

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

DONALD GOLD,

Petitioner,

INDEX No. 017735/10

MOTION DATE: June 10, 2011
Motion Sequence # 003, 004

-against-

HAZARDOUS ELIMINATION CORP. and
CATHLEEN COLELLA a/k/a CATHY
COLELLA,

Respondents.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... X

Motion by respondents for leave to reargue petitioner's motion for an order requiring respondents to post a bond is **denied**. Cross-motion by petitioner to hold respondents in contempt is **denied**.

This is a petition for the judicial dissolution of a corporation pursuant to § 1104-a of the Business Corporation Law. Petitioner Donald Gold is the owner of 49% of the stock of respondent Hazardous Elimination Corp ("HEC"). HEC is engaged in the business of remediating asbestos, lead, and other hazardous substances in commercial and residential buildings.

Gold acquired HEC in 1995. In February 1996, Gold sold 51% of the stock to

respondent Cathleen Colella and entered into a written employment agreement with the company. The agreement was to “continue indefinitely from month to month,” unless terminated earlier by Gold or the employer. The agreement further provides that the shareholders, acting by majority vote, may terminate Gold’s employment for cause, which includes illegal conduct, disclosure of confidential material, or engaging in business in competition with the employer.

On September 13, 2010, Colella sent Gold a letter, notifying him that he was suspended with pay, pending a meeting of the shareholders on September 24, 2010. By separate letter, Gold was advised that the purpose of the shareholders meeting was to remove him as a director and officer of the corporation.

On September 17, 2010, Gold commenced this proceeding for the judicial dissolution of HEC on the ground of oppressive conduct and waste of corporate assets. On October 1, 2010, Colella elected to purchase Gold’s shares at fair value (Business Corporation Law § 1118[a]).

By order dated November 24, 2010, the court denied petitioner’s request for involuntary dissolution of the corporation. Petitioner’s applications for a preliminary injunction, restraining respondents from disbursing corporate funds other than in the ordinary course of business, and for a receiver were also denied.

By order dated April 11, 2011, the court directed respondents to post a bond in the amount of \$750,000 to secure payment for petitioner’s shares within 15 days of the date of the order (See BCL § 1118[c]). Since HEC’s balance sheet showed total stockholders’ equity of \$1,590,502, as of December 31, 2009, the court determined that petitioner’s 49% interest was worth approximately \$779,346.

Respondents move for leave to reargue petitioner’s motion requiring them to post a bond. Respondents assert that the court misapprehended the “draft” balance sheet which showed stockholder’s equity of \$1,590,502. According to respondents, the final balance sheet shows a deficit of \$1,428,109. Thus, respondents argue in essence that a bond should not be required because petitioner’s stock is worthless.

Petitioner cross-moves to hold respondents in contempt for failing to post the bond. Petitioner argues that respondents should not be excused from posting a bond because the decline in book value occurred while they were in control of the company.

BCL § 1118(c)(2) provides, "The court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares." Among the factors to be considered are the financial capability of respondents to carry through on their offer to purchase petitioner's shares and the evidence as to the value of the company (*In re Dissolution of Elliot Kastelman, Inc.*, 234 AD2d 181 [1st Dept 1996]).

Although the value of HEC is in dispute, respondents have not offered proof of their ability to purchase petitioner's interest, even if the fair value of the company was not accurately reflected by the draft financial statements. Accordingly, respondents' motion for leave to reargue petitioner's motion for an order requiring them to post a bond is **denied**.

Business Corporation Law § 1118 "counterbalances" § 1104-a by affording the corporation the option of electing to purchase the minority's shares, thereby avoiding dissolution (*Blake v Blake Agency*, 107 AD2d 139, 144 [2d Dept 1985]). If respondents are unwilling or unable to post security for the fair value of petitioner's shares in HEC, the alternative is dissolution of the company.

Accordingly, petitioner's application to hold respondents in contempt of court for failing to post a bond is **denied**. However, if respondents fail to post a bond in the amount of \$750,000 within 10 days of the date of this order, petitioner may submit a final order of dissolution of Hazardous Elimination Corp on notice to respondents.

A hearing on the fair value of petitioner's shares shall be held before the undersigned, or a referee to hear and report, on September 26, 2011.

So ordered.

Dated AUG 08 2011


J.S.C.

ENTERED

AUG 10 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE