

**Matter of Hack (National Empl. Assistance
Providers, Inc.)**

2010 NY Slip Op 33024(U)

October 25, 2010

Supreme Court, Suffolk County

Docket Number: 19377-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 46 SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
 J. S. C.

MOTION DATE: 07-13-2010
 SUBMITTED: 08-03-2010
 MOTION NO.: 001 MG

FINAL DISP
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CASEDISP

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 In the Matter of the Application of
 MICHAEL J. HACK,

the holder of 24.5% of all outstanding shares of the stock of
 NATIONAL EMPLOYEE ASSISTANCE PROVIDERS, INC,
 and of LONG ISLAND EAP, INC.

Petitioner,

for the judicial Dissolution pursuant to BCL §1104-a of
 NATIONAL EMPLOYEE ASSISTANCE PROVIDERS, INC. a
 New York Corporation, and of LONG ISLAND EAP, INC., a New
 York Corporation,

-and-

NATIONAL EMPLOYEE ASSISTANCE PROVIDERS, INC.
 a/k/a NATIONAL EAP, LONG ISLAND EAP, INC.,
 and ROBERT E. DETOR and KEVIN CONWAY, who constitute
 all of the remaining shareholders of both corporations,

Respondents.

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The Petitioner, Michael J. Hack ("Hack") moves by Order to Show Cause for judicial dissolution of two New York Corporations, National Employee Assistance Providers, Inc. ("National") and Long Island EAP,

Inc. ("Long Island") (collectively the "Companies") under BCL §1104-a claiming that as a minority shareholder, he has been oppressed by Robert E. Detor ("Detor"), the holder of 51% of the shares in the Companies and by Kevin Conway ("Conway"), the holder of the remaining 24.5% shares in the Companies. Hack further alleges that the remaining shareholders sought to dilute the shares of the Companies by expanding the number of outstanding shares of the Companies from 200 to 800 which would drastically reduce the value of the shares Hack currently holds. Hack further seeks to have the Court adjust the rights and interests of the Shareholders of the Companies and impose a surcharge on the remaining shareholders pursuant to BCL §1104-a (d).

In or about September 2008, Hack contends that he voluntarily left the employment of National as its Chief Executive Officer, a position he held since the inception of National. Hack contends that during the time of his employment, National grew nearly 600% and National is now a viable, well organized company. In support of his petition for dissolution, Hack contends that Respondent Detor made repeated promises that if Hack's wanted to sell his shares, they would be purchased. Hack further contends that in the eight years he worked for the company and was a shareholder, he tried to memorialize an agreement which would define the roles of the shareholders and memorialize Detor's undertakings and promises to provide a market for Hack's shares if he decided to sell. Hack states that an agreement of the shareholders was finally entered into by all shareholders in 2004 however, it did not define the rights of the shareholders in the event any shareholder wished to sell his shares. Rather, it only defined the shareholders' rights in the event of a shareholder's death.

In further support of his petition, Hack contends that Detor has received and ignored bona fide offers to purchase all National's shares from independent third parties including an offer for approximately one million dollars.

Hack received notice of a meeting on or about April 29, 2010. The notice informed Hack that a meeting was scheduled for June 8, 2010 at which the shareholders were to vote to expand the number of outstanding shares in the Companies and to appoint an individual to the Board of Directors and as Secretary of the Corporation. Part of the Order to Show Cause signed by the Court, which commenced this action contained a temporary restraining Order enjoining the

respondents from holding the June 8, 2010 meeting, from transacting any business outside the ordinary course of business, including authorizing the expansion of outstanding shares, and from paying or providing any dividends or compensation or benefits to themselves other than base salary, pending further order of the Court. This restraint remains in place through this date. Hack contends that the pattern of behavior by the respondents will dilute his stock, reduce their value, and make it impossible to sell his shares in the Companies which is oppressive conduct by the majority shareholder entitling him to dissolution of the Companies.

The Respondents oppose the Petition for Dissolution claiming there has been no oppression of the minority shareholder and dissolution is not warranted. The Respondents contend that Hack is a passive, minority shareholder in the Companies and is frustrated because there is no present market for his shares. The respondents allege that Hack has brought the petition for dissolution to force the respondents to purchase his shares in the Companies. In support of their contention, the respondents argue that the Companies are viable, profitable going concerns. In addition, the Respondents have represented that they will agree and stipulate to certain restrictions regarding issuance of National's stock so as to protect Hack from any potentially unfair dilution of his ownership interest. Detor has represented in an affidavit to the Court that the resolution to authorize additional shares of stock has been withdrawn and "for as long as Hack owns shares of NEAP, no additional shares of stock will be authorized...without unanimous shareholder consent". This is offered in further support that dissolution of these Companies is not warranted and the petition should be dismissed.

Detor, as the majority shareholder in both companies and Conway, the remaining 24.5% shareholder, have both provided affidavits in opposition to dissolution. They argue that there is no legal or contractual obligation to purchase the 24.5% interest held by Hack. The Buy-out agreement entered into by the parties gives the Company the right of first refusal if any shareholder wants to sell his shares but does not impose any obligation to do so. In addition, the Respondents contend that there has been no bona fide offer by a third party to purchase all the shares of National as argued by Hack. However, they do acknowledge that there were preliminary discussions regarding the possible purchase of portions or all of National's assets however, Hack has offered no support for his contention that

there was a firm offer to purchase.

Dismissal of an action is warranted when the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; *Leon v Martinez*, *supra* at 88). Additionally, the Court must look to the individual causes of action and determine if they are sufficiently plead to survive a motion to dismiss (*see, EBC Inc. v Goldman, Sachs & Co.* 5 NY3d 11).

N.Y. Bus. Corp. Law §1104-a provides in relevant portion that the holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, may present a petition for dissolution where the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders. Oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture (*See, Matter of Kemp & Beatley*, 64 NY2d 63). Furthermore, disappointment alone by a shareholder of 20 % or more of a closely held corporation should not necessarily be equated with oppression. Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that , objectively viewed, are both reasonable under the circumstances and are central to the shareholder's decision to join the venture (*See, In re Mintz*, 113 AD2d 803).

Applying this law to the facts set forth in the petition for dissolution and the motion to dismiss the petition, the Court finds that the Petitioner, Hack, has failed to demonstrate that he has been oppressed by the majority shareholders in these companies. It is undisputed that Hack voluntarily left the employment of National to pursue another opportunity. It is also evidenced by the executed shareholder agreement attached to the motions that there was no provision/agreement to be bought out in the event one or more of the shareholders wished to sell. While Hack argues that this provision was discussed and contemplated by the parties, it was never reduced to writing and incorporated in the agreements between the shareholders.

Although Hack also argues that the shareholders expressly stated that the strategy amongst the three of them was to grow and then sell

the business, Detor, argues that his plan for the companies differed. However, the agreements between the shareholders do not reflect any anticipated buy-out other than that which would occur upon the death of one of the shareholders. Any issue with regard to dilution of Hack's shares has been resolved by the affidavit of Detor.

The Court finds that Hack failed to sufficiently establish that he was oppressed by the majority shareholders and therefor the petition for dissolution is dismissed. The provisions of the May 26, 2010 temporary restraining order are lifted.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: October 25, 2010

Emily Pines
Emily Pines J. S.C.

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