

Matter of Srybnik v Srybnik

2016 NY Slip Op 31066(U)

March 30, 2016

Supreme Court, New York County

Docket Number: 160603/15

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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In the matter of

CAROLYN SRYBNIK, in her capacity as the Preliminary
Executor of the Estate of Louis Srybnik, the owner of fifty
percent of the outstanding shares of KERNS
MANUFACTURING CORP., LIFE SCIENCE
PHARMACEUTICALS INC., 186-194 IMLAY ST. REALTY
CORP., RIVERSIDE MACHINERY CO., WATER POWER
INTERNATIONAL, INC., and ADVANCED AIRCRAFT
TECHNOLOGY, INC., all domestic corporations, for
dissolution pursuant to Business Corporation Law § 1104,

Petitioner,

Index No.: 160603/15
(Action 1)

-against-

SIMON SRYBNIK, JUDITH SRYBNIK, KERNS
MANUFACTURING CORP., LIFE SCIENCES
PHARMACEUTICALS, INC., 186-194 IMLAY ST.
REALTY CORP., RIVERSIDE MACHINERY CO.,
INC., WATER POWER INTERNATIONAL, INC.,
and ADVANCED AIRCRAFT TECHNOLOGY, INC.,

Respondents.

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In the matter of

CAROLYN SRYBNIK, in her capacity as the Preliminary
Executor of the Estate of Louis Srybnik, the owner of a
fifty percent membership interest in PREMIER ATLANTIC
PROPERTIES, LLC, a domestic limited liability company,
for dissolution pursuant to Limited Liability Company Law
§ 702,

Petitioner,

Index No.: 160821/15
(Action 2)

-against-

SIMON SRYBNIK, PREMIER ATLANTIC
PROPERTIES, LLC and JUDITH SRYBNIK

Respondents.

-----X

ANIL SINGH, J.:

Motion sequence numbers 1, 2, and 3 in action one and motion sequence numbers 1, 2, and 3 in action two are consolidated for disposition.

In action number one, petitioner Carolyn Srybnik (Carolyn), in her capacity as the preliminary executor of the Estate of Louis Srybnik (Louis), the owner of fifty percent of the outstanding shares of Kerns Manufacturing Corp., Life Science Pharmaceuticals Inc., 186-194 Imlay St. Realty Corp., Riverside Machinery Co., Inc., Water Power International, Inc., and Advanced Aircraft Technology, Inc. (collectively, the Srybnik corporations), moves for an order dissolving those corporations pursuant to Business Corporations Law (BCL) § 1104.

In action number two, petitioner Carolyn, in her capacity as the preliminary executor of the Estate of Louis Srybnik, the owner of a fifty percent membership interest in Premier Atlantic Properties, LLC (the LLC), moves for an order dissolving that limited liability company pursuant to Limited Liability Company Law (LLCL) § 702.

Respondents Simon Srybnik (Simon), Judith Srybnik (Judith), the Srybnik corporations and the LLC cross-move to dismiss the petitions.

In addition, Carolyn cross-moves in action one, pursuant to CPLR 3025 (b), to amend the petition and she cross-moves in both actions for sanctions against the respondents, but not their attorneys.

FACTS COMMON TO BOTH ACTIONS

Petitioner alleges that Louis and Simon were each 50% owners of the Syrbnik corporations and the LLC. Pursuant to a shareholders' agreement executed on April 19th, 2013, which encompasses both the Syrbnik companies and the LLC, Louis and Simon agreed that:

2. Survivor's Right of First Refusal

a. Following the death of a party, in the event that his heirs . . . estate or legal representative should, within three (3) years after the date of death, receive a bona fide offer from a third party . . . of a proposed purchase and sale of any Interests (a 'Third Party Offer'), the surviving party, if still living, shall have a right of first refusal to purchase the said interests on the same terms and conditions as are contained in the Third Party Offer.

* * *

3. Deadlock

a. As is stated in the Recitals, the Parties each own equal percentages of the Companies; they have at all times been members of the Boards of Directors of the Companies; and despite the absence of a controlling interest by either Party, there has never been a deadlock on any matter requiring a unanimous vote of the shareholders or directors.

* * *

c. It is further stipulated that, upon the death of either party, the surviving party will, *a fortiori*, have knowledge and experience in the ownership, operation, management, and control of the Companies superior to that of the decedents' heirs . . . executors . . . or legal representatives.

d. By reason of the survivor's superior knowledge as so demonstrated and stipulated; given that the interests of the survivor may be adverse to the interests of the decedent's beneficiaries heirs or estate; and given that the survivor may find himself deadlocked with the decedent's beneficiaries, heirs or estate in matters requiring the unanimous vote of the shareholders or directors, it is further

stipulated and agreed that in the event of a deadlock on any decision that requires a unanimous vote of the shareholders or directors, the surviving party shall have the tiebreaking vote.

* * *

6. Miscellaneous

g. This Agreement supersedes all Agreements previously made between the Parties relating to the subject matter hereof, including but not limited to conflicting or differing Shareholder Agreements, Operating Agreements, bylaws, and/or resolutions, and the Parties state that there are no understandings or Agreements between or among them other than as set forth in this Agreement. In the event that this Agreement conflicts with any such prior or contemporaneous Agreement, etc., this Agreement shall be controlling

(Amended Petition, exhibit 2).

In August 2013, Louis prepared his last will and testament (will) which named Caroline and Simon as co-executors. Article V (B) of the will provides that, “if at any time SIMON and CAROLINE are the Fiduciaries serving hereunder and shall disagree as Executors as to matters pertaining to my estate the determination of SIMON or his successor Fiduciary shall be binding upon my estate” (La Sala Affirmation, exhibit D).

Louis died on May 30, 2015 at the age of 91. His brother Simon, age 99, and his wife Caroline survive him.

In September 2015, Caroline submitted a petition to the Surrogate’s Court, New York County, to admit Louis’s will to probate.¹ As part of her petition to admit the will to probate, Caroline requested that “preliminary letters testamentary” be issued to her; that “letters testamentary” be issued to her and Darby Macfarlane, the designated successor executor, instead

¹ *Mater of Louis Srybnik*, File No. 2015-3422

of to Simon; and that the Surrogate's Court decline to grant letters testamentary to Simon because, "[u]pon information and belief, [Simon] is infirm and lacks the requisite level of understanding to execute the office of executor" (La Sala affirmation, exhibit G; see Surrogates Court Procedure Act [SPCA] § 707 [1] [e]).

Simon filed a cross petition in Surrogate's Court seeking: (1) revocation of the "preliminary letters testamentary" issued to Caroline; (2) issuance of "preliminary letters testamentary" to him; (3) the issuance of "letters testamentary" to him or, alternatively, that "letters testamentary be issued to him, Caroline and a disinterested third-party who would be agreeable to both Simon and Caroline". In addition, Simon filed objections to the issuance of "preliminary letters testamentary" to Caroline.

Thereafter, on October 15, 2015, Caroline filed, in this court, a Petition for dissolution of the Syrbnik corporations under BCL §§ 1104 (a) (2) and 1104 (a) (3)² (action one). The petition also names Simon as a respondent and alleges that Simon is unable to exercise his tie-breaking power under the will and the 2013 Shareholders' Agreement, because of his advanced age and lack of mental capacity. In that petition, Caroline alleges, on information and belief, that Simon is "no longer of sufficiently sound mind and body to operate competently as the final decision maker" with respect to the affairs of the corporations (Amended Petition, ¶ 18).

On October 21, 2015, Caroline filed, in this court, a petition for dissolution of the LLC

² BCL sections 1104 (a) (2) and (3) permit the holders of one-half of the shares of a corporation to petition the court for dissolution on the grounds "[t]hat the shareholders are so divided that the votes required for the election of directors cannot be obtained" and "[t]hat there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders."

pursuant to section 702 of the LLCL.³ That petition also alleges, on information and belief, that Simon is unable to competently exercise his tie breaking power under the 2013 Shareholders' Agreement due to his advanced age and mental incapacity (Petition, action two, ¶ 8).

Simon has cross-moved, in both actions, to dismiss the petitions or to transfer the supreme court actions to Surrogate's Court or to stay these proceedings, on the grounds, inter alia, that the threshold questions of Simon's capacity, and/or incapacity, and Caroline's standing to act as representative of Louis's estate are currently before the Surrogate and will be decided in the probate proceeding. It is respondents' position that, if Simon is found competent in the probate proceeding, his tie-breaking authority under the will becomes operative and his determination that dissolution is not in the best interest of the estate becomes binding on the estate. In addition, he posits that the Surrogate's decision will also be significant in determining his competence in this proceeding. If he is determined to be competent, his tie-breaking power under the Shareholders' Agreement would become operative to defeat dissolution.⁴

Caroline opposes a stay on the grounds that she has been issued preliminary letters testamentary to act as executor of Louis's estate and that, as such she has standing to seek dissolution. Moreover, she argues that while Louis's will does appoint Simon as a co-executor,

³ LLCL section 702 is titled "Judicial Dissolution" and it states that, "[o]n application by or for a member, the supreme court . . . may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."

⁴ Simon alleges, in both the Surrogate's proceeding and in these civil actions, that he is competent and has the capacity to run the Srybnik corporations and the LLC. In support of his allegations in the civil actions, he has submitted the affidavits of several executives and employees who work with Simon on a daily basis and who attest that he is capable of making the high-level strategic and financial decisions that are necessary to run the Srybnik corporations and the LLC.

there is little chance that he will ultimately receive that appointment because of his lack of capacity.

For the reasons stated below, the branches of respondents' cross motions that seek to stay these actions pending resolution of the issue of Simon's competence in the Surrogate's Court proceeding are granted.

DISCUSSION

CPLR 2201 provides that, “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

In *Belopolsky v Renew Data Corp.* (41 AD3d 322, 322-323 [1st Dept 2007]), the First Department affirmed a lower court decision that granted a stay of the *Belopolsky* action pending determination of a previously commenced related case, stating,

“[u]pon due consideration of the goals of judicial economy, orderly procedure and the prevention of inequitable results, we conclude that the court did not exercise its discretion improvidently by staying this action pending resolution of the previously commenced related action. Even though there was not a complete identity of the parties, there were overlapping issues and common questions of law and fact and the determination in the prior action may dispose of or limit issues which are involved in the subsequent action”

(internal quotation marks and citations omitted; *see also Doronin v Amanat*, 133 AD3d 524 [1st Dept 2015]; *SSA Holdings LLC v Kaplan*, 120 AD3d 1111 [1st Dept 2014]; *Lupoli v Lupoli*, 205 AD2d 595, 595 [2d Dept 1994] [“the Supreme Court did not err in staying this action, pending resolution of the Surrogate's Court proceeding, as the determination in the Surrogate's Court proceeding may dispose of the issues in the instant action”]).

The question of Simon's mental capacity, a pivotal issue in the Surrogate's Court and the dissolution actions, is currently pending in the previously commenced Surrogate's Court matter. Indeed, in the Surrogate's Court case, Caroline has alleged, on information and belief, that Simon is "infirm and lacks the requisite level of understanding to execute the office of executor" and she has asked the Surrogate to disqualify Simon as an executor pursuant to SCPA §707 (1) (e)⁵ (Srybnik aff, exhibit G).⁶

Moreover, in a November 20, 2015 letter, Caroline's counsel requests that the parties schedule Simon's deposition, "that would be limited to the threshold issue in both the Surrogate's Court and the two dissolution actions pending in the Supreme Court: Simon Srybnik's current mental faculties" (LaSala affirmation, exhibit K).

Staying the dissolution actions, pending resolution of Simon's capacity to act as executor in Surrogate's Court would promote judicial economy and avoid the possibility of inconsistent adjudications. A determination that Simon has the capacity to act as executor in Surrogate's Court could dispose of the dissolution actions because Simon could invoke his tie-breaking power under both the will and Shareholders' Agreement to determine that dissolution is not in the best interest of the shareholders.

The question of transfer of the dissolution actions to Surrogate's Court (*see* CPLR 325 [e]) will be addressed, if necessary, following the Surrogate's determination of Simon's capacity

⁵ SCPA 707 (1) (e) provides that letters testamentary "may issue to a natural person or to a person authorized by law to be a fiduciary except as follows. 1. Persons ineligible . . . (e) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office."

⁶ *Estate of Louis D. Srybnik*, File No. 2015-3422

to act as executor.

Accordingly, it is ORDERED that respondents' cross motion to dismiss in action one is granted to the extent of staying further proceedings in that action, except for an application to vacate or modify the stay; and it is further

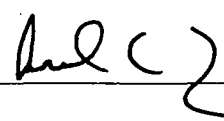
ORDERED that respondents' cross motion to dismiss in action two is granted to the extent of staying further proceedings in that action, except for an application to vacate or modify the stay; and it is further

ORDERED that either party, in action one or action two, may make an application by order to show cause to vacate or modify the stay upon the determination of Simon's competence to act as executor in the Surrogate's Court proceeding known as Estate of Louis D. Srybnik, File No. 2015-3422, pending before the Surrogate's Court, New York County; and it is further

ORDERED that respondents are directed to serve a copy of this order with notice of entry on the Trial Support Office (Room 158).

Dated March 30, 2016

ENTER:



J.S.C.