

**Matter of Dziomba**

2011 NY Slip Op 32271(U)

August 17, 2011

Supreme Court, New York County

Docket Number: 104203/11

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PART 15

PRESENT: RAKOWER  
Justice

DEIOMBA, EUGENE

- v -

RE:

INDEX NO. 104203/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER **FILED**

AUG 22 2011

NEW YORK COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Dated: 8/21/11

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check-if appropriate:  DO NOT POST  REFERENCE  
SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
In the Matter of the Application of  
EUGENE DZIOMBA

Index No.  
104203/11

Petitioner,

**DECISION  
and ORDER**

For the Judicial Dissolution of

NEW YORK COLOR CENTER, INC.,

Mot. Seq.  
001 & 002

**FILED**

Pursuant to Section 1104-a of the  
Business Corporation Law.

**AUG 22 2011**

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner Eugene Dziomba ("Dziomba") owns a 49% interest in New York Color Center Inc. ("the Corporation"). Carole Fakler ("Fakler") owns 51% of the Corporation's stock. Dziomba moves by order to show cause for an order dissolving the Corporation pursuant to Business Corporation Law ("BCL") §1104-a. According to Dziomba's affidavit in support of his application, the Corporation was and is engaged in the business of printing and has gross sales of approximately \$850,000 per year. Fakler has been responsible for the day to day operation and management of the Corporation, "including but not limited to production and the finances of the Corporation." Dziomba, on the other hand, worked as a sales agent and was responsible for maintaining accounts and generating income for the Corporation. Dziomba states that while he and Fakler never signed a shareholder agreement, it was agreed among the two that Fakler was the President of the Corporation, and Dziomba the Vice President, and that the two would share profits equally. In addition, they were to each to receive an annual salary of \$70,000 plus expenses.

Dziomba alleges that, on or around December 15, 2010, he and Fakler came to disagree over the management of the Corporation as a result of increasing debt and questions as to the continued viability of the Corporation. About a month later, Fakler told Dziomba that she could "no longer take the pressure of running the Corporation and that things need to change." Sometime prior to this, Dziomba claims that Fakler

“moved the Corporation’s banking relationship without [Dziomba’s] authority and removed him as a signatory on all bank accounts,” effectively removing him as a signatory on all corporate bank accounts. He further alleges that, on or around February 11, 2011, Fakler stopped providing him with any form of salary or expenses. In addition Dziomba alleges that Fakler advised the landlord of the building where the Corporation conducts business that Dziomba was no longer allowed in the building. Dziomba also claims that he has been denied access to corporate books and records.

Dziomba states that, “[u]pon information and belief the Corporation has approximately \$100,000.00 in accounts receivable and \$15,000.00 in production. The Corporation owes approximately \$60,000.00 in NYS Payroll Tax arrears; \$90,000.00 on an S.B.A. loan, personally guaranteed by [Dziomba] and Fakler; \$60,000.00 to various vendors and \$140,000.00 in personal loans.” Dziomba states that, based on the foregoing, judicial dissolution is warranted, as is the appointment of a receiver.

Fakler submits an affidavit in partial opposition to the Petition. Fakler states that the Corporation did approximately \$752,000.00 in sales last year, as evidenced by a copy of a “Sales by Customer Summary” annexed to Fakler’s affidavit. Fakler further states that “the corporation has been consistently losing money and is heavily indebted.” Fakler provides a copy of the Corporation’s 2009 tax return showing a loss of \$58,000.00. She states that the Corporation’s 2010 return is currently on extension, and that a similar loss is expected on that return. Fakler also annexes a printout of receivables and payables demonstrating debts totaling approximately \$310,000.00, whereas the Corporation has approximately \$28,500.00 in receivables.

Fakler alleges that Dziomba “ha[d] not been doing significant work but was drawing a salary ... since October 2009 until February 2011.” Accordingly, she advised him that she could no longer work with him, and that she would wind down the Corporation’s affairs so the two could part ways. Fakler states that since February 2011, she has been “completing open projects and collecting the receivables in an attempt to pay down the corporations [sic] obligations.” She states that, since February 2011, she has reduced payables by approximately \$40,000.00.

Fakler states that “there is currently no open work nor is there any business to dissolve or for a Receiver to run. Moreover, the only asset beyond the receivables is some used printing equipment and office furniture.” She provides a list of the

Corporation's equipment and furniture, and offers that "they are worth no more than \$25,000." She further states that she has taken possession of these items, and has advised Dziomba that she will take the furniture and equipment, and will apply that sum toward monies that she and her father are owed by the Corporation.

Based on the foregoing, Falker states that she does not oppose the motion insofar as it seeks an order of dissolution. However, she asserts that she would be the person appointed to complete and wind down the affairs of the Corporation.

In reply, Dziomba states that a receiver needs to be appointed in order to protect his interests in the Corporation. He claims that Fakler sold a portion of the Corporation's equipment and furniture, and is using some of the Corporation's "equipment, materials and employees" in another business Fakler established called NY Image Studio LLC ("NY Image"). He also states that Fakler breached her fiduciary duty to the Corporation by "running a printing job for Bloomingdales [sic] for her new company knowing that Bloomingdales [sic] was [the Corporation's] largest client."

BCL §1104-a(a)(2) allows for a shareholder of 20% or more of a corporation to petition for dissolution where "[t]he 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." BCL §1113 empowers the court to appoint a receiver to preserve corporate property. The receiver may be a director, officer or shareholder of the corporation (*id.*). However, the First Department has held the appointment of a neutral person to act as receiver is appropriate where there exists hostility between the two shareholders in a closely held corporation (*see In re Broder*, 265 A.D.2d 218 [1st Dept. 1999]).

Based on the foregoing, it is clear that dissolution is appropriate here. Moreover, the court finds that the appointment of a neutral receiver is warranted to preserve the assets of the corporation and wind down the corporation's affairs.

Wherefore it is hereby

ORDERED that the petitioner to dissolve the Corporation is granted, and the Corporation hereby is dissolved, and it is further

ORDERED, that the attorney for Dziomba transmit as required, one or more certified copies of this Order of Dissolution to the Department of State and to the clerk of the county in which the office of the Corporation is located, and it is further

ORDERED that the Corporation forthwith shall wind up its business affairs; and it is further

ORDERED that Mary D. Dorman, Esq., 134 W 26<sup>th</sup> Street Room 902, New York, NY 10001, (646) 230-7444, be and hereby is appointed Permanent Receiver with of the powers and duties in addition to those herein specifically provided for, as are possessed and conferred upon receivers pursuant to Article 12 of the Business Corporation Law, and is directed to take, receive, and reduce to her possession any and all assets, credits, and all real, tangible, and intangible property of the Corporation, to liquidate said assets, credits and property; to reduce to cash, as speedily as possible, the assets, credits, choses in action, and property of the Corporation which it may have or be entitled to or may be entitled to claim or receive; and it is further

ORDERED that the Permanent Receiver is authorized in her sole discretion if deemed necessary and appropriate, to give notice by publishing once a week for two successive weeks in an appropriate publication to be determined by the Receiver, requiring all persons indebted to the Corporation to render an account of all debts owing by them to the Corporation and to pay the same to the Permanent Receiver at a specified place and date, and requiring all creditors and claimants, including any with unliquidated or contingent claims and any with whom the Corporation has unfulfilled contracts to present their claims to th Permanent Receiver in writing and in detail at a specified place and date not less than six months after the first publication of such notice; and it is further

ORDERED that the Permanent Receiver shall execute and acknowledge, in the usual form, and file with the Clerk of this Court, a bond to the People of the State of New York in the penal sum of \$100,000.00 with a duly authorized surety company as surety, or with at least two sufficient individual sureties who shall severally justify, conditioned for the faithful discharge of their duties and for all monies or property of every kind received by her as such received, which bond is to be approved as to its sufficiency, form, and manner of execution and sufficiency of surety by a Justice of this Court; and it is further

ORDERED that said Permanent Receiver shall deposit all funds of the Corporation and all funds resulting from the operation and/or management of the Corporation, coming into her hands not needed for immediate disbursement in an escrow account maintained at JP Morgan Chase bank at 305 7<sup>th</sup> Avenue, New York, NY 10001; and it is further

ORDERED that all parties interested in New York Color Center Inc. be and they hereby are enjoined from in any way using, controlling, interfering with or encumbering the said corporation's property, and from collecting any debts due said corporation, or paying out any money belonging to said corporation, until the further order of this court.

Dated: August 17, 2011



EILEEN A. RAKOWER, J.S.C.

**FILED**  
**AUG 22 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE