Matter of Skoler v Country Group Inc.
2016 NY Slip Op 31924(U)
October 11, 2016
Supreme Court, New York County
Docket Number: 650108/2015
Judge: Lawrence K. Marks

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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In the Matter of the Application of Joseph Skoler and Susan Necheles, the Holders of Fifty Percent of All Outstanding Shares of Country Group Inc.

Petitioners,

For the Judicial Dissolution of

Country Group Inc., a Domestic Corporation,

Index No. 650108/2015

Respondent.

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LAWRENCE K. MARKS, J.

Petitioners Joseph Skoler and Susan Necheles seek judicial dissolution of Country Group Inc. ("Country Group"), pursuant to Section 1104(a) of the New York Business Corporation Law ("BCL").

BACKGROUND

Country Group is a New York domestic corporation, incorporated in 1967. Pet ¶ 1. Country Group is the owner and holder of a single asset, real estate in Sullivan County of approximately 118 acres. *Id.*, ¶ 10.[1] The property consists of wooded and open field land, as well as four bungalows. *Id.*

Petitioners hold 50% of the issued stock in Country Group. *Id.*, ¶8. Louis and Eleanor Horowitz jointly hold 25% of the stock, and Stuart and Sandy Rabeck jointly hold the remaining 25% of the stock. *Id.* Together, Louis and Eleanor Horowitz and

[1] The property is located at 361 Post Hill Road, Mountaindale, New York. Opp Br at 2.

Stuart and Sandy Rabeck ("responding shareholders") oppose judicial dissolution, and filed a cross motion to dismiss the petition. Opp Br at 1.

Petitioners assert that Country Group is a small and closely-held corporation whose sole function was as a vehicle of convenience through which to manage and maintain the property; and that it was not formed for the purpose of being profitable. Wohlgemuth Aff, ¶ 47-48.

Petitioners obtained their original shares in Country Group in 2003, when Joseph Skoler's parents transferred their 25% interest to them. Opp Br at 3. In 2008, petitioners acquired an additional 25% interest by purchasing the shares from another couple, the Sterns, for $190,000. *Id.* At this time, each 25% share in Country Group entitles the shareholder to a proprietary lease to a designated bungalow on the property. Pet ¶ 11.

Petitioners argue that the shareholders disagree about the management of the corporation's asset, specifically the basic upkeep and maintenance of the property. *Id.*, ¶ 20. They argue that the other shareholders refused to contribute sufficient capital to allow for the increasing costs of basic upkeep on the property, including lawn care, pool upkeep and tax and insurance payments. *Id.*, ¶ 21. Petitioners assert that, as a result, they have advanced funds necessary to cover these expenses. *Id.*, ¶ 22. They argue that, as a result of the other shareholders' refusal to contribute capital, despite multiple and repeated requests, the corporation has been unable to pay its expenses, including real property taxes. *Id.*, ¶ 24-25. They further assert that the lack of proper maintenance has relegated

the property to a state of disrepair and has substantially diminished its value. *Id.*, ¶ 25.

Petitioners assert that dissension among the shareholders has been longstanding. *Id.*, ¶ 19. They argue that there has been an inability to achieve consensus for over 30 years. *Id.* Petitioners aver that the relationship among the shareholders has deteriorated to such a degree that they cannot, *inter alia*, hold annual meetings, elect new officers or agree upon a budget. *Id.*, ¶ 28. As such, petitioners seek judicial dissolution of Country Group. In addition to judicial dissolution, petitioners also seek distribution and partition of the real property, pursuant to New York's Real Property Actions and Proceedings Law § 915.

Responding shareholders oppose judicial dissolution, and have cross-moved to dismiss the petition.

Following argument on this petition, this case was referred to a Judicial Hearing Officer for assistance with settlement. Those efforts were ultimately unsuccessful, and the parties were given the opportunity to supplement the record, if they so wished. Each side stated that it intended to do so. On the day that those supplemental submissions were due, counsel contacted the Court to seek additional time, to engage in direct settlement efforts. A final extension for any supplement to the petition and cross-motion papers was granted, although counsel were reminded that they were free to settle at any time. No

papers regarding settlement were filed with the Court, and only responding shareholders chose to supplement the record.

DISCUSSION

Section 1104(a) of the BCL provides:

> (a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:
>
> (1) That 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) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
>
> (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Petitioners argue that Country Group meets all three of the criteria for judicial dissolution. Pet ¶ 31. They contend that their calls for an annual meeting in 2014 did not result in a meeting being held, with responding shareholders refusing to attend or failing to appear at the property so that a meeting could be held. *Id.*, ¶ 33; Wohlgemuth Aff, ¶ 31-32. Petitioners argue that the position of responding shareholders – that the shareholders are not so divided that the votes for election of directors cannot be obtained because they agree to keep the current directors – is irrelevant. Wohlgemuth Aff, ¶ 33; Opp Br at 10. Petitioners assert that they do not agree to have Eleanor Horowitz continue

as treasurer or Sandy Rabeck continue as secretary of Country Group, arguing that they are not competent to hold these positions.[2] Wohlgemuth Aff, ¶ 33. Petitioners also argue that dissolution is even more appropriate because Country Group is a close corporation. They note that in "a close corporation, the relationship between the shareholders vis-a-vis each other is akin to that between partners." *In re T.J. Ronan Paint Corp.*, 98 A.D.2d 413, 412 (1st Dep't 1984).

Petitioners argue that dissolution of the corporation and sale of the property is not prejudicial, as it offers all parties the same opportunity to purchase the property at fair market value. Wohlgemuth Aff, ¶ 45. Petitioners argue that, given the property's layout, it is impossible to physically partition the property so as to provide each party with an equal share. *Id.*, ¶ 37.

In opposition, responding shareholders contend that, despite the dispute, the corporation is functioning – all common bills have been paid, property taxes are up to date and the property itself is well maintained. Opp Br at 15. The responding shareholders submitted proof of payment of the school and property taxes, from 2013 through 2015. Horowitz Supp Aff, Exh A. The total of these payments is $31,145.69, and the copies of checks making those payments reflect the name "Country Group, Inc." *Id.*; Horowitz Supp Aff, ¶ 2. Responding shareholders assert that these payments have been made solely by contributions by themselves, and not petitioners, despite emails in

[2] Joseph Skoler is currently president. Opp Br at 10.

2013 and 2014 evidencing their request to have petitioners pay their share of the taxes. Horowitz Supp Aff, ¶ 2-3; Horowitz Supp Aff, Exh B. Despite this, responding shareholders continue to seek dismissal of the petition. Levine Supp Aff, ¶ 1.

Responding shareholders disagree about the length of the dispute among the shareholders in Country Group. They aver that, although other shareholders did have disagreements with petitioner Skoler's parents when they controlled the shares, the premises were generally operated and maintained with little discord. Opp Br at 4. Responding shareholders contend that on May 19, 2011, they received an email from petitioner Skoler, in which he notified them that he had installed a zip line on the premises, and his guest had been injured while using it. *Id.* at 4. This resulted in a lawsuit.[3] They claim that it was only after they received notice of the lawsuit that the relationship with petitioners deteriorated. Opp Br at 6.

Responding shareholders contend that, following the lawsuit, Country Group lost the insurance it had since 1968, at $998 per year. Skoler refused to remove the zip line, obtained insurance for the zip line at approximately $4,000 per year and demanded that the other shareholders pay 50% of the new premium. *Id.*

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[3] *Zelkowitz v. Country Group, Inc.*, Index No 151307/2012 was filed on March 28, 2012 in Supreme Court, New York County. Torto Aff, Exh A. The complaint was dismissed by the April 13, 2015 Decision and Order of Justice Wooten. Wohlgemuth Aff, Exh A. The claims against Country Group were discontinued by the parties, via a stipulation dated October 15, 2015, but not the claims against Skoler. Levine Supp Aff, Exh C. The Appellate Division reversed the trial court decision, and reinstated the complaint as against Skoler. *Zelkowitz v. Country Group, Inc.*, 142 A.D.3d 424 (1st Dep't 2016).

Responding shareholders argue that to the extent there has been any erosion on the premises, it has been due to petitioners' overuse of the grounds, including the use of five all terrain vehicles by petitioners and their guests. *Id.* at 10. Further, responding shareholders contend that petitioners are simply using the property differently than it had previously been used.[4] Responding shareholders assert that petitioners purchased an adjacent property and, without permission from them, connected Country Group's water supply to their new property, to provide water for sheep that petitioners maintain on their adjacent property. *Id.* at 4.

Responding shareholders argue that petitioners have never offered them a fair price for their shares, not anything "remotely close" to the $190,000 that petitioners paid for the additional 25% of Country Group they had previously purchased. *Id.* at 10. Responding shareholders contend that they have counter-offered to purchase petitioners' shares, and petitioners refused to discuss the offer. Joint Reply Aff, ¶ 19. They argue that petitioners seek to dissolve the corporation in order to purchase the premises at a public sale for less than its fair market value. Opp Br at 10. Responding shareholders assert that petitioners are manufacturing an alleged deadlock in the functioning of the corporation as a predicate to dissolve the corporation, and buy it at below market value. Torto Reply Aff, ¶ 6.

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[4] For example, petitioners constructed their own swimming pool with a locked enclosure, a fenced-in garden, a trampoline and a chicken coop with 20-30 chickens and roosters, for their own use. Opp Br at 3. Petitioners also expanded their original bungalow and now have a much larger structure. *Id.*

Responding shareholders argue that they are senior citizens, and use the property on weekends during the summer months, while petitioners and their minor children use the property much more frequently and treat the premises as a second home. Opp Br at 3. Responding shareholders argue that the Country Group property has emotional value to them, that it "has been our summer home since 1967. It is a place where we raised our families and spent memorable summers." Joint Reply Aff, ¶ 18.

The Court had determined that petitioners have not met their burden. There has been no showing of facts that would require court-ordered dissolution under BCL § 1104.

The corporation was never intended to be a profit-generating enterprise, so additional costs over time are not dispositive. Additionally, although there is no question that friction exists between certain shareholders, taxes and insurance have been paid, and basic upkeep of the property has been maintained. From the record presented to the Court, it appears that in recent years petitioners have taken principal responsibility for certain bills stemming from maintenance and insurance, while responding shareholders have been paying the real estate and school taxes. The Court is making no determination that this is how Country Group was intended to, or should be, run. It is clear, however, that despite the current state of the relationships, the obligations of the corporation are being met. Moreover, both petitioners and responding shareholders seek to continue to own and use Country Group, and continue to derive benefit from it.

As the First Department has held, court-ordered dissolution and forced sale of

corporate assets is "the ultimate remedy" and "should only be applied as a last resort." *Matter of Yoet Ngor Ng*, 174 A.D.2d 523, 526 (1st Dep't 1991). This may be particularly true where from the "record it appears that the financial management of the corporations had been conducted somewhat loosely from the inception" and there has been a history of "failure to observe corporate formalities." *Id.* Indeed, even where principals would not directly speak to each other, but the record reflected that the subject corporation could "still function on a day-to-day basis," the First Department upheld denials of such petitions. *Hayes v. Festa*, 202 A.D.2d 277, 277 (1st Dep't 1994).

Moreover, BCL § 1104 may be "inapplicable," as "mere failure to hold shareholders' meetings is not sufficient grounds for dissolution. Business Corporation Law § 1104 requires a showing of deadlock, but there can be no deadlock where, as here, the contending factions have not even attempted to elect directors." *In re Parveen*, 259 A.D.2d 389, 391 (1st Dep't 1999) (internal citations omitted). In the instant case, responding shareholders aver that they have never refused to hold an annual meeting, and have acknowledged advising petitioner Skoler that it should be held during the summer at the property "as the corporation has always done." Joint Reply Aff, ¶¶ 16-17.

Further, a "hearing is only required where there is some contested issue determinative of the validity of the application." *Matter of Klein v. Klein Law Group, P.C.*, 134 A.D.3d 450 (1st Dep't 2015). In the instant case, although there are disputes

between the parties, none of them is currently substantive enough to impact the application before the Court.[5]

The Court has considered the parties' other arguments, and finds them to be unavailing.[6]

Accordingly, it is

ORDERED that the Petition is denied; and it is further

[5] Petitioners argue, for example, that a broken and unused in-ground pool has been at minimum an eyesore for 20 years. Wohlgemuth Aff, ¶¶ 19-21. The Court agrees with responding shareholders, however, that although "the in ground pool area may not be in the best shape, it is by no means a reason to dissolve the corporation." Torto Reply Aff, ¶ 9.

Similarly, petitioners contend that the lawn, approximately five acres, needs to be mowed every two weeks in the summer to keep the property from looking abandoned. Wohlgemuth Aff, ¶ 23. Responding shareholders contend that the shareholders had all agreed to keep a portion of the front lawn in its natural state, for conservation of wildflower, butterflies and other wild life, and to keep vehicles away. Joint Reply Aff, ¶ 12. This is, again, a non-dispositive issue, as responding shareholders contend that despite this prior agreement, they have agreed to share the additional mowing expense, but that the petitioners did not provide them with any bills for same. *Id.*

[6] For example, that portion of the Petition that seeks partition and sale of the corporate asset is premised on an order dissolving the corporation. Pet ¶¶ 39-40. Since this Court is not ordering that Country Group be dissolved, this aspect of the Petition need not be addressed.

ORDERED that the cross-motion to dismiss the Petition is granted.

This constitutes the Decision and Order of the Court.

Dated: October 11, 2016

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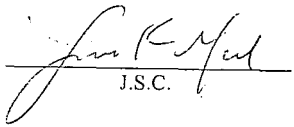

HON. LAWRENCE K. MARKS