

Nastasi v Carlino

2011 NY Slip Op 30626(U)

March 8, 2011

Supreme Court, Suffolk County

Docket Number: 14470-2008

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 14470-2008

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

Present:

HON. EMILY PINES
J. S. C.

JOSEPH NASTASI, on Behalf of Himself as a Shareholder of
ALETTO & NASTASI, LTD CORPORATION, and All
Other Shareholders of Said Corporation Similarly Situated,

Petitioner,

-against-

RALPH CARLINO, JOSEPH ALETTO, and ALETTO &
NASTASI, LTD.,

Respondents.

RALPH CARLINO, JOSEPH ALETTO, and ALETTO &
NASTASI, LTD.,

Third Party Plaintiffs,

-against-

JOSEPH NASTASI, Individually ans as Shareholder and
Director of ALETTO & NASTASI, LTD., TIFFANY
MANUFACTURING CORP. d/b/a THE TUB FACTORY
and BELLPORT MARBLE AND GRANITE
CORPORATION,

Third Party Defendants.

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DECISION AFTER TRIAL

In 2008, Petitioner Joseph Nastasi (“Nastasi”), a 40% shareholder in Aletto & Nastasi. Ltd. Corporation (“A & N”), commenced the instant proceeding seeking dissolution of A & N pursuant to BCL §1104-a. Nastasi alleged that respondents, Ralph Carlino (“Carlino”) and Joseph Aletto (“Aletto”), owners of 40% and 20% of the shares of A & N respectively, attempted to “oust” him as A & N’s President. Nastasi also

alleged that there was “internal dissension and irreconcilable differences” between the shareholders and that they were “deadlocked” on the election of directors and the method of operation of the corporation.

Carlino and Aletto, individually and derivatively on behalf of A & N, commenced a third-party action against Nastasi and Tiffany Manufacturing Corp. d/b/a The Tub Factory (“Tiffany Manufacturing”) and Bellport Marble and Granite Corporation (“Bellport Marble”), seeking, among other things, an accounting based on Nastasi’s alleged conversion and/or diversion of corporate funds for his own personal use and breach of fiduciary duty.

By order dated October 16, 2008, this Court, among other things, denied the Petition for dissolution of A & N finding that “[t]he conclusory allegations of ouster, irreconcilable differences and financial damage to the corporation, are insufficient to demonstrate ‘oppressive conduct’ as to warrant dissolution.” The claims in the third-party action proceeded to trial.

Carlino and Aletto assert that they entered into an agreement with Nastasi to become 40%(Carlino) and 20% (Aletto) shareholders of A & N; that Aletto and Carlino contributed hundreds of thousands of dollars in funds to A & N; that Nastasi prevented them from reviewing the books and records of A & N; and that Nastasi improperly took corporate funds for his personal use or use by his other corporations. Carlino and Aletto seek to have these monies, which they claim amount to well over \$400,000, repaid by Nastasi.

Nastasi claims he invested far more than Carlino and Aletto in cash and labor, in running A & N’s showroom and in ultimately refurbishing it after Carlino and Aletto destroyed it. Nastasi claims that A & N has sustained losses of approximately \$740,000 and, therefore, he is entitled to reimbursement from Carlino and Aletto in order to equalize their respective shares thereof, upon giving them credit for the amounts given to the A & N, which he states amount to barely over \$200,000, as well as reimbursement for over \$180,000 Nastasi claims to have paid to refurbish A & N’s warehouse after

Carlino and Aletto destroyed it. All parties testified and made their books and records of expenditures in this regard available in documentary evidence format.

There is no dispute that Aletto invested a total of \$80,000 in A & N. The Court finds, based on the evidence presented by Carlino, that Carlino gave A & N, in the form of investment and loans, a total of \$372,637. Plaintiffs' Exhibits L, M and N demonstrate, in addition to the investment of \$136,000, which is not in dispute, withdrawals from personal accounts by Carlino, during the 2006- 2007 period, of funds from his various accounts and lines of credit in the amounts of \$21,000, \$8,000, \$10,800, \$20,000 and \$8,337, and a loan from the Bank of America for \$50,000. All these monies were, as Carlino credibly testified, handed over to Nastasi either for investment in the new corporation or as loans to get it on its feet. In addition, Carlino testified credibly that he borrowed \$40,000 from his father, \$20,000 from his brother, paid another \$50,000 toward initial labor, brochures and materials to set up the showroom and \$8,500 for electrical installations. These amounts, which Carlino credibly states he invested in or loaned to A & N amount, in toto, to \$372,637. When added to Aletto's \$80,000 investment, Carlino and Aletto invested \$452,637 in A & N.

The Exhibits submitted (Defendant's 1-189) set forth the sales of A & N, as well as many of the corporate invoices (Defendant's 200-236) during the period from 2006 through early 2008, when Nastasi was removed as the manager of the showroom. It appears uncontroverted that A & N lost money during this period (Defendant's 258, 259, 260, 261, 262). However, the Court finds that Nastasi's testimony with regard to his financial contributions to A & N is simply unfounded and not credible. Based on the hundreds of documents placed into evidence, it appears that to the extent that Nastasi had any involvement with A & N (all parties agreed he was supposed to manage on a daily basis), it was through and for the benefit of his other wholly owned corporations. For example, Nastasi leased the showroom space for A & N from a landlord, through his corporation, Tiffany Manufacturing; yet, Tiffany Manufacturing charged A & N far more than it was charged. A & N's annual rent to Tiffany Manufacturing for the period 10/1/06 - 9/30/07 was \$56,784, while Tiffany Manufacturing's rent to the landlord, Lu-Four for 11/1/06 through 10/31/07 was \$36,250 (Plaintiff's Exhibits J and K). In

addition, the Court finds credible the testimony of both Aletto and Carlino that Nastasi kept the books and records of A & N in a separate office, run by one of his other corporations in Bellport and prevented them from learning what A & N was expending and/or taking in over a two year period. Finally, the Court finds credible Carlino's testimony that he, rather than Nastasi, did the bulk of the work to put the showroom in place in 2006, when the corporation actually began its operations, and that when he visited the location, Nastasi was rarely present. Almost all of the invoices submitted by Nastasi for the 2006 through early 2008 period appear to be from Nastasi's wholly owned corporation (Defendant's 200-236). Nastasi's share that should have been contributed to equal his forty (40%) percent interest in A & N was between \$180,000 and \$185,000.

On the other hand, the Court, finds credible Nastasi's testimony that the showroom was essentially destroyed when he took it back from Aletto and Carlino through an eviction proceeding. In 2008, dissatisfied with the manner in which Nastasi was running the corporation, Aletto and Carlino met, without giving prior notice to Nastasi; voted to take over the running of the company and had him thrown off the property (Defendant's 255). This action was taken without the notice required by **BCL § 605**. In March 2009, Nastasi, though Tiffany, the sub lessor, regained possession of the premises through an eviction proceeding (Defendant's 254). That judgment, which remains unsatisfied, is not the subject of this proceeding. Nastasi testified credibly that when he re-entered the showroom, he found that the granite was all broken, the sinks had been smashed, all fixtures had been removed along with the cabinets and tiling. Photographs taken by Nastasi in March 2009 demonstrate the extent of the damage (Defendant's 265). He testified credibly that he made improvements to the showroom over a six month period, and expended over \$180,000.

Aletto and Carlino are seeking repayment of their investments and loans to A & N on the premise that the corporation never really existed. However, the documents presented, including the shareholder's agreement (Plaintiff's A); stock certificates (Plaintiff's E); filing receipt with the Secretary of State (Plaintiff's C); the small business corporation election form 2553(Defendant's 239) support Nastasi's assertion that the

business did exist. To the extent that he claims that it was not profitable, that also appears to be the case. Thus, Aletto's and Carlino's entitlement is limited to amounts necessary to equalize the respective contributions of the shareholders (see, **Donati v Marinelli Construction Corp**, 247 AD2d 423, 424 (2d Dept 1998)).

On balance, the Nastasi breached his fiduciary duty to Aletto and Carlino by allowing his other corporation (Tiffany Manufacturing) to profit at the expense of A & N. Nastasi should have made, but was unable to demonstrate at trial, contributions of between \$180,000 and \$185,000 to the corporation representing his 40% share. On the other hand, Carlino and Aletto had a fiduciary obligation, once in possession of the showroom, to prevent its destruction and dismantling. Their actions in permitting such destruction also amount to a breach of their fiduciary duty to A & N, and they should have contributed the over \$180,000 toward the renovation of the showroom. As A & N is no longer functioning, which counsel for both parties have confirmed with the Court, and it appears to the Court that both Plaintiffs and Defendant owe a defunct corporation approximately equal amounts, the Court finds that neither is entitled to judgment against the other as the defunct corporation will receive no benefit from any influx of funds, when no party seeks to continue its existence. In reaching this conclusion the Court finds credible the testimony of Carlino that he contributed approximately \$50,000 other than the specific checks set forth in the record for the set up of the showroom, and the testimony of Nastasi that he and/or his various corporations contributed approximately \$180,000 to the restoration of the showroom after he retook possession.

All the individual claims set forth against Nastasi and Aletto and Carlino are dismissed.

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

Dated: March 8, 2011
Riverhead, New York



EMILY PINES
J. S. C.