To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN M. LORETI, as Administrator of the Estate of JOHN LORETI,

Petitioner,

-against-

Index No.: 53885/2019

LORCRESS ENTERPRISES, INC., SEBASTIAN A. LORETI a/k/a SAL LORETI, MARIA LORETI, MARIA LORETI as custodian for SEBASTIAN LORETI, MARIA LORETI as custodian for ANDREW LORETI, GINA LORETI FORGIONE,

DECISION and ORDER

Motion Sequence Nos. 6 & 8

Respondents.

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RUDERMAN, J.

The following papers were considered on the motion by respondent Gina Forgione for an order pursuant to CPLR 3212 granting partial summary judgment declaring her percentage of ownership of the corporate respondent Lorcress Enterprises, Inc. (sequence 6), and petitioner's cross-motion for a judgment as to petitioner's percentage of ownership of the corporate respondent, and for summary judgment dissolving the corporation, compelling respondent Maria Loreti to account for unauthorized loans and distributions by the corporation, and holding her personally liable to the corporation and its shareholders for such loans and distributions, removing her as a director and an officer, and for related relief (sequence 8):

Papers - Sequence 6	Numbered
Notice of Motion, Affirmation, Affidavit, Exhibits A - Q, and Memorandum of Law	1
Lorcress Affidavit in Opposition, Exhibits A - G, Memorandum of Law, Exhibit A	2

Maria Loreti Affirmation in Opposition, Exhibits A - N	3
Reply Affirmation, Affidavit, Exhibit A	4[1]
- Sequence 8	
Notice of Cross-Motion, Affirmation, Affidavit, Exhibits 1 - 40 and Memorandum of Law	5
Forgione Affirmation in Support of Cross-Motion, Exhibits A - B	6
Lorcress Affidavit in Opposition, Exhibits A - G, Memorandum of Law, Exhibit A	7
Maria Loreti Affirmation in Opposition to Cross-Motion, Exhibits A - J	8
Reply Affidavit, Affirmation, Exhibits 41 - 42, and Memorandum of Law	9

I.

Summary Judgment Regarding Ownership Percentages

This is one of three separate but interrelated proceedings, each involving a closely-held, family-owned corporation, all three of which are being litigated simultaneously by the same individuals (*see also Loreti v 1466 E. Gun Hill Rd. Corp.*, Sup Ct, Westchester County Index No. 53885/2019 and *Loreti v JJL Realty Corp. of New York*, Sup Ct, Westchester County Index No. 56905/2019). While the claims are predominantly the same in all three proceedings, and discovery seems to be proceeding jointly, there are some facts and allegations that are unique to each proceeding, necessitating separate decisions. Nevertheless, some of the submissions on these motions carry all three captions, and combine their discussion of the three proceedings.

The amended petition in this proceeding seeks a dissolution of the corporate respondent,

[1] This motion has been decided without consideration of the proposed sur-reply that is the subject of a noticed motion returnable on a future date, which respondent Maria Loreti filed over three weeks after this motion was submitted. This Court determined to proceed with this decision on the submitted motions before the return date of the new motion for leave to file a sur-reply, because (1) the timing of that application was excessively delayed, (2) the assertions that are cited therein as new allegations necessitating a further response are not significantly different than respondents' previous factual assertions, and (3) the 19-page proposed sur-reply affidavit and the eleven supporting exhibits contain substantial factual claims and assertions that go far beyond the extent of what is appropriate for a sur-reply.

Lorcress Enterprises, Inc. (the "Corporation" or "Lorcress"), as well as other declaratory and equitable relief and money damages. The Corporation owns property at 44-50 Fountain Place in New Rochelle, New York, which a 2019 statement of assets and liabilities valued at approximately $12,500,000.00.

The present motion by respondent Forgione (sequence 6) asserts that the parties' respective ownership interests in the Corporation can be determined at this time as a matter of law.[2] Respondent Forgione contends that the shareholder ownership interests in the corporation are as follows: John Loreti, 40% (80 shares), respondent Gina Forgione, 20% (40 shares), respondent Maria Loreti as custodian for Sebastian G. Loreti under the New York Transfers to Minors Act, 20% (40 shares), and Maria Loreti as custodian for Andrew Loreti under the New York Transfers to Minors Act, 20% (40 shares). She submits documentary evidence dating from February 11, 2002, including a Consent of the Board of Directors, the Minutes of a Special Meeting of Shareholders, a Resolution of Shareholders, and stock certificates #5, 6, 7 and 8.

Forgione acknowledges that on February 9, 2010, a Special Meeting of Shareholders of the Corporation was held, and the minutes of that meeting dated February 9, 2010, signed by Sebastian Loreti as Vice President of the Corporation, reported inter alia that the Corporation unanimously resolved to "[issue] new share certificates so that the ownership of the corporation shall be Maria Loreti, 100% (200 shares)." However, Forgione observes, the corresponding

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[2] It is noted that Forgione previously made such a motion, which was denied by the previously-assigned judge (Hon. Gerald Loehr, J.) in an on-the-record court appearance on December 16, 2019; when pressed, the judge granted the movant leave to renew. This Court considers the present motion to have been brought pursuant to that grant of leave.

Resolution of Shareholders of the Corporation dated February 9, 2010, which recites that "All current stockholders unanimously resolve to transfer their full shares to Maria Loreti for no consideration or monetary compensation," was signed by shareholder John Loreti and by Maria Loreti, but not by Gina Forgione. Moreover, the three new stock certificates issued to Maria Loreti – #9 for 40 shares, # 10 for 40 shares, and # 11 for 200 shares – not only improperly effectuated a purported transfer without Forgione's consent, but also issued a number of common stock shares beyond the 200 authorized. Notably, each of those stock certificates recites, "The Corporation is authorized to issue 200 Common Shares – No Par Value."

Forgione explains that on February 9, 2010, Lorcress was in the process of applying for a loan with Emigrant Funding Corp., and the loan required personal guarantees from all the shareholders of Lorcress. Because at the time John Loreti was in financial difficulty, to circumvent the problem caused by his participation in the loan, a plan was devised whereby the shareholders would surrender all their shares to Lorcress, which would then temporarily reissue 200 shares to Maria Loreti, who would then serve as the signatory and guarantor on the 2010 Loan. Following Gina's hesitation, an agreement was reached whereby the new certificates intended to replace the 200 shares temporarily issued to Maria would be delivered to an escrow agent pursuant to a written Escrow Agreement signed by John Loreti, Gina Forgione and Maria Loreti, dated May 17, 2010, in which each of them acknowledged that Lorcress was only legally authorized to issue 200 shares of no par value stock. The Escrow Agreement provided that, upon successful funding of the 2010 Loan, the escrow agent would deliver the escrowed stock certificates totaling 200 shares to each of the shareholders in the same percentages and number of shares as existed prior to the 2010 Loan, consistent with the documented February 11,

2002 initial issuance of shares (except that the shares previously held by Maria Loreti as custodian for each of her minor children under the UTMA were to be re-issued to Maria Loreti).

Thereafter, Forgione explains, after the loan was funded, new stock certificates # 12, 13 and 14, dated May 20, 2010, were delivered to Maria Loreti, John Loreti and Gina Forgione respectively, in accordance with the escrow agreement, reflecting the agreed-upon ownership percentages. The minutes of a special meeting of shareholders on May 25, 2010, signed by Sebastian Loreti as Vice-President, include the resolution that "the Corporation shall issue new share certificates so that ownership of the corporation shall be John Loreti, 40% (80 shares)[,] Maria Loreti, 40% (80 shares) and Gina Forgione, 20% (40 shares)." Like the earlier certificates, those stock certificates also recite, "The Corporation is authorized to issue 200 Common Shares – No Par Value."

One aspect of petitioner's cross-motion (sequence 8) similarly seeks a declaratory judgment as to his percentage of ownership interest in Lorcress, and supports Forgione's claim. He submits many of the same documents recited above. In addition, he also submits a certified copy of Lorcress's original Certificate of Incorporation, dated August 31, 1976 and filed September 15, 1976, stating, inter alia, that the corporation is authorized to issue two hundred shares of no par stock. Also submitted are the Lorcress Annual Shareholder Lists for December 31, 2002 through December 31, 2009, reflecting ownership as petitioner and Forgione claim – John Loreti, 40% (80 shares), Gina Forgione, 20% (40 shares), Maria Loreti as custodian for Sebastian G. Loreti, 20% (40 shares), and Maria Loreti as custodian for Andrew Loreti, 20% (40 shares).

However, as petitioner acknowledges, the corporation's Annual Shareholder Lists

beginning with that dated December 31, 2010, including the list from December 31, 2015 which was filed by petitioner as an exhibit along with the original petition (*see* NYSCEF Doc. No. 4), contains different information. They read,

Owner	Percent	Number of Shares
Gina Forgione	11.76%	80
Maria Loreti (as custodian for Sebastian G. Loreti)	5.88%	40
Maria Loreti (as custodian for Andrew Loreti)	5.88%	40
Maria Loreti	52.94%	360
John Loreti	23.52%	160

Those are the ownership percentages Maria Loreti claims in opposition to Forgione's current motion and the similar portion of petitioner's current cross-motion. She gives effect not only to the 200 shares issued on May 20, 2010 in certificates # 12, 13 and 14, but also to the stock certificates issued in February 2010, certificates # 9 and 10 for 40 shares each to her as the custodian of Sebastian G. Loreti and Andrew Loreti, and # 11 for 200 shares to her personally, in addition to the 80 shares she was issued by certificate # 14 in May 2010. Maria Loreti also submits information printed from the New York Department of State website – not an amendment to the Certificate of Incorporation – reflecting that Lorcress is authorized to issue 2,000 shares with no par value. Additionally, the submissions include a copy of a Resolution of Lorcress's Board of Directors dated December 9, 2001, authorizing an increase in the amount of shares of common stock from 200 to 2,000.

Petitioner's cross-moving papers assert that notwithstanding the December 9, 2001 resolution, the amount of authorized shares was not properly increased at that time, since such a change must be accomplished by filing with the Secretary of State a Certificate of Amendment to the Certificate of Incorporation (*see* Business Corporation Law § 805 [c]). He challenges the

validity of the February 9, 2010 share certificates, which, if they were treated as valid, would constitute an overissue, and contends that the overissue was cured by the new issuance of 100% of corporate stock in May 2010; he particularly points out that on the back of share certificate #11 is written,

> "Return to Lorcress Enterprises, Inc. as treasury stock.
> New Shares Distributed.
> 5-20-2010.
> 80 Shares – Maria Loreti
> 80 Shares – John Loreti
> 40 Shares – Gina Forgione"

In opposition, both Maria Loreti and the Corporation rely on the February 9, 2010 issuance of shares, and the ownership percentages as recited in the corporation's Annual Shareholder Lists starting with that of December 31, 2010, reflecting that the total number of issued shares is 680, with Maria Loreti personally owning 360 of them, and owning 80 as custodian, Gina Forgione owning 80, and John Loreti owning 160. Also submitted in opposition is a 16-page document entitled "Consent of the Board of Directors of Lorcress Enterprises, Inc.," dated May 5, 2016, signed by Maria Loreti as Director and Sebastian Loreti as Vice President and Secretary of Lorcress, reciting the actions of the corporation, including the February 9, 2010 authorization of the issuance of 280 shares of stock to Maria Loreti, and appearing to purportedly approve all such actions retroactively. They also rely on a deposition taken of Gina Forgione in a Surrogate's Court matter, in which she testified that "to the best of [her] knowledge" the respective ownership shares recited in the list provided by Maria Loreti were correct.

On reply, petitioner sheds light on the issue of the number of shares the corporation was authorized to issue in 2010. He offers a document he recently obtained from the Department of

State – not from defendants, despite demands for same – consisting of a Certificate of Amendment of Certificate of Incorporation dated November 12, 2019 and which was filed November 13, 2019, that is, during this litigation. This Certificate of Amendment, signed by Maria Loreti, acknowledges that at the time the corporation was authorized to issue 200 shares, and states that aggregate was increased from 200 to 2000. It also misrepresents that the amendment was authorized first by the board *and* by the holder(s) of all outstanding shares entitled to vote thereon. This recently-obtained document clarifies how the printout from the Department of State website, on which respondents relied in opposition here, recited that Lorcress is authorized to issue 2000 shares.

In Forgione's reply, she discusses the circumstances of her deposition in the Surrogate's Court matter, in which she was not represented by counsel, and did not understand the import of her answers or how they might be used. She explains that Maria Loreti had attacked her verbally, belittled her and attempted to pressure her, and had misrepresented the situation to her.[3]

Discussion

To prevail on a motion for summary judgment under CPLR 3212, the moving party must show "sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), such that summary judgment is appropriate "as a

[3] This motion has been decided without consideration of the proposed sur-reply that is the subject of a noticed motion returnable on a future date, which respondent Maria Loreti filed over three weeks after this motion was submitted. This Court determine to proceed with this decision on the submitted motions before the return date of the new motion for leave to file a sur-reply, because (1) the timing of that application was excessively delayed, (2) the assertions that are cited therein as new allegations necessitating a further response are not significantly different than respondents' previous factual assertions, and (3) the 19-page proposed sur-reply affidavit and the eleven supporting exhibits contain substantial factual claims and assertions that go far beyond the extent of what is appropriate for a sur-reply.

matter of law" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

The evidence submitted by petitioner and Forgione establishes that the shares and percentages of ownership of Lorcress as claimed by Maria Loreti and the corporate respondent is incorrect. The February 9, 2010 purported issuance of 280 shares of stock was improper for several reasons, and must be treated as a nullity. The resolution dated February 9, 2010, reciting that "[a]ll current stockholders unanimously resolve to transfer their full shares to Maria Loreti for no consideration or monetary compensation," is not supported by any document showing that Forgione consented.

Moreover, the total of 280 shares purportedly issued at that time totaled more than the 200 shares the corporation was authorized to issue at that time. The 2001 resolution to increase the number of shares of corporate stock was insufficient to effectuate an amendment to the Certificate of Incorporation, since such a change may only be accomplished by filing a Certificate of Amendment to the Certificate of Incorporation (*see* Business Corporation Law § 805 [c]). The amendment filed in November 2019 cannot be relied on to retroactively increase the authorized number of shares in 2010. When a corporation issues shares of stock beyond the maximum authorized by its certificate of incorporation, that action is void (*see Matter of Marino v Island Express Adv.*, 172 AD2d 525 [2d Dept 1991]).

In addition, the notation on the back of stock certificate # 11 specifically recites that those 200 shares as purportedly represented by that certificate were "[r]eturn[ed] to Lorcress

Enterprises, Inc. as treasury stock" and that new shares were distributed on May 20, 2010. Furthermore, the share certificates themselves recite that the corporation is authorized to issue 200 no par shares.

As a matter of law, the percentages of ownership of Lorcress stock are those recited in the minutes of the May 25, 2010 shareholder meeting, comprised of the 80 shares issued to John Loreti in certificate # 13 representing a 40% interest in the corporation, the 40 shares issued to Gina Forgione in certificate # 14 representing a 20% interest, and the 80 shares issued to Maria Loreti in certificate # 12 representing a 40% interest, which totals the authorized maximum of 200 shares. There is no evidence that since that time, outstanding shares have been transferred or new shares have been issued. Nor have respondents established any valid corporate action since that time that would have properly altered those ownership shares and percentages in any manner.

Summary judgment on this point is not rendered premature by the incomplete discovery process. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence" (*Cortes v Whelan*, 83 AD3d 763, 764 [2d Dept 2011] [citation omitted]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*id.*). It is Maria Loreti and the corporate respondent who possess the relevant information regarding share ownership, and they offer no basis to claim that either petitioner or Forgione is in sole possession of documentation or information that they lack with regard to the relevant facts. The Court rejects their suggestion that they are entitled to inquire of Forgione with regard to what she knew, believed, or consented to, before summary

judgment issues; Forgione's beliefs or understanding regarding ownership of the shares in Lorcress cannot in any event change the facts that are supported by documentation.

Nor have respondents presented any evidentiary materials creating an issue of fact as to any pleaded affirmative defense that would preclude summary judgment on the issue of ownership percentages. To the extent respondents contend that the 80 shares issued to John Loreti were issued "subject to a power of appointment" or, in the alternative, as "nominee for Maria Loreti," they have not offered proof creating an issue of fact as to that claim.

Powers of appointment must be created or reserved by written instrument executed by the donor (*see* EPTL § 10-4.1 [a] [2]). In support of the defense that John Loreti took his shares subject to a power of appointment, a document was turned over to petitioner, which document is either part of the will that Sebastian A. Loreti signed on July 6, 2019 – i.e., during this litigation – or an accompanying document. It is a notarized single-page document entitled "Power of Appointment," and in it, Sebastian A. Loreti listed a number of items, including "all issued shares in the name of Gina Forgione and John Loreti or under the Estate of John Loreti," and stated that he was exercising his power of appointment over those shares by appointing his wife, Maria Loreti, as owners of those shares.

However, this document does not serve to create a power of appointment. It merely purports to exercise an existing, previously-created power of appointment by Sebastian A. Loreti. However, respondents have not provided any writings, either in discovery or in opposition to this motion, that validly created such a power of appointment.

Importantly, nothing in the shares themselves, or in the corporate documents that provided for issuance of the shares to John Loreti and to Gina Forgione, makes their issuance

subject to any power of appointment, or indicates that the named owner would be a mere nominee. In contrast, when the corporation intended to transfer shares to Maria Loreti in the capacity of custodian under the Unified Transfers to Minors Act in 2002, it so specified on the share certificates, and, additionally, the annual list of shareholders thereafter stated that Maria Loreti held title to those shares as trustee under the UTMA. Notably, John Loreti and Gina Forgione were listed on every annual list of shareholders of the Corporation without any asterisk, notation, footnote, or qualification.

Respondents also raise the affirmative defense of standing on the theory that John Loreti failed to pay consideration for the shares of stock over which petitioner claims ownership. However, petitioner has established the invalidity of this defense, and respondents have not offered any evidentiary materials in opposition to the motion that would establish the existence of an issue of fact precluding summary judgment on this defense. The status of petitioner's father as a shareholder was repeatedly confirmed after the last issuance of shares to him in May 2010, most recently in connection with the corporation's annual meeting in November 2017. Notably, the resolution in the minutes of the May 2010 shareholder meeting specifically recited that the shares would be transferred to John Loreti and Gina Forgione "for no consideration or monetary compensation." It is also noted that monetary consideration is only required for shares that have par value (see Business Corporation Law § 504 [c]). While a corporation *may* issue no par value shares "for such consideration as is fixed from time to time by the board" (*see* Business Corporation Law § 504 [d]), here the shares were issued in May 2010 without fixing such consideration, and the signing of the share certificates constitutes approval by the board of their issuance.

Since respondents have not demonstrated the existence of fact either as to petitioner's and Forgione's ownership interest, or the correct percentage of their ownership interest, summary judgment is granted on petitioner's first cause of action and Forgione's first cross-claim.

II.

Summary Judgment on Petitioner's Second Through Seventh, Ninth, and Tenth Causes of Action

Second Cause of Action

Petitioner's second cause of action seeks dissolution of the corporation pursuant to Business Corporation Law §§ 1104-a(a)(1), (a)(2), and the common law. Business Corporation Law §1104-a provides that an owner of at least 20 percent of the voting shares in a corporation may file a petition for its dissolution on grounds that "the directors or those in control have engaged in "illegal, fraudulent or oppressive actions toward the complaining shareholders" (§ 1104-a [a] [1]) or that the "property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation" (§ 1104-a [a] [2]). At the time this action was commenced, petitioner owned a sufficient number of shares of the corporation to seek dissolution under this statute.

Petitioner claims on this motion that undisputed documents and facts satisfy the grounds provided by Business Corporations Law § 1104-a (a) (1) and (a) (2) for dissolution, namely, that those in control of the corporation have been guilty of "illegal, fraudulent, or oppressive actions toward the complaining shareholders."

Specifically, he argues that Maria Loreti made material false statements on a loan

application submitted to CMS Bank to secure a $2,000,000.00 mortgage loan to the Corporation in April 2014, by certifying that she was the 100% owner of the Corporation, while the Corporation's tax return for 2014 identified Sebastian Loreti as the 100% shareholder of the Corporation. These falsehoods, petitioner argues, exposed the Corporation to possible acceleration of the debt and other penalties.

He also claims that Maria Loreti committed oppressive conduct by issuing share certificates # 9 and 10 in her name without shareholder approval, and by falsely claiming title to shares that had been surrendered to the Corporation, in an effort to dilute the economic and voting interests of John Loreti and Gina Forgione; by misrepresenting the extent of petitioner's and respondent Forgione's respective ownership interests and on one occasion, denying petitioner's shareholder interest in the Corporation; and by denying petitioner access to the books and records and financial statements, tax, or financial information, and refusing to hold annual meetings to elect directors. Petitioner also complains that Maria Loreti caused the Corporation to hire her property management company, Costa Realty LLC, without corporate approval, to strip the profits of the Corporation.

He asserts that Maria and Sebastian Loreti "looted" the Corporation and committed "waste" by using the Corporation to pay their personal expenses, characterizing these payments as "loans" on the Corporation's financial records.

Petitioner also cites conduct by Sebastian Loreti, who is deceased and no longer a party to this proceeding, in particular his non-cooperation at an April 2018 deposition in the Surrogate's Court matter involving the estate of petitioner's father.

Petitioner relies on case law that in a close corporation, a minority shareholder's

"reasonable expectations" may be used to measure and identify oppressive conduct (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73 [1984]). He argues that according to this "reasonable expectations" test, "[o]ppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or [based on] personal animus" (*Matter of Maybaum*, 6 Misc 3d 1019(A) [Sup Ct, Nassau County 2005]; *see Matter of Wiedy's Furniture Clearance Ctr. Co., Inc.*, 108 AD2d 81, 84 [3d Dept 1985] [conduct "freezing out" or "squeezing out" the petitioner due to family animosity, constituted oppressive conduct warranting application of Business Corporation Law § 1104–a (a) (1)]).

Third Cause of Action

Petitioner's third cause of action seeks judicial dissolution of the Corporation on grounds specified in Business Corporation Law § 1104, because (i) the directors have failed to hold an annual meeting for at least two annual meeting dates, and therefore failed to elect directors as called for in the bylaws (§ 1104 [c]); (ii) the shareholders are so divided that the votes required for the election of directors cannot be obtained (BCL § 1104(a)(2)); and (iii) there is internal dissension among two factions of shareholders who are so divided that dissolution would be beneficial to the shareholders (BCL § 1104(a)(3)). He relies on the assertion that the Corporation has not held an election of directors for more than thirty (30) months, despite Petitioner's demand to the Corporation in June 2019 to hold a special meeting for that purpose. The last annual meeting of the Corporation was held in November 2017.

Respondents observe that subdivision (a) of section 1104 only applies to "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." In contrast, however, subdivision (c) of section 1104 is not limited to a holder of at least half the shares; it authorizes "any holder of shares entitled to vote at an election of directors of a corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors."

Petitioner suggests that there is no genuine dispute as to the existence of deadlock and dissension.

Fourth Cause of Action

Petitioner's fourth cause of action is a derivative claim against Maria Loreti for violation of Business Corporation Law § 719 (a)(4), based on purported loans made to her and for her personal benefit by the Corporation while she was its sole director, in the amount of $1,423,549.00. He asserts that there is no corporate record that these "loans" were approved by the shareholders as required by Business Corporation Law § 714. He adds that the Corporation's 2017 federal tax return shows $1,423,549.00 as a "loan to shareholders" asset of the Corporation, yet this "loan" was not disclosed on the 2019 Statements of Assets and Liabilities Maria Loreti prepared for the Court in this proceeding.

Fifth Cause of Action

Petitioner's fifth cause of action is a derivative claim against Maria Loreti for violation of Business Corporation Law § 719 (a) (1), based on improper distributions. Section 719 (a) (1) provides that directors who vote for or concur in the declaration of any dividend or other distribution contrary to the provisions of Business Corporation Law § 510 (a) or (b) shall be

liable to the corporation for the benefit of its creditors or shareholders to the extent of any injury suffered by such persons as a result of such distributions. He argues that the amounts received by Maria Loreti and her husband, that were called "loans," were actually corporate distributions. Petitioner cites corporate records indicating that while he received less than $10,000 in distributions, and Forgione approximately $400,000 in distributions, Maria Loreti and/or her husband received over $1,000,000.00.

Sixth Cause of Action

Petitioner's sixth cause of action, brought pursuant to Business Corporation Law § 713, seeks to set aside the July 2, 2018 property management agreement the Corporation entered into with Costa Realty LLC, of which Maria Loreti is the owner. Petitioner asserts that the agreement was not validity approved by the shareholders, and that by its terms, is not fair and reasonable to the Corporation, in view of its ten year term and its management fee of 8% of the gross income of the Corporation, which petitioner states is far in excess of the market rate for property management services.

Seventh Cause of Action

Petitioner's seventh cause of action is a derivative claim against Maria Loreti for breach of fiduciary duty. The claim is based on his showing that Maria Loreti has acted contrary to the best interest of all shareholders by: threatening to dissipate and conceal the assets of the Corporation; causing the Corporation to issue shares in her name in order to dilute the economic and voting interests of John Loreti and Gina Forgione, the minority shareholders; denying petitioner's interest as a shareholder of the Corporation and misrepresenting his and Forgione's respective ownership interests; and denying him access to the books and records of the

Corporation despite proper demand under BCL § 624.

Ninth Cause of Action

Plaintiff's ninth cause of action seeks the removal of Maria Loreti as a director for cause pursuant to Business Corporation Law § 706(d), based on his claims that she engaged in illegal, oppressive, and abusive conduct and flagrant self-dealing. The statute allows the holders of ten percent of the outstanding shares of a corporation to bring such a petition.

Tenth Cause of Action

Petitioner's tenth cause of action seeks the removal of Maria Loreti as an officer for cause pursuant to Business Corporation Law § 716(c).

Discussion

Initially, the bare assertion that discovery is not complete does not justify a denial of a summary judgment motion as premature, where the party relying on the claim is unable to establish the nature of the information to be obtained through discovery that is needed to oppose the motion. The corporate respondent and Maria Loreti are the parties in possession and control of virtually all relevant information. Nothing submitted in Maria Loreti's opposition to this motion establishes what information is anticipated that is not presently in her possession or control.

However, while petitioner creates a strong impression that Maria Loreti may have engaged in misconduct, some of which was directed at him personally as the administrator of his father's estate, or that corporate funds were used for non-corporate purposes by its directors, officers or those in control of the corporation, there are a number of reasons why this Court is

unable to determine as a matter of law what relief, if any, petitioner is entitled to in this proceeding.

Petitioner relies on case law that in a close corporation, a minority shareholder's "reasonable expectations" may be used to measure and identify oppressive conduct (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73 [1984]). He argues that according to this "reasonable expectations" test, "[o]ppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or [based on] personal animus" (*Matter of Maybaum*, 6 Misc 3d 1019(A) [Sup Ct, Nassau County 2005]; *see Matter of Wiedy's Furniture Clearance Ctr. Co., Inc.*, 108 AD2d 81, 84 [3d Dept 1985] [conduct "freezing out" or "squeezing out" the petitioner due to family animosity, constituted oppressive conduct warranting application of Business Corporation Law § 1104–a (a) (1)]).

However, "[t]he appropriateness of an order of dissolution pursuant to Business Corporation Law § 1104-a 'is in every case vested in the sound discretion of the court considering the application,'" (*Matter of Fancy Windows & Doors Mfg. Corp.*, 244 AD2d 484 [2d Dept 1997], quoting *Matter of Kemp & Beatley, Inc.*, 64 NY2d at 73). The question of reasonable expectations is by its nature one of fact. Petitioner cites *Matter of Neville v. Martin* (29 AD3d 444, 445 [1st Dept 2006]) and *Matter of Goodman v Lovett* (200 AD2d 670, 671 [2d Dept 1994]) for the proposition that judgment should be awarded in a corporate dissolution matter without a hearing where the record demonstrates sufficient dissension and animosity between the shareholders to prevent the continued efficient operation of the corporation, and there is no contested issue determinative of the application. However, there are underlying facts

and circumstances here that must be clarified before final determination of this petition.

Notably, some of the factual claims underlying the causes of action for corporate dissolution occurred before petitioner's decedent passed away, such as the 2014 loan application, and this Court is unable to determine whether and to what extent petitioner's decedent knew of and consented to the complained-of conduct. Indeed, if the shareholders accepted, from the outset, the use of the Corporation to pay Maria and Sebastian Loreti's personal expenses, and the characterization of such payments as loans on the Corporation's financial records, that historical approval is a relevant consideration in the determination of petitioner's complaints that respondents continued to do so, without his approval, after his decedent passed away. Although oppressive conduct is not excused by its longstanding nature, the history of the practice may be relevant to a determination of the appropriate form and manner of relief to be awarded in a proceeding such as this.

The derivative claims against Maria Loreti, and the claims seeking her removal, also require this Court to make fact-findings when her conduct is considered at a hearing against the backdrop of the history of the Corporation's shareholder-approved actions.

As to petitioner's claim regarding the property management agreement, his submissions fail to establish as a matter of law his claim that its terms are not fair and reasonable to the Corporation or that its management fee is far in excess of standard market rates for such services.

Even those factual assertions that appear to be undisputed, such as petitioner's claim that the Corporation has not held an election of directors for more than thirty months, despite demand, and that the last annual meeting of the Corporation was held in November 2017, do not clearly establish the appropriate form or manner of relief.

Without further addressing each individual cause of action, this Court concludes that it will be necessary to hold a hearing following the completion of discovery, for the Court to render its finding of facts in order to fully address and determine petitioner's claims against respondents.

Conclusion

Accordingly, it is hereby

ORDERED that the motion by respondent Gina Forgione for order pursuant to CPLR 3212 granting partial summary judgment declaring her percentage of ownership of the corporate respondent Lorcress Enterprises, Inc. (sequence 6) is granted, and it is determined and declared that Forgione's percentage of ownership of Lorcress stock is that recited in the minutes of the May 25, 2010 shareholder meeting, comprised of the 40 shares issued to her in certificate # 14 representing a 20% interest in the corporation; and it is further

ORDERED that the portion of petitioner's cross-motion for a declaration as to his percentage of ownership of the corporate respondent Lorcress Enterprises, Inc. (sequence 8), is granted, and it is determined and declared that the percentage of ownership of Lorcress stock belonging to petitioner as administrator of the estate of John Loreti is that recited in the minutes of the May 25, 2010 shareholder meeting, comprised of 80 shares pursuant to certificate # 13, representing a 40% interest in the corporation, and it is further

ORDERED that the branch of petitioner's cross-motion seeking summary judgment on his second through seventh, ninth and tenth causes of action is denied, and it is further

ORDERED that the parties are shall appear in the Compliance Conference Part of the

Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, on a date and in a manner directed by that Part.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
August 18, 2020

HON. TERRY JANE RUDERMAN, J.S.C.