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.: 56905/2019

JJL REALTY CORP. OF NEW YORK, SEBASTIAN A. LORETI a/k/a SAL LORETI[1], 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. 2 & 4

Respondents.

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RUDERMAN, J.

The following papers were considered on the motion by respondents (except Gina Forgione) for an order pursuant to CPLR 3211 dismissing the petition (sequence 2), and petitioner's motion for leave to amend the petition (sequence 4):

Papers - Sequence 2	Numbered
Notice of Motion, Affirmation, Exhibits A - H, and Memorandum of Law	1
Petitioner's Affidavit in Opposition, Exhibit A, Berkey Affirmation, Milner Affirmation, Exhibits 1 - 19, and Memorandum of Law	2
Nicotera Affirmation in Opposition	3
Reply Affirmation in Further Support	4

[1] The proceeding has been discontinued as against respondent Sebastian A. Loreti, by notice of discontinuance filed August 21, 2019.

- Sequence 4

Notice of Motion, Affirmation, Exhibits A - C, 1 - 19, and Memorandum of Law	5
Corporate Respondent's Affidavit in Opposition by Maria Loreti, Exhibits A - I, and Memorandum of Law in Opposition[2]	6

The closely-held, family-owned corporate respondent, JJL Realty Corp. of New York, was formed by a certificate of incorporation filed on September 25, 1995. The petition in this proceeding, filed May 2, 2019, seeks a dissolution of the corporate respondent pursuant to Business Corporations Law ("BCL") § 1104-a, appointment of a receiver for the corporation, an injunction restraining the corporate respondent and its officers and directors from taking any funds or property of the corporate respondent, and other, related relief. It is based on claims that respondents engaged in "oppressive conduct" and "fraudulent and/or illegal acts" against minority shareholders, and/or "looted, wasted, or diverted corporate assets for non-corporate purposes."

Similar petitions, with the same individual parties, and the same essential allegations, have been filed by petitioner regarding two other closely-held, family-owned and -run corporations: Lorcress Enterprises, Inc. (*see* Supreme Court, Westchester County Index No. 53885/2019) and 1466 E. Gun Hill Rd. Corp. (*see* Supreme Court, Westchester County Index No. 56906/2019). Additionally, petitioner has commenced an action to quiet title to a number of properties[3], naming the same individual respondents (*see* Supreme Court, Westchester County Index No. 53883/2019). The parties filed a stipulation on August 23, 2019 providing that the

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[2] Joined by Maria Loreti individually and as custodian.

[3] Referencing one property in Yonkers, NY, one property in Rye, NY, three in Bronx, NY and one in Pompano Beach, Florida.

three corporate dissolution matters and the quiet title action should be heard by the same judge, and that the three corporate dissolution proceedings should "proceed as a joint trial, pursuant to CPLR 602, for pre-trial purposes at the time of trial for any and all purposes." The filed stipulation was not so-ordered.

In motion sequence 1, petitioner moved by order to show dated May 6, 2019, for an order granting the relief set forth in the petition. In motion sequence 2, filed May 21, 2019, the corporate respondent and all the individual respondents except Gina Forgione moved pursuant to CPLR 3211 for an order dismissing the petition on the ground that the requisite specificity was lacking from its claims that respondents engaged in "oppressive conduct" by "engaging in fraudulent and/or illegal acts, and/or looted, wasted, or diverted corporate assets for non-corporate purposes. Motion sequence 3 was brought by respondent Gina Loreti Forgione for partial summary judgment declaring the respective percentages of ownership of the shareholders in the corporate respondent. Motion sequence 4, filed on November 26, 2019, seeks leave to serve an amended petition, to add causes of action seeking dissolution of the respondent corporation on grounds specified in BCL § 1104-a and BCL § 1104 (a) (2) and (3), as well as derivative and direct claims for declaratory and equitable relief against respondent Maria Loreti personally based on her alleged misconduct and breach of her fiduciary duty.

Written decisions were not filed on any of the foregoing motions until now. Rather, in the months leading up to December 2019, then-assigned Hon. Gerald E. Loehr, J. presided over the exchange of discovery and engaged in a series of settlement discussions. However, in a court appearance on December 16, 2019, the assigned Justice determined that attempts at a global resolution of this and the related proceedings had failed, directed that the matter should be

referred to a hearing, specifically denied the summary judgment motions, and referred for assignment to another judge the motion to amend the petition. There was no further discussion of the other motions, and the motion to dismiss the petition (sequence 2) and the motion to amend the petition (sequence 4) have been referred to this Court for decision.

Motion Sequence 2

The motion to dismiss the petition is arguably moot, to the extent it is based on a claimed lack of specificity or insufficiency of allegations. Upon receipt of discovery, plaintiff has moved to amend the petition so as to add allegations as well as forms of relief. Moreover, by denying summary judgment and referring the matter for trial, Justice Loehr implicitly, if not explicitly, concluded that plaintiff's claims were viable. In any event, in the interest of clarity, the motion is now denied.

On a motion to dismiss a pleading under CPLR 3211(a)(7), the pleading must be liberally construed, the facts as alleged are accepted as true, and the party whose pleading is challenged must be afforded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83 [1994]). "Moreover, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true" (*Benjamin v Yeroushalmi*, 178 AD3d 650, 653 [2d Dept 2019]). The petition here, as supplemented by petitioner's affidavit, provides particularized details about the circumstances constituting the alleged frauds, oppressive acts, and breaches of fiduciary duty, sufficient to inform respondents of the incidents complained of, so as to state a claim under Business Corporation Law § 1104-a (a).

Business Corporation Law § 1104-a (a) permits involuntary dissolution where

> "(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; [or]
> "(2) 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."

Respondents contend that the petition lacks the requisite specific and detailed factual allegations.

The petition alleges that the individual respondents have refused and failed to provide petitioner access to records and information about the corporation and "frozen him out" of the corporation for no legitimate reason other than family animosity; have paid to themselves excessive compensation and benefits in breach of their fiduciary duty to the minority shareholders; and that respondent Maria Loreti attempted to authorize an increase to the number of authorized shares of the corporation and to cause the corporation to issue her 360 additional shares, without shareholder approval, in excess of the maximum permitted under the corporation's Certificate of Incorporation, for less than fair consideration, in an effort to dilute petitioner's and respondent Forgione's voting interests in the corporation. It is further alleged that the individual respondents have used the corporation's resources for their personal purposes, including to pay the expenses of their personal residence, without paying dividends or distributions to the minority shareholders.

Respondents cite case law holding that failure to pay dividends to minority shareholders is not an oppressive act or oppressive conduct warranting dissolution, per se (citing *Matter of Schlachter*, 154 AD2d 685, 686 [2nd Dept 1989]; *Burack v I. Burack, Inc.*, 137 AD2d 523, 526 [2d 1988]). However, the Court of Appeals has upheld a finding of oppressive conduct when the majority shareholders of a closely held corporation have adopted procedures that in effect

awarded dividends to all shareholders except a class of minority shareholders, serving as a basis for an order pursuant to BCL § 1104-a dissolving the corporation (*see Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 NY2d 63, 67 [1984]; *see also Matter of Clever Innovations, Inc. (Dooley)*, 94 AD3d 1174, at 1176 [3d Dept 2012]). Among the allegations of the petition are some that state such a claim, precluding dismissal. In any event, since – pursuant to the discussion below, regarding motion sequence 4 – petitioner is being granted leave to amend the petition, thereby including additional and modified factual claims, any preceived inadequacy in the original petition is cured by the amendment.

As to respondents' argument that since the respondent corporation is a closely held family corporation, even acts that fall within the category of oppressive conduct are not sufficient for dissolution (citing *DiPace v Figueroa*, 223 AD2d 949, 951 [3d Dept 1996]), that contention does not present grounds to dismiss the petition. Rather, it raises a question of whether, instead of dissolution, some other relief is more appropriate, as was the case in *DiPace v Figueroa*, *supra*. That issue must be addressed in the context of the ultimate determination, rather than on this motion.

Motion Sequence 4

Petitioner seeks leave to serve an amended petition, based on information obtained in the course of discovery, so as to add causes of action seeking dissolution of the respondent corporation on grounds specified in BCL § 1104 (a) (2) and (3) as well as declaratory and equitable relief against individual respondent Maria Loreti based on her alleged misconduct and breach of her fiduciary duty.

The amended petition includes, inter alia, additional or modified claims that:

1- Respondent Maria Loreti threatened to dissipate and conceal the assets of the corporation;

2- Respondent Maria Loreti caused the corporation to issue shares in her name for no consideration in order to dilute the economic and voting interests of John Loreti and Gina Forgione, the minority shareholders of the corporation;

3- Respondent Maria Loreti denied petitioner's interest as a shareholder of the corporation, misrepresented the extent of petitioner's and respondent Forgione's respective ownership interests, and repeatedly denied petitioner access to the books and records of the corporation and financial statements, tax, or financial information concerning the corporation, despite petitioner's proper demands;

4- Without corporate approval, respondent Maria Loreti caused the corporation to hire her property management company, Costa Realty LLC, on grossly unconscionable terms; amounting to self-dealing, looting, wasting, and diverting corporate resources, to the detriment of the Corporation and for her personal gain;

5- Through her domination of the corporation as its sole director, respondent Maria Loreti and her husband diverted funds from the corporation's bank accounts for their personal and non-corporate purposes, which were classified as "loans to shareholders" on the corporation's tax returns in an effort to evade payment of state and federal income taxes, exposing the corporation to significant tax liabilities and audit risk from tax authorities. Moreover, respondent Maria Loreti has failed and/or refused to seek repayment of these "loans" despite due demand on the corporation.

6- While respondent Maria Loreti has been the corporation's sole director, she caused the corporation to make distributions for her benefit without making like distributions to the minority shareholders of the corporation, and has failed to account for the extent of such distributions;

7- Respondent Maria Loreti used and continues to use the corporation's bank accounts to pay her personal expenses, and has failed to account for the extent of such unauthorized payments, despite repeated requests;

8- Respondent Maria Loreti made material false statements on loan applications submitted to institutional lenders on behalf of the corporation, risking the imposition of default interest, penalties, and acceleration of the corporation's debts.

Additionally, the amended petition also makes other modifications, such as eliminating as a named respondent Maria Loreti's deceased spouse, Sebastian A. Loreti a/k/a Sal Loreti, and

adding as a respondent MSA Realty Group, LLC, which is currently the title owner of the shares formerly held in the name of Maria Loreti as custodian for each of her children.

"[T]he amendment of a petition for corporate dissolution is governed by Business Corporation Law § 1107, not CPLR 3025 (a) which is applicable to amendment of pleadings, generally" (*Matter of Dissolution of Public Relations Aids, Inc.*, 109 AD2d 502, 508 [1st Dept 1985]). "Business Corporation Law § 1107 expressly controls the amendment of petitions for dissolution and permits the court, in its discretion, to grant an order amending the petition, '[at] any stage, before final order'" (*id.*). Notably, the affidavit attested to by Maria Loreti, submitted in opposition to the motion to amend, consists of denials and refutations of factual allegations in the proposed amended petition. Such disputes regarding factual claims do not present grounds to deny the sought amendment, but merely establish the existence of disputed issues of fact.

If the considerations of CPLR 3025 are applied here, no prejudice or surprise to the opposing party has been shown, and the proposed amendment is not "palpably insufficient or patently devoid of merit" (*see Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008], quoting *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95 [2d Dept 2007]).

The legal argument contained in the corporate respondent's memorandum of law in opposition, namely, that the motion to amend is precluded by CPLR 402, is rejected. CPLR 402 provides that the court may permit such other pleadings as are authorized in an action upon such terms as it may specify. While a petition in a special proceeding that is amended without leave of the court is a nullity (*see Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651 [2d Dept 2007]), a motion for leave to amend the petition, such as petitioner has brought here, is the proper means by which to do so.

The corporate respondent also argues that to permit an amendment at this time would be unduly burdensome, and would divert its time and attention from operations to again addressing and responding to the petitioner's allegations. However, in view of the process of the litigation to date, in which significant discovery has been exchanged and further discovery agreed upon (conditional upon the determination of the present motions), it does not appear that petitioner unduly delayed, or that the litigation process which was already ongoing will be significantly altered by the amendment. Under the unique circumstances here, based on the additional information obtained in the course of discovery, the exercise of discretion so as to allow the sought amendment of the petition is warranted. The factual claims and contentions can be addressed and determined by the Court following the completion of discovery.

Although on December 16, 2019, Justice Loehr pronounced that discovery was complete – an assertion that was disputed by some of the parties at the time – the additional discovery conditionally agreed upon in the parties' so-ordered stipulation is appropriate, particularly in view of the amendment. Therefore, the parties are expected to comply with the preliminary conference stipulation and order issued in this matter on February 5, 2020. Any further issues regarding disclosure shall be addressed to the Compliance Part.

Accordingly, it is hereby

ORDERED that respondents' motion to dismiss the petition is denied, and it is further

ORDERED that petitioner's motion to amend the petition is granted, and the amended petition shall be deemed served upon service of a copy of this order with notice of entry thereon, and it is further

ORDERED that the parties are shall appear, *as previously directed*, on May 6, 2020, in

the Compliance Conference Part of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
February 27, 2020

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