

Altop v TNT Petroleum, Inc.
2012 NY Slip Op 32262(U)
August 2, 2012
Supreme Court, Nassau County
Docket Number: 4612/12
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

UGUR ALTOP, Holder of Shares Representing
30% of the Votes of All Outstanding Shares
Entitled to Vote in an Election of Directors,
Suing Individually and Derivatively on Behalf
of TNT Petroleum, Inc., 2320 Union Boulevard,
Inc. and Ankara Realty Corp.,

INDEX No. 4612/12

MOTION DATE:
Motion Sequence # 1

Plaintiff-Petitioner,

For the Dissolution of TNT PETROLEUM, INC.,
2320 UNION BOULEVARD, INC. and ANKARA
REALTY CORP., Pursuant to Section 1104-a of the
Business Corporation Law,

-and-

TAMER AZAZ and TOLGA AZAZ,

Defendants-Respondents,

-and-

TNT PETROLEUM, INC., 2320 UNION
BOULEVARD, INC. and ANKARA REALTY
CORP.,

Nominal Defendants.

The following papers read on this motion:

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Order to Show Cause.....	X
Affidavit in Opposition.....	X
Affidavit in Support.....	X
Affidavit in further Support.....	X
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	X

Motion by petitioner Ugar Altop for the judicial dissolution of TNT Petroleum, Inc., 2320 Union Boulevard, Inc. and Ankara Realty Corp. is **denied** with leave to renew. Motion by petitioner for a temporary receiver of the assets of the corporations is **denied**. Motion by petitioner for a preliminary injunction restraining respondents from transacting business other than in the ordinary course, or exercising corporate powers, is **granted** to the extent indicated below.

Petitioner Ugar Altop is a 30 % shareholder of respondents TNT Petroleum, Inc., 2320 Union Boulevard, Inc. and Ankara Realty Corp. According to petitioner, respondent Tamer Azaz holds the other 70 % of the stock of all three corporations. The companies are involved in the retail and wholesale gasoline distribution business. Ankara Realty holds title to property improved with a gas station, car wash, and convenience store located at 171 Carleton Avenue in East Islip. 2320 Union holds title to a gas station located at 2320 Union Boulevard in Bay Shore. Azaz contributed the parcels of real property to the venture. Altop contributed working capital in the form of cash and lines of credit which he personally guaranteed.

Altop alleges that funds of the corporations were used to purchase a third property, 114 Carlton Avenue in East Islip, which is used for both residential and commercial purposes. Although title to 114 Carlton Avenue was taken in Azaz' name, Altop alleges that it was to be held in trust for the various companies. Altop alleges that since 2001 was responsible for the day-to-day operation of the business, except for the car wash at the Islip station, which was run by Azaz' son, respondent Tolga Azaz.

Altop alleges that in early 2011, Tolga seized possession of the corporations' financial records and denied Altop access to their banking records by changing the computer passwords. Altop further alleges that Tolga changed the locks at the 114 Carlton Avenue property. Altop alleges that in June 2011 he received a letter from Tolga dated November 8, 2010 purporting to remove Altop as an officer of the companies. Finally, Altop alleges that since May 2010 respondents have misappropriated approximately \$470,000 of the funds

of the corporations.

This proceeding was commenced on April 11, 2012. Petitioner seeks judicial dissolution of TNT Petroleum, Inc., 2320 Union Boulevard, Inc. and Ankara Realty Corp. on the grounds of looting of corporate assets and oppressive action toward petitioner under § 1104-a of the Business Corporation Law. In the second cause of action, in the form of alternative relief, petitioner seeks an “equitable buyout” of his shares. In the third cause of action, petitioner seeks to impose a surcharge upon respondents for wilful or reckless dissipation of assets pursuant to Business Corporation Law § 1104-a(d). In the fourth cause of action, petitioner asserts a derivative claim on behalf of the corporations for respondents’ breach of their fiduciary duties as officers and directors of the corporations. In the fifth cause of action, petitioner asserts a claim for an accounting as to the unauthorized distributions paid to respondents. Finally, in the sixth cause of action, petitioner seeks to impose a constructive trust on the 114 Carlton Avenue property.

By order to show cause dated April 11, 2012, petitioner seeks judicial dissolution of the corporations, as well as the appointment of a temporary receiver to preserve the assets and carry on the business of the corporations pursuant to BCL § 1113. Petitioner also seeks a preliminary injunction restraining respondents from transacting business other than in the ordinary course; from exercising any corporate powers, except with the consent of petitioner or permission of the court; from collecting any debt or paying out any property of the corporations; from transferring to themselves any funds of the corporations; and compelling respondents to provide weekly reports of the business of the corporations.

Pending the hearing and determination of the motion, the court restrained respondents from selling or mortgaging the real properties of the corporations, increasing lines of credit, ceasing to make regular debt payments of less than \$50,000 per month; transacting any business other than in the ordinary course; and directing respondents to maintain and preserve the books and records of the corporations.

On July 10, 2012, apparently 90 days after the petition was filed, respondent Tolga Azaz, claiming to be the majority shareholder of the three corporations, purported to exercise his right to purchase petitioner’s shares in the three corporations at fair value (See BCL § 1118).

In view of respondent’s purported election to purchase petitioner’s shares at fair value, petitioner’s motion for judicial dissolution of TNT Petroleum, Inc., 2320 Union

Boulevard, Inc. and Ankara Realty Corp. is **denied**, with leave to renew upon a showing that the election was untimely or, upon an affidavit from Tamer, that Tolga is not a shareholder of the corporations (See BCL § 1118[b]).

The court is authorized to appoint a receiver at any stage of a dissolution proceeding (BCL § 1113). However, a receiver should not be appointed, unless the complaining shareholder makes a clear showing of a serious risk of potential loss of his interest or a violation of the court's directives on the part of the other shareholder (*In re Harrison Realty Corp.*, 295 AD2d 220 [1st Dept 2002]).

Despite the outstanding debt and the significant decline in revenue since Tolga took over management, petitioner has not established that there is a serious risk of the loss of his 30 % interest in any of the three corporations. Accordingly, petitioner's application for the appointment of a receiver of the corporations is **denied**.

BCL § 1115 authorizes the court to issue an injunction, restraining the corporation's officers and directors from transacting any unauthorized business, from exercising any corporate powers, from collecting any debt or property of the corporation, or paying out the corporation's property, except by permission of the court. The court also possesses general equity power in aid of the dissolution proceeding (*Rust v Turgeon*, 295 AD2d 962 [4th Dept 2002]). Since the court may issue an injunction "at any stage" of the dissolution proceeding, an injunction may issue despite an election to purchase the petitioner's shares.

In order to protect the rights of creditors and secure petitioner's right to receive fair value for his 30 % interest, the temporary relief ordered by the court in its April 11, 2012 order to show cause shall continue, pending a hearing to determine the fair value of petitioner's shares (BCL § 1118[b]). Petitioner's application for injunctive relief is granted to that extent. Petitioner's request for a surcharge is denied with leave to renew upon the hearing to determine the fair value of petitioner's shares (Id).

A Preliminary Conference has been scheduled for September 24, 2012 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated AUG 02 2012

ENTERED  J.S.C.

AUG 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE