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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY

Justice.

IAS PART 17
NASSAU COUNTY
INDEX NO. 31594/99

In the Matter of the Application of
FRANK GALLO,

Petitioner,

MOTION DATE: 2/16/01
MOTION SEQUENCE NO. 1,2

- against -

JOSEPH GALLO, VINCENT GALLO and
VINCENT & FRANK GALLO PARTNERSHIP,

Respondent(s).

The following papers read on this motion:

Notice of Motion/Order to show cause X
Notice of Cross Motion..... X
Answering Affidavits..... X
Replying Affidavits.....
Briefs..... XX

Upon the foregoing papers, it is ordered that this application by petitioner pursuant to Business Corporation Law section 1104-a to dissolve the respondent corporation is determined as hereinafter provided.

Motion by respondents pursuant to CPLR 3211(a)(7) to dismiss the petition is granted to the limited extent that the application for judicial dissolution of Vincent and Frank Gallo Partnership is denied.

Petitioner and his two brothers - respondents Joseph Gallo and Vincent Gallo - are owners of the respondent corporation Long

Island Fireproof Door, Inc. (Fireproof) with each brother owning approximately 33.33 percent (33 1/3%) of the shares of the corporation. In this proceeding, brought pursuant to Business Corporation Law section 1104-a, petitioner seeks dissolution of Fireproof predicated on the "oppressive actions" committed by his brothers Joseph and Vincent Gallo. Petitioner also seeks dissolution of the Vincent and Frank Gallo Partnership (V&F) general partnership which is the owner of commercial property located at 11-05 Clintonville Street, Whitestone, New York, a portion of which is occupied by Fireproof.

The oppressive conduct claimed by petitioner includes his alleged exclusion from all participation in the business and financial benefits of Firepoof since its formation in 1966, as well as in the recent sale of two commercial buildings owned by Fireproof to Home Depot for the approximate sum of $16,000,000.00. While petitioner claims he has received no dividends, profit distributions, salary or other benefits, respondents counter that he has neither invested any money in the corporation nor been employed by it, but has instead been content, for a period of more than thirty years, to leave the running of Fireproof to his brothers while he concentrated on his own door installation business known as Active Door. Respondents maintain that the petitioner has received benefits including Fireproof's payment of various expenses attendant to the Operation of Active Door (including secretarial services, computers, fax services,

advertising, life and medical insurance premiums) and participation in Fireproof's pension plan. Moreover, respondent corporation is the principal source of business referrals for petitioner's business.

Dissolution pursuant to Business Corporation Law section 1104-a is permitted when a corporation's controlling faction is guilty of "oppressive action" toward the complaining shareholder(s). As pointed out by the Court of Appeals in **Mtr Kemp & Beatley (Gardstein)** (64 NY2d 63, 73) "oppression should be deemed to arise only when the majority conduct substantially defeats [petitioner's] expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." The court also noted that "oppressive action" refers to conduct that substantially defeats the expectations of the complaining shareholder, that objectively viewed, were reasonable under the circumstances (**Mtr Kemp & Beatley (Gardstein), supra**, at p. 72). Under Business Corporation Law section 1104-a, the court has discretion to fashion a less drastic alternative remedy rather than dissolving a viable on-going business. The court may order the other shareholders to buy out the petitioner's ownership interest pursuant to section 1118 of the Business Corporation Law (**In re Parveen**, 259 AD2d 389, 391-392). Section 1118 is a defensive mechanism for the non-petitioning shareholder who has "an absolute right to avoid the dissolution proceedings and any possibility of the company's liquidation by electing to

purchase petitioner's shares at their fair value and under terms and conditions approved by the court" (**Fedele v Seybert**, 250 AD2d 519, 522 quoting **Pace Photographers [Rosen]**, 71 NY2d 737, 744-745).

Inasmuch as the conflicting affidavits of the parties raise questions of fact regarding the merits of the petition (i.e., whether there has been oppressive conduct sufficient to warrant dissolution of Fireproof under section 1104-a of the Business Corporation Law or whether an alternative appropriate remedy exists), a hearing must be conducted to hear the allegations and proofs of the parties and determine the facts (Business Corporation Law §1109; **Matter of Cunningham v 344 6th Avenue Owners Corp.**, 256 AD2d 406; **Matter of Steinberg (Cross Country Paper Products Corp.)**, 249 AD2d 551, 552; **Matter of Kournianos (H.M.G., Inc.)**, 175 AD2d 129).

Inasmuch as V&F is a "partnership at will", subject to dissolution at any time by any partner, it is not necessary that the court order its dissolution (**Stanley Company v Louis**, 197 AD2d 412, 413).

The hearing is referred to the Court Attorney/Referee Part for June 4, 2001.

Counsel prepared to proceed to the hearing are directed to appear at the Referee's Part courtroom, Room 060 (lower level) at 9:15 a.m. for assignment to a referee. A failure to appear may be deemed a default within the meaning of 22 NYCRR §202.27 and subject the non-appearing party to an appropriate sanction provided for

therein or any other sanction authorized by statute, regulation or rule.

Adjournments will be granted upon the written consent of the parties addressed to the Court Attorney/Referee prior to the date scheduled. Adjournments will not be accepted by telephone. Counsel are directed not to contact chambers with regard to adjournments. All agreed-upon adjourned dates will be subject to change based on availability of referees.

In the event the parties cannot agree on an adjournment, at least twenty-four (24) hours before the scheduled date, the requesting party shall notify his or her adversary that such a request will be made on the call of the calendar.

The reference shall be to hear and report unless the parties agree otherwise. In such regard counsel are referred to the transcript requirements of 22 NYCRR §202.44. The cost of such transcript shall be borne equally by the parties with the right of the prevailing party to seek to recover the expense as a disbursement.

APR 25 2001

Dated: APR 25 2001

J.S.C.

ENTERED

APR 27 2001

NASSAU COUNTY
COUNTY CLERKS OFFICE

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