

PUBLISHED

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

In the Matter of the Application of **NATALE
CARDINO** as Holder of More Than Twenty Percent
of All Outstanding Shares of **PEEK-A-BOO INC,**

Petitioner,

For the Dissolution of **PEEK-A-BOO INC,** a
Domestic Corporation.

INDEX NO.: 2007-37021

MOTION SEQ. NO.: 001 - MG

ORIG. MOTION DATE: 01/15/08

MOTION SEQ. NO.: 002 - MD

ORIG. MOTION DATE: 01/15/08

FINAL SUBMIT DATE: 01/06/10

UPON the following papers numbered 1 to 12 read on these motions:

- Petitioner's Order to Show Cause (Papers 1-2);
- LOMBARDO SR's Order to Show Cause (Papers 3-4);
- LOMBARDO SR's Opposition (Papers 5-6);
- Petitioner's Reply (Papers 7-8);
- Petitioner's Memorandum of Law (Papers 9-10);
- LOMBARDO SR's Memorandum of Law (Papers 11-12);

It is,

ORDERED, that the application of Petitioner CARDINO is hereby granted to the extent set forth herein below; and the application of VINCENT LOMBARDO SR is hereby denied as moot.

Petitioner CARDINO moves this Court for an Order of dissolution of PEEK-A-BOO, INC, on grounds specified in section 1104-a of the Business Corporation Law, that the directors and/or remaining others shareholders and/or those in control of the Corporation have allegedly been guilty of illegal, fraudulent or oppressive actions towards Petitioner.

LOMBARDO SR moves this Court for an Order asserting the he should not be required to make available Peek-A-Boo Inc's corporate financial books and records for inspection until such time as this Court shall direct.

Petitioner alleges that, due to his contributions to the Peek-A-Boo Inc (the Corporation), he is entitled to equitable stock ownership and thus the title of stockholder. Further, he alleges, due to the illegal, fraudulent or oppressive actions of Vincent Lombardo Jr and Vincent Lombardo Sr, the other stockholders, the Petitioner is entitled to dissolution of the Corporation under section 1104-a of the Business Corporation Law.

Section 1104-a of the Business Corporation Law permits the judicial dissolution of a corporation under special circumstances. It states, in pertinent part, as follows:

... The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, ...no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

- (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders...

While the shares, themselves, meet the criteria set forth for judicial dissolution, Petitioner concedes that no share certificates were ever issued to him with respect to Peek-A-Boo Inc or its predecessor, List Books Co Inc. However, Petitioner contends that he nevertheless is a shareholder based on a theory of equitable stock ownership.

"[T]he mere fact that an alleged shareholder is not formally issued stock certificates, or does not physically possess stock certificates or a shareholders' agreement is not dispositive, without more, of whether he or she is a shareholder (*see: Davydov v Zhuk*, 23 Misc3d 1129A; *French v French*, 288 AD2d 256 [2001]; *Blank*, 256 AD2d 693; *Matter of Steward*, 229 AD2d 500 [1996]; *Matter of M. Kraus, Inc.*, 229 AD2d 347 [1996]; *Purnell v LH Radiologist PC*, 228 AD2d 360 [1996], *affd* 90 NY2d 524 [1997]; *Matter of Benincasa v Garrubbo*, 141 AD2d 636 [1988]; *Lubov v Wilikson*, 2008 NY Slip Op 30234[U] [Sup Ct, NY County 2008]; *Marciano v Champion Motor Group Inc*, 2007 NY Slip Op 33021[U] [Sup Ct, NY County 2007])."

"A stock certificate is *evidence* of shareholder status, but is not necessary to its creation (*see: Matter of Rappaport*, 110 AD2d 641 [emphasis in original]; *United States Radiator Corp v State of New York*, 208 NY 144; *Matter of Walsh v Somerset Group*, 45 AD2d 915).

"Where no certificates of stock are issued by a corporation, the court may consider other evidence to determine the validity of a plaintiff's claim that he or she was a shareholder of the corporation, such as corporate and personal tax returns, financial statements, the names on corporate bank accounts, bank records, the parties' testimony, the monies contributed by the parties to the corporation, the work performed by the parties for the corporation, and the payments made by the parties for corporate obligations (*see: Davydov, supra; Blank, supra; Hunt v Hunt*, 222 AD2d 759 [1995])."

Petitioner contends that he has invested over \$60,000 into the Corporation, and his monies were used for various business expenses, including \$18,500 in legal fees to the attorney for List Books Co Inc (the predecessor corporation to Peek-A-Boo, Inc.), to fund the costs of and resolve various litigations for both Peek-A-Boo Inc and its predecessor corporation. Petitioner has supplied copies of cleared personal checks totaling \$22,724.25: \$13,500 were made out to said counsel \$9,244.25 made out to Yacko Distributors, a supplier of videos to the Corporation. Petitioner has further supplied copies of correspondence (faxes and letters) which show he is Peek-A-Boo Inc's contact for tax payments

and returns, and insurance renewals.

While Petitioner has supplied such documents to support his assertions, LOMBARDO SR simply contends that Petitioner's claims are untrue. This Court, however, is thus confront with the questions as to why a *mere employee* would write personal checks to Peek-A-Boo Inc's (and its predecessor corporation's) attorney and suppliers; why a *mere employee* would be authorized to discuss Peek-A-Boo Inc's tax returns or be the contact for Peek-A-Boo Inc's insurance renewal; and why a *mere employee* would have signatory authority on a check traceable to the account of List Books Co Inc (the predecessor corporation to Peek-A-Boo, Inc.) to pay New York Sales Tax?

This Court find it inconceivable that a mere employee would possess these authorities. The Court finds that Petitioner has supplied sufficient evidence that he is an equitable stockholder and that the actions of the two Respondent shareholders were at least oppressive, if not more. Petitioner's 33% ownership meets the threshold requirement of 20% stock ownership, which permits this Court to make its finding pursuant to Business Corporation Law § 1104-a regarding involuntary dissolution.

The Court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

- (1) Whether liquidation of the Corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and
- (2) Whether liquidation of the Corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

Here, Petitioner has been "shut out" of the business operations, and has no access to the store or business premises, the business records, or the profit sharing. Petitioner's title of stockholder continues to be disputed by LOMBARDO SR. This Court finds involuntary dissolution of Peek-A-Boo Inc is the proper remedy, taking into account that the above-mentioned facts prevent Petitioner from obtaining a fair return on his investment, and prevent the protection of Petitioner's right and interests in the Corporation.

The questions before us may further be decided by utilizing the principle of equitable estoppel. Its applicability requires the essential elements of (1) conduct which amounts to a false representation or concealment of material facts, (2) intention that such conduct will be acted upon by the other party, and (3) knowledge of the true facts (*see: Melron Amusement Corp v Town of Mamaroneck*, 104 AD2d 858; *Airco Alloys Div v Niagara Mohawk Power Corp*, 76 AD2d 68). Should these elements be found, the respondents would be equitably estopped from claiming any facts but those upon which the other party relied (*see: Matter of Benincasa v Garrubbo et al*, 141 AD2d 638 [1988]; *Simcuski v Saeli*, 44 NY2d 442; *Golser v Golser*, 115 AD2d 695; *Fishman v Hymes*, 114 AD2d 802).

Here, LOMBARDO SR (1) represented to Petitioner that he would have ownership rights and be issued shares for his monetary contributions to Peek-A-Boo Inc and/or its predecessor corporation, (2) intended that Petitioner would, in fact, contribute monetarily to Peek-A-Boo Inc based on such

representations, and (3) knew that Petitioner would never actually be receiving his promised ownership rights and shares. LOMBARDO SR is therefore estopped from claiming any facts but those upon which Petitioner relied. Again, the totality of such facts permit this Court to make its finding pursuant to Business Corporation Law § 1104-a of the regarding involuntary dissolution.

Due to the relief granted herein above, LOMBARDO SR's Order to Show Cause is moot, and further the Court will not deny Petitioner access to records and books of the Corporation.

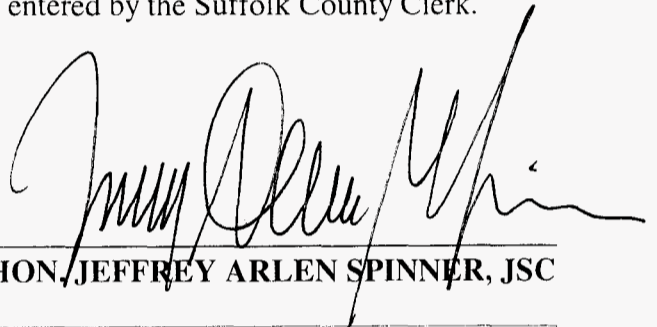
For all the reasons stated herein above and in the totality of the papers submitted herein, it is,

ORDERED, that the above referenced application of Petitioner for an Order granting involuntary dissolution of Peek-A-Boo Inc is hereby granted and a hearing to set forth the details of said dissolution is hereby scheduled for July 14, 2010, at 2:30 in the afternoon of that day, to be held at Part 21 of the Courthouse located at 1 Court Street, Riverhead, New York, all parties hereby being directed to appear ready for full participation in said hearing to determine the proper means of equitable distribution of the Corporation's assets; and it is further

ORDERED, that the above referenced application of the LOMBARDO SR is denied as moot because of the relief granted herein above; and it is further

ORDERED, that Counsel for Petitioner herein is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties, and upon the Calendar Clerk of this Court within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: Riverhead, New York
April 7, 2010



HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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