

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
In the Matter of the Application of  
ROBERT COHN a/k/a ROBERT COVEN,

Petitioner,

for judgment pursuant to Business Corporation  
Law §1104 judicially dissolving LAST CHOICE  
REAL ESTATE CORP.,

- against -

LAST CHOICE REAL ESTATE CORP. and  
MARTIN COHN a/k/a/ MARTIN COVEN,

Respondents.  
\_\_\_\_\_

TRIAL/IAS PART 20  
NASSAU COUNTY

INDEX NO. 20605/07

MOTION SUBMISSION  
DATE: 3/31/08

MOTION SEQUENCE  
NO. 001

The following papers read on this motion:

Notice of Petition and Affidavits.....	<u>  X  </u>
Affirmation in Opposition.....	<u>  X  </u>
Reply Affirmation.....	<u>  X  </u>

The petitioner moves for a judgment or order directing the judicial dissolution of Last Choice Real Estate Corp., pursuant to §1104 and §1111 of New York Business Corporation Law, and upon such dissolution, distributing assets, rendering an accounting, compelling the sale of certain assets, awarding petitioner certain shares in rental income, awarding damages, issuing a temporary restraining order, appointing a temporary receiver, and awarding petitioner costs. The respondents, Martin Cohn a/k/a Martin Coven, (hereinafter referred to as "Martin") and Last Choice Real Estate Corp., (hereinafter referred to as "Last Choice"), submits "opposition". The petitioner submits a "reply" affirmation.

The instant Verified Petition seeks, in the first cause of action, the appointment of an independent temporary receiver of Last Choice, pursuant to New York Business Corporation Law §1202(a)(1), in the second cause of action, an order compelling the respondent to render an accounting to the petitioner, in the third cause of action, an order finding that the respondent breached his fiduciary duties to petitioner, whereby petitioner seeks a final order (A - I), as follows:

- A. Granting a judgment or final order directing the judicial dissolution of Last Choice, pursuant to §§1104 and 1111 of the Business Corporation Law;
- B. And upon such dissolution, distribution to Petitioner of fifty percent (50%) of the net equity of Last Choice Real Estate Corp. according to his share;
- C. Compelling respondent to render an accounting to petitioner for the affairs of Last Choice Real Estate Corp.;
- D. Compelling respondent, upon dissolution of Last Choice Real Estate Corp., to sell the real property and assets held by Last Choice Real Estate Corp. and to distribute to petitioner fifty percent (50%) of the proceeds therefrom;
- E. Awarding petitioner his share of the rental income from November 2002 to the present;
- F. Awarding petitioner damages in an amount to be determined at trial but in no event less than \$2,000,000.00;
- G. Awarding petitioner punitive damages in an amount to be determined at trial but in no event less than \$2,000,000.00;
- H. Awarding petitioner the costs and disbursements of this action; and
- I. Awarding such other and further relief as this Court may deem just and proper.

The petition provides that “a prior application for the relief requested herein was dismissed without prejudice due to failure to submit petitioner’s personal affidavit”.

The petitioner had previously moved, by way of order to show cause, in the prior action entitled “In the Matter of the Application of ROBERT COHN a/k/a ROBERT COVEN, for judgment pursuant to Business Corporation Law §1104 judicially dissolving LAST CHOICE REAL ESTATE CORP. v. MARTIN COHN a/k/a MARTIN COVEN and LAST CHOICE REAL ESTATE CORP.” under Index No. 5940/07, in Supreme Court, County of Nassau. That by way of order of the Honorable Stephen A. Bucaria, dated July 18, 2007, the petitioner’s order to show cause for judicial dissolution was denied, and the petition dismissed. The order provided that the petitioner’s pleading was not verified on the basis of personal knowledge, whereby the verification of the pleading by the petitioner’s attorney was not a valid substitute for the petitioner’s personal affidavit. The order provided that “the petitioner neither submitted an affidavit of merit *nor any other evidence* in support of his assertion that internal dissension exists between the shareholders of LCRC [Last Choice]. (Emphasis added.)

The respondent submits that the petitioner is estopped from requesting any of the relief sought in the instant petition, invoking the doctrine of collateral estoppel. The respondent provides that the prior matter was not dismissed solely on the grounds that petitioner failed to submit an affidavit of merit, but also on the grounds that the petitioner failed to submit "any other evidence" to support the assertion that internal dissension exists. However, the issues in the prior action have not been litigated, and therefore, the doctrine of collateral estoppel does not bar the instant action.

The "doctrine of collateral estoppel is intended to reduce litigation and conserve resources of court and litigants and is based upon the general motion that it is not fair to permit a party to relitigate an issue that has already been decided against it". (*Kaufman v. Eli Lilly and Company*, 65 NY2d 449). The two requirements which must be satisfied in order to invoke the doctrine of collateral estoppel are that the identical issue must have been decided in the prior action and be decisive of the present action, and that the party precluded from relitigating the issue had a full and fair opportunity to contest the prior determination. (*Id.*) If the issue had not been litigated, there is no "identity of issues between the present action and prior determination", whereby an issue is not litigated if there had been a default, a confession of liability, a failure to place the matter in issue by proper pleading, or even because of a stipulation. (*Id.*) The Court reasoned that if the issue has not been litigated, there is no identity of issues between the present action and the prior determination. (*Id.*)

Here, the issues raised in the prior petition, also raised in the instant petition, have not been litigated, and therefore, there is no identity of issues between the present action and the prior determination. The issues in the prior action were not decided by the order of the Honorable Justice Bucaria dated July 18, 2007. The dismissal of the prior action was not determined on the merits so as to bar the commencement of a second action. (*Maitland v. Trojan Electric & Machine Co., Inc.*, 65 NY2d 614).

The petitioner herein has submitted an affidavit by Robert Cohn a/k/a Robert Coven, (hereinafter referred to as "Robert"), to support the instant petition for judicial dissolution of the corporation, Last Choice. The petitioner, Robert, and the respondent, Martin, are each 50% shareholders of Last Choice. The petitioner contends that there is dissension and deadlock between the two shareholders. The respondent herein does not submit an affidavit disputing the contentions of the petitioner. In fact, the respondent has not submitted a Verified Answer to the instant petition, but rather, an affirmation in opposition submitted by the respondents' counsel.

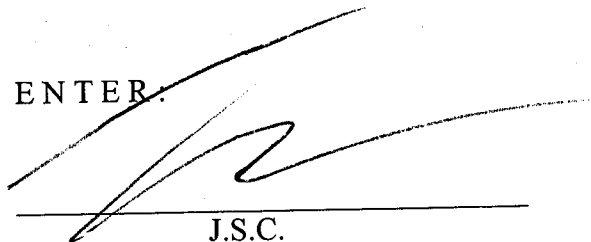
Upon the foregoing papers, it is ordered that the instant application by petitioner requesting a final order (A - I), as delineated *supra*, is decided as follows.

A hearing is required on the issues delineated (A - I).

Subject to the discretion on the Justice presiding in the Calendar Control Part, (CCP), all issues raised in this matter are respectfully referred to for a hearing on July 9, 2008, to be heard before the residing Justice, Referee and/or J.H.O. In the event that the matter is referred to a Referee or J.H.O., such Referee or J.H.O. is given the jurisdiction to hear and report all issues to the undersigned and/or to hear and resolve all issues. Petitioner shall serve and file a note of issue no later than twenty (20) days after entry of this order, in default of which the action shall be deemed

abandoned (see CPLR 3216). A copy of this order shall accompany the note of issue when filed, accompanied by proof that a copy has been mailed to all to the original petition within fifteen (15) days after entry. A copy of this order shall be served on the clerk of CCP within twenty (20) days after entry.

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

Dated: May 13, 2008

cc: The Feldman Law Firm, P.C.  
Baker Greenstein and Bernstein, Esqs.

**ENTERED**

MAY 16 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE