

Wachs v Tienken

2020 NY Slip Op 30321(U)

January 10, 2020

Supreme Court, New York County

Docket Number: 655933/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

TESS WACHS,

Plaintiff,

- v -

RICHARD TIENKEN, JEAN TIENKEN, COMIC STRIP
PROMOTIONS INC.

Defendant.

-----X

INDEX NO. 655933/2019
MOTION DATE 10/11/2019
MOTION SEQ. NO. 001

**INTERIM DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISSOLUTION.

Upon the foregoing documents and for the reasons set forth on the record (1/20/20), petitioner's order to show cause seeking dissolution of Comic Strip Promotions, Inc. (**Comic Strip**) and the appointment of a receiver to wind up its affairs is held in abeyance pending a hearing as set forth below, and the respondents' cross motion to dismiss the petition is denied.

Background

This proceeding concerns a comedy club known as the Comic Strip, which is currently owned by Tess Wachs as 50% shareholder and Richard and Jean Tienken as equal 25% shareholders (Petition, ¶¶ 2-3). Tess Wachs obtained her 50% interest in the Comic Strip from her husband Robert Wachs, now deceased. Jean Tienken obtained her 25% interest in the Comic Strip from Richard Tienken, who was previously a 50% owner with Robert Wachs. Previously, in July of 2016, Ms. Wachs commenced an arbitration proceeding before the American Arbitration

Association to, among other things, confirm her 50% stake in the Comic Strip (*id.*, ¶ 6). The arbitrator confirmed her 50% stake in an award (the **Award**) dated February 14, 2017 (NYSCEF Doc. No. 2). This court (Charles Ramos, J.) confirmed the Award in October 2017 (652586/2017). At the suggestion of the court, the parties returned to the arbitrator concerning the control and operations of the Comic Strip (*October 24, 2017 Tr.*, p. 9:24-10:6, 652586/2017). The arbitrator issued a supplemental award (the **Supplemental Award**) dated February 13, 2018, which provided as follows:

Before me now is a dispute arising out of the Shareholders Agreement over the control and operations of the Comic Strip Promotions, Inc. ("Comic Strip" or the "Corporation"). As previously determined, Richard Tienken ("Tienken") and Tess Haley Wachs ("Tess Wachs") are equal shareholders of the Corporation. Corporate formalities have not been followed in terms of annual meetings, election of directors or election of officers at least since the passing of Robert Wachs, a former director and officer. The shareholders are directed to hold a meeting and to elect each other as members of the Board. As Robert Wachs is no longer alive, he cannot properly be elected as an officer of the Corporation by the directors, thus frustrating the underlying purpose of that provision of the Shareholders Agreement that provided for Robert Wachs to elect Tienken and Tienken to elect Robert Wachs. Given the death of Robert Wachs this mutuality of obligation can no longer be effectuated. Similarly, you cannot assume that Tess Wachs quo shareholder can be substituted in or assigned the right to be voted in as an officer as if she were Robert Wachs. By its terms the Shareholders Agreement provides it "shall be binding upon any person to whom any of the shares of Common Stock of any shareholder is transferred" and is expressly intended to "operate for the benefit of the parties hereto and their respective heirs." That provision is insufficient to re-write the terms of the Shareholders Agreement or to effectuate an agreement to elect Tess Wachs as an officer in lieu of Robert Wachs or to bind her to elect Tienken as President. From a governance standpoint Tienken and Tess Wachs as equal shareholders must be treated equally and have equal powers to determine the management and operations of the Corporation unless they now agree otherwise. One shareholder's will and desire cannot be forced upon the other under any of the viable terms of the Shareholders Agreement or the N.Y. Business Corporations Law. If the shareholders are unable to agree on the election of directors and officers, such division and dissention will result in deadlock and Tienken and Tess Wachs may proceed with their statutory rights under such circumstances based on this finding.

(NYSCEF Doc. No. 3).

In a decision dated September 26, 2019, the court (Marcy Friedman, J.) affirmed the Supplemental Award (650783/2019).

Ms. Wachs now brings this petition to dissolve the Comic Strip, arguing that since the issuance of the Supplemental Award, the Tienkens have failed to treat her equally, have not allowed her to participate in the management/operations of the Comic Strip, and that the shareholders have failed to agree on the election of officers which has resulted in a deadlock requiring dissolution of the company. Ms. Wachs seeks to invoke her statutory right to dissolve the Comic Strip and to appoint a temporary receiver to wind up the affairs of the company (Petition, ¶¶ 14-16). She claims that dissolution is necessary because, among other things, the Tienkens have locked her out of the Comic Strip's premises, denied her access to the company's books and records (i.e., "the point-of-sale [POS] system and the nightly texts, the only records that provide accurate gross and net receipts information"), and have mismanaged the Comic Strip's affairs and looted its assets (Wachs Reply Aff., ¶¶ 9-10, NYSCEF Doc. No. 19). Ms. Wachs also claims that she has been subject to verbal harassment from Comic Strip's managers such that she fears for her safety and that she has not received a single distribution or pay-out from the Comic Strip whereas Mr. Tienken "has been taking out" \$1,500/week as a distribution and has charged personal expenses to the Comic Strip (*id.*, ¶¶ 9, 12).

The Tienkens dispute Ms. Wachs' claim of deadlock. In an affidavit, Richard Tienken attests that he is the sole director of the company and as the only director he can cause the board to act (R. Tienken Aff., ¶ 2, NYSCEF Doc. No. 11). Mr. Tienken further attests that he has run the

Comic Strip since 1976, and that, in any event, Ms. Wachs never asked for a vote of directors

(*id.*, ¶ 3). He states:

[Ms. Wachs] has not asked for a vote of directors. The last shareholders' meeting was held on March 1, 2019 at the club. Tess called the meeting and distributed an agenda for that meeting. A copy of the email from her attorney containing the agenda is attached as Exhibit A. While "Appointment of Officers" is on the agenda, Tess did not ask for a vote to appoint directors. I do not believe that Tess can establish that the election of directors cannot be obtained without even proposing a vote for directors. Since then, I have tried to have more than one shareholders meeting that Tess has refused to attend, so we have not had a quorum.

(*id.*).

Mr. Tienken also maintains that while the shareholders may have differing opinions on issues, dissolution of the company would not be beneficial to the shareholders and, in fact, would be detrimental to every shareholder as, among other things:

[the Comic Strip] has a great deal of legacy debt and no significant assets, but it does have income and a roadmap to becoming debt-free (or close to it). It has no protectable intellectual property and no lease for its location (we have a month-to-month tenancy). Its assets consist of only of the furniture and fixtures. These items would raise a negligible amount of money at auction. Finally, since Bob's death, I am the sole personal guarantor of certain of the company's debts. Thus, dissolution would not help any shareholder and would affirmatively hurt me financially.

(*id.*, ¶ 4).

BCL §1104, in pertinent part, states as follows:

(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.

(BCL §1104).

BCL § 1104–a (b) vests broad discretion in the court to determine whether and when dissolution should proceed. Among other things, the court has the ability to order the resolution appropriate for a particular case, such as a buyout in lieu dissolution (*Matter of Burack*, 137 AD2d 523, 527 [2d Dept 1988]). The court is required to evaluate if any remedy short of dissolution would be appropriate (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 73 [1984]). Dissolution of a company is a drastic remedy and should be considered as a last resort (*Matter of 168 ½ Delancey Corp.*, 174 AD2d 523, 526 [1st Dept 1991]). This may be particularly true where from the "record it appears that the financial management of the corporation had been conducted somewhat loosely from the inception" and there has been a history of "failure to observe corporate formalities" (*id.*). Because dissolution is considered to be an option of last resort, ordering such relief without a factual hearing is "precipitous" (*id.*). This is particularly true where, as here, the parties submit conflicting affidavits which raise factual questions as to the merits of the petition and the appropriate remedy (*Matter of Steinberg*, 249 AD2d 551, 552 [2d Dept 1998]). Here, a hearing is necessary to determine these issues. Therefore, this matter is referred to a Special Referee or JHO to hear and report with recommendations on whether the shareholders of the Comic Strip have reached a deadlock or one of the grounds set forth in BCL 1104 has been established, and whether dissolution would be beneficial to shareholders.

Accordingly, it is

ORDERED that the petition is referred to a Special Referee or JHO to hear and report on the issues set forth herein except that the parties may stipulate, as permitted by CPLR 4317, for the Special Referee, or another person designated by the parties to serve as referee, to hear and determine the aforementioned issues; and it is further

ORDERED that the petition for dissolution shall be held in abeyance pending the hearing and report of the Special Referee to whom this is assigned; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter,

the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that unless otherwise directed by the special referee or JHO, on the initial appearance in the Special Referees Part, the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further ORDERED that the cross motion to dismiss the petition is denied; and it is further

ORDERED that a status conference in this matter is set for **March 2, 2020 at 11:30 A.M.** for the parties to apprise the court of the status of the hearing before the JHO/Special Referee.


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1/10/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE
			<input type="checkbox"/>	DENIED	