

**Matter of Guglielmi v GVP Realty Corp.**

2018 NY Slip Op 33872(U)

April 5, 2018

Supreme Court, Nassau County

Docket Number: 609311-17

Judge: Timothy S. Driscoll

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**ORIGINAL**

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**In the Matter of the Application of**

**TRIAL/IAS PART: 11  
NASSAU COUNTY**

**GIOVANNINA GUGLIELMI, Individually, and  
GIOVANNINA GUGLIELMI, as a Trustee of and on  
behalf of the CONSTANCE GUGLIELMI TRUST  
u/a/d 11/20/07, the DINA GUGLIELMI TRUST  
u/a/d 11/20/07 and the MICHELE NUNZIATA TRUST  
u/a/d 11/20/07,**

**Index No: 609311-17  
Motion Seq. Nos. 1 and 2  
Submission Date: 3/28/18**

**Petitioners,**

**-against-**

**GVP REALTY CORP., FLUSHING TRIPLE G & F  
STORAGE CORP., LASTRADA REALTY CORP.,  
PETER GUGLIELMI a/k/a PIETRO GUGLIELMI,  
Individually, PETER GUGLIELMI a/k/a PIETRO  
GUGLIELMI and DAIENA D'ARPINO, as  
Co-Trustees of the DAIENA D'ARPINO TRUST  
u/a/d 11/20/007, PETER GUGLIELMI a/k/a PIETRO  
GUGLIELMI, and NICOLETTA SCORDO, as  
Co-Trustees of the NICOLETTA SCORDO TRUST  
u/a/d 11/20/2007, THE ESTATE OF GINO GUGLIELMI,  
GIULIA GUGLIELMI, as Trustee of the GIULIA  
MOLLICA TRUST u/a/d 11/20/07 and GIULIA  
GUGLIELMI, as Trustee of the THERESA  
GUGLIELMI TRUST u/a/d 11/20/2007,**

**Respondents.**

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**Papers Read on these Motions:**

- Order to Show Cause, Affirmation in Support, Affidavit in Support,  
Verified Petition and Exhibits.....X**
- Notice of Motion, Affirmations in Opposition/Support,  
Affidavits in Opposition/Support and Exhibits.....X**

**Motion Papers Read (cont.)**

- Memorandum of Law in Opposition/Support.....X**
- Affirmation in Opposition and Affidavit in Opposition.....X**
- Correspondence dated January 30, 2018.....X**

This matter is before the court on 1) the motion by Petitioners filed September 11, 2017, and 2) the motion by Respondents filed November 14, 2017, both of which were submitted on March 28, 2018. For the reasons set forth below, the Court 1) denies Petitioners’ motion and vacates the temporary restraining order issued on September 12, 2017 by the Honorable Daniel Palmieri, sitting as the Special Term Justice; and 2) denies Respondents’ motion.

**BACKGROUND**

**A. Relief Sought**

Petitioners move for an Order 1) pursuant to CPLR § 6301, enjoining and restraining Respondents, their respective officers, directors, shareholders, agents, servants and employees, and all persons acting by or on their behalf, from: distributing, encumbering, transferring, selling and/or divesting themselves of any real property, personal property and/or other assets (other than payment of usual and customary accounts payable in the ordinary course of operating real property) of GVP Realty Corp. (“GVP”), Flushing Triple G & F Storage Corp. (“Flushing”) and Lastrada Realty Corp. (“Lastrada”) (the “Companies”) and/or taking such action to change the Companies’ Shareholders Agreements, on the grounds that Petitioners have commenced an action for, *inter alia*, an equitable accounting, the imposition of a constructive trust, and damages, and that Petitioners would suffer immediate and irreparable harm thereby, if such injunction is not granted; 2) dissolving the Companies pursuant to Business Corporation Law (“BCL”) § 1104-a; 3) appointing a receiver to operate, supervise and liquidate their real property and wind up their affairs; and 4) directing Respondents to fully account to Petitioners and the Court for all of their activities.

Respondents oppose Petitioners’ motion and move for an Order 1) pursuant to CPLR § 3211(a)(7) and BCL § 623, dismissing the Verified Petition for Dissolution (“Petition”); 2) pursuant to CPLR § 3211(a)(10), dismissing the Petition; and 3) pursuant to CPLR § 3211(c), granting summary judgment in Respondents’ favor based on the documentary evidence and dismissing the Petition.

B. The Parties' History

The Petition alleges as follows:

Petitioner Giovannina Guglielmi ("Giovannina") was and is a 17% owner of each of the Companies. Giovannina was and is the Trustee of the Constance Guglielmi Trust u/a/d 11/20/07, the Dina Guglielmi Trust u/a/d 11/20/07 and the Michele Nunziata Trust u/a/d 11/20/07 ("Petitioner Trusts"). The Petitioner Trusts were and are a 16.33% owner of each of the Companies. At all relevant times, Petitioners collectively owned more than 20% of the voting shares of each of the Companies, specifically 33.33% of each of the Companies.

At all relevant times, GVP was a closely held corporation, whose shares were owned by Petitioners and various members of Petitioners' family. GVP was and is the owner of real property located at 639 Commack Road, Commack, New York ("Commack Property") which consisted of rental/income producing commercial property. At all relevant times, Flushing was a closely held corporation, whose shares were owned by Petitioners and various members of Petitioners' family. Flushing was the owner of real property located at 118-20 29<sup>th</sup> Avenue and 29-16 120<sup>th</sup> Street, College Point, New York ("College Point Property") which consisted of rental/income producing commercial property. At all relevant times, Lastrada was a closely held corporation, whose shares were owned by Petitioners and various members of Petitioners' family. Lastrada was the owner of real property located at 113-121 Mineola Avenue, Roslyn, New York ("Roslyn Property") which consisted of rental/income producing commercial property.

Respondent Peter Guglielmi a/k/a Pietro Guglielmi ("Peter") was and is a 17% owner of each of the Companies. At all relevant times, Respondents Peter and Daiena D'Arpino ("Daiena") were the Trustees of Respondent Daiena D'Arpino Trust u/a/d 11/20/07. At all relevant times, Respondents Peter and Nicoletta Scordo ("Nicoletta") were the Trustees of Respondent Nicoletta Scordo Trust u/a/d 11/20/07, and the Daiena D'Arpino Trust and Nicoletta Scordo Trust are referred to collectively as the "Peter Trusts." The Peter Trusts were and are a 16.33% owner of each of the Companies.

Gino Guglielmi ("Gino"), the Decedent of Respondent Estate of Gino Guglielmi, was and is a 17% owner of each of the Companies. Gino and Respondent Trustee Giulia Guglielmi ("Giula") were the Trustees of Respondents Giulia Mollica Trust u/a/d 11/20/07 and Theresa Guglielmi Trust u/a/d 11/20/07. The Giulia Mollica Trust and Theresa Guglielmi Trust are referred to collectively as the "Gino Trusts." The Gino Trusts were and are a 16/33% owner of

each of the Companies. At all relevant times, Respondents Peter, Peter Trusts, Gino and Gino Trusts (“Respondent Owners”) collectively owned all of the remaining ownership interest in each of the Companies, specifically, collectively, 66.66% of each of the Companies.

Vincenzo Guglielmi (“Vincenzo”) and his brothers Peter and Gino (the “Brothers”) formed the Companies for the purpose of owning, managing, controlling and profiting from the Commack, College Point and Roslyn Properties (the “Properties”). At all relevant times, the Brothers had a 1/3 ownership interest in the Companies and their respective Properties. Petitioners allege that the Brothers owed a fiduciary obligation to the shareholders to maximize the profits derived from the Companies and their Properties. At all relevant times, until Vincenzo’s death, the Brothers participated equally in the management and control of the Companies and the Properties, and shared equally in their profits.

The Brothers assigned and/or transferred portions of their respective ownership interest in the Companies and Properties to the various family trusts named herein. The Companies regularly made biannual distributions to and for the benefit of Petitioners and Respondent Owners.

The Shareholders Agreement for each of the Companies provides that management of the Companies is to be by the majority vote of the outstanding voting shares. Since Vincenzo’s death, the Respondent Owners have exercised their majority interest to oppress the Petitioners, waste and/or divert, for the benefit of the Respondent Owners, the Companies’ assets, rents, income and profits, deprive Petitioners of their right to share in those assets and income, and exclude Petitioners from participating in the management of the Companies. Respondent Owners have taken control of the management of the Companies’ Properties and financial records, including the commercial leases with respect to the Properties, and have denied Petitioners access to financial statements and records regarding the Properties. In addition, the Companies’ accountant has refused to provide Petitioner with business and financial records, allegedly at the direction of the Respondent Owners.

Petitioners allege *inter alia* that 1) Peter and Gino began taking salaries and other distributions from the Companies, in an effort to deplete the Companies of their assets, to the detriment of Petitioners; 2) Respondent Owners have paid salaries, fees and other monies to various family members from the Companies, to the detriment of Petitioners, which included Peter’s use of funds from Companies to pay his construction company for services that may not have been performed or were performed at a rate substantially higher than the fair market rate

for those services; 3) Respondent Owners, knowing that Giovannina relies on distributions for her living expenses and hoping to apply financial pressure on Giovannina, ceased making any distributions to Petitioners; and 4) Respondent Owners continue to take distributions from the Companies by taking salaries and/or indirect financial benefits in the nature of unrelated expenses.

Respondent Owners have refused to authorize any further distributions to Petitioner until Petitioners acquiesce in their demand to sell them Petitioners' ownership interest in the Companies for a discounted price to be set by Respondent Owners. Respondent Owners have taken actions, and threaten to continue to take actions, designed to force Petitioners into selling their ownership interest in the Companies at terms that are solely beneficial to Respondent Owners. Respondent Owners' actions have effectively precluded Petitioners from participating in the management and sharing in the profits of the Companies and have deprived Petitioners of the continued expectation to share in the management and profits of the Companies. Petitioners allege that liquidation of the Companies is the only feasible means by which Petitioners may reasonably expect to obtain a fair return on their investment, and is reasonably necessary for the protection of Petitioners' rights and interests.

The Petition contains five (5) causes of action:

- 1) a request for dissolution of the Companies and the appointment of a temporary receiver to protect against the looting, waste and diversion of Companies' assets;
- 2) a request for an accounting with respect to the property, assets, income, profits and money allegedly diverted;
- 3) a request for the imposition of a constructive trust on all property, assets, income, profits, money and/or distributions derived from the Companies by the Respondent Owners, for the benefit of Petitioners;
- 4) against Respondents for conversion of Petitioners' portion of the Companies' property, assets, income, profits, money and/or distributions; and
- 5) a request for monetary damages resulting from Respondents' failure to share or permit Petitioners to participate in the management and control of property, assets, income, profits, money and/or distributions derived from the Companies.

On September 12, 2017, the Honorable Daniel Palmieri, sitting as the Special Term Justice, issued a temporary restraining order ("TRO") which directed that, pending further order of the court, except as to permitted assignees as such term is defined in paragraph 7c of the

attached Shareholders Agreement, Respondents and their agents are restrained from distributing, encumbering, transferring, selling and/or divesting themselves of any real property, personal property, and/or other assets (other than payment of usual and customary expenses as are necessary in the ordinary course of business) of the Companies.

In support of Petitioners' motion, Giovannina affirms that one of the purposes of the family trusts was to ensure that each Brother's family would be entitled to participate in the management and commercial exploitation of the Companies and continue to receive their one-third share of the profits upon the death of any of the Brothers. Giovannina affirms that until the death of her husband Vincenzo in September 2012, the Brothers participated equally in the ownership and control of the Companies and the Properties, and shared equally in profits derived from the Companies and the Properties. Giovannina submits that, following Vincenzo's death, Peter and Gino seized the opportunity to usurp sole management and control of the Companies, to the exclusion of Petitioners. Giovannina reaffirms the truth of the allegations in the Petition regarding the exclusion of Petitioners from involvement in the management of the Companies, and Respondents' failure to provide Petitioners with financial information and documentation regarding the Properties.

Giovannina affirms that in mid-2016, Gino called Giovannina to discuss selling the Properties. When Giovannina suggested that the Properties be appraised, Gino advised her that Peter did not wish to obtain an appraisal, and that they would decide the price of the Properties. When Giovannina would not agree to proceed with the sale of the Properties without an independent appraisal, Gino and Peter expressed their desire to "swap" (Giovannina Aff. in Supp. at ¶ 23) the Properties, thereby transferring full ownership of one of each of the Properties to Petitioners, Peter and Gino, and their respective trusts. Peter proposed taking the College Point Property, the most valuable of the Properties, and Gino intended to take one of the strip centers of his choice. When Giovannina would not acquiesce to their demands, they began to engage in a pattern of oppressive conduct designed to force Petitioners to succumb to their demands. That conduct included Respondents' scheduling of meetings for the Companies' shareholders at times and places that were inconvenient, including the College Point Property where Giovannina had to climb three flights of steps which was difficult for her.

At a meeting, over Petitioners' objections, Peter and Gino, through his other family members who attended on his behalf, voted themselves as President and Vice-President respectively of each of the Companies. Peter thereafter reiterated Respondents' desire to swap

the Properties and made it clear that, if Petitioners did not agree to the proposed swap, he intended to force the sale of the Properties on his own terms and conditions. Peter advised Petitioners that their participation was not needed for him to take any action he wished with respect to the Companies, but he would consider entering into an agreement for the sale to a third party for the appraised value. The proposed agreements drafted by counsel for Respondents (“Respondents’ Counsel) permitted Peter and Gino to control any right of acceptance of any offer that they received, and gave them the right to buy Petitioners out for that price, which would be discounted further. Petitioners declined to enter into the proposed agreements.

Giovannina affirms that the Shareholders Agreement for the Companies, which are virtually identical, provide that management of the companies would be by “majority vote” (Giovannina Aff. in Supp. at ¶ 43). Peter advised Petitioners that he intended to vote to change the valuation process for the Companies set forth in the Shareholders Agreement. Giovannina affirms that although the management of the Companies was to be by majority vote, the valuation process for the shares of the Companies was expressly excluded from such majority vote and, instead, required a unanimous vote by the shareholders. Giovannina explains that the reason for the unanimous vote requirements was to provide a means by which all shareholders would realize the full value of their ownership interests, and to ensure that if there were a deterioration of familial relationships that prompted a shareholder’s decision or need to sell his/her shares, the non-selling majority of shareholders could not unilaterally set and/or control the valuation of the Companies and Properties at the expense and to the detriment of the minority shareholders.

Giovannina submits that, although Respondents have agreed that Petitioners may secure an appraisal of their own, Respondents, by refusing to provide Petitioners with any information and documentation to provide to an appraiser, have effectively precluded Petitioners from securing an accurate and fair appraisal of the Properties, thereby ensuring that any appraisal would be of no value. Giovannina affirms that Respondents have refused to make either of the distributions required for 2017 to Petitioners unless Petitioners agree to Respondents’ terms and provides March 3, 2017 correspondence in support (Ex. D to Giovannina Aff. in Supp.). Giovannina affirms that it was only after Petitioners advised Respondents of their intention to file this action that Petitioners received certain distributions. Giovannina submits that if Respondents’ conduct is permitted to continue, Petitioners will suffer irreparable harm by the

loss of their unique ownership interest in the Properties. Giovannina affirms that each of the Properties is “unique in its nature and provides certain unique benefits and opportunities based upon its location and the permitted uses” (Giovannina Aff. in Supp. at ¶ 10).

In further support of Petitioners’ motion, counsel for Petitioners (“Petitioners’ Counsel”) submits that although Respondents implicitly acknowledge that dissolution of the Companies is warranted, they are seeking to compel Petitioners to agree to unreasonable terms and conditions of any purchase and/or transfer of Petitioners’ interest in the Companies and Properties “by nothing less than what is tantamount to extortion” (Presberg Aff. in Supp. at ¶ 32). In support, Petitioners’ Counsel provides an email from Brian Van Cott, Esq. (“Van Cott”), an attorney representing Respondents (Ex. D to Presberg Aff. in Supp.), in which Van Cott advises Petitioners’ Counsel that Respondents refuse to make further distributions to Petitioners unless Petitioners agree to the terms set by Respondents. Petitioners’ Counsel submits that Respondents, by refusing to provide Petitioners with any financial information regarding the Companies, have effectively precluded Petitioners from securing an accurate and fair appraisal of the Properties.

In opposition to Petitioners’ motion and in support of Respondents’ motion, Peter affirms that he is the President and a voting shareholder of each of the Companies, each of which owns and operates commercial real property. The Brothers formed the Companies between 1982 and 1992, when they purchased the Properties. The Brothers each owned a 1/3 interest in each of the Companies until 2007, when certain provisions of their respective estate plans took effect, at which time the ultimate recipients of the shares for each of the Companies were the Petitioner Trusts and the Respondent Trusts. In addition to the Petitioner Trusts and Respondent Trusts, there are three additional trusts that hold non-voting shares of the Companies. The Brothers also started a construction company in 1973 called Lastrada General Contracting Corp. (“Lastrada Contracting”). Peter and his daughter run the daily operations of Lastrada Contracting, and Peter is its CEO. Vincenzo and Gino retired from Lastrada Contracting in 1996.

Peter affirms that, in connection with the 2007 estate planning, the Companies were restructured so that each of them is managed by the shareholders, as opposed to officers and directors. It became necessary, in 2016, to elect officers of the Companies to give authority to the President and Vice President to retain a valuation firm and eventually market and sell the Properties. This resulted following the parties’ failure to agree on the division of the Properties. The Companies have no employees. GVP pays for a part-time administrative assistant who

receives a Form 1099 at the end of the year. Peter affirms that he does not now take, and has never taken, a salary from any of the Companies, and neither Vincenzo nor Gino ever took a salary from any of the Companies.

Peter affirms that, following Vincenzo's death in 2012, Gino and Peter, who is 73 years old, continued to operate and manage the Companies and Properties until Gino's health began to deteriorate, at which point it became difficult for Peter to manage the Companies and Properties on his own. Peter's daughter Daiena, who works for Lastrada Contracting, has been helping Peter manage the Properties, without compensation. The Companies do not pay Peter or Daiena for the work that they perform for the Companies. The Brothers had envisioned that each of their families would eventually take ownership of one Property each and, to the extent that one Property was more valuable than another, they would make a cash adjustment to make up any difference. Alternatively, they thought that the Properties could be sold, and the proceeds divided evenly. Gino passed away on March 8, 2017. As a result, there is no one left in the family who can manage the Properties, or wishes to do so. Thus, Peter wishes to sell the Properties, distribute the proceeds in accordance with the percentage ownership interest in each of the Companies, and thereafter dissolve the Companies.

Peter affirms that Giovannina, his sister-in-law, has had little or no involvement in the Companies, and never expressed an interest in being involved. Peter affirms that Giovannina's allegations of fraudulent and oppressive conduct by Peter are "baseless and untrue" (Peter Aff. in Opp./Supp. at ¶ 21). Peter affirms that Giovannina was content not to be involved, and to receive distribution checks, until she was advised that Peter and Gino contemplated a sale of the Properties, in light of their deteriorating health and resulting inability to continue to manage the Properties. Peter disputes Giovannina's claim that she was deprived of financial information, and affirms that in 2012, Giovannina and her financial advisor met with Nicholas J. Rosa ("Rosa"), the Companies' accountant, to review the Companies' financial documents, and Respondents provide an affidavit of Rosa. In addition, Giovannina received quarterly statements for each of the Companies.

Peter also disputes Giovannina's assertion regarding rents paid to GVP and Lastrada in cash (see Giovannina Aff. at ¶ 20), affirming that he does not recall rents ever being paid in cash. He also disputes Giovannina's allegation that it was her repeated request for information and desire to be involved in the Companies that spurred discussion of selling the Properties in the summer of 2016, as well as her allegation that Gino and Peter insisted on unilaterally

determining the value of the Properties. Peter affirms that Giovannina ignored repeated requests from family members to meet and discuss the future of the Companies. Peter also disputes many of Giovannina's other allegations, including her claims that Gino and Peter took salaries and other distributions from the Companies, and that Lastrada Contracting pays no rent for the space that it occupies at the College Point Property (*see* lease, Ex. 1 to Peter Aff. in Opp./Supp.). Peter affirms that biannual distributions, which were voluntary and not mandatory, continued after Vincenzo's death in 2012 until 2016 when, on the advice of counsel, the Companies ceased making those distributions because the families contemplated selling the Properties and winding down the Companies. The Companies have since resumed making voluntary distributions, primarily in response to Giovannina's threats of litigation.

Daiena also disputes Petitioners' allegation that they have not been provided with financial information regarding the Companies or permitted to participate in the management of the Companies. Daiena affirms that, following Vincenzo's death in 2012, she communicated frequently with Giovannina, her aunt, regarding various financial matters, and also met and communicated with Giovannina's financial advisor. Daiena affirms that Rosa met with Giovannina and her financial planner, and began sending quarterly reports for each of the Companies to Giovannina following Vincenzo's death.

Daiena affirms that in February 2016, she requested that Annette Vaz ("Vaz"), a part-time administrative assistant for GVP, send notes to Giovannina, and other family members, to set up a meeting to discuss the future of the Companies. Between February and March 2016, Vaz spoke with Giovannina regarding that note. At that time, Daiena's uncle Gino was in poor health and getting worse, and Daiena's father Peter, who has a heart condition, could not manage the Properties without assistance. In late March 2016, Vaz advised Daiena that she had received an email from a paralegal with the law firm Marchese & Maynard, LLP (Ex. 1 to Daiena Aff. in Opp./Supp.), which requested copies of financial documents regarding the Companies. Robyn S. Maynard ("Maynard"), an estate planning attorney, was Giovannina's attorney at the time. Daiena affirms that she contacted Rosa to put him in touch with Maynard.

Daiena affirms that Giovannina ignored repeated requests to meet and discuss the future of the Companies. Daiena submits that, while Respondents agree that it is time to sell the Properties and wind down the Companies, a judicial dissolution is neither a necessary or efficient way to accomplish that. Daiena disputes many of the affirmations in Giovannina's affidavit in support, including her allegation that Company assets are being looted. Daiena

affirms that neither Peter nor Gino, nor any member of the family, takes a salary from any of the Companies, and the Companies have no employees. She also disputes Giovannina's allegation that Lastrada Contracting pays little or no rent for the space that it occupies at the College Point Property, calling that allegation "100% false" (Daiena Aff. in Opp./Supp. at ¶ 25). Daiena affirms that Lastrada Contracting currently pays \$9,535 per month for the space that it occupies at the College Point Property, and has a 5-year lease.

In further opposition to Petitioners' motion and in support of Respondents' motion, Rosa affirms that he is a certified public accountant who has provided financial accounting services for the Companies since their formation, and to the Brothers in their individual capacities. Rosa affirms that the Companies were formed as holding companies for the Properties, and the gross profits of the Companies are generated by rental income from commercial tenants that lease space at the Properties. The Companies have no employees, and the Brothers did not take salaries from the Companies. The Brothers' respective ownership interests in the Companies changed in or about 2007, when their estate planning took effect and portions of their ownership interests were transferred into various trusts. The Companies were then restructured so that each of them is managed by the shareholders, as opposed to officers and directors.

Rosa affirms that following Vincenzo's death in 2012, he met with Giovannina and her financial advisor to review the financial documents of the Companies. It was agreed at that meeting that Rosa would send Giovannina quarterly reports, prepared at the Companies' expense, for each of the Companies. Thereafter, every quarter, Rosa sent Giovannina quarterly reports, and he continued to do so until 2016 when Rosa met with Giovannina's estate planning counsel and gave her access to all of the Companies' financial documents. Rosa affirms that Giovannina did not express any displeasure or dissatisfaction with the quarterly reports until 2016, when Peter and Gino, whose health was declining, contemplated a division of the Properties. In June 2016, Giovannina's estate planning counsel came to Rosa's office where Rosa provided her with access to all of the files requested. Estate counsel reviewed those files, made copies, and took the copies with her. Rosa also provided estate counsel with an informal appraisal that had been conducted of the Properties (Ex. 1 to Rosa Aff.). Estate counsel never contacted Rosa thereafter. Rosa affirms that he is "floored" (Rosa Aff. at ¶ 14) by the claims by Giovannina and her counsel that her requests for financial information were ignored. In addition to the files copied by Giovannina's estate counsel in 2016, Giovannina routinely received quarterly reports for the Companies. Rosa also disputes Giovannina's allegation regarding rents

being paid in cash, affirming that in all of the years that he served as an accountant for the Companies, he was unaware of any instance in which rents were paid in cash.

In further opposition to Petitioners' motion, Van Cott affirms that at the request of the Individual Respondents in connection with their future estate planning, by letter to Petitioners dated May 10, 2016 (Ex. 1 to Van Cott Aff.), Respondents' Counsel summarized the various trusts that own a portion of the Companies and memorialized Individual Respondents' proposal to divide the Properties among the three families with an appropriate cash adjustment based on their respective values. After receiving no response, Respondents' Counsel sent a follow-up letter dated July 1, 2016 (Ex. 2 to Van Cott Aff.). The July 1, 2016 letter confirmed that in early June 2016 then-counsel for Petitioners had been provided with all of the Companies' paperwork that they requested and reiterated the proposal set forth in the May 10, 2016 letter. By letter dated July 11, 2016 (Ex. 3 to Van Cott Aff.), Maynard admitted receiving all of the information requested regarding the Companies but requested additional time to respond to the proposal. The July 11, 2016 letter from Maynard included the following:

You are correct that we [were] given access to the information of the entities in June but at that time we were simply allowed to come in and photocopy the documents at Mr. Rosa's office. At this time we haven't had an opportunity to review all of the documents and may request additional information

Considering we have been requesting information in excess of one year I believe it is entirely unreasonable to expect an answer to a proposal in such a short time period. We require an ample opportunity to do our own due diligence before making any proposals.

By letter dated July 27, 2016 (Ex. 4 to Van Cott Aff.), Respondents' Counsel disputed Maynard's assertion in the July 11, 2016 letter that Petitioners had been requesting information for more than a year. Respondents' Counsel advised Maynard that Giovannina had been receiving quarterly statements from the Companies' accountant since her husband's passing. He also advised Maynard that, while he understood Petitioners' need for additional time to consider the proposal, Petitioners were "eager to move forward with this plan." Respondents' Counsel requested that Maynard advise him by August 5, 2016 whether the proposal was acceptable, but received no response.

Van Cott affirms that, in light of Petitioners' failure to respond to Respondents' proposal, Respondents asked Van Cott to assist them with formally calling a special meeting of the shareholders to determine the future of the Companies and authorize the appraisal of the

Properties, the dissolution of the Companies following their sale of the Properties, and the pro-rata distribution of the proceeds to the shareholders. Van Cott provides copies of the Notices of Special Meeting Upon Demand of Shareholders (“Notices”) (Exs. 5, 6 and 7 to Van Cott Aff.) which were mailed on October 18, 2016, which set forth the purpose of the special meeting. Van Cott emailed a copy of those Notices to Maynard (Ex. 8 to Van Cott Aff.), along with an explanation of why the shareholders’ meetings were called at two different locations. On October 27, 2016, Maynard’s paralegal advised Van Cott via email that Petitioners could not attend the shareholders meetings as noticed, requested an alternative date and requested that the meetings be held at a single location. On November 3, 2016, Petitioners’ Counsel confirmed that he would now be representing Petitioners. The meeting was adjourned to November 17, 2016, and Van Cott provides the meeting minutes for all three Companies (Exs. 11, 12 and 13 to Van Cott Aff.), executed by Peter in his capacity as shareholder and President of the Companies.

Van Cott also describes his conversations with Petitioners’ Counsel regarding a proposed buy-sell agreement that would involve the Petitioners and Individual Respondents each valuing the Companies separately, then seeking mutual agreement on a valuation of each, and then giving an option for any of the shareholders to purchase the Companies at the agreed valuation. If no shareholders elected to purchase, then the Properties would be marketed and sold on the open market. Van Cott provides copies of correspondence between Petitioners’ Counsel and Van Cott regarding draft agreements containing proposed revisions and comments (Exs. 16-18 to Van Cott Aff. ). By email to Petitioners’ Counsel dated July 17, 2017 (Ex. 19 to Van Cott Aff.), Van Cott advised Petitioners’ Counsel that the Individual Respondents intended to proceed with obtaining appraisals as originally planned, that Petitioners could obtain their own appraisals at the cost of the Companies, and that distributions would continue in the meantime as a show of good faith.

By email to Petitioners’ Counsel dated August 18, 2017 (Ex. 20 to Van Cott Aff.), Van Cott advised Petitioners’ Counsel that distribution checks had been sent out and that he was collecting shareholders’ signatures on corporate consents (“Written Consents”) to formally authorize the distributions, requested that Petitioners sign and return the Written Consents, and advised him that the appraisals of the Properties were underway. Van Cott affirms that Petitioners never provided him with signed Written Consents to reflect their authorization of the distributions that they received and accepted. Petitioners also never advised Van Cott whether they wished to obtain their own appraisals of the Properties at the cost of the Companies.

Instead, Petitioners filed the instant action.

In reply, Giovannina submits that Respondents do not dispute that they intend to remove the requirement in the Shareholder Agreement that there be a unanimous vote with regard to the valuation process for the Companies and their Properties. Giovannina submits that such a change would allow Respondents to deprive Petitioners of their right to participate in the determination of the value of the Properties, contrary to the express provisions of the Shareholders Agreements.

Giovannina also submits that the distributions that were made were only enough to cover potential estimated taxes on the “phantom income” from the Companies attributed to the shareholders on their K-1s (Giovannina Reply Aff. at ¶ 11), and not on the actual profits of the Companies. Giovannina submits that actual profits have not been distributed to Petitioners and that Petitioners do not know the true financial situation of the Companies because Respondents have not provided Petitioners with that information.

Giovannina disputes Respondents’ contention that, following Giovannina’s meeting with Rosa in 2012, Giovannina was provided with quarterly statements regarding the Companies. She affirms that she received, at most, two quarterly statements, which were only provided after repeated demands. Giovannina also affirms that Daena’s communications with Giovannina regarding financial matters were limited to discussions regarding the removal of Giovannina’s husband from the contracting company’s pension plan, and Daena did not provide any information regarding the Companies. Giovannina submits that, while all parties agree that dissolution of the Companies is appropriate, Respondents seek to dictate the terms of that dissolution, and Petitioners require the Court’s involvement and oversight as a result of Respondents’ oppressive conduct.

### C. The Parties’ Positions

Petitioners submit that they have established their right to the requested injunctive relief by 1) establishing a likelihood of success on the merits with respect to the allegations in the Petition, specifically that Respondents have engaged in oppressive and fraudulent conduct, including ceasing the biannual distributions of income and profits to Petitioners from the Companies, taking salaries and other benefits from the Companies to compensate themselves in lieu of the biannual distributions, ignoring Petitioners’ requests to participate in the management of the Companies and for financial information regarding the Companies, and occupying the College Point Property for Peter’s construction company at below-market rent or for no rent at

all; 2) establishing that they will suffer irreparable injury without injunctive relief because, without injunctive relief, Respondents will continue to take actions designed to ensure that Petitioners' interest in the Companies and Properties are lost forever, including changing the valuation process provided for in the Shareholders Agreements and accepting the best offer, as determined by them, regardless of how that compares to the actual value of the Properties; and 3) a balancing of the equities favors Petitioners because a preliminary injunction will not harm Respondents, and will simply maintain the status quo and prevent Respondents from continuing to take actions that harm Petitioners. Petitioners contend, further, that in light of the foregoing, it is appropriate for the Court to appoint a temporary receiver because, without that relief, Respondents will continue to control the Companies' assets and Properties, and will continue to divest Petitioners of their rightful ownership interest in those Properties, and to divert cash rental payments to themselves.

Respondents oppose Petitioners' motion submitting that 1) Petitioners cannot demonstrate a likelihood of success on the merits because none of Petitioners' allegations and/or submissions constitute clear and convincing evidence of the oppressive conduct alleged by Petitioner as the record supports the conclusion that a) Petitioners have been passive shareholders who have never sought to be actively involved in the management of the daily operations of the Companies; b) the alleged looting of the assets of the Companies never occurred; c) Petitioners were never denied an opportunity to participate in the management of the Companies; and d) Petitioners were equal recipients of the voluntary distributions paid by the Companies; 2) Petitioners cannot demonstrate that they will suffer irreparable injury without injunctive relief because Petitioners have adequate remedies at law, including an appraisal proceeding pursuant to BCL § 623, and money damages; and 3) a balancing of the equities favors Respondents because the Companies are financially sound and continue to generate profits from the rents paid by the tenants at the Properties, the TRO has made it difficult for Respondents to operate the Companies, including negotiating new leases and renewing existing leases, and continued injunctive relief will continue to hamper the ability to operate the Companies and manage the Properties while the shareholders attempt to value them and market them for sale.

With respect to their motion to dismiss, Respondents submit that dismissal of the Petition is warranted because Petitioners have not established their entitlement to dissolution of the Companies pursuant to BCL § 1104-a. Respondents submit that 1) dissolution is not the

appropriate remedy to address Petitioners' concerns that they will not receive fair value for their shares, and the appropriate remedy is an appraisal proceeding under BCL § 623, which is required where, as here, a minority shareholder objects to the sale price of all or substantially all of a corporation's assets; 2) Petitioners have not demonstrated that the familial disagreements between Giovannina, and Peter and Gino or his estate, will prevent the Companies from continuing to function, or prevent the appraisal and marketing of the Properties, and have also not demonstrated that Peter or Gino or his estate have taken any action to force Petitioners out of the Companies or deprive Petitioners of the value of their respective holdings in the Companies; and 3) dissolution would be harmful to the parties' interests because dissolution, which is a drastic remedy, would damage the shareholders' rights and interests in light of the fact that the Companies are financially sound and continue to generate profits from the rents paid by the commercial tenants at the Properties.

Petitioners oppose Respondents' motion to dismiss submitting that they have set forth allegations demonstrating that Respondents are willing to negotiate a sale of the Properties only on terms that Respondents deem acceptable, and have excluded Petitioners from participating in the operation of the Companies. Petitioners contend that the submissions demonstrate that there is an irreconcilable animosity between the parties and, while all parties agree that dissolution of the Companies is warranted, Petitioners need the Court's involvement in determining the value of the assets and the mechanism for the sale of the Properties, to prevent Respondents from unilaterally deciding which offer for the Properties is acceptable. Petitioners submit that Respondents have engaged in oppressive conduct because Respondents, by virtue of their control of the majority vote, are attempting to dictate the terms and conditions of the disposition of the Properties, to the exclusion of Petitioners.

#### RULING OF THE COURT

##### A. Injunctive Relief

To demonstrate entitlement to a preliminary injunction under CPLR § 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction. *Matter of Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613 (2d Dept. 2008) citing *Matter of K.W.F. Realty Corp. v. Kaufman*, 16 A.D.3d 688, 689-90 (2d Dept. 2005); *Olabi v. Mayfield*, 8 A.D.3d 459 (2d Dept. 2004). A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by

money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Dissolution of a Corporate Pursuant to BCL § 1104-a

BCL § 1104-a provides a mechanism for shareholders of at least 20% of the outstanding shares of a non-publicly traded corporation to petition for its dissolution when those in control of the corporation engage in illegal, fraudulent or oppressive actions toward the complaining shareholders or misappropriate corporate assets. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1175-1176 (3d Dept. 2012), citing BCL § 1104-a and *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984). Oppression has been defined as conduct of a controlling shareholder that substantially defeats expectations that, viewed objectively, were both reasonable under the circumstances and central to the oppressed shareholder's decision to join the venture. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d at 1176, citing *Matter of Upstate Med. Assoc.*, 292 A.D.2d 732, 733 (3d Dept. 2002), quoting *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73.

Where oppressive conduct is found, it falls to the discretion of the courts to consider the totality of the circumstances surrounding the corporation and to determine whether a remedy other than dissolution constitutes a feasible means of satisfying the rights and interest of the shareholders, or whether an alternate remedy if appropriate, such as a forced buy-out. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d at 1176, citing BCL § 1111(b)(2); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73-74; *Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 A.D.2d 81, 84 (3d Dept. 1985). The appropriateness of an order of dissolution pursuant to BCL § 1104-a is in every case vested in the sound discretion of the court considering the application. *Matter of Fancy Windows & Doors*, 244 A.D.2d 484 (2d Dept. 1997), quoting *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73. In *Matter of Fancy Windows & Doors*, *supra*, the Appellate Division, Second Department held that, in view of the parties' conflicting assertions, the trial court should have held an evidentiary hearing on the application for dissolution pursuant to BCL § 1104-a. 244 A.D.2d at 484-485, citing, *inter alia*, *Matter of Rosen [Hofteller Enters.]*, 102 A.D.2d 855 (2d Dept. 1984) and *Matter of Kournianos [H.M.G., Inc.]*, 175 A.D.2d 129 (2d

Dept. 1991).

C. Rights of Dissenting Shareholders

Generally, the remedy of a shareholder dissenting from a merger and the offered “cash-out” price is to obtain the fair value of his stock through an appraisal proceeding. *Collins v. Telcoa Int’l Corp.*, 283 A.D.2d 128, 131 (2d Dept. 2001), quoting *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 567-68 (1984), citing BCL § 623. This protects the minority shareholder from being forced to sell at unfair values imposed by those dominating the corporation while allowing the majority to proceed with its desired merger. The pursuit of an appraisal proceeding generally constitutes the dissenting shareholder’s exclusive remedy. An exception exists, however, when the merger is unlawful or fraudulent as to that shareholder, in which event an action for equitable relief is authorized. *Collins v. Telcoa Int’l Corp.*, 283 A.D.2d at 131-32, quoting *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d at 567-68. Once a dissenting shareholder brings a proceeding pursuant to BCL § 623 to have his shares appraised, however, he may not also commence either an individual or derivative action for money damages. *Collins v. Telcoa Int’l Corp.*, 283 A.D.2d at 132, citing *Breed v. Barton*, 54 N.Y.2d 82, 85 (1981).

D. Appointment of a Receiver

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party’s interests. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d at 632, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis*, the Second Department reversed the trial court’s order granting plaintiff’s motion for appointment of temporary receiver in light of plaintiff’s failure to make the required evidentiary showing. 49 A.D.3d at 631-632.

E. Dismissal Standards

On a motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Nouveau Elevator Industries, Inc. v. Glendale Condominium Town and Tower Corp.*, 107 A.D.3d 965,

966 (2d Dept. 2013), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

F. Application of these Principles to the Instant Action

The Court denies Petitioners' motion and vacates the temporary restraining order issued on September 12, 2017. Petitioners have not established their right to injunctive relief because 1) in light of the conflicting affidavits and documentation, Petitioners have not demonstrated a likelihood of success on the merits; 2) Petitioners have not established that they will suffer irreparable injury without injunctive relief because, notwithstanding Petitioners' conclusory assertion that the Properties are unique, Petitioners' injury, if any, appears compensable by money damages; and 3) in light of the conflicting affidavits, and documentation supporting the conclusion that Respondents have been communicating with Petitioners for a significant amount of time in an effort to reach a mutually-agreeable mechanism for appraising the Properties, Petitioners have not demonstrated that a balancing of the equities favors Petitioners. In light of the foregoing, Petitioners have also not met the high burden to warrant the appointment of a receiver. The Court also will not issue an order directing Respondents to fully account to Petitioners and the Court for all of their activities, in light of evidence demonstrating that Respondents have kept Petitioners apprised of relevant information regarding the Companies and Properties, but would anticipate that Respondents will continue to keep Petitioners so apprised.

The Court denies Respondents' motion to dismiss. Viewing Petitioners' allegations in their most favorable light, those allegations arguably support dissolution of the Companies pursuant to BCL § 1104-a. Moreover, in light of Petitioners' allegation that Respondents' conduct is unlawful or fraudulent as to Petitioners, the Court denies Respondents' motion to dismiss the Petition on the grounds that Respondents' sole remedy is an appraisal proceeding pursuant to BCL § 623. In addition, the Court, for the reasons outlined in the Affirmation In Opposition of Petitioners' Counsel, also denies Respondents' motion to dismiss the Petition for failure to name necessary parties. Finally, the Court denies the application by Respondents' Counsel, as set forth in her correspondence to the Court dated January 31, 2018, to strike certain paragraphs from the Affirmation in Opposition of Petitioners' Counsel.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on May 1, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY

April 5, 2018



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

APR 09 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE