Matter of Hawthorne v Hawthorne
2021 NY Slip Op 31889(U)
March 9, 2021
Supreme Court, Bronx County
Docket Number: 33655/2020E
Judge: Eddie J. McShan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA-32

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In the Matter of the Application of

LORNA HAWTHORNE, as Executrix of the Estate of Lowell Hawthorne, Holder of Shares Representing Forty-Two (42%) Percent of the Votes of all Outstanding Shares of Stock of Golden Krust Caribbean Bakery, Inc.,

Petitioner,

Pursuant to Section 619 of the Business Corporation Law Adjudicating the Outcome of a Disputed Election of the Board of Directors of Golden Krust Caribbean Bakery, Inc.,

-against-

LLOYD HAWTHORNE,

Respondent.

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Index No.: 33655/2020E

HON. EDDIE J. MCSHAN

The following papers numbered 1 to ___ were read on this motion (Seq. No. **001**)
for _____ noticed on _____.

Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, the Court reserves decision on the Order to Show Cause submitted by the Petitioner and Notice of Counterclaim Petition submitted by the Respondent in accordance with the annexed Decision and Order signed simultaneously with this Order.

In light of the foregoing, it is hereby

ORDERED that the parties appear for a virtual conference on March 18, 2021 at 11:00 a.m. to schedule a hearing in accordance with the Court's Decision and Order.

This shall constitute the decision and order of the Court.

Dated: March 9, 2021

Hon. _____
J.S.C.

Motion is Respectfully Referred to:Justice: _____
Dated: _____

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☒ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

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DECISION AND ORDER

INDEX NO.: 33655/2020E

MOTION SEQ. NO.: 001

PRESENT:
HON. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 (Motion Seq. #001) were read on this Order to Show Cause seeking declaratory relief and the Notice of Counterclaim Petition also seeking declaratory relief.

Petitioner moves for an order declaring and adjudging that the majority of shareholders at the special meeting of the shareholders of Golden Krust Caribbean Bakery, Inc. ("Golden Krust") held on October 9, 2020 officially removed the eight member board of directors ("Board of Eight"), and replaced those vacancies with a five-member board of directors ("Board of Five"). Petitioner also moves for an order declaring and adjudging that all actions taken by the Board of Five subsequent to the special meeting are valid and enforceable and should be ratified, and that any and all actions taken by the Board of Eight shall be null and void. Respondent opposes Petitioner's applications and cross-petitions for an order declaring and adjudging that the

majority of the shareholders at the aforementioned special meeting retained the Board of Eight and that the election was proper and valid. Respondent also moves for an order declaring the Voting Agreement that he executed did not "strip Respondent of his fundamental right to vote his shares in any manner he chooses with respect to the Board of Directors." Respondent further moves for an award of court costs. Petitioner opposes Respondent's applications.

Background

The parties are minority shareholders of Golden Krust. Petitioner, as executrix of the Estate of Lowell Hawthorne, holds 42% of the voting shares for Golden Krust. Respondent holds 4.8% of the voting shares. On September 22, 2020, a majority of the shareholders for Golden Krust voted at a special meeting to remove the Board of Five and filled the vacancies with the Board of Eight. The resolution adopted by the majority of the shareholder also terminated the actual or apparent authority of various officers, including the President and Chief Executive officer, Al Novas. Petitioner, as the largest shareholder, voted against the resolution and subsequently initiated another special meeting seeking to overturn the resolution based upon her concern that the former CEO threatened litigation.

In her efforts to call another special meeting, Petitioner, with the assistance of her two sons, Daren Hawthorne ("Daren") and Haywood Hawthorn ("Haywood"), solicited Respondent and Velma Hawthorne ("Velma") for their voting shares to authorize the meeting as required by Golden Krust's bylaws.[1] Petitioner, Respondent, Velma, Daren, and Haywood met *via* Zoom on September 27, 2020 to discuss the circumstances that necessitated the scheduling of another

[1]Article III Section 2 of the bylaws authorizes a special meeting of the shareholders or any purpose at the request of a majority of the shareholders. Petitioner maintains 42% of the voting shares, Respondent maintains 4.8% of the voting shares and Velma Hawthorne maintains 4.8%.

special meeting. Petitioner, Respondent and Velma executed a "Demand to Call Special Meeting of Shareholders" ("Demand") dated September 27, 2020. The Demand noticed the meeting for October 9, 2020 *via* Zoom for "[t]he purposes of the meeting shall be (a) to remove the current members of the Corporation's board of directors; (b) to fill the vacancies of the Corporation's board of directors resulting from such removal with the following individuals . . . ; and (c) to ratify and approve the adoption of an amendment to the Corporation's bylaws . . ."

Petitioner, Respondent and Velma also executed a "Voting Agreement" on September 27, 2020 in anticipation of the special meeting wherein they agreed to elect the Board of Five thereby removing the Board of Eight, and limiting the size of the Board to five members. The Voting Agreement required Petitioner, Respondent and Velma to vote their shares in accordance with the agreement. The Voting Agreement further provided Petitioner with Respondent's and Velma's irrevocable proxies for a period of three years, authorizing Petitioner, among other things, to vote their shares to fill any necessary vacancies of the Board if required.

The Special Meeting was held with the required quorum on October 9, 2020. Petitioner appointed her son Daren as her designee for the meeting. Respondent and Velma both personally appeared for the meeting to cast their votes. Prior to the vote, Lorraine Hawthorne-Morrison ("Lorraine"), the Chief Administrative Officer (CAO) and Corporate Secretary for Golden Krust, received *via* email the Voting Agreement and Respondent's ballot that was signed by Petitioner's son, Haywood, in accordance with the Voting Agreement. The ballot submitted on behalf of the Respondent voted in favor of removing the Board of Eight and replacing it with the Board of Five in accordance with the Voting Agreement. Lorraine announced prior to the vote that she received from Respondent a revocation of any previous proxy he signed and that Respondent

named her as his proxy. Lorraine also announced that Respondent would vote for himself because he was present despite the proxy he provided.

During the vote, Petitioner's son, Daren, as her designee and in accordance with the Voting Agreement, cast her vote in favor of the proposed resolution. Petitioner's son, Haywood, also as her designee and Respondent's proxy, cast Respondent's share of the votes in favor of the resolution in accordance with the Voting Agreement. Velma personally cast her share of the votes in favor of the proposed resolution also in accordance with the Voting Agreement.[2] Respondent, along with the remaining shareholders who all appeared for the meeting, cast their votes against the proposed resolution.[3] Lorraine, as one of the two inspectors to count the votes and prior to reading the Voting Agreement, announced that Respondent along with the remaining shareholders constituted the majority of the votes with 53.2% and the resolution to replace the Board of Eight among other resolutions failed.

Petitioner asserts on this record that Lorraine ignored Haywood's proxy vote of Respondent's shares although she acknowledged receiving the Voting Agreement. She insists that Lorraine wrongly counted Respondent's negative vote against the proposed resolution despite the fact that the Voting Agreement gave her Respondent's irrevocable proxy. Petitioner asserts that Respondent was excited about signing the Voting Agreement and suggests that he knowingly, voluntarily, and intentionally executed the Agreement. Petitioner suggests that Respondent was under intense pressure from his siblings to change his vote and that any claims

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[2]Petitioner's, Respondent's, and Velma Hawthorne's shares of the vote constituted 51.6% of the total vote.

[3]Respondent and the other remaining shareholders shares of the vote constituted 53.2% of the vote.

of fraud are meritless.

Petitioner argues that there is indisputable authentic evidence to refute Respondent's claims of fraud that tricked him into signing the agreement. She provides specific details summarizing the phone calls, the meeting on Zoom and the emails exchanged between the parties that she suggests demonstrate that Respondent knowingly and voluntarily signed the Voting Agreement. She argues that Respondent's allegations of fraud are not plead with enough particularity as a matter of law and fails to refute any of the details she alleged to establish the facts and circumstances that resulted in the execution of the Voting Agreement. She insists that Respondent has not presented clear and convincing evidence to establish fraud to warrant the invalidation of the Voting Agreement.

Petitioner further argues that Respondents allegations of fraud based upon claims of misrepresentations made by her and her sons must fail because the facts represented were not matters peculiar to their knowledge and Respondent had means to discover the alleged misrepresentations by a routine investigation. She insists that there was nothing preventing Respondent "from contacting any of his family members to investigate the page more thoroughly." Petitioner asserts that Respondent's claim of fraud in the execution must also fail because he was negligent by not reading the Voting Agreement. She insists that Respondent was not prevented from reading the entire Voting Agreement after it was emailed to him on September 27, 2020. She also insists that each provision of the Voting Agreement was discussed in great detail during the 54 minute Zoom meeting held on September 27, 2020. Petitioner asserts that Respondent expressed his willingness to sign the Voting Agreement during the Zoom meeting. She suggests that Respondent is literate despite his seventh-grade education and that he

does not suffer from any disability that prevented him from reading the Voting Agreement. Petitioner insists that the authentic evidence rebuts any suggestion that Respondent was tricked into signing the Voting Agreement.

Respondent asserts that Petitioner, with the assistance of her two sons, engaged in "a reprehensible act of family treachery" that tricked him into signing the Voting Agreement. Respondent argues that Petitioner and her two sons breached their fiduciary duty and that the Voting Agreement should not be considered because it was obtained by fraud. Respondent notes that Daren and Haywood contacted him on September 26, 2020 expressing an urgency that they meet. He notes that he had a zoom meeting with Petitioner, her two sons, and Velma at 2:00 p.m. on that date because they wanted him to sign for another special meeting to consider putting Mr. Novas back on the Board for a short time because he was the only person authorized to sign bank documents and was the only person with a relationship with the bank. He suggests that Petitioner represented during the Zoom meeting that the bank would take everything and the company would go bankrupt if Mr. Novas was not put back on the board. He indicates that he was informed during the Zoom meeting that someone would stop by with something to sign. He also indicates that Haywood inquired about giving him the authority to cast his vote on his behalf if he would be running late or could not make it to the meeting. Respondent insists that he informed Haywood that he would vote for himself asserting that "no one can vote for me."

Respondent notes that a family friend came to his restaurant around 5:00 p.m. or 6:00 p.m. with the request to call a special meeting for him to sign. Respondent insists that the family friend only gave him the request to call a special meeting to sign, and although there were two places to sign, he thought it was only to call the meeting. He states that he did not read the

document and thought that he would still have the opportunity to vote at the special meeting. Respondent indicates that he became suspicious the next day because everything was done in a rush and they did not give him time. He indicates that he assured Lorraine, Cassandra, and Milton that he had only signed the request for the special meeting and did not sign anything else. Respondent asserts that he signed a revocation of proxy and gave Lorraine his proxy "because I felt, after thinking about what happened and how they called me on Sunday and demanded I sign something right away, that Daren and Haywood had set me up with a trick." Respondent asserts that Petitioner and her two sons breached their fiduciary duties by misleading him and insists that he did not intend to give up his right to vote at the special meeting.

Declaratory Judgment

CPLR 3001 provides in relevant part that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." It has long been established that "[t]he use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The discretion must be exercised judicially and with care. . . . It is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action" (*see for example James v Alderton Dock Yards*, 256 NY 298 [1931]). The Court of appeals noted in *James* that "[t]he general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. . . . Where there is no necessity for resorting to the declaratory judgment it should not be employed" (*James*, 256 NY 298). Moreover, the court should not reject granting

declaratory relief where there are issues of fact as the declaration of such rights and legal relations may necessitate a preliminary disposition of the disputed facts in question (*see for example Dupigny v St. Louis*, 115 AD3d 638 [2d Dept 2014] *citing Rockland Power & Light Co. v City of New York*, 289 NY 45 [1942]). "A declaratory judgment is *ex vi termini* a judgment on the merits. Until disputed questions of fact necessary to be determined before judgment can be rendered are settled, it is plain that rights and legal relations cannot be determined, defined and declared" (*Dupigny*, 115 AD3d 638).

Both parties in the instant matter seek declaratory relief to define their respective rights as a result of the election held during the Special Meeting on October 9, 2020. BCL § 619 provides the supreme court with the authority to hear the petition of shareholders aggrieved by a corporate election at a shareholders' meeting and 'confirm the election, order a new election, or take such action as justice may require'" (*see for example Matter of Schmidt (Magnetic Head Corp.)*, 97 AD2d 244 [2d Dept 1983]). A proceeding brought under BCL § 619 only authorizes judicial inquiry into actions taken at a shareholders' meeting which are relevant to the election such as voting rights and stock ownership (*see Matter of Schmidt*, 97 AD2d 244). The critical issue that must be determined in this proceeding is the validity of the Voting Agreement that defines Respondent's voting rights and is clearly relevant to the outcome of the disputed election.

The parties unquestionably present a justiciable controversy that warrant declaratory relief to stabilize the uncertainty of the election held at the Special Meeting on October 9, 2020. Respondent's submission of out-of-state affidavits without the certificates of conformity as required by CPLR 2309(c) is not fatal on this record especially in light of the reply affidavits which were submitted with the required certificates of conformity (*see for example Fredette v*

Town of Southampton, 95 AD3d 940 [2d Dept 2012]). The parties conflicting allegations regarding the validity of the Voting Agreement do not prevent this Court from declaring their respective rights (*Dupigny*, 115 AD3d 638).

The Court finds on this record genuine questions of fact as to whether Respondent knowingly signed the Voting Agreement or was "tricked" into signing it by the Petitioner and her two sons which may be a breach of a position of trust. Petitioner sufficiently argues that the evidence demonstrates that Respondent knowingly and voluntarily signed the disputed Voting Agreement. Respondent sufficiently argues that Petitioner, Daren and Haywood breached their fiduciary duties as family members and shareholders in a closely-held corporation by tricking him into signing the Voting Agreement. Respondent provides sufficient allegations regarding the circumstances that may have constituted a breach of trust by Petitioner and her two sons. The disputed facts regarding the circumstances that ultimately led to Respondent signing the Voting Agreement must be determined before this Court can render judgment on the parties' respective rights and legal relations (*Dupigny*, 115 AD3d 638). The Court finds that a determination of the disputed facts will quiet the parties' dispute as it relates to the legitimacy of the election held at the Special Meeting.

Accordingly, this Court reserves decision on the parties' respective applications for declaratory relief and retains jurisdiction over the parties' controversy to conduct a hearing over the disputed issues of fact as determined above (*Dupigny*, 115 AD3d 638). The parties shall appear for a virtual conference on March 18, 2021 at 11:00 a.m. to schedule a hearing in this matter. The Court notes that access to the courts remain limited as a result of the COVID-19 Pandemic. The parties shall be prepared to discuss their objections, if any, to a virtual hearing being held to resolve their dispute.

In light of the foregoing, it is hereby

ORDERED that the Court reserves decision on Petitioner's applications seeking various declaratory relief in accordance with the Court's findings above; and it is further

ORDERED that the Court reserves decision on Respondent's applications seeking various declaratory relief and costs in accordance with the Court's findings; and it is further

ORDERED that the parties appear for a virtual conference on March 18, 2021 at 11:00 a.m. to schedule a hearing in accordance with the Court's findings above.

This shall constitute the decision and order of the Court.

Dated: March 9, 2021

J.S.C.