

**Qadan v Tehseldar**

2014 NY Slip Op 33762(U)

March 13, 2014

Supreme Court, Richmond County

Docket Number: 100354/12

Judge: Philip S. Stranieri

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 19

Index No.: 100354/12

GHAZI QADAN, Individually and as a shareholder  
of FURNITURE A 2 Z INC. and FURNITURE 123 INC.  
Suing on behalf of himself and in the right of  
FURNITURE A 2 Z INC. and FURNITURE 123 INC.

*Plaintiff*

DECISION & ORDER  
HON. Philip S. Stranieri

*against*

NOUMEIR TEHSELDAR, IHAB TARTIR,  
FURNITURE A 2 Z INC. and FURNITURE 123 INC.

*Defendant*

Plaintiff, Ghazi Qadan (Qadan), individually and as a shareholder of Furniture A2Z Inc. and Furniture 123 Inc., suing on behalf of himself and in the right of Furniture A2Z Inc. and Furniture 123 Inc., commenced this action in Supreme Court, Richmond County against the defendants, Noumeir Tehseldar (Tehseldar), Ihab Tartir (Tartir), Furniture A2Z Inc. (A2Z), and Furniture 123 Inc. (123), seeking an accounting and damages from the defendants, dissolution of the two corporations, payment of all debts and liabilities with division of the surplus between the parties, and appointment of a receiver to accomplish those purposes. A non-jury trial was held on February 19 and February 25, 2014. Both sides were represented by counsel.

Initially defendants had asserted counterclaims against the plaintiff. After the close of plaintiff's case. Defendants rested and withdrew their counterclaims. Only defendant Tehseldar testified for the defendants.

Background;

The testimony of the witnesses establishes that sometime in late 2010 Qadan, Tehseldar and Tartir orally agreed to enter into a business relationship to run a furniture store in Staten Island, New York. On January 4, 2011 they entered into a written lease with First 530-536 Bay Street LLC for the premises known as 530-536 Bay Street, Staten Island, New York. The tenant on the lease was Furniture 123 Inc. The lease was only signed by Tehseldar. The term of the lease is for five years and commenced January 15, 2011.

A search of Department of State Division of Corporations records shows Furniture 123, Inc. being incorporated as a domestic business corporation on

January 6, 2011 and Furniture A2Z, Inc., being incorporated as a domestic business corporation on February 7, 2011. Also submitted into evidence are stock certificates for both entities in Qadan's name, as well as federal and state tax filings for both corporations.

It was agreed between the three individuals that each would have a specific role in establishing and running the business. Qadan, who had worked in the furniture business for about twenty years was supposed to provide the expertise in ordering and managing merchandise and stock. Tehseldar who had experience in retail businesses was to handle deliveries and checking merchandise as it came in. Tartir, who was an attorney no longer practicing law, was to draft agreements and provide advice in that area. It was also understood that all would share the daily floor work in the store and would work about the same amount of hours each week. The store was to be opened and was open seven days a week. The business actually opened its doors sometime in February 2011.

On March 4, 2011 the three individuals entered into a written "Partnership & Management Agreement" (Agreement) in which it was agreed that they would each be one-third owners of the two businesses A2Z and 123. The agreement recited that they each contributed \$10,000.00 as working capital and that the "partnership" commenced business on February 1, 2011. It should be understood that this technically is not a "partnership" agreement as the businesses were not partnerships but corporations. It should be noted that the names of the two corporate entities are spelled wrong in the agreement. In spite of the mislabeling of the Agreement, the court will interpret the terms as being the binding contract between the three individuals setting forth their respective rights and obligations in their business endeavors. The Agreement was drafted by Tartir and not by independent counsel. None of the three individuals had the document reviewed by counsel prior to its execution.

Paragraph 20 of the Agreement creates a right of surviving partners to continue the business in the event there is a "retiring, incapacitated, deceased or insane" partner. Paragraph 21 of the Agreement set forth the method of valuating the interest of a partner who is "retiring, incapacitated, deceased, or insane." Paragraph 23 establishes the procedure to be followed in the event the relationship is "terminated." There is no provision in the agreement specifically dealing with the situation raised in this litigation for a voluntary or involuntary dissolution of the partnership.

Plaintiff alleges that neither of these clauses applies as he was forced out and was neither "retiring, incapacitated, deceased or insane." Defendants assert that the terms of the agreement are applicable because the parties voluntarily agreed to terminate their relationship and buy plaintiff out of the business.

Sometime in the spring of 2011, plaintiff alleges that he insisted that the business was making enough money to pay each of them some weekly compensation. The parties agreed to pay each other \$400.00 a week. Plaintiff received these payments until he stopped working in June 2011. Defendant testified that thereafter the defendants continued to pay each other \$600.00 a week. Plaintiff also testified that during that period the businesses had accumulated over \$30,000.00 in cash and he asked that they each take \$10,000.00. Plaintiff acknowledges that he received his \$10,000.00. Defendant stated that although the plaintiff took his \$10,000.00 neither of other two of them received any monies, instead electing to put the money back into the business. There is no documentary evidence to establish whether the additional \$20,000.00 was put back into the business as alleged or remains "under the mattress" at the premises with other undistributed cash.

It should be noted that neither 2011 corporate tax return lists any compensation being paid to the directors (line 12) nor does it list any salaries or wages being paid (line 13). Defendants assert that nothing was reported because the plaintiff failed to give them his social security number. If that was true, it would not be an excuse for failing to report the payments on the corporate return and certainly it would not be a reason not to report the payments to the defendants. This of course does not explain why payments to the other "partners" were not reported nor were any payments to the truck drivers and delivery persons which were hired on an as needed basis.

In June 2011 plaintiff stopped working. Plaintiff claims he was being forced out by the two defendants. It is agreed that prior to that time plaintiff had some health issues which prevented him from working to the same extent as the two defendants. After June 2011 plaintiff apparently had no management role in the business and received no salary or other distribution from either corporation. Plaintiff stated that the defendants relieved him of his responsibility of ordering merchandise. Defendant stated that the change was made not only because of plaintiff missing a substantial amount of time for health reasons, but because plaintiff was not properly controlling inventory and was ordering too much stock from Ashley Furniture which had a very low profit margin. Plaintiff testified that Tartir sided with Tehseldar in these decisions.

On October 13, 2011 an "Agreement to Purchase Back (Redeem) the Share Between Furniture 123 Inc. and Furniture A2Z Inc. (Purchaser) and Ghazi Qadan (Seller)" was drafted by Tartir. It provided that Qadan would sell his one-third interest in each entity for a total of \$17,000.00. On the signing of the agreement he would receive \$7,000.00 and then \$10,000.00 payable in three months payments. The agreement was never signed.

Thereafter, the parties met at the office of an attorney selected by the plaintiff in an attempt to finalize a settlement. It is asserted that before the matter could be resolved the attorney had a family emergency and the meeting ended. It

was not rescheduled. Submitted into evidence were the original stock certificates issued to plaintiff representing his one-third interest in each corporation. The certificates are signed by plaintiff, indicating that he was willing to have his shares purchased, but the transfer information has not been completed.

Unable to resolve this matter, plaintiff commenced this litigation in February 2012.

**Applicable Statutes:**

Plaintiff has alleged that owing to how the defendants have kept him from performing his duties as a shareholder and co-owner in the corporations, he is entitled to have the two corporations dissolved. The Business Corporations Law (BCL) law uses the term "petition" in regard to a proceeding for dissolution which usually indicates that a special proceeding should be brought pursuant to CPLR Article 4. This action has not been specifically delineated as one being brought as a special proceeding pursuant to BCL Article 11. However, as there are other causes of action being pled by the plaintiff for mismanagement which would entitle him to damages, it would not be in the interest of judicial economy to require a separate law suit be commenced for that purpose. The plaintiff may seek the remedy of dissolution in this action, as the cause of action is set forth in the complaint and there is no prejudice to the defendants [CPLR §2001].

BCL§1104 provides for dissolution of a corporation when there is deadlock between the directors which prevents the business from operating. A review of that statute leads to the conclusion that it is not applicable to the facts of this case.

BCL§1104-a permits a petition for judicial dissolution under special circumstances. To utilize this procedure, a shareholder need only own 20% of the shares of the corporation. It is undisputed that plaintiff owns one-third of the shares of each corporation so he has standing to bring this action seeking dissolution. Plaintiff must allege that the directors "in control have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" [BCL §1104-a(a)(1)]. The testimony at trial supports plaintiff's allegations in this regard as he was denied an accounting properly demanded to which he was entitled both as a shareholder and pursuant to statute. The actions of the defendants prevented him from participating in the business in the manner he had expected as part of their original understanding. As a result, he was prevented in continuing in the operation of the business. In addition it is obvious that the defendants failed to timely file tax returns and keep the books and records in any recognized manner. Within thirty days of the filing of this action in February 2011, defendants should have made available the books and records of the corporation for plaintiff to inspect and copy. This was not done.

BCL§1118 sets forth the criteria to be used in order to value the plaintiff's shares for purchase by the remaining shareholders. Within ninety days after the

filing of the petition, the remaining shareholders were to have the opportunity to purchase plaintiff's shares at "fair value." If that option was not exercised, the court may determine the fair value of plaintiff's shares as of the day prior to the filing of the petition. Plaintiff's summons and complaint which contained the request for dissolution was filed with the Supreme Court on February 10, 2012. In addition, the statute permits the court to award interest from the date the petition was filed to the date payment is received for the shares. Further, if as here, the defendants failed to act within ninety days after filing the petition to purchase the shares, the court may award reasonable attorneys fees.

For the purposes of valuation of the shares of a closely held corporation, "fair value" is what a prudent and informed investor would be willing to pay in order to buy the entire business as an on going entity [Markman v Exterior Delite, Inc., 14 Misc3d 910 (2006)].

**Plaintiff's Expert:**

Plaintiff, through his current counsel, pursuant to the Business Corporations Law, made demand to examine the books and records of the corporation. These demands were ignored until ordered by the court during the course of the litigation. A crate of documentation was made available to the plaintiff and submitted into evidence. Plaintiff engaged his own accountant to review the documents in an attempt to be able to offer an opinion as to the value of the businesses. Plaintiff's expert testified and was subject to cross-examination. It should be noted that on the date of trial defendants produced the 2011 corporate tax returns for both businesses.

The accountant testified that the books and records were in disarray and not kept in a manner to readily permit a complete review. He stated that he was able to obtain enough documents to render an opinion as to the value of plaintiff's share of the business. The accountant based his testimony on a review of seventeen months' records, February 1, 2011 through June 30, 2012. He pointed out a major discrepancy in defendants' bookkeeping in that a review of the actual sales invoices maintained by the defendants showed gross sales for that time period of \$828,295.75. While the corresponding sales tax returns for that period reported gross sales figures of \$511,885.00.

This is a serious discrepancy. A three hundred thousand dollar difference in gross sales is more than a "carrying error." Defendants did not call an accountant to contradict this testimony nor did they explain the apparent under-reporting of the gross sales on the state sales tax returns and on the 2011 corporate tax filing. It should be noted that the gross sales reported on the 2011 corporate tax returns matched the figures reported as gross sales for the same period on the sales tax returns. As the 2011 corporate tax returns were prepared by an accountant, albeit in December 2012, for the tax year ending December 31, 2011, the court must question what information was provided to the accountant to prepare the returns

and if accurate for 2011, did the apparent under-reporting discovered by plaintiff's expert occur beginning only in 2012 or this was and is a continuing problem with the defendants' recordkeeping. Why plaintiff's expert was able to discover the apparent reporting error while defendants' accountant did not was not resolved at trial.

Plaintiff's expert valued plaintiff's share of the business at \$108,000.00. He based this on taking twice the net profit over a two year period, placing a value on the inventory in existence after an inspection in January 2013, and adding back in monies expended for legal fees to defend this case from the business account by the defendants without the consent of the plaintiff. The accountant failed to include one-third of the security deposit posted in regard to the leasing of the Bay Street properties which the parties acknowledge came from joint funds. The expert calculated the net income per year as \$67,365.00, so that twice the annual net profits gave him a figure of \$134,730.00.

If the expert based plaintiff's share on twice the net profits. He does not explain how he arrived at \$108,000.00 as the value of plaintiff's share if he was using twice the annual net profit as the standard. Especially when the value of the inventory is added. His report does not explain how he reached the \$108,000.00 he testified to as the value of the two businesses.

Also the court must question the methodology used by the expert. The expert does not refer to any recognized sources such as Generally Accepted Accounting Principals (GAAP) or American Institute of Certified Public Accountants (AICPA) guidelines or standards to support his use of the method of taking twice the net profits as the proper or an acceptable measure for the valuation of a business. On the other hand, the defendants did not introduce any evidence or witnesses to dispute the findings of plaintiff's expert thereby leaving that testimony as being unchallenged.

There is an additional problem with the expert's conclusion. He based it on records of the defendants for a seventeen month period and then extrapolated the figures out for two years. It is clear from the testimony that plaintiff was no longer participating in the operation of the business after June 30, 2011 at the latest. If he was forced out as he alleges by the defendants, then the valuation of the business should be as of that date. The Agreement the parties signed in March 2011 anticipated that each would contribute to working at the business. Plaintiff was not converted to a mere investor because he was denied the right to participate. It would seem his share should be calculated on the value of a five-month old start-up furniture business. At that stage, the business being new, had little if any "good-will" or a measurable customer base. The Agreement was breached in June 2011. Because plaintiff is seeking damages arising from defendants' breach of their Agreement, under the above analysis, that is the date from which his share should be calculated.

However, under the BCL, because the plaintiff has sought dissolution of the two corporations, the valuation date for his share of the businesses is the day before the date the petition was filed February 10, 2012 [BCL §1118(b)]. Owing to the fact that none of the parties testified as to when they actually opened for business in February 2011, for the purposes of this litigation, the court will use the twelve-month period February 1, 2011 to January 31, 2012 as the time frame to be used for calculating the value of the plaintiff's share.

Based on the numbers as testified to by the expert, the average monthly net profits over seventeen months he reviewed February 1, 2011 to June 30, 2012, was \$5,613.81. Assuming that was a constant figure over that period of time, the net profit for the five months the plaintiff was active in the business, was \$28,069.05 and a one-third share for five months would be \$9,356.35. Those figures for twelve months are \$67,365.72 with plaintiff's one-third share being \$22,455.24.

The court is not convinced that using the gross sales over seventeen months accurately reflects the value of plaintiff's shares. A more accurate method would seem to be using a percentage formula to determine the net profits of the business. The expert found a net profit of \$95,434.79 was generated on gross sales of \$828,295.75 over that seventeen month period. This would be a 12% return. Taking that 12% figure and applying it to the gross sales figures reported on the sales tax returns and the 2011 corporate tax return of \$27,762.61 a month a 12% net profit on that amount of sales is \$3,331.51 a month or \$16,675.55 for a five month period. Plaintiff's one-third share under this scenario would be \$5,552.52. The net profit for the twelve month period is \$39,978.12. Plaintiff's one-third share is \$13,326.04. Because the expert failed to break down the gross sales/net profits figures on a monthly basis for the seventeen months he reviewed, it is impossible to determine if the defendants were underreporting gross sales for the entire seventeen months or in a more likely scenario, the underreporting occurred in higher amounts after the plaintiff stopped participating in the business as sales in all likelihood increased as the business became more established. This is supported by the defendant's testimony that they have opened two other furniture stores.

Owing to the uncontradicted, apparent underreporting of gross sales by the defendants, the court will construe the figures against the defendants as they kept and maintained the books, and use the calculation based on the gross sales/net profits the accountant calculated over the seventeen month period of a 12% profit margin.

In January 2013, a court-ordered inspection of the furniture on-hand at the store and a subsequently leased warehouse space disclosed \$48,051.00 of inventory according to the expert. Although defendants claim that the inventory increased substantially after the plaintiff left the business, no inspection as the plaintiff was entitled to conduct under the Business Corporations Law, could be made because of the non-cooperation of the defendants. The defendants did not offer any testimony

challenging that valuation. Therefore, the defendants are stuck with the value of the inventory as of the date it was conducted and are estopped from asserting a lesser value. Plaintiff's one-third share of the inventory value is \$16,071.00.

Added to the monies to be credited to plaintiff's account are \$2,575.00 for one-third of the legal fees defendants spent to defend this action which was from the assets of the corporations and should be credited back, a long with \$2,666.67 as one-third of the security deposit of \$8,000.00 posted with the landlord when the store was rented.

Finally, plaintiff is entitled to the return of his \$10,000.00 initial investment. The \$10,000.00 plaintiff received in the spring of 2011 was a distribution of profits and not a return of his initial investment.

This makes the total due plaintiff \$44,638.71 as the value of his share of the two businesses.

**Other Findings:**

The court rejects defendants' contentions that the terms of the Agreement concerning termination of the business and valuation of their respective shares are applicable to this situation. The evidence establishes that the plaintiff was no longer welcome in the business arrangement by the other two individual defendants. As such, once a voluntary dissolution or buy-out of his interests could not be negotiated, his only recourse was to the courts to seek a buyout of his shares or dissolution of the businesses.

It is also apparent that the defendants maintained the books and records of the business since its inception and the plaintiff had little or no involvement in keeping that documentation. The trial testimony and exhibits, lead to the conclusion that the books and records are not being kept accurately. Whether this is being done intentionally or through the inexperience or negligence of the parties is not before the court. However, a \$300,000.00 discrepancy between income on sales invoices and what defendants reported for tax purposes along with no compensation payments being reported and a completely blank Schedule L of the 1120 where Assets and Liabilities for the business are to be disclosed, including showing no inventory, does not indicate good faith compliance with the tax laws by the defendants.

**Conclusion:**

Plaintiff has prevailed on his claim that he was wrongfully excluded from the management of the two corporations, and that he was denied his right to an accounting from the individual defendants. He is entitled to have his share of the businesses purchased by the defendants or to have the businesses dissolved, the assets sold and the net profits distributed.

The value of plaintiff's share of the business as of January 31, 2012 is \$44,638.71 including the return of his \$10,000.00 investment. Pursuant to the BCL §1118, plaintiff's counsel is entitled to reasonable attorney's fees. Plaintiff's counsel is to submit an affirmation of services setting forth the work performed, time spent performing it and the charges for such services. Such amount will be added to the judgment amount due plaintiff.

Also pursuant to the BCL §1118 interest will be calculated on the value of the plaintiff's share from January 31, 2012 and added into the amount of the judgment.

Judgment for plaintiff in the amount of \$44,638.71 with interest from January 31, 2012, costs, disbursements and attorney's fees.

Plaintiff is directed to submit a judgment for approval by the court by March 31, 2014. Thereafter the defendants will have until June 15, 2014 to pay the amount of the judgment. In the event the defendants fail to make such payment. Plaintiff may file an affirmation of noncompliance and request the appointment of a receiver for the purpose of liquidating the two businesses.

In view of the testimony of the plaintiff's expert, a copy of this decision will be sent to the appropriate federal and state tax authorities.

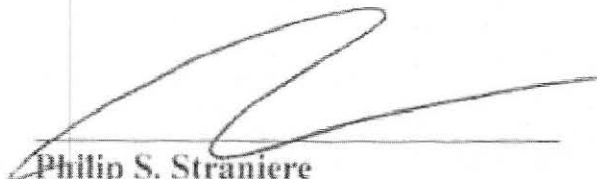
Exhibits, if any, will be available at the office of the clerk of the court thirty days after receipt of a copy of this decision.

The foregoing constitutes the decision and order of the court.

Accordingly, it is hereby:

ENTER,

DATED: March 13, 2014

  
Philip S. Straniere  
Acting Justice of the Supreme Court