

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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IN THE MATTER OF DULAL BEHEDO,

Petitioner,

Index No.: 23745/12

Motion Date: 04/03/13

Motion No.: 11

Motion Seq.: 2

For the Dissolution of
BROTHER'S STAFFING, INC.,
A Domestic Corporation

Pursuant to Article 11 of the Business
Corporation Law.

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The following papers numbered 1 to 12 were read on the motion by petitioner for a default judgment against respondent, M Fazlur Rahman, based upon his failure to serve an answer to the petition for dissolution; and the cross-motion of the respondent for an order granting attorney's fees against the petitioner as a sanction for filing a frivolous motion:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Respondent's Cross-Motion-Affirmation.....	5 - 7
Reply to Cross-Motion.....	9 - 12

Petitioner, Dulal Behedo, and respondent, M Fazlur Rahman are alleged to each be 50% owners of Brother's Staffing Inc., a corporation whose business is dedicated to providing staffing and personnel to hotels for parties and events. On December 13, 2012 the plaintiff commenced an action pursuant to BCL §§ 1104(a)(3), 1104-a(a)(1) and 1104-a(a)(2) for the corporate dissolution of Brothers Staffing, Inc. In his verified petition dated November 28, 2012, petitioner alleges that there is internal dissension between the stockholders such that dissolution would be beneficial to the stockholders and alleging that respondent Rahman has been guilty of illegal, fraudulent and oppressive action towards the petitioner consisting of looting, wasting and diverting property and assets of the Corporation. Petitioner

alleges that respondent has been denying petitioner access to the corporate office, that respondent arranged to have an individual approach and accost the petitioner and threaten him with physical violence, and that respondent improperly denied the petitioner control over the operation of the Corporation and denied petitioner his share of salary and profits of the Corporation.

By order to show cause dated December 13, 2012, petitioner moved for an order granting corporate dissolution and consolidating the dissolution action with a plenary action filed under Index No. 21666/2012. Respondent cross-moved to dismiss the dissolution proceeding. By order dated June 17, 2013, this Court granted petitioner's motion for consolidation of the two actions, denied the respondent's cross-motion to dismiss the petition and granted respondent leave to serve a verified answer.

Petitioner now seeks an order pursuant to CPLR 3215 granting a default judgment against respondent on the ground that the respondent failed to serve a timely answer to the petition. The petition was served on December 28, 2012. The respondent moved to dismiss the petition and has not as yet filed a verified answer to the dissolution proceeding. Petitioner alleges that pursuant to CPLR 403(b) the respondent's answer was due on January 29, 2013 and therefore the respondent, who has not yet served an answer, is in default.

Respondent opposes the motion and cross-moves for attorney's fees as a sanction for filing a frivolous motion. Respondent asserts that because he filed a pre-answer motion to dismiss the dissolution proceeding that his time to answer the petition is deferred until such time as the Court determines the motion to dismiss.

Upon review and consideration of the petitioner's motion for a default judgment and respondent's opposition thereto, this court finds that motion for a default judgment pursuant to CPLR 3215 is denied. On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a petitioner must submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defendant's default.

Here, the petitioner failed to submit satisfactory proof of the respondent's default. As stated above, in response to the petitioner's motion to consolidate the two actions, respondent filed a pre-answer motion pursuant to CPLR 404 for an order dismissing the dissolution proceeding. Pursuant to said statute the answer is not due until such time that the motion is denied. As the respondent's motion to dismiss the petition was pending

until this court's decision of June 17, 2012, the respondent was not required to file an answer during that time. However, as stated in the prior decision, the respondent is now required to serve a verified answer within the time limit set forth in this court's prior determination.

Accordingly, for all of the above stated reasons it is hereby

ORDERED, that the petitioner's motion for a default judgment is denied and it is further

ORDERED, that respondent's cross-motion for sanctions is denied.

Dated: June 18, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.