

Hoffman v S.T.H.M. Realty Corp.

2016 NY Slip Op 32945(U)

October 6, 2016

Supreme Court, Kings County

Docket Number: 514635/15

Judge: Lawrence S. Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of October, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

ELAINE HOFFMAN,
Petitioner,

- against -

S.T.H.M. REALTY CORP., ALLAN HOFFMAN,
DONNA HOFFMAN, and JUDI BREZNIAK,

Respondents.

-----X

DECISION AND ORDER

Index No. 514635/15

Mot. Seq. #1

The following e-filed papers herein:

| | <u>NYSCEF #</u> |
|--|-----------------|
| Amended Order to Show Cause and Petition Annexed _____ | 1, 4, 11 _____ |
| Notice of Motion, Supporting Affirmation, Exhibits, and Memorandum of Law Annexed _____ | 20-21, 22 _____ |
| Petitioner's Affidavit in Opposition and Exhibits Annexed _____ | 26-29 _____ |
| Reply Affidavit with Exhibits Annexed _____ | 30-34 _____ |
| Reply Memorandum of Law _____ | 35 _____ |

This is a proceeding pursuant to Business Corporation Law § 1104-a for judicial dissolution of S.T.H.M. Realty Corp., a closely held corporation. The petitioner has submitted a verified petition, which is the equivalent of an affidavit of merit (see CPLR 105 [u]). Her petition, as augmented by her affidavit in opposition, states a cause of action for dissolution of the corporation at issue pursuant to Business Corporation Law § 1104-a (a) (1) and (2) on the grounds of "oppressive actions," among others (see *Matter*

of Steinberg [*Cross Country Paper Products Corp.*], 249 AD2d 551, 552 [2d Dept 1998]).

The branch of the respondents' pre-answer motion which is to dismiss the petition for failure to state a cause of action and for lack of particularity is denied. The remaining branch of the respondents' motion which is to consolidate this proceeding with the two other corporate dissolution proceedings commenced by the petitioner – *Hoffman v Hymel-Porter Realty Corp., et al.*, index No. 514638/15, and *Hoffman v Cornell Beverages, Inc., et al.*, index No. 514639/2015 – has been rendered moot by the parties' so-ordered stipulation.

A judicial dissolution is a remedy of last resort, and a buy-out pursuant to Business Corporation Law § 1118 (b) is generally held to be preferable to dissolution, in that it maintains the viability of the corporation (*see Matter of Androtsakis [Ithaca Dev. Corp.]*, 159 AD2d 442, 443 [1st Dept 1990]). Courts will, absent exceptional circumstances, ordinarily exercise their discretion to authorize such a buy-out (*see Matter of Flushing Office Ctr. [Young Dae Kwon]*, 276 AD2d 629, 629-630 [2d Dept 2000]). At the pre-answer stage of this proceeding, the petitioner is not entitled to the ultimate relief she seeks; namely, the dissolution of the corporation at issue and the appointment of a receiver to sell the real estate owned by such corporation. The conflicting affidavits submitted by the petitioner and the respondent Donna Hoffman raise questions of fact regarding the merits of the petition, the appropriate remedy, and whether the respondents are entitled to a set-off (*see Matter of Cunningham [344 6th Ave. Owners Corp.]*, 256 AD2d 406, 407 [2d Dept 1998]; *Matter of*

Steinberg, 249 AD2d at 552; *Matter of Fancy Windows & Doors Mfg. Corp. [Fei Wu]*, 244 AD2d 484 [2d Dept 1997]).

In accordance with CPLR 404 (a): the respondents shall electronically serve and file their answer within five days after service of this decision and order with notice of entry; the petitioner may re-notice the matter for a hearing on two days' notice; in the alternative, the respondents may re-notice the matter for a hearing upon service of their answer on seven days' notice. Further, in accordance with CPLR 404 (b), "[t]he petitioner may raise an objection in point of law to new matter contained in the [respondents'] answer by setting it forth in [her] reply or by moving to strike such matter on the day the petition is . . . re-noticed to be heard."

This constitutes the decision and order of the Court.

E N T E R

J. S. C.

HON. LAWRENCE KNIPEL