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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**

Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

**SAMUEL FEINBERG, individually and SAMUEL  
FEINBERG, a shareholder of L & E INTERNATIONAL  
LTD., suing in the right of L & E INTERNATIONAL  
LTD.,**

**Decision and Order**

**Plaintiffs,**

**MOTION SUBMITTED:**

**March 26, 2013**

**MOTION SEQUENCE:05**

**INDEX NO.:3120-11**

**-against-**

**ERROL SILVERBERG, VICTOR HECHT, RICK  
KREMER and L & E INTERNATIONAL LTD.,  
A nominal defendant,**

**Defendants.**

**Action No.1**

**ERROL SILVERBERG,**

**Petitioner,**

**-against-**

**INDEX NO.: 7892-12**

**SAMUEL FEINBERG and L& E INTERNATIONAL  
LTD.,**

**Respondents.**

**Action No.2**

**The following papers and the attachments and exhibits thereto have been read on this  
motion:**

Notice of Motion	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation	5

It is hereby ordered that the motion by Plaintiff pursuant to CPLR 602(a) to consolidate, “into a single action to be tried before this Court”, the within matter with the dissolution proceeding under Index No. 12-007892, which is presently pending before Hon. Timothy S. Driscoll is granted, to the extent that a joint trial of particular issues common to both actions shall be held.<sup>1</sup> In so holding, the court notes the importance of, and interplay between, the following general principles and statutes: CPLR 602[a], which allows the court, upon motion, to “order a joint trial of any or all the matters in issue \* \* \* [to consolidate the actions], and to make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay”; joint trials of actions are favored by the courts so as to avoid the possibility of inconsistent results and to advance judicial efficiency<sup>2</sup>; CPLR 410, requiring that triable issues of fact in a special proceeding “be tried forthwith”; CPLR 4011, under which the court is vested with the authority to determine the order of trial of the issues; and, CPLR 3104, which permits the court to supervise disclosure.

At bar, the complaint contains, *inter alia*, three causes of action seeking damages based on the alleged bad faith conduct and breach of fiduciary duty by Errol Silverberg in threatening dissolution without justification, isolating plaintiff Feinberg from business operations, depriving him of meaningful management of the business, attempting to oust him from the business, etc. (Exhibit “A” to Motion). In the petition for dissolution (Exhibit “D” to Motion at pp 2-3), Silverberg alleges that “[t]he two shareholders [of L&E International, Ltd.] have fundamental disagreements on the management of the corporation’s affairs, and their respective roles in it” and that “because of internal dissension between Feinberg and Silverberg, dissolution would be

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<sup>1</sup> Although the plaintiff did not explicitly request a joint trial, the relief of a joint trial is closely related to that of consolidation and prejudices no party in either action (*see Frankel v Stavsky*, 40 AD3d 918 [2d Dept 2007]; 3-602 New York Civil Practice: CPLR P 602.05 [court has broad discretion to grant consolidation or joint trial]). Consolidation would be inappropriate here considering that the parties are in different litigation postures in the respective actions (*Rogin v Rogin*, 90 AD3d 507 [1<sup>st</sup> Dept 2011]).

<sup>2</sup> *New York Annual Conference of Methodist Church v Cho*, 156 AD2d 511 [2d Dept 1989]; *Humiston v Grose*, 144 AD2d 907 [4<sup>th</sup> Dept 1988]; *Heck v Waldbaum's Supermarkets, Inc.*, 134 AD2d 568 [2d Dept 1987]

beneficial to the shareholders" (BCL 1104[3]).

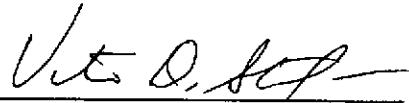
It is axiomatic that bad faith in seeking dissolution of a corporation is a defense to dissolution (*e.g.*, *Kavanaugh v Kavanaugh Knitting Co.*, 226 NY 185 [1919]; *Kroger v Jaburg*, 231 AD 641 [1<sup>st</sup> Dept 1931]), and, therefore, the allegations of bad faith conduct in the instant action may, at least, in part, also constitute a defense to dissolution in the special proceeding pending before Justice Driscoll.

Accordingly, it is appropriate that the matters be joined for trial to the extent indicated herein, and, considering the principles enunciated above, that discovery, if any, be conducted on a limited and expedited basis, and that the trial of such limited issues, likewise be conducted on an expedited basis.<sup>3</sup> Remaining causes of action and issues in the action under Index No. 3120-11 shall be determined in due course subsequent to the joint trial of the petition and related causes of action in the complaint (CPLR 4011).

A conference shall be held before the undersigned on June 3, 2013, at 9:30 a.m., at which the court will address the issues to be tried first and the disclosure that shall take place, if any.

This constitutes the decision and order of the court.

Dated: May 17, 2013



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
MAY 21 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>3</sup>The trial shall be limited to petitioner's claim for dissolution, the defenses thereto, and the causes of action in the complaint premised on the bad faith conduct of the defendant Silverberg, but only to the extent of determining if the defendant acted in bad faith, without regard to causation or damages. Likewise, in the event that dissolution is ordered, liquidation and winding up, and any matters that might be attendant thereto, will be addressed after trial.