Amendola v Amendola
2024 NY Slip Op 35644(U)
March 4, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67149/2023
Judge: Linda S. Jamieson
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To commence the statutory time period 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

PRESENT: HON. LINDA S. JAMIESON

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ENZO AMENDOLA and MATEO AMENDOLA, individually and collectively as direct and or equitable holders of fifty (50%) percent of the outstanding shares of Amendola Realty, Inc.,

Index No. 67149/2023

DECISION AND ORDER

Petitioners,

-against-

NICOLA AMENDOLA and AMENDOLA REALTY, INC.,

Respondents.

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The following papers numbered 1 to 6 were read on the motion (seq. no. 2) by respondents Nicola Amendola ("Nicola") and Amendola Realty, Inc. ("Amendola Realty") (together, "respondents") pursuant to CPLR §§ 3211(a)(3), (5) and (7) for an Order dismissing the Verified Petition dated September 8, 2023 (the "Petition") in its entirety:

Papers	Numbered
Petition	1
Notice of Motion	2
Affidavit in Support	3
Memorandum of Law in Support	4
Affirmation in Opposition	5
Memorandum of Law in Reply	6

The following papers numbered 1 to 4 were read on the motion (seq. no. 3) by respondents pursuant to 22 NYCRR § 202.21(e) for an Order vacating the Note of Issue filed by petitioners Enzo Amendola ("Enzo") and Mateo Amendola ("Mateo") (together, "petitioners"):

Papers	Numbered
Notice of Motion	1
Affirmation in Support	2
Affirmation in Opposition	3
Memorandum of Law in Reply	4

BACKGROUND

This special proceeding for dissolution was commenced on September 21, 2023, and arises from a dispute concerning the management of Amendola Realty, a closely-held corporation that is alleged to be jointly owned by Enzo, Mateo, and Nicola, who are brothers. *See* NYSCEF Doc. No. 1. In particular, the Petition alleges that it is brought pursuant to BCL §§ 1104(a) and (c), and seeks to dissolve Amendola Realty. *Id.* In relevant part, it alleges that from its formation in 1986 through the date of the Petition, Amendola Realty has been jointly owned by Enzo, Mateo, and Nicola, each with a 33.33 percent interest therein. *Id.* It further alleges that no shareholders or directors meetings have been called by Amendola

Realty "in many years, if ever"; and that Nicola in managing Amendola Realty since approximately 1996 has appropriated to himself the corporation's rents, profits, books and records to the detriment of petitioners Enzo and Mateo. *Id.* It alleges that because Nicola will continue to impair the assets and value of Amendola Realty by improperly diverting funds to himself to the detriment of petitioners absent judicial relief, and because Nicola has acted in a manner suggesting that he is the sole owner of Amendola Realty, the Petition seeks to dissolve Amendola Realty pursuant to BCL §§ 1104(a)(1), (2) and (3) and BCL § 1104(c). *Id.*

In response to the Petition, on October 25, 2023 respondents moved (seq. no. 2)[1] pursuant to CPLR §§ 3211(a)(3), (5) and (7) for an Order dismissing the Petition in its entirety. *See* NYSCEF Doc. Nos. 12-14. Respondents' motion is grounded in three principal arguments. First, respondents assert that the Petition's claims pursuant to BCL §§ 1104(a)(1), (2) and (3) should be dismissed pursuant to CPLR §§ 3211(a)(3) and/or (7) because relief under this BCL provision is expressly limited to "the holders of shares representing one-half of the votes of all outstanding shares of a corporation," and is inapplicable where, as here, the Petition unambiguously alleges

[1] The Petition and accompanying documents have collectively been assigned motion sequence number 1. *See* NYSCEF Doc. Nos. 1, 2, 6.

that petitioners own two-thirds of the shares in Amendola Realty, *i.e.*, Enzo and Mateo each having a 33.33 percent interest therein. *See* NYSCEF Doc. No. 13 at pp. 7-9. Second, respondents contend that the Petition's claims pursuant to BCL § 1104(c) should be dismissed pursuant to CPLR § 3211(a)(7) because the Petition asserts only conclusory allegations and is fatally undermined by Nicola's affidavit, in which he avers that petitioners have never called for Amendola Realty to have an annual meeting and that the entity has never had such a meeting in its history dating back to 1986. *See* NYSCEF Doc. No. 13 at pp. 9-10; NYSCEF Doc. No. 14. Third and finally, respondents argue that the Petition's claims are time-barred pursuant to the six-year limitations period governing proceedings for dissolution, as the conduct complained of in the Petition has not changed since 1996 when Nicola began managing Amendola Realty; and that the Petition should therefore be dismissed pursuant to CPLR § 3211(a)(5). *See* NYSCEF Doc. No. 13 at p. 11.

On January 9, 2024, petitioners opposed respondents' motion and simultaneously filed a Note of Issue and Certificate of Readiness for Trial. *See* NYSCEF Doc. Nos. 21-22. In their opposition, petitioners contend that the Petition's claims pursuant to BCL §§ 1104(a)(1), (2) and (3) should not be dismissed pursuant to CPLR § 3211(a)(3) or (7) because petitioners are entitled to a jury trial to resolve all factual issues, notwithstanding their allegation in the Petition that Enzo and Mateo together own two-thirds of Amendola Realty. *See* NYSCEF Doc. No. 21. Petitioners further assert that the Petition's claims pursuant to BCL § 1104(c) should not be dismissed pursuant to CPLR § 3211(a)(7) because it would be premature to dismiss the Petition at this juncture, which pleading in any event adequately pleads such claims. *Id.* Petitioners also argue that the Petition should not be dismissed as time-barred pursuant to CPLR § 3211(a)(5) because respondents have failed to identify any triggering event by which the statute of limitations would have started to run. *Id.*

In response to petitioners' filing of the Note of Issue, on January 26, 2024, respondents moved (seq. no. 3) pursuant to 22 NYCRR § 202.21(e) for an Order vacating the Note of Issue. *See* NYSCEF Doc. Nos. 25-26. In sum and substance, respondents contend that it was improper and premature for petitioners to file a Note of Issue where, as here, respondents' motion to dismiss the Petition is pending and respondents have accordingly not even furnished a responsive pleading. *See* NYSCEF Doc. No. 26. Petitioners oppose the motion, arguing that they filed a Note of Issue because petitioners are entitled to have a jury trial concerning the issue of their alleged ownership of shares in Amendola Realty, and that such Note of Issue was not prematurely filed and should not be vacated. *See* NYSCEF Doc. No. 29.

Accordingly, presently before the Court are two fully submitted motions, *i.e.*, respondents' motion to dismiss the Petition (seq. no. 2), and respondents' motion to vacate the Note of Issue (seq. no. 3). The Court addresses the respective motions in chronological order below.

RESPONDENTS' MOTION TO DISMISS THE PETITION

With respect to respondents' motion seeking to dismiss the Petition pursuant to CPLR § 3211(a)(7), it is well-established that "the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference." *Cunningham v Nolte*, 188 AD3d 806, 807 (2d Dept 2020), *citing Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." *Cunningham*, 188 AD3d at 807, *citing Hartman v Morganstern*, 28 AD3d 423, 424 (2d Dept 2006). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002).[2]

Having reviewed the parties' submissions, the Court determines that the Petition's claims pursuant to BCL §§ 1104(a)(1), (2) and (3) should be dismissed pursuant to CPLR §§ 3211(a)(3) and (7), as set forth below.

BCL § 1104(a) permits the holders of one half of the votes of all outstanding shares of a corporation to petition for dissolution on three grounds. It states:

> (a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), <u>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</u> 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

[2] To the extent that respondents' motion is also made pursuant to CPLR § 3211(a)(3), that provision states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the party asserting the cause of action has not legal capacity to sue."

> to the shareholders. *See* BCL § 1104(a) (emphasis added).

Based upon the plain and unambiguous text of the statute as highlighted above, the Court credits respondents' argument that because this provision of the BCL is expressly limited to "the holders of shares representing one-half of the votes of all outstanding shares of a corporation," it is inapplicable to this proceeding in which the Petition plainly alleges that petitioners own two-thirds of the shares in Amendola Realty, *i.e.*, Enzo and Mateo each having a 33.33 percent interest therein. In fact, notwithstanding petitioners' contention in opposition that dismissal of their BCL § 1104(a) claim is premature because they are entitled to a jury trial regarding their ownership interest in Amendola Realty, they clearly state in the Petition: "That the original shareholders of the corporation and their respective shareholdings were ENZO AMENDOLA (33 1/3%), MATEO AMENDOLA (33 1/3%), and NICOLA AMENDOLA (33 1/3%). That there has been no change in the ownership of the corporation's shares from the time of the initial filing of the corporation with the New York State Department of State on March 18, 1986 through and including the date of commencement of this action." *See* NYSCEF Doc. No. 1 at ¶¶ 5-6.

Accordingly, given that BCL § 1104(a) "is intended for situations in which there is 50/50 deadlock between shareholders" (*see Elting v Shawe*, 2014 N.Y. Misc. LEXIS 3616, *10 [Sup. Ct. N.Y. Cty. July 24, 2014]), and in light of petitioners' clear allegation that they collectively own two thirds of Amendola Realty, the Court dismisses petitioners' related claims pursuant to CPLR §§ 3211(a)(3) and (7). *See Matter of Rust v Turgeon*, 295 AD2d 962, 963 (4th Dept 2002) (holding that where "the corporate ledger shows Rust as owner of 65 shares of stock out of a total of 135 shares issued . . . he could not be deemed a holder of one half of the shares as required by Business Corporation Law § 1104(a)" and reversing the Supreme Court's denial of the related portions of Rust's dissolution petition); *Elting*, 2014 N.Y. Misc. LEXIS 3616 at **9-10 (stating that "[h]olders of more (or less) than one-half of the votes of all outstanding shares in a corporation cannot avail themselves of BCL 1104(a)"), *citing* Thomas J. McNamara, *The Law of Corporate Divorce*, NYLJ, Feb. 18, 2004, at p. 6, col. 1) (noting regarding BCL § 1104[a] that "[w]here there is intense personal hostility between two 50/50 shareholders, which poses an irreconcilable barrier to the continued functioning and prosperity of the corporation, judicial dissolution may be the only viable remedy to resolve the dissension and deadlock").

Furthermore, the Court agrees with respondents' contention that that the Petition's claims pursuant to BCL § 1104(c) should be dismissed as conclusory pursuant to CPLR § 3211(a)(7). BCL § 1104(c) states:

> Notwithstanding any provision in the certificate of incorporation, 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. *See* BCL § 1104(c).

As noted by respondents, the Petition first parrots the language of BCL § 1104(c) by alleging, without any factual details, that Amendola Realty should be dissolved because "the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect directors whose terms would have expired upon the election and qualification of such directors or their successors." *See* NYSCEF Doc. No. 1 at ¶ 16. It further alleges in conclusory fashion that the shareholders "are so divided respecting the management of the corporation's affairs that . . . the votes required for the election of directors cannot be obtained." *Id.* at ¶¶ 17-18. The Petition also alleges that "no Shareholders' meetings or Directors' meetings have been called for the corporation in many years, if ever . . ." *Id.* at ¶ 22.

The Court agrees with respondents that the case of *Gupta v E.J.'s Bucket Buddies, Inc.*, 2020 N.Y. Misc. LEXIS 3567 (N.Y. Sup. Ct. July 24, 2020) is precisely on point and warrants the dismissal of petitioners' BCL § 1104(c) claims where, as here, those claims used nearly identical language that was copied and pasted from the statute without furnishing any underlying factual allegations. In *Gupta*, the court found that conclusory allegations that "'there is internal dissension between and among the three factions of shareholders holding 100% of the voting stock who are so divided that they are unable or unwilling to elect directors' . . . is insufficient to support dissolution." *Gupta*, 2020 N.Y. Misc. LEXIS at **1-2. In dismissing the BCL § 1104(c) claim, the court in *Gupta* noted that there was no dispute that the company in question never held annual meetings to elect directors, but attributed the failure to hold such meetings to "the Shareholders' customary practice of foregoing the annual meeting every year" and not because of some "internal dissention." *Id.* at *9. The court also emphasized that the petitioner in *Gupta* never alleged that he "called for an annual meeting to elect directors" or that the meetings were refused on the basis of some manner of deadlock.

Id. at *10; *see also Fazio Realty Corp. v Neiss*, 10 AD3d 363, 364 (2d Dept 2004) (holding that "in the absence of evidence that the petitioners ever called for an election or proposed a third director, it cannot be said that the election of another director was necessary or could not be obtained").

As urged by respondents, this is exactly analogous to the facts at hand in this special proceeding. In support of their motion, respondents furnish a sworn affidavit from Nicola, who avers based upon his personal knowledge that Amendola Realty "has always been a closely held family company" among the brothers, that as with many closely held family companies, it "never held formal annual meetings and never elected directors," which "has been the case for the entire 37-year history of the Company," and that neither Nicola "nor either of [his] two brothers have ever called for an annual meeting or any meeting to elect directors." *See* NYSCEF Doc. No. 14 at ¶¶ 3-6. In opposition to respondents' submission, petitioners glaringly neglected to furnish an affidavit from either Enzo or Mateo, which potentially could have served to dispute Nicola's sworn averments and/or to bolster the Petition's wholly conclusory allegations with supporting factual details. Instead, petitioners merely submitted an affirmation from their counsel that fails to dispute Nicola's sworn averments, and that does nothing to amplify the Petition's BCL § 1104(c) claims, which merely parrot the statute's language without providing any underlying factual allegations. *See* NYSCEF Doc. Nos. 1, 21.

As such, the Court dismisses petitioners' BCL § 1104(c) claims pursuant to CPLR § 3211(a)(7). *See Fazio Realty Corp.*, 10 AD3d at 364; *Gupta*, 2020 N.Y. Misc. LEXIS 3567 at **9-10; *see also In re Dissolution of Rencor Controls, Inc.*, 263 AD2d 845, 846 (3d Dept 1999) (reversing the Supreme Court's denial of a motion to dismiss a dissolution petition where petitioner's opposition "offered no proof of oppressive conduct or looting beyond the conclusory allegations of the petition which at that point had been factually refuted by [respondent's] motion papers"); *Matsias v Sparagis*, 2019 N.Y. Misc. LEXIS 43596, **9-10 (Sup. Ct. Queens Cty. Nov. 21, 2019) (dismissing a BCL § 1104 dissolution claim that "does not allege specific instances of illegal or oppressive conduct," and holding that such "pleading is devoid of the essential facts"); *In re Affiliated Agency, Inc. v Duggan*, 2011 N.Y. Misc. LEXIS 6714, **12-13 (Sup. Ct. Queens Cty. Jan. 26, 2011) (dismissing a petition asserting a BCL § 1104 claim for dissolution on the ground that "[t]he Petition makes general, conclusory allegations completely lacking in specifics regarding the allegedly improper conduct of the Respondents").

Accordingly, for the reasons stated above, respondents' motion (seq. no. 2) to dismiss the Petition is granted in its entirety, and the Petition is dismissed pursuant to CPLR §§ 3211(a)(3) and (7).[3]

RESPONDENTS' MOTION TO VACATE THE NOTE OF ISSUE

In light of the Court's granting of respondents' motion to dismiss the Petition in its entirety (seq. no. 2), the Court denies as moot respondents' motion (seq. no. 3) to vacate the Note of Issue. *See generally Wild v Bausch & Lomb Inc.*, 250 AD2d 382, 383 (1st Dept 1998) (holding that the dismissal of an action rendered moot defendant's "motion for an order striking plaintiffs' note of issue").

The foregoing constitutes the decision and order of the Court.[4]

Dated: White Plains, New York
March 4, 2024

HON. LINDA S. JAMIESON
Justice of the Supreme Court

[3] The Court accordingly need not reach respondents' argument that the Petition should be dismissed as time-barred pursuant to CPLR § 3211(a)(5).

[4] All other arguments raised on these two motions and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

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