

INDEX
NO. 10717-05

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 8-26-05

Submission Date: 9-9-05

Motion Sequence No.:001,002/MOT D

In the Matter of the Application of LORI
PATTI, Holder of One-Half of All
Outstanding Shares Entitled to Vote in
an Election of / Directors of SOMA
CARE MASSAGE THERAPY &
WELLNESS, P.C. For the Dissolution
SOMA CARE MASSAGE THERAPY &
WELLNESS, P.C., A Domestic
Corporation,

Petitioner,

- against -

COUNSEL FOR PETITIONER
Simmons, Jannace & Stagg, LLP
75 Jackson Avenue
Syosset, New York 11791

COUNSEL FOR RESPONDENT
Blumberg, Cherkoss, Fitz Gibbons &
Blumberg, LLP
330 Broadway - Suite One
Amityville, New York 11701

PAUL FUSCO,

Respondent,

_____x

ORDER

The following papers were read on Petitioners application to judicially dissolve Soma Care Massage Therapy & Wellness, P.C. and Respondent's cross-petition relieving Lori Patti of her duties as an officer and director of Soma Care; an accounting and directing Lori Patti to surrender possession of the corporate books and records.

Notice of Motion dated July 8, 2005;
Petition of Lori Patti duly verified July 7, 2005;
Notice of cross-petition dated August 19, 2005;
Petition of Paul Fusco duly verified August 19, 2005;
Affidavit of Lori Patti sworn to on August 22, 2005;
Affidavit of Paul Fusco sworn to on September 7, 2005.

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Petitioner, Lori Patti ("Patti"), a 50% shareholder of Soma Care Massage Therapy & Wellness, P.C. ("Soma Care"), petitions for dissolution of Soma Care pursuant to Business Corporation Law 1104(a)(3) on the grounds that there is internal dissension and that the two shareholders are so divided that dissolution would be beneficial to the shareholders.

Respondent Paul Fusco ("Fusco"), the other 50% shareholder of Soma Care, cross-petitions for denial of the petition, surrender of the corporate books and records, equipment and premises by Patti, an accounting by Patti and a hearing on damages.

BACKGROUND

Soma Care was incorporated in late 2003 as a professional service corporation for the practice of massage therapy. Petitioner and Respondent are each 50% shareholders. Patti states that the initial capital invested in the corporation was \$20,000. Each shareholder brought certain clients to Soma Care and, it is alleged, that each serviced private clients outside of Soma Care.

It is clear from the record that Patti and Fusco reached a parting of the ways in April 2005, when Soma Care's relationship with its "on site" physician, Dr. Bressler, was terminated by Fusco. Patti states that she wanted to continue receiving medical referrals from Dr. Bressler. She notes that it was Fusco who had originally invited Dr. Bressler to treat Soma Care's clients in Soma Care's offices, and that it was Fusco who gave Soma Care's customer list to Dr. Bressler. Nevertheless, a permanent arrangement with Dr. Bressler did not work out. Patti claims that when she informed

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Fusco that she wanted to work with Dr. Bressler one day a week, Fusco abandoned Soma Care and confiscated its books.

Fusco alleges that Patti wanted to provide medical massage services to Soma Care's clients at Dr. Bressler's office and that this would create a conflict of interest. He contends that certain corporate records were delivered to his attorney. Further, he alleges that Patti changed the locks at Soma Care after she was contacted by Fusco's former lawyer.

DISCUSSION

The standard for dissolution is not who is at fault for a deadlock, but whether a deadlock exists. See, Matter of Kaufmann, 225 A.D. 2d 775 (2nd Dept. 1996). The critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs. Matter of Goodman v. Lovett, 200 A.D. 2d 670 (2nd Dept.), *lv. app. disp.*, 84 N.Y.2d 850 (1994). *Cf. Matter of Fazio Realty Corp.*, 10 A.D. 3d 363 (2nd Dept. 2004).

In the case of a close corporation, the relationship between the shareholders is akin to that of partners. When the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation. Molod v. Berkowitz, 233 A.D. 2d 149 (1st Dept. 1996), *lv. app. disp.*, 89 N.Y. 2d 1029 (1997); and Greer v. Greer, 124 A.D. 2d 707 (2nd Dept. 1986), *app. disp.*, 69 N.Y. 2d 900 (1987). Where the record demonstrates sufficient differences and animosity between the shareholders, and dissolution is the only viable alternative,

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dissolution will be granted Molod v. Berkowitz, *supra*; and Matter of Goodman v. Lovett, *supra*. Dissolution is not to be denied merely because the dissension has not yet had an appreciable impact on the corporation's profitability. Molod v. Berkowitz, *supra*.

On this record, the Court finds sufficient evidence of such dissension between the two shareholders that a deadlock exists. Soma Care cannot continue to function effectively. For this reason, the petition for dissolution must be granted and the cross-petition for denial of dissolution must be denied.

However, the Court is troubled by the allegations of self-dealing by Petitioner. Shareholders in a close corporation owe each other a duty to act in good faith. Matter of Cassata v. Brewster-Allen-Wichert, Inc., 248 A.D. 2d 710 (2nd Dept. 1998). The relationship of such shareholders is a fiduciary one. See, Brunetti v. Musallam, 11 A.D. 3d 280 (1st Dept. 2004); and Spodek v. Neiss, 304 A.D. 2d 557 (2nd Dept. 2003). The issue presented on this record is whether Patti has breached her fiduciary duty to Fusco, by diversion of corporate opportunities for Soma Care. See gen'lly, Fender v. Prescott, 101 A.D. 2d 418 (1st Dept. 1984), *affd.*, 64 N.Y. 2d 1079 (1985). The cross-petition alleges such a claim for breach of fiduciary duty. Thus, the cross-petition must be granted to the extent of setting this claim down for a hearing.

In addition, Fusco is certainly entitled to an accounting of all of the assets of Soma Care and the winding down of its business. The hearing on Fusco's breach of fiduciary duty claims shall be heard along with the accounting issues.

Accordingly, it is,

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ORDERED, that the petition for dissolution of Soma Care pursuant to Business Corporation Law 1104(a)(3) is **granted**, and, to the extent that the cross-petition seeks denial of dissolution, it is **denied**; and it is further,

ORDERED, that the cross-petition is **granted** to the extent of setting down for a hearing the claim against petitioner for breach of fiduciary duty; and it is further,

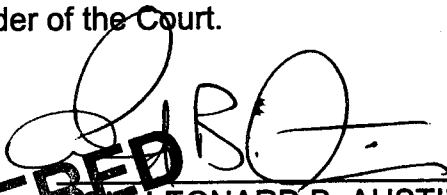
ORDERED, that the request in the cross-petition for an accounting of Soma Care and its winding down is **granted**; and it is further,

ORDERED, that the remainder of the cross-petition is **denied**; and it is further,

ORDERED, that counsel for the parties are directed to appear for a preliminary conference on January 10, 2006 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, N.Y.
November 30, 2005


ENTERED
DEC 08 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE
HON. LEONARD B. AUSTIN, J.S.C.