SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 13050/10

MOTION DATE: May 17, 2011
Motion Sequence # 001, 002, 003

In the Matter of the Application of SHMOUEL TOLEDANO, individually, and as 50% shareholder of Home Tower Group, Inc., Prestige Equities, Inc., First Stage, Inc., Second Stage, Inc., Third Stage, Inc., Gross Group Inc., Strong Equities, Inc., Singer Equities, Inc., Rose Equities, Inc. and Sterling State, Inc.,

Petitioner-Plaintiff,

For the Judicial Dissolution of HOME TOWER GROUP, INC.; PRESTIGE EQUITIES, INC., FIRST STAGE, INC., GROSS GROUP, INC., STRONG EQUITIES, INC., SINGER EQUITIES, INC., ROSE EQUITIES, INC. and STERLING STATE, INC.,

-against-

YORAM ELIYAHU, STRAIGHT GROUP, INC., SUPER POWER HOMES, INC. and JOHN DOE CORP./ENTITIES "1" through "25", the names of which are unknown to Petitioner-Plaintiff but are intended to be entities that are owned by YORAM ELIYAHU,

Respondents-Defendants,

**TOLEDANO v ELIYAHU, et al** **Index no. 13050/10**

-and-

DREW R. LONTOS, ESQ. as Escrow Agent,

Nominal Defendant.

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The following papers read on this motion:

Order to Show Cause..... X
Notice of Motion..... XX
Affidavit in Opposition..... XXX
Emergency Affirmation in Support..... X
Reply Affidavit..... XX
Memorandum of Law..... XXXXX
Reply Memorandum of Law..... XX

Motion by petitioner for a preliminary injunction restraining respondents from transferring any assets of the jointly held companies other than in the ordinary course of business is **granted** to the extent indicated below. Motion by petitioner for partial summary judgment is **denied** as to his first and **granted** as to his second cause of action. Motion by petitioner for partial summary judgment dismissing respondents' sixth counterclaim is **granted**. Motion by respondent to vacate that portion of the temporary restraining order that enjoins the escrow agent, Drew R Lontos, Esq., from disbursing any funds and to direct the disbursement of ecrowed funds to the parties in equal shares is **granted** to the extent indicated below.

This is an action for judicial dissolution of a group of jointly held corporations. Petitioner Shmouel Toledano and respondent Yoram Eliyahu each own 50 % of Home Tower Group, Inc., Prestige Equities, Inc., First Stage, Inc., Second Stage, Inc., Third Stage, Inc., Gross Group, Inc., Strong Equities, Inc., Singer Equities, Inc., Rose Equities, Inc., and Sterling State, Inc. The corporations are engaged in real estate development and own 41 commercial properties located in New York City and Westbury, Connecticut.

On November 3, 2006, Toledano and Eliyahu entered into a "dissolution agreement," whereby the parties would attempt to liquidate as many properties as possible during the next 18 months. At the end of the 18 month period, the remaining properties were to be

distributed to the shareholders, except for undeveloped land and certain longer term investment, or "keeper" properties. The agreement provided that Eliyahu was to divide the properties into two lists, or "pools," and that Toledano was to chose one of the two lists of properties within ten days thereafter.

The keeper properties were to be offered for sale upon execution of the agreement. Upon receipt of a bona fide offer from a third party, either shareholder had the right to purchase the property at that price. If both shareholders wanted to buy the property, they were each to submit a sealed bid and the property was to be sold to the higher bidder. If neither shareholder wanted to buy the property, it was to be sold to the third party at the offer price. The vacant land was to be liquidated in the same manner, except that the parcels were to be placed on the market gradually over time.

As to one of the properties, 40 Broad Street in Manhattan, the parties held only a 5 % interest. Thus, it was agreed that if the 5 % interest could not be sold, it would be transferred to two separate companies, one owned by each shareholder. Finally, the parties agreed that, at the end of the 18 month period, Eliyahu was to buy out Toledano's interest in the corporate offices located at 138-15 Jamaica Avenue in Queens for $600,000.

Toledano alleges that Eliyahu refused to divide the properties into two lists as he was required to do pursuant to the terms of the dissolution agreement. Toledano further alleges that Eliyahu refused to buy out his interest in the Jamaica Avenue property as required by the agreement. Additionally, Toledano alleges that Eliyahu misappropriated funds of the jointly held companies to pay expenses of his own companies, as well as his personal expenses.

This action was commenced on July 8, 2010. In his first cause of action, Toledano seeks specific performance of the dissolution agreement, including an order directing Eliyahu to divide the properties into two lists and to purchase Toledano's interest in the Jamaica property. In the second cause of action, petitioner seeks judicial dissolution of the jointly held corporations on the ground of deadlock pursuant to Business Corporation Law § 1104. Toledano also asserts causes of action for an accounting, breach of contract, breach of fiduciary duty, diversion of assets, misappropriation of assets, and unjust enrichment.

In their answer, respondents allege that in 2006 Toledano traveled to Romania to develop real estate investment opportunities in which the parties were to share equally. However, Toledano took title to the properties in his own name rather than in the name of one of the jointly owned companies. Respondents assert counterclaims for breach of

contract, breach of the duty of good faith and fair dealing, and an accounting. In their sixth counterclaim, respondents allege that the dissolution agreement was based on the belief that the real estate market would remain active and the properties could be sold at reasonable prices within 18 months. In this counterclaim, respondents seek to rescind the dissolution agreement on the ground of mutual mistake because the parties' expectations as to the real estate market were not realized.

By order to show cause dated July 8, 2010, petitioner moves for a preliminary injunction restraining respondents from transferring any assets of the jointly held companies, other than in the ordinary course of business and with the written consent of petitioner. In the order to show cause, the court issued a temporary restraining order restraining respondents, including the escrow agent, Drew Lontos, Esq., from transferring any assets of the jointly held companies, except in that manner.

Petitioner is also moving for partial summary judgment with respect to his first two causes of action for specific performance and dissolution. Additionally, petitioner seeks summary judgment dismissing respondents' sixth counterclaim for rescission of the dissolution agreement.

Respondents move for an order vacating that portion of the temporary restraining order that enjoins the escrow agent from disbursing any funds, and directing the escrow agent to disburse $1,455,598 to the parties in equal shares, with $200,000 to stand to the credit of the action.

"As a general rule, where a mistake in contracting is both mutual and substantial, there is an absence of the requisite meeting of the minds to the contract and relief will be provided in the form of rescission" (***Orange v Grier***, 30 AD3d 556 [2d Dept 2006]). The mutual mistake must exist at the time the contract is entered into and must be substantial. The effect of rescission is to declare the contract void from its inception and to put or restore the parties to *status quo* (Id). Since the mutual mistake must exist at the time the contract is entered into, the mistake cannot relate to the occurrence of future events. Thus, respondents cannot obtain rescission of the dissolution agreement based upon Eilyahu's assumptions as to future conditions in the real estate market. Moreover, it is unlikely that an experienced real estate investor would assume that the market would not fluctuate in any event. Petitioner's motion for partial summary judgment dismissing respondents' sixth counterclaim for rescission for failure to state a cause of action is **granted**.

Business Corporation Law § 1104(a) provides that the holders of 50 % of the voting shares may petition for dissolution on the ground that the directors are so divided respecting the management of the corporation's affairs that action by the board cannot be obtained, the shareholders are so divided that the election of directors cannot be obtained, or there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

In considering an application for judicial dissolution, the critical consideration is whether dissension exists and has resulted in deadlock precluding the successful and profitable conduct of the corporation's affairs (***Dream Weaver Realty v Poritsky***, 70 AD3d 941 [2d Dept 2010]). The underlying reason for the dissension is of no moment, nor is it relevant to ascribe fault to either party (Id). A hearing is required only where there is some contested issue determinative of the application (Id). The existence of an agreement with respect to the winding up of the affairs of the corporation does not, of itself, preclude a finding of deadlock (See ***Johnson v ACP Distribution, Inc.***, 31 AD3d 172 [1st Dept 2006]).

The court determines as a matter of law that respondent's rejection of the dissolution agreement has resulted in deadlock precluding the successful and profitable liquidation of the real estate properties. Accordingly, petitioner's application for summary judgment as to his second cause of action for dissolution of the jointly held corporations on the ground of deadlock is **granted**. Petitioner may submit on notice to respondents a final order of dissolution for each of the jointly held corporations (See Business Corporation Law § 1111).

Courts of equity historically have refused to order an individual to perform a contract for personal services because of the inherent difficulty in supervising the performance of uniquely personal efforts (***American Broadcasting Co. v Wolff***, 52 NY2d 394, 401 [1981]). The provision in the dissolution agreement requiring Eliyahu to divide 41 commercial properties into two groups of equivalent value is similarly incapable of supervision by the court. Petitioner's motion for partial summary judgment on his first cause of action for specific performance is **denied** as to the provision in the contract requiring respondent Eliahu to divide the properties. The branch of the motion requesting specific performance of the provision requiring the buyout of the Jamaica property is **denied** with leave to renew upon the accounting proceeding.

Business Corporation Law § 1115 provides that at any stage of an action or special proceeding, seeking judicial dissolution of a corporation, the court may, in its discretion,

grant an injunction, effective during the pendency of the action or special proceeding, restraining the corporation and its officers or directors from collecting or receiving any debt or property of the corporation, and from paying out or otherwise transferring or delivering any property of the corporation, except by permission of the court.

Accordingly, petitioner's motion for a preliminary injunction is **granted** to the extent that petitioner Toledano and respondent Eliyahu are restrained from paying out or otherwise transferring or delivering any property of the jointly held corporations other than in the ordinary course of business, except by permission of the court.

In opposition to respondent's motion to release $1,455,598 from escrow, petitioner argues that sufficient funds must be held to secure respondent's obligation to purchase petitioner's interest in the Jamaica property for $600,000, as well as to secure petitioner's breach of fiduciary duty claims. Thus, petitioner argues that, since he is entitled to at least half the escrow, $1.2 million would be sufficient only to secure petitioner's $600,000 claim. Respondent counters that the equity in the unsold properties is more than sufficient to satisfy petitioner's claims.

Accordingly, respondents' motion for permission to pay money out of escrow is **granted** to the extent that the escrow agent, Drew Lontos, Esq., is directed to pay $500,000 each to petitioner Toledano and respondent Eliyahu. The balance of $655,598, and any additional accrued funds, is to remain in escrow pending the conclusion of the action.

So ordered.

Dated JUL 25 2011

Stephen A. Bucaria
J.S.C.

ENTERED
JUL 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE