

**Affiliated Agency, Inc. v Duggan**

2011 NY Slip Op 33667(U)

January 26, 2011

Supreme Court, Nassau County

Docket Number: 021033-10

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

-----X

**PETITION FOR DISSOLUTION OF**

**AFFILIATED AGENCY, INC.**

**BY RAYMOND COMPARATO,**

**Petitioner,**

**- against -**

**THOMAS J. DUGGAN and PHILIP S. MULLER,**

**Respondent.**

-----X

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 021033-10**

**Motion Seq. No: 1**

**Submission Date: 1/10/11**

**The following papers have been read on this motion:**

**Order to Show Cause, Petition and Affirmation in Support.....x**

**Affirmation in Opposition, Affidavit in Opposition and Exhibits...x**

**Affidavit in Opposition and Exhibit.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Petitioner Raymond Comparato ("Petitioner" or "Comparato") on November 9, 2010 and submitted on January 10, 2011. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety and dismisses the Petition.

**BACKGROUND**

**A. Relief Sought**

In his Order to Show Cause, Petitioner seeks an Order 1) pursuant to §§ 1104-a of the New York Business Corporation Law ("BCL") dissolving Affiliated Agency, Inc. ("Affiliated" or "Corporation"); and 2) pursuant to CPLR § 6401, appointing a temporary receiver

Respondents Thomas J. Dugan ("Dugan") and Philip S. Muller ("Muller") (collectively "Respondents") oppose Petitioner's application.

B. The Parties' History

The Petition alleges as follows:

The Corporation, whose principal place of business is 255 Executive Drive, Suite 207, Plainview, New York, was organized to conduct business as an insurance agency. Comparato, Duggan and Muller are directors ("Directors") of the Corporation. The Corporation is authorized to issue 200 shares of stock with no par value, of which 100 shares are issued and outstanding. Each Director owns 33 & 1/3 % of the outstanding shares.

The Petition contains the following allegations in support of the requested dissolution (§§ 7-9 of Petition):

This petition is being brought as the directors and shareholders Duggan and Muller, named above, are guilty of illegal and fraudulent conduct with respect to trust funds over which the non-petitioning directors and shareholders have control of by nature of the corporation's business and have frustrated the petitioners [sic] efforts to correct and cease this conduct.

That this petitioner [sic] is further being brought on the grounds that the non-petitioning shareholders and directors have engaged in oppressive actions towards the petitioner. Specifically, the non petitioning shareholders and directors have made decisions material to the interest of the petitioner's rights and entitlements to profits in violation of the agreed upon practice of the Corporation.

The petitioner submits that liquidation is necessary to prevent further fraudulent conduct and is reasonably necessary for the protection of the rights and interests of the petitioner.

In his Affidavit in Opposition, Muller affirms as follows:

Muller, Dugan and Petitioner founded Affiliated, which was incorporated in 1997, and are each 33-1/3 % shareholders of Affiliated. The parties entered into a Shareholder Agreement ("Agreement") dated March 1, 1998 (Ex. A to Muller Aff.) which sets forth the procedures to be followed when a shareholder offers his interest for sale and when a shareholder becomes permanently disabled. The Agreement also provides a method of determining the value a shareholder would receive for his interest in the Corporation.

Section 29(A)(1) of the Agreement provides as follows:

In the event a Shareholder shall become “permanently disabled,” as that term is defined hereunder, the Corporation shall purchase and the disabled Shareholder shall sell all of his shares of stock to the Corporation under the terms and conditions and at the purchase price set forth herein. However, this criteria shall be effective if, and only if, there is in effect at the time of the disability of said Shareholder a disability “buy-out policy” insuring the disabled Shareholder and said policy or policies shall pay the benefits as called for thereunder. In the event there is no insurance in effect at such time or in the event such insurance benefits are not payable for whatever reason, the provisions of this Section “A” shall become null and void and of no further effect, and the provisions of Section “B”[Non-funded Disability Purchase”] shall apply.

In August of 2010, the Hartford Life Insurance Company notified petitioner that he was approved for his claim of Long Term Disability benefits, effective June 4, 2010 (*see* letter, Ex. B to Muller Aff.). In light of Petitioner’s permanent disability, Petitioner was obligated to sell his shares to the Company, pursuant to the Agreement. Instead, Muller received a letter from Petitioner’s attorney dated August 26, 2010 (Ex. C to Muller Aff.), addressed to Duggan and Muller, which advised Respondents that Petitioner no longer desired to be a shareholder in the Corporation and requested a purchase agreement buying his shares out at the price of \$1,250,000.00 (“Purchase Price”). The letter stated that Petitioner was “greatly concerned about certain managerial judgments made and permitted by you both which [Petitioner] views as a gross departure from the sound management of [Affiliated] and no longer desires to be a shareholder in the agency.”

Muller directed his attorney to request from Petitioner 1) his purported justification for the Purchase Price, which far exceeded 1/3 of the Corporation’s value, and 2) specifics regarding Respondents’ alleged mismanagement of the Corporation. In response, counsel for Petitioner sent a letter to Muller’s attorney dated September 20, 2010 (Ex. E to Muller Aff.) in which Petitioner’s counsel asserted, *inter alia*, that 1) Petitioner’s concerns about Respondents’ conduct, and Petitioner’s desire to have Respondents purchase his shares, are “well known” by Muller; 2) the validity of the Agreement is in question; and 3) Petitioner desires either to be bought out, or to dissolve the Corporation.

Muller affirms that Petitioner has had full access to the Corporation’s books and records, noting that Petitioner has made no request for those items in this application. Muller affirms, further, that it is Petitioner’s own misconduct, and failure to comply with the Agreement, that has prompted Respondents to seek a declaratory judgment directing Petitioner to comply with the terms of the Agreement.

In his Affidavit in Opposition, Duggan affirms as follows:

The Agreement was “freely and openly” negotiated by the parties (Duggan Aff. at p.1). Duggan submits that Comparato has filed this action because he wishes to retire and is dissatisfied with the remuneration he will receive pursuant to the Agreement.

Affiliated is an ongoing business concern that operates at a profit. Affiliated employs 19 people who depend on that employment for their livelihood. Respondents have not barred Petitioner from Affiliate’s office, employees, clients or records. Moreover, Petitioner and his wife, who is also an agent for Affiliate, regularly communicate with and rely on the services of Affiliated’s employees.

C. The Parties’ Positions

Petitioner submits that the Petition adequately alleges that Respondents have violated their fiduciary responsibility with respect to the collection of insurance premiums and refunds. Petitioner contends, further, that the appointment of a receiver is appropriate because Respondents’ alleged misconduct exposes the Corporation to fines, penalties and revocation of licenses, and the receiver would “safeguard and protect these funds from further unauthorized use and possible loss” (Jannuzzi Aff. at ¶ 4).

Respondents oppose Petitioner’s application, submitting, *inter alia*, that 1) Petitioner’s application is procedurally improper because he has not named the Corporation, a necessary party, in this action; 2) the Petition consists of conclusory allegations of improper conduct that are insufficient to warrant an involuntary dissolution pursuant to BCL § 1104-a; and 3) Petitioner has failed to establish that the appointment of a receiver is appropriate, given Petitioner’s failure to establish that Respondents’ allegedly improper conduct adversely affected the assets of Affiliated.

## RULING OF THE COURT

### A. 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.

A corporation should be dissolved only as a last resort. *Matter of Parveen*, 259 A.D.2d 389 (1st Dept. 1999); *Matter of Imperatore*, 128 A.D.2d 707 (2d Dept. 1987). 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).

#### B. Appointment of a Receiver

With respect to Petitioner's application for the appointment of a receiver, CPLR § 6401 provides as follows:

(a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person

shall be joined as a party.

(b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

(c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis, supra*, the Second Department reversed the trial court's order granting plaintiff's motion for appointment of temporary receiver in light of plaintiff's failure to make the required evidentiary showing. *Id.* at 631-632.

C. Application of these Principles to the Instant Action

The Court concludes that the Petition fails to allege facts that would warrant dissolution of the Corporation pursuant to BCL § 1104-a. The Petition makes general, conclusory allegations completely lacking in specifics regarding the allegedly improper conduct of the Respondents.

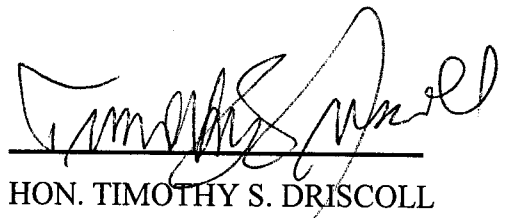
Given the paucity of the allegations in the Petition, Petitioner has also failed to meet his burden to warrant the appointment of a receiver.

In light of the foregoing, the Court dismisses the Petition.

All matters not decided herein are hereby denied.  
This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
January 26, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
FEB 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE