

Matter of Cusimano v Berita Realty LLC
2011 NY Slip Op 34207(U)
March 2, 2011
Supreme Court, Nassau County
Docket Number: 013147/2010
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

In the Matter of the Application of

RITA CUSIMANO,
Petitioner,

INDEX NO.: 013147/2010
MOTION DATE: 8/16/2010
SEQUENCE NO.: 01, 02

For the Judicial Dissolution of Berita Realty LLC,
pursuant to Section 702 of the Limited Liability
Company Law,

- against -

BERITA REALTY LLC, and BERNADETTE
STRIANESE,

Respondents.

The following papers were read on this matter:

Order to Show Cause for Dissolution of Berita Realty LLC	1
Order to Show Cause for Stay of Proceedings and Compel Arbitration	2
Memorandum of Law in Support of Application for Stay and Arbitration	3
Affirmation in Opposition to Motion for Stay and Arbitration	4
Reply Affirmation in further Support of Respondents' Application	5
Reply Memorandum in Further Support of Respondents' Application	6

PRELIMINARY STATEMENT

Petitioner moves by order to show cause for dissolution of Berita LLC and for an accounting. Respondent cross moves for a stay of the proceedings and to compel

arbitration .

BACKGROUND

This action was commenced on July 12, 2010 by the filing of the petition by Rita Cusimano, a 50% shareholder in Bertia, LLC. The request is for judicial dissolution of the company and for an accounting from her sister, Bernadette Strianese, also a 50% member of the company. Berita Realty LLC was formed in 2001 as a successor to Berita Realty Corp., the shares of which were equally owned by Rita Cusimano and Bernadette Strianese. The assets of Berita consist of a 19% ownership interest in Greenbriar Associates LLC. Greenbriar is the owner of the Marriot Resident Inn on Old Country Road in Plainview, NY.

According to counsel for petitioner, Greenbriar made substantial distributions during the period 1995 through 2005, amounting to a sum in excess of \$10 million. There was an additional special distribution as a result of a re – financing of a mortgage on Greenbriar Associates in an amount exceeding \$2 million. Until July 26, 2010, at which time counsel attended a meeting of Greenbriar, petitioner disavows any knowledge of these distributions and, despite her being a 50% owner of Berita, none of the distributions were given to her.

Counsel further request that pending the accounting, Ms. Cusimano be made an essential signing party on all disbursements being made by Berita, so that she can now monitor the inflow and outflow of funds. He also expresses objection to the implementation of the arbitration clause, contending that it is narrow in scope and does not encompass a request for an accounting or dissolution as a dispute which is capable of resolution by mediation.

Contrary to the position of petitioner, respondents contend that the Berita Operating Agreement contains an Arbitration Clause which is applicable to the controversies of dissolution and accounting. ¶ 20 of the Agreement provides as follows:

20. Arbitration

Any dispute, controversy or claim arising out of or in connection with this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to Michael G. Norman Or Andrew Schnurr, Jr., to act as an independent mediator. If said mediator cannot resolve the matter, then the dispute, controversy or claim, as above set forth, shall be submitted to , and settled by, arbitration in the city in which the principal place of business of the Limited Liability Company is then located, pursuant to the commercial arbitration rules then in effect of the American Arbitration Association (or at any other time or place or under any other form of arbitration mutually acceptable to the parties involved). Any award rendered shall be final and conclusive on the parties and a judgment thereon may be entered in a court of competent jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the cost of its own experts, evidence and attorneys' fees of a party if the arbitrator expressly determines that the party against whom such award is entered has caused the dispute, controversy or claim to be submitted to arbitration as a dilatory tactic or in bad faith.

Respondent contends that the petitioner's claims are arbitrable in that the dispute falls within the broad arbitration provision contained in the Operating Agreement and that claims for an accounting and dissolution are, in fact, arbitrable. Respondents further assert that the underlying action must be stayed until a determination is made on the motion to compel arbitration, and that respondent should be given an extension of time within which to, respond or otherwise move with respect to the order to show cause and petition of Cusumano.

Respondent takes issue with the request by petitioner for affirmative relief in the affirmation opposing the application for a stay and for arbitration. They also dispute petitioner's claim of lack of knowledge of distributions allegedly made by Greenbrier to

Berita between 1995 and 2005 since petitioner, as a 50% owner of Berita had every opportunity to attend meetings of Greenbrier or Berita and could have accessed the records at any time during the 10 year period. Counsel further notes that the lack of knowledge rings particularly hollow, in that the same accountants served Berita, Cusimano, Strianese, and Greenbriar during the period in question; life insurance has been maintained on behalf of Cusimano and Bernadette Strianese based on the “stated value” of Greenbriar; and Berita paid tax liabilities on behalf of petitioner directly to the IRS. Allegedly, according to counsel for respondents, Cusimano has had meetings with other members of Berita, its manager and accountant, Michael Norman, throughout the years, to discuss distributions, even to the extent of her having the K-1 personally explained to her.

DISCUSSION

Arbitrability

A request to dissolve a corporation is subject to arbitration where the parties agreed to arbitrate disputes. (*Spatz v. Ridge Lea Associates, LLC*, 309 A.D.2d 1248 [4th Dept. 2003]). There is no evidence that the respondents have in any way waived their claim for arbitration, raising it at the inception of the action commenced on July 10, 2010.

The Petition, Exh. “C” to respondents’ Order to Show Cause, itemizes the subjects of the controversy, including the succession of managers of Berita Realty, LLC, and five separate transactions, including: an allegedly unauthorized loan of \$50,000; issuance of a mortgage in the amount of \$295,535, apparently without interest between 2001 and 2005; representations of distributions to Cusimano in the amounts of \$407,111 in 2001, and \$107,000 in 2002, receipt of which is denied; allegedly unauthorized management fees in excess of \$139,290 between 2001 and 2008; and an unauthorized purchase and sale of 500 shares of Nortel stock with a loss of \$39,000 reported in 2005.

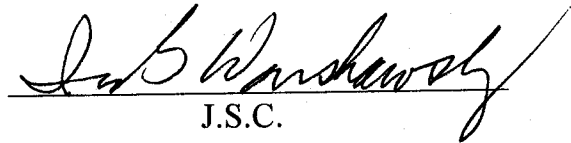
These are actions which are directly related to the operation and management of Berita, and are appropriately governed by the Arbitration Clause in the Operating

Agreement. It is noteworthy that the two parties identified in the clause are directly involved as accountants for the involved individuals as well as Berita. They would appear to be well-positioned to explain the claimed justification for the transactions complained of in the petition.

Petitioners' application for an accounting and dissolution is denied at this time. Respondents' application for a stay of the proceedings for dissolution and accounting pending arbitration is granted. The matter is referred for resolution of all issues, including those of dissolution and accounting, in accordance with the terms of the Arbitration Clause contained in the Berita Realty, LLC Operating Agreement.

This constitutes the Decision and Order of the Court.

Dated: March 2, 2011


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**