mizrahi**

2010 NY Slip Op 32417(U)

August 27, 2010

Sup Ct, NY County

Docket Number: 106520/10

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

MIZRAHI, YOEL

Plaintiff,

- v -

YGAL MIZRAHI,

Defendant.

INDEX NO. 106520/10

MOTION DATE 7/27/10

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this petition for corporate dissolution

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

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

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this petition

PAPERS NUMBERED

1-2

**FILED**

AUG 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
*and Order*

Dated: 8/27/10

JBL  
JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [X] REFERENCE

[ ] SUBMIT ORDER/JUDGMENT [ ] SETTLE ORDER/JUDGMENT

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

-----X

In the Matter of the Application of  
YOEL MIZRAHI,

Petitioner,

Index No. 106520/10

For the judicial dissolution of  
CORNELIA COMMERCIAL  
HOLDING CORP.,  
pursuant to BCL § 1104-a  
Civil Practice Law and Rules

**Decision and Order**

-against-

YGAL MIZRAHI

Respondent,

-----X

**JOAN B. LOBIS, J.S.C.:**

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

Motion Sequence Numbers 001 and 003 are consolidated for disposition. In Motion Sequence Number 001, petitioner Yoel Mizrahi ("petitioner") moves by order to show cause for, inter alia, an order of dissolution of Cornelia Commercial Holding Corporation ("Cornelia"). In Motion Sequence Number 003, respondent Ygal Mizrahi ("respondent") moves by order to show cause for an order vacating an order entered against him on default on Motion Sequence Number 002. Though not explicitly set out in the petition, the parties are brothers.

On or about May 26, 2010, petitioner commenced this special proceeding by bringing two separate, simultaneous motions by order to show cause (Motion Sequence Numbers 001 and 002). The first order to show cause (Motion Sequence Number 001) contains the initial petition for corporate dissolution. The second order to show cause (Motion Sequence Number 002) contained a request for a preliminary injunction enjoining Cornelia, a corporation that owns and operates a

condominium of commercial units, and respondent (while acting on Cornelia's behalf) from transacting business, including collecting rent and distributing funds, and the appointment of a temporary receiver to preserve the assets of Cornelia. Both orders to show cause were signed by the court on May 26, 2010. The court set the return date for the second order to show cause seeking the preliminary injunction for June 1, 2010, and the first order to show cause containing the underlying petition for July 13, 2010.

Respondent failed to appear before the court on June 1, 2010. Upon his default, the court signed an order (the "June 1 Order") granting petitioner's second order to show cause in full and giving petitioner until June 7, 2010, to submit to the court a list of possible court-approved receivers who would be available for appointment, upon which the court would issue a further order naming the receiver. On or about June 7, 2010, petitioner submitted a list of every receiver approved and authorized by the Office of Court Administration. On or about June 9, 2010, respondent brought Motion Sequence Number 003 by order to show cause, seeking to vacate the June 1 Order. The court set the return date for the third order to show cause for June 29, 2010. On June 28, the parties entered into a stipulation (the "Stipulation"), which the court so-ordered, adjourning the return date for the third order to show cause until July 13. The Stipulation also provided that the June 1 Order would remain in effect; that the appointment of a receiver would be delayed; and that respondent would be allowed to solicit and collect rent on behalf of Cornelia, deposit rents into Cornelia's bank account, pay ordinary expenses subject to petitioner's approval, and perform repairs not exceeding \$500 and other tasks necessary to protect the interests of Cornelia subject to petitioner's approval. The Stipulation further set forth that respondent was to provide petitioner with information related

to Cornelia's bank accounts and rent rolls. The matter was then adjourned two more times until Motion Sequence Numbers 001 and 003 were finally fully submitted, without further oral argument, on July 27, 2010 and August 6, 2010, respectively.

In Motion Sequence Number 003, respondent contends that he has a reasonable excuse for defaulting on Motion Sequence Number 002 and a meritorious defense to petitioner's application for the preliminary injunction and the appointment of a temporary receiver. Respondent also opposes the underlying petition. Respondent has never served a formal answer to the petition. However, the court will treat respondent's papers on Motion Sequence Number 003 as both his answer to the petition and his application to open the default. See Jordan v. City of New York, 38 A.D.3d 336, 338 (1st Dep't 2007).

As to his reasonable excuse for defaulting on Motion Sequence Number 002, respondent sets forth that he was served with the first and second orders to show cause on May 27, 2010. He maintains that he is not a native English speaker and did not appreciate that the orders had different return dates. He believed that the controlling date was July 13, 2010, the date set forth on the order to show cause for Motion Sequence Number 001. Respondent alleges that it was not until he received a call from the parties' sister that he realized that he defaulted on Motion Sequence Number 002. As to his meritorious defense to petitioner's application for the preliminary injunction and the appointment of a temporary receiver, respondent submits an affidavit alleging that petitioner is not a shareholder of Cornelia; that respondent is not engaged in any wrongdoing with respect to Cornelia; that a receivership is not necessary; and that the dissolution of Cornelia is not necessary

to protect the interest of its shareholders. In opposition, petitioner argues that respondent's excuse is not reasonable and annexes documentary evidence purporting to support his claims that he is a partial owner and the president of Cornelia. In reply, respondent submits documentary evidence purporting to disprove petitioner's claims.

In order to vacate the default order, respondent "must demonstrate both a reasonable excuse and a meritorious defense." Benson Park Assocs., LLC v. Herman, 73 A.D.3d 464 (1 Dep't 2010) (citation omitted). Here, respondent's default was excusable (see In re Salon Ignazia, Inc., 34 A.D.3d 821, 822 [2d Dep't 2006]) and he has demonstrated a meritorious defense. The June 1 Order is thus vacated; however, the Stipulation will still govern the day-to-day management of Cornelia until the petition is resolved.

Cornelia was incorporated under the laws of New York in or about June 2003 and is located in Manhattan. Petitioner alleges that pursuant to contributions he made to Cornelia at the time of its incorporation he became a 49.0% shareholder. Respondent controls the remaining shares. Petitioner further alleges that he "was to be president of Cornelia" with rights equal as respondent in managing Cornelia's funds and accessing its records. Petitioner alleges that since 2008, he has been denied access to the corporate premises and that respondent has been managing Cornelia's funds without petitioner's approval. Petitioner contends that respondent has interfered with his access to Cornelia's records and bank accounts and that respondent has been depositing rent checks and other income into his personal bank account. Petitioner sets forth that respondent refinanced the condominium without petitioner's input or consent. Petitioner further maintains that he has not

received his share of profits.

Pursuant to Business Corporation Law § 1104-a(a), a shareholder holding 20% or more of a corporation may petition the court for corporate 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.

Where there are disputed issues of fact, courts should not order dissolution until a hearing is held to resolve such issues. See e.g., In re WTB Properties, Inc., 291 A.D.2d 566, 567 (2d Dep't 2002); In re Ng, 174 A.D.2d 523, 526 (1st Dep't 1991).

Ultimately, there are several factual issues that can only be resolved by a hearing. The matter will, therefore, be submitted to a special referee in order to hear and report, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317, on the issues of whether petitioner has standing to bring this proceeding, whether corporate dissolution is necessary pursuant to B.C.L. § 1104-a, and whether a receivership is necessary pending the resolution or further order of the court of the petition pursuant to B.C.L. § 1113.

In the event that the parties do not agree to hear and determine, then, in accordance with C.P.L.R. Rule 4403 and 22 N.Y.C.R.R. § 202.44(a), following the filing of the report and notice to each party of the filing of the report, petitioner shall move to confirm or reject all or part of the

report within fifteen (15) days after notice of the filing of the report. If petitioner fails to do so, then respondent shall so move within thirty (30) days after notice of the filing is given. 22 N.Y.C.R.R. § 202.44(a). Accordingly, it is hereby

ORDERED that respondent's motion on Motion Sequence Number 003 to vacate this court's order dated June 1, 2010 is granted, and that order is vacated; and it is further

ORDERED that the provisions of the stipulation executed on June 28, 2010 shall continue pending the resolution of the petition or further order of the court; and it is further

ORDERED that the issues of whether petitioner has standing to bring this proceeding, whether corporate dissolution is necessary pursuant to B.C.L. § 1104-a, and whether a receivership is necessary pending the resolution of the petition pursuant to B.C.L. § 1113 are referred to a special referee to hear and report, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317; and it is further

ORDERED that a decision on Motion Sequence Number 001 shall be held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to C.P.L.R. Rule 4403 or receipt of the determination of the special referee or the designated referee; and it is further

ORDERED that within fifteen (15) days of the date of notice of entry of this order,

petitioner is to serve a copy of this order with notice of entry, together with the Special Referee Information Sheet, on the Special Referee Clerk (Room 119) to arrange a date for the reference to a special referee; and it is further

ORDERED that in the event the parties do not agree to hear and determine, following the filing of the report and notice to each party of the filing of the report, petitioner shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If petitioner fails to do so, then respondent shall so move within thirty (30) days after notice of the filing is given.

Dated: *Aug. 27, 2010*

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

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