

**Matter of Nunziata v Village Chapels, Inc.**

2013 NY Slip Op 31775(U)

July 25, 2013

Sup Ct, Queens County

Docket Number: 4205/2013

Judge: Orin R. Kitzes

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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN KITZES

IA PART \_\_\_\_\_

-----x	Index
In the Matter of the Application of	Number <u>4205/</u> 2013
JOSEPH NUNZIATA, as Holder of One-Third	
of all Outstanding Shares Entitled to	
Vote in an Election of Directors,	Motion
	Date <u>May 1,</u> 2013
Petitioner,	

For the Dissolution of VILLAGE CHAPELS,	Motion Seq. No. <u>1</u>
INC., a Domestic Corporation, pursuant	
to Section 1104-a(a)(1) and (2) of the	
New York Business Corporation Law,	

-against-

JOHN DIMARIO and GEORGE H. LUHRING,

Defendants.

-----x

The following papers numbered 1 to 22 read on this proceeding by petitioner Joseph Nunziata for a judicial dissolution (1) dissolving Village Chapels Inc., pursuant to BCL 1104-a (1) and (2); (2) adjudicating of the rights and interests of the shareholders of Village Chapels Inc., pursuant to BCL 1104-a(d); (3) imposing a surcharge on respondents John DiMario and George H. Luhring, pursuant to BCL 1104-a(d); (4) enjoining and restraining respondents DiMario and Luhring from transacting any unauthorized business and from exercising any corporate powers, except by permission of the court, pursuant to BCL 1115(a) (1) ; (5) enjoining and restraining DiMario and Luhring, pursuant to BCL 1115(a) (2), from collecting or receiving any debt or other property of the corporation of the corporation, and from paying out or otherwise transferring or delivering any property of the corporation, except by permission of the court; (6) granting a preliminary injunction, pursuant to CPLR 6301, (a)enjoining and restraining DiMario and Luhring from hypothecating, secreting, wasting, transferring, withdrawing or otherwise using or depleting funds held in the name of or in any and all bank accounts in the name of Village Chapels, Inc., except as reasonably necessary in order for Village Chapels

Inc., to conduct its ordinary and normal course of business; (b) enjoining and restraining DiMario and Lurhing from utilizing any and all credit cards, charge cards and/or lines of credit held in the name of Village Chapels, Inc., except as reasonably necessary for Village Chapels Inc. to conduct its ordinary and normal course of business; (c) enjoining and restraining DiMario and Lurhing from raising their salaries from the current amount of \$65,000.00 per annum; and (d) enjoining and restraining DiMario and Lurhing from utilizing any assets of Village Chapels Inc., whether in cash, credit card, charge card, line of credit or otherwise, to pay their legal fees in connection with this proceeding. Respondents cross move for an order dismissing the petition on the grounds that it fails to state a cause of action, pursuant to CPLR 3211(a)(7) and 3212.

	<u>Papers Numbered</u>
Order to Show Cause-Affidavit-Exhibits.....	1-4
Affidavits of Service.....	5-10
Other Affirmation-Exhibits.....	11-12
Notice of Cross Motion-Affidavits-Exhibits.....	13-17
Opposing Affirmation-Affidavit-Exhibits.....	18-20
Reply Affirmation.....	21-22
Memorandum of Law	
Memorandum of Law	

Upon the foregoing papers the motion and cross motion are determined as follows:

Village Chapels Inc. operates a funeral parlor located at 67-67 Eliot Avenue, Middle Village, New York. Respondents John DiMario and George Lurhing are licensed funeral directors and it is alleged that they were previously employed by Village Chapels Inc. for many years, at which time the stock was owned by Annette Ferrarella.

On August 2, 2011, Joseph Nunziata, John DiMario, and George Lurhing purchased the shares of stock in said corporation from the prior owner. Pursuant to a shareholders' agreement dated August 2, 2011, the corporation was authorized to issue 60 shares of common stock with a par value of \$30,000.00, and Nunziata, DiMario, and Lurhing were each issued 10 shares of the outstanding stock. Mr. Nunziata, and his wife Susan Nunziata, provided the majority of the financing which enabled the parties to purchase the shares of stock in the corporation, and in an addendum to the shareholders' agreement, the corporation agreed to the payment of promissory notes it had given to Joseph Nunziata and Susan Nunziata.

Mr. DiMario and Mr. Lurhing, pursuant to the August 2, 2011 shareholders' agreement are salaried employees of Village Chapels,

Inc. Said agreement also provides that no salaries shall be paid to any of the officer or directors of the corporation until all of the expenses incurred by the corporation have been paid. A corporate resolution dated August 2, 2011, named John DiMario as president, George Lurhing as vice president and secretary and Joseph Nunziata as treasurer, until the next annual meeting of the Board of Directors.

The real property upon which the funeral parlor is situated is owned by Dinunzlu Group LLC, which was formed by Nunziata, DiMario and Lurhing in connection with the purchase of Village Chapels' stock. Nunziata, DiMario and Lurhing are each members of Dinunzlu Group LLC, and DiMario and Lurhing are its managing members. Village Chapels Inc., pursuant to a lease agreement dated August 2, 2011, agreed to pay rent to Dinunzlu Group LLC.

Petitioner Joseph Nunziata seeks the dissolution of Village Chapels Inc., on the grounds that he has not received a "single penny" in compensation from said corporation, has been "frozen out" of all business operations of said corporation, and has not been able to obtain all financial and accounting records of said corporation from respondents John DiMario, George H. Lurhing, or the corporation's accountant, Robert Lindholm, CPA, despite making appropriate demands, in accordance the shareholders' agreement; that no shareholders' meetings have been held, and that he has not been permitted to vote either as a shareholder or officer of Village Chapels, Inc.; and that DiMario and Lurhing are using the corporation's accounts and credit cards for personal, non-corporate purposes. He alleges that no vote was ever taken with respect to DiMario and Lurhing's salaries, although they are each receiving \$65,000.00, and that the corporation is also paying for their medical insurance, dental insurance, cellular phone bills, insurance and gas for their personal motor vehicles, miscellaneous ATM cash withdrawals, their personal food and beverage expenses, and DiMario's parking expenses when his son was in the hospital. He alleges that respondents DiMario and Lurhing are guilty of illegal, fraudulent and oppressive acts against him, and that the property and assets of the corporation are being looted, wasted or diverted by DiMario and Lurhing, and therefore seeks judicial dissolution of Village Chapels Inc.

Respondents have served an answer and interposed as affirmative defenses of failure to state a cause of action; that respondents have not paid any personal expenses from the business; and that no dividends have been paid to any shareholder and no dividends are expected to be paid.

In support of the cross motion to dismiss the petition, John DiMario and the corporation's accountant have submitted affidavits in which they assert that the all of the expenditure were for

legitimate business purposes, and that petitioner has received all the financial information he is entitled to, and that his claims are baseless. The accountant states that George Luhring each receive a salary of \$78,000.00, that these salaries are derived from tables for union workers, and are consistent with the amount paid to funeral directors.

Business Corporation Law § 1104-a, provides, in pertinent part, that "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . 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."

The Court of Appeals has equated the term "oppressive" conduct as utilized by BCL § 1104-a[a][1], to mean, in part, whether the acts complained of substantially defeat "the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise" (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72-73 [1984]; *Burack v I. Burack, Inc.*, 137 AD2d 523, 526 [2d Dept 1988 ]; see also *In re Charleston Square, Inc.*, 295 AD2d 425 [2d Dept 2002]). "Whether the expectations of the complaining shareholder are reasonable must of course be determined on a case-by-case basis" (*Matter of Burack*, 137 AD2d at 526; see also *Matter of Kemp & Beatley, Inc.*, 64 NY2d at 73).

It is well settled that "[t]he appropriateness of an order of dissolution pursuant to Business Corporation Law § 1104-a 'is in every case vested in the sound discretion of the court considering the application' " (*Matter of Fancy Windows & Doors Mfg. Corp.*, 244 AD2d 484 [2d Dept 1997] quoting *Matter of Kemp & Beatley, Inc.*, 64 NY2d at 73; *In re Parveen*, 259 AD2d 389, 391-392 [1st Dept 1999]), and that a corporation should be dissolved only as a last resort (*Application of Ng*, 174 AD2d 523, 526 [1st Dept 1991]; *Muller v Silverstein*, 92 AD2d 455[1st Dept 1983]).

Respondents cross motion to dismiss the petition is denied, as the petition sufficiently states a claim for judicial dissolution. However, as the parties conflicting affidavits raise questions of fact regarding the merits of the petition and the appropriate remedy, if any, to be granted, an evidentiary hearing is required (*In re WTB Props.*, 291 AD2d 566, 567 [2d Dept 2002]; *Matter of Steinberg [Cross Country Paper Prods. Corp.]*, 249 AD2d 551 [1998]; *Matter of Fancy Windows & Doors Mfg. Corp.*, 244 AD2d at 485; *Cassata v Brewster-Allen-Wichert, Inc.*, 248 AD2d 710 [2d Dept 1998]; *Giordano v Stark*, 229 AD2d 493, 494 [2d Dept 1996]; *Matter*

of Rosen, 102 AD2d 855 [2d Dept 1984])). The parties are directed to appear for a hearing in IA Part 17, courtroom 116, at the Supreme Court Queens County, located at 88-11 Sutphin Boulevard, Jamaica, New York 11435, on November 4, 2013, at 9:30 A.M.

Business Corporation Law § 1115 authorizes the court to issue an injunction, at any stage of the proceedings, 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]; *Matter of Schwartzreich*, 136 AD2d 642, 643 [2d Dept 1988] ).

Therefore, petitioner's application for injunctive relief is granted solely to the extent that the temporary relief ordered by the court in its March 5, 2013 order to show cause shall continue, pending the evidentiary hearing. Petitioner's request to adjust the rights and interests of the shareholders and to impose a surcharge is denied with leave to renew, if petitioner deems it necessary, following the evidentiary hearing.

Dated: July 25, 2013

---

J.S.C.