

<b>Wolfsohn v Wolfsohn</b>
2011 NY Slip Op 33109(U)
November 18, 2011
Sup Ct, Nassau County
Docket Number: 007624-11
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court

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SYDELLE WOLFSOHN,

Petitioner,

-against-

TRIAL/IAS PART: 20  
NASSAU COUNTY

Index No: 007624-11  
Motion Seq. Nos: 1 and 2  
Submission Date: 10/3/11

JONATHAN WOLFSOHN, SEABROOK  
PROPERTIES, INC., MITCHELL ENTERPRISES,  
INC., MITCHELL CONDOS, LLC, NEW YORK  
TAX SERVICES, INC., WOLFSOHN & ASSOCIATES,  
INC., WOLFSOHN ACCOUNTING SERVICES, INC.,  
WOLFSOHN FINANCIAL SERVICES, INC., FSC  
TAX LIEN NEGOTIATORS INC., LONG ISLAND TAX  
SERVICE, INC. and CENTRAL AVENUE APARTMENT  
CORP.,

Respondents.

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The following papers have been read on these motions:

- Order to Show Cause, Verified Petition and Exhibits.....X
- Affidavits in Opposition (2) and Exhibits.....X
- Order to Show Cause, Affidavit in Support,  
Affirmation in Support and Exhibit.....X
- Affirmation in Opposition/Further Support and Exhibits.....X
- Reply Affirmation.....X

This matter is before the Court for decision on 1) the Order to Show Cause filed by  
Petitioner Sydelle Wolfsohn ("Petitioner") on May 24, 2011, and 2) the Order to Show Cause  
filed by Respondents on August 11, 2011, both of which were submitted on October 3, 2011.  
For the reasons set forth below, the Court 1) refers Petitioner's Order to Show Cause to a

hearing; and 2) denies Respondents' Order to Show Cause.

## BACKGROUND

### A. Relief Sought

Petitioner moves for an Order, pursuant to New York Business Corporation Law ("BCL") § 1104-a, dissolving the Respondent corporations.

Respondents oppose Petitioner's application, and move to dismiss the Verified Petition ("Petition") on the grounds that Petitioner lacks standing to pursue this action.

### B. The Parties' History

The Petition alleges as follows:

Respondents Seabrook Properties, Inc. ("Seabrook"), Mitchell Enterprises, Inc. ("Mitchell Enterprises"), Mitchell Condos, LLC, New York Tax Services, Inc., Wolfsohn & Associates, Inc., Wolfsohn Accounting Services, Inc., Wolfsohn Financial Services, Inc., FSC Tax Lien Negotiators, Inc., Long Island Tax Service, Inc., and Central Avenue Apartment Corp. (collectively "Corporations")<sup>1</sup> are New York corporations with their principal places of business at 153 Broadway, Lynbrook, New York.

On or about December 31, 2003, Milton Wolfsohn ("Decedent"), spouse of Petitioner and father to Respondent Jonathan Wolfsohn ("Jonathan"), passed away. Pursuant to Decedent's Last Will and Testament dated September 11, 2003 ("Will") (Ex. A to Pet.) and the Milton Wolfsohn Revocable Trust Agreement dated September 11, 2003 ("Trust") (*id.* at Ex. B), Petitioner became the sole beneficiary of Decedent's estate, which included his interests in the Corporations. As a result, Petitioner is and was a fifty (50%) percent shareholder in the Corporations and Jonathan is the holder of the other fifty (50%) percent share in the Corporations.

Petitioner alleges that Jonathan has "wrongfully shut out and locked out [P]etitioner from her ownership interest" in the Corporations (Pet. at ¶ 36) by, *inter alia*, 1) failing to account for profits and losses; 2) failing to share in the proceeds of the Corporations; and 3) failing to provide an accounting for each Corporation. Petitioner also alleges that Jonathan has acted in a

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<sup>1</sup> Although one of the Respondent entities is a limited liability company ("LLC"), the Court will refer to the entities collectively as the "Corporations."

“duplicitous and underhanded manner in exercising total control and domination” of the Corporations (*id.*), has breached his fiduciary duties and, on information and belief, has converted Corporate funds for his own benefit. The Petition also alleges that Jonathan breached the Stockholder’s Agreement dated September 6, 2005 (“Agreement”), entered into by Petitioner and Jonathan (Ex. C to Pet.), pursuant to which the parties 1) acknowledged their 50% ownership interests; and 2) agreed that all real estate assets, monies and profits stemming from their ownership of the Corporations Seabrook and Mitchell Enterprises, and any successors, “were to be split in accordance therewith” (*id.* at ¶ 115).

The Petition, which contains thirteen (13) causes of action, seeks the following relief: 1) dissolution of the Corporations pursuant to BCL § 1104-(a), with Petitioner receiving one-half of the proceeds of the liquidation, 2) an award of \$210,600.00 against Wolfson & Associates, Inc. and Jonathan for their breach of the Agreement, 3) awarding judgment against Jonathan for alleged conversion and other improper conduct, 4) ordering the Corporations to provide an accounting; 5) awarding judgment against Jonathan for his acts/omissions in connection with his alleged dominance over the Corporations; 6) awarding Petitioner profits, distribution and salary following the requested accounting; 7) ordering the Corporations to open and provide their books and records for the preceding five (5) years; and 8) appointing a receiver to immediately take charge of the Corporations.

In opposition to Petitioner’s Order to Show Cause, Jonathan submits that Decedent’s bequeath to Petitioner under his Will did not include any shareholder interest in any of the Corporations except for Mitchell Condos, LLC and Seabrook Properties, which is governed by the Agreement. Jonathan also affirms, *inter alia*, that 1) Mitchell Enterprises is inactive, although it was never formally dissolved; 2) Mitchell Enterprises still owns property but operates under the name Mitchell Condos, LLC for tax purposes; 3) the name Wolfson & Associates, Inc. is no longer valid in light of the Change of Name Certificate dated May 25, 2010 changing its name to Wolfsohn Accounting Services Inc.; 4) Central Avenue Apartment Corp. should not be part of this proceeding because the real estate that it owned was sold in 1999, and it owns no other properties; 5) Jonathan is the sole owner of the stock of New York Tax Services, Inc., and the Decedent had no involvement in this Corporation; 6) Jonathan and the Decedent were

signatories on the Wolfsohn Financial Services, Inc. checking account; 7) FSC Tax Lien Negotiators, Inc. has conducted no business since before the Decedent's death, and Jonathan filed a final tax return in 2010; 8) it was "part of the understanding between my father and me" (Jonathan Aff. in Opp. at ¶ 10) that Long Island Tax Service, Inc. was to be Jonathan's alone after the Decedent's death; 9) Jonathan's family understood that, upon Decedent's death, Petitioner and Jonathan's sister would receive all the investments including stocks, bonds, money and property, but the business was to remain Jonathan's; and 10) his sister received the net proceeds from the sale of his parents' home, and the business was left to him "to equalize whatever was left to my Mother and Sister" (*id.* at ¶ 12).

Respondents provide an Affidavit in Opposition of Jane Poliseno ("Poliseno"), who provided cleaning services to Decedent at his office and home for many years. Poliseno affirms that she "distinctly recalls" the Decedent stating to her that, upon his death, Jonathan would own and operate the accounting business in which they had worked (Poliseno Aff. in Supp. at ¶ 4). She also affirms that although she occasionally saw Jonathan's sister at the office, the Decedent told Poliseno that his daughter had no interest in the accounting business, and that the accounting business would ultimately be Jonathan's. Poliseno submits that it was "common knowledge" that the accounting practice was to become Jonathan's business (*id.* at ¶ 8).

Counsel for Respondents submits that the Court lacks subject matter jurisdiction because the Will, which left Decedent's entire estate, through a trust, to Petitioner, has not been admitted to probate. The source of counsel's assertion is his receipt of a report of the Guardian Ad Litem who recommended that the Will be admitted to probate. Thus, Respondents argue, as the Will has not yet been admitted to probate, Petitioner is not yet a "legitimate shareholder" (Erlitz Aff. in Supp. at ¶ 5) and has no standing to sue.

In opposition, Petitioner submits that Respondents' assertion that Petitioner lacks standing is "without merit" (Levin Aff. in Opp./Further Supp. at ¶ 3). Petitioner's counsel avers that Decedent's estate ("Estate") was submitted to Surrogate's Court and a Certificate of Voluntary Administration (Ex. A to Levin Aff. in Opp./Further Supp.) was issued on May 4, 2004 providing Petitioner with the authority to act as Voluntary Administrator of the Estate. Pursuant to this action, the assets of the Decedent passed to the Trust, of which Petitioner

was bequeathed ownership. Petitioner's counsel also provides an Affidavit in Relation to Settlement of the Estate Under Article 13, SCPA (*id.* at Ex. B), in which the original Will was submitted and the Trust Agreement was identified as the beneficiary. Petitioner's counsel submits that, from this point forward, Petitioner had standing to commence this action.

Petitioner's counsel affirms further that, by Commission dated October 5, 2010, Petitioner was granted Preliminary Letters Testamentary (Ex. C to Levin Aff. in Opp./Further Supp.), which additionally provided Petitioner with the authority to commence this action. Petitioner's counsel also provides a Decree of Probate dated August 30, 2011 and Letters Testamentary issued to Petitioner on the same date (*id.* at Ex. D). Petitioner concedes that these documents were issued after the filing of Petitioner's Order to Show Cause, but submits that the prior Surrogate's Court declarations and certifications provided Petitioner with standing to commence this action. Petitioner's counsel notes further that there was no challenge to the ultimate probate and submits that dismissal of this action would be "counter-productive, costly and procedurally inefficient" (*id.* at ¶ 7).

With respect to Respondents' opposition to Petitioner's Order to Show Cause, Petitioner submits that Jonathan has provided no proof in support of his challenge to Petitioner's allegation that she and Jonathan are each 50% owners of the Corporations. Jonathan concedes that Petitioner is a 50% owner of Mitchell Enterprises, Mitchell Condos, LLC and Seabrook. Moreover, he has provided no documentation substantiating his claims as to the ownership of the other Corporations, including Central Avenue Apartment Corp. and New York Tax Services, Inc. Petitioner notes, further, that Jonathan provided no documentation that demonstrates where the assets of the Corporations are located.

Petitioner submits further that Jonathan's references to his sister are of no evidentiary value. Petitioner also describes as "preposterous" (Levin Aff. in Opp./Further Supp.) Respondents' reliance on the Polisenno affidavit, noting that her affidavit contains no dates or times of the events described therein, and is inconsistent with the Estate documentation.

Respondents dispute Petitioner's contention that the assets of the Decedent passed to the Trust, noting that the Certificate states that it was issued to enable Petitioner to open an Estate bank account. Respondents also argues that, as the Letters Testamentary were not issued until

August 30, 2011, which was more than three months after the commencement of this proceeding, Petitioner lacks standing to file this action.

### C. The Parties' Positions

Petitioner submits that she has demonstrated her right to dissolution of the Corporations by establishing that she is an oppressed shareholder who has been totally cut out of the businesses, without the ability to review and analyze Corporate decisions, books and records, and that Corporate funds have been improperly diverted. Petitioner notes that Respondents have not disputed the allegations in the Petition regarding that oppression, and have not provided documentation reflecting where the Corporation's assets are located, and the value of those assets. Moreover, Respondents have provided no credible proof in support of their claims that Petitioner and Jonathan are not 50% owners of certain of the Corporations.

Petitioner submits, further, that in light of the Estate documentation provided, Petitioner has established her status as a shareholder with standing to pursue this action. That documentation demonstrates that the assets of the Decedent passed to the Trust, of which Petitioner was bequeathed ownership.

Respondents oppose Petitioner's application, disputing Petitioner's claim that Respondent and Jonathan are each 50% owners of all of the Corporations. Respondents also contend that, based on statements allegedly made by Decedent to his housekeeper, there is evidence that it was Decedent's intention that Jonathan operate certain of the Corporations.

Respondents also seek dismissal of the Petition. Respondents contend that, in light of the procedural history of the Estate proceedings, Petitioner was not a shareholder at the time she filed this action and, therefore, lacks standing to pursue this action.

## RULING OF THE COURT

### A. Standing

CPLR § 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity, or standing, to sue. Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. *Matter of Eaton Assoc. Inc. v. Egan*, 142 A.D.2d 330, 334-335 (3d Dept. 1988), citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984), *reh. den.*, 468 U.S. 1250 (1984). Standing involves a determination of whether the party seeking relief has a

sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. *Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). A plaintiff must thus demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dept. 2006), citing *Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339 (1976).

B. Judicial Dissolution Pursuant to BCL § 1104-a

BCL § 1104-a(a) and (b) provide as follows:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of 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.

(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

(1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

(2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

The appropriateness of an order of dissolution pursuant to BCL § 1104-a is within the sound discretion of the court considering that application. *Matter of Fancy Windows & Doors*, 244 A.D.2d 484 (2d Dept. 1997), citing *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63 (1984).

In construing BCL 1104-a, courts are to give the terms "illegal" and "fraudulent" their common meaning. *Id.* The term "oppressive" is not defined in the statute. Courts have,

however, held that a minority shareholder is subject to oppression when the majority or controlling parties' conduct defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. *Matter of Kemp*, 64 N.Y.2d at 73. See also *In the Matter of Charleston Square, Inc.*, 295 A.D.2d 425 (2d Dept. 2002); *In re Dissolution of Upstate Medical Associates, P.C.*, 292 A.D.2d 732 (3rd Dept. 2002); *Application of Rambusch*, 143 A.D.2d 605 (1st Dept. 1988).

Oppressive conduct is generally found where (a) a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, (b) an employee/shareholder is discharged without cause and thus deprived of his or her salary or (c) corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment. See *Matter of Weidy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d 81 (2d Dept. 1985) (minority shareholder fired from family business because of family dispute); *Kemp & Beatley, supra* (corporate policy changed after petitioners terminated employment to deny them distribution of corporate earnings); *Gunzberg v. Art-Lloyd Metal Products Corp.*, 112 A.D.2d 423 (2d Dept. 1985) (shareholders who were long term employees and officers who ran the corporation were removed from their office, fired and denied compensation); *In re Dissolution of Upstate Medical Associates, P.C., supra* (petitioner discharged from employment and excluded from operation of corporation for no legitimate business reason); *Matter of Topper v. Sheraton Park Pharmacy, Inc.*, 107 Misc. 2d 25 (Sup. Ct. N.Y. Co. 1980) (minority employee-shareholder who was most active member of business fired, removed as officer, removed as co-signer on corporate bank account, excluded from corporate offices and denied compensation).

Waste includes misappropriation of corporate assets for private purpose. *Cunningham v. 344 6<sup>th</sup> Ave Owners Corp.*, 256 A.D.2d 406, 407 (2d Dept. 1998).

### C. Application of these Principles to the Instant Action

The Court denies Respondent's Order to Show cause seeking dismissal of the Petition. The Estate documentation provided establishes that Decedent left his entire Estate, through a trust, to Petitioner. Decedent's Estate included his interests in the Corporations. Accordingly, Petitioner has established that she has a sufficiently cognizable stake in the outcome of this

action so as to cast the dispute in a form traditionally capable of judicial resolution. The Court concludes, further, that Jonathan's affidavit, which contains no support for his conclusory assertions as to Decedent's intent regarding the operation of the Corporations, and the Poliseno affidavit, which contains no details or specificity assuming *arguendo* that its apparently hearsay assertions were admissible, do not defeat, or create an issue warranting a hearing regarding, Petitioner's standing to pursue this action.

The Court refers Petitioner's Order to Show Cause to a hearing. While Petitioner has alleged conduct by Jonathan that would support dissolution of the Corporations pursuant to BCL § 1104-a, including his failure to account for profits and losses or to share in the proceeds of the Corporations, and Jonathan has not disputed those allegations, the Petition lacks details regarding, *e.g.*, Petitioner's efforts to obtain an accounting of profits and losses, Respondents' response to those efforts, whether Petitioner has been provided with any portion of the proceeds of the Corporations, and the basis for Petitioner's belief that Jonathan has improperly converted Corporate funds. The Court concludes that a hearing is appropriate so that these allegations can be amplified and explored, providing the Court with a fuller record on which to determine whether dissolution of the Corporations is appropriate.

All matters not decided herein are hereby denied.

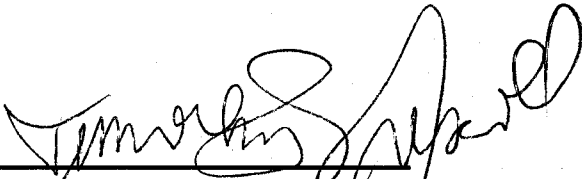
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on December 21, 2011 at 9:30 a.m. at which time the Court will schedule the hearing as provided herein and direct the filing of a note of issue.

ENTER

DATED: Mineola, NY

November 18, 2011

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
NOV 30 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE