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| Poubouridis v Drizis |
| 2015 NY Slip Op 32445(U) |
| October 15, 2015 |
| Supreme Court, Queens County |
| Docket Number: 3663/15 |
| Judge: Howard G. Lane |
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Upon the foregoing papers it is ordered that the petition and cross motion are determined as follows:

This court finds that those branches of Agelis' cross motion to dismiss the petition for judicial dissolution of Maximus are denied. First, Agelis cross-moves to dismiss the petition pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, asserting that petitioners failed to personally serve him with process as required by CPLR 308 and 403 and as directed by the order to show cause. In opposition, however, petitioners submitted a process server's affidavit of service indicating that Agelis was personally served at his residence, which constituted prima facie evidence of proper service of process pursuant to CPLR 308(1) (*see Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733 [2015]; *Scarano v Scarano*, 63 AD3d 716 [2009]). Agelis failed to rebut the specific facts contained in that affidavit of service (*id.*). As such, that branch of the cross motion by Agelis to dismiss the petition for lack of personal jurisdiction is denied.

That branch of Agelis' cross motion to dismiss the petition pursuant to CPLR 3211(a)(3) on the ground that petitioners lack standing to commence the proceeding because they do not hold one-half of the shares of the corporation as required by BCL § 1104(a) is also denied. To commence a proceeding for the dissolution of a corporation in the case of deadlock among directors or shareholders, where as here, the petitioner must be a holder of "shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors" (BCL § 1104[a]). The burden of establishing the requisite ownership interest in a corporation that is the subject of a dissolution proceeding rests with the petitioner (*see Matter of Iceland Inc.*, 97 AD3d 579 [2012]). Here, petitioners offered sufficient evidence (i.e. tax records) establishing that each party owns a 25% interest in Maximus and, therefore, are entitled to commence a proceeding for dissolution under BCL § 1104 (*see e.g. Rosenfeld v Luccaro*, 2009 NY Slip Op 30963[U] [Sup Ct, Nassau County 2009]).

The court will now turn to the branch of Agelis' cross motion to dismiss the petition pursuant to CPLR 3211(a)(4) on the ground that a related action is pending in Supreme Court, New York County. CPLR 3211(a)(4) permits the dismissal of an action

where there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires. Given that the New York County action and the dissolution proceeding, which was commenced prior to the plenary action, will be consolidated or jointly tried, as discussed below, the issues of judicial economy and inconsistent determinations have no bearing and do not weigh in favor of a dismissal of this proceeding.

That branch of Agelis' cross motion to dismiss the petition pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). Pursuant to BCL §§ 1104(a), the holders of one-half of the outstanding shares of a corporation may petition for dissolution of the corporation where (1) the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained, (2) the shareholders are so divided that the votes required for the election of directors cannot be obtained, and (3) there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders. In support of his cross motion, Agelis contends that the petition fails to state a claim under BCL §§ 1104(a)(1), (a)(2), and (a)(3) because the grounds upon which petitioners seek dissolution of the corporation are inapplicable. Specifically, Agelis argues that Maximus has never had any directors and that petitioners never attempted to elect directors or requested to do so. In addition, Agelis argues that there is no internal dissension because petitioners excluded respondents from any participation in the affairs of the corporation. However, Agelis' cross motion to dismiss attacks the merits of the petition and not its sufficiency. Accepting the facts as alleged in the petition as true and according petitioners the benefit of every possible favorable inference, this court finds that petitioners' allegations are sufficient to support their claim for dissolution of Maximus pursuant to BCL §§ 1104(a)(1), (a)(2), and (a)(3).

Agelis also seeks dismissal of the petition pursuant to CPLR 3211(a)(10) on the ground that petitioners failed to name necessary parties, namely Anthony Drizis and Allied Telecom Corp. (Allied). CPLR 1001(a) defines a necessary party as "[p]ersons who ought to be parties if complete relief is accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action. . . ." In support of his cross motion, Agelis failed to offer evidence that Anthony Drizis is a shareholder in Maximus. In addition, since Allied is a named defendant in the New York

County action and that action will be tried jointly with the dissolution proceeding, as will be discussed below, Allied will not be inequitably affected by a judgment in this proceeding.

Agelis cross-moves in the alternative to consolidate the instant proceeding with an action entitled *Agelis v Poubouridis* (index No. 651009/15), pending in Supreme Court, New York County. Pursuant to CPLR 602(a), when actions involve a common question of law or fact, the court may order a joint trial or consolidate the actions. There is a preference for consolidation in the interest of judicial economy, unless the party opposing the motion demonstrates prejudice to a substantial right (*see Lecorps v Bromberg*, 127 AD3d 931 [2015]). Here, in the plenary action, Agelis alleges against petitioners, inter alia, breach of fiduciary duties, misappropriation of corporate funds, mismanagement, and fraud in relation to Maximus. It is clear that the issues in that action are inextricably intertwined with the instant dissolution proceeding. It is also noted that the dissolution of Maximus is one of the remedies sought by Agelis in the plenary action. Moreover, respondents have not demonstrated that consolidation would prejudice a substantial right. Given that both actions involve common questions of law and fact, concern the same parties, and are still in the early stages of discovery, consolidation of the instant proceeding and the plenary action is warranted to avoid the possibility of inconsistent verdicts and in the interests of judicial economy (*see e.g. In re Dissolution of Tosca Brick Oven Bread*, 243 AD2d 416 [1997]). The court further finds that, in order to avoid jury confusion, the two actions should be consolidated for joint trial since consolidation would result in certain parties appearing as both plaintiff and defendant (*see generally Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [2005]). Therefore, that branch of Agelis' cross motion to consolidate is granted only to the extent of ordering a joint trial.

With respect to the issue of venue, absent exceptional circumstances involving the convenience of material witnesses, the venue of a consolidated action should be the county in which the first action was commenced (*see Parker v Troutman Sanders LLP*, 89 AD3d 638 [2011]; *Teitelbaum v PTR Co.*, 6 AD3d 254 [2004]). In this case, the instant proceeding was commenced before the action in New York County and, thus, the proper venue is Queens County.

In view of the foregoing, Agelis' remaining requests for relief are denied.

Accordingly, the petition for dissolution is denied. That branch of the cross motion by Agelis to dismiss the petition is also denied, and Agelis shall serve a verified answer to the petition within fifteen (15) days from service of a copy of this order with notice of entry. In addition, that branch of the cross motion to consolidate the instant

proceeding and the action entitled *Agelis v Poubouridis*, pending in Supreme Court, New York County, under index No. 651009/15, is granted to the extent that the actions shall be tried jointly in Supreme Court, Queens County. A Supreme Court, Queens County index number shall be obtained for the action now pending in Supreme Court, New York County. Each action joined for trial shall have its own index number and separate requests for judicial intervention and notes of issue shall be filed for each action.

The title of the actions to be tried jointly shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

DEMETRIO POUBOURIDIS and VASILIOS
STERGIOU, on behalf of themselves as shareholders and
directors of and in the right of MAXIMUS I
CONTRACTING CORP.,

Action No. 1

Index No. 3663/15

Petitioners,

-against-

HELEN DRIZIS THEODORE AGELIS and
MAXIMUS I CONTRACTING CORP.,
Respondents.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

THEODORE AGELIS, individually, and derivatively
on behalf of MAXIMUS I CONTRACTING CORP.;
and derivatively on behalf of BJTT CORP. d/b/a
STARGATE; and derivatively on behalf of 29-06
172 STREET CORP. d/b/a KALAMAKI,

Action No. 2

Index No. TBA

Plaintiffs,

-against-

DEMETRIOS POUBOURIDIS, VASILIOS
STERGIOU, ARIS KONSTANTINIDIS, ALLIED
TELECOM CORP., and V-TECH TELECOM, INC.,
Defendants.

Agelis is directed to serve a copy of this order with notice of entry on the Clerk of the Supreme Court, New York County, who, upon receipt of any required fees, shall transfer the file of the action entitled *Agelis v Poubouridis* (Index No. 651009/15), to the Clerk of the Supreme Court, Queens County. A copy of this order shall be served on all parties and the Clerk of Queens County, and shall also be affixed to the notes of issue at the time of filing.

Dated: October 15, 2015

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Howard G. Lane, J.S.C.