

counsel and of respondent Manfra wherein they contested the petitioner's entitlement to any judicial dissolution of the corporate respondent. The answer also contained a counterclaim in which respondent Manfra sought recovery of 50% of sums due for sales taxes, penalties and interests owing to the New York State Taxation and Finance Bureau. Underlying such claim are allegations that the petitioner bears responsibility for one-half of the expenses of the corporate respondent by reason of the petitioner's 50% shareholder interest therein. The court is unaware of the service of a reply to the counterclaim. The issues raised by the petition and the answer were certified to be ready for determination by stipulation dated January 11, 2013.

Respondent Manfra now moves for the following relief: 1) an order dissolving the corporate respondent pursuant to BCL §1104 and 2) an order awarding him summary judgment on his counterclaim against the petitioner. The petitioner opposes that motion and cross-moves for summary judgment on its pleaded demands for dissolution of the corporate petitioner pursuant to CPLR 1104-a or BCL §1104-a(3). In addition, the petitioner seeks an order severing his remaining causes of action for an accounting of the assets and liabilities of the corporate respondent and those wherein the petitioner seeks the recovery of monies from both respondents due to their non-payment of wages and/or salary and the recovery of damages, including punitive damages, due to the respondents' purported conversion of monies allegedly owing to the petitioner. The petitioner also seeks discovery with respect to the severed causes of action. For the reasons stated below, both the motion-in-chief and the cross motion are denied.

Respondent Manfra's demand for an order directing a judicial dissolution of the now defunct corporate respondent pursuant to BCL §1104 on the grounds of dissension and deadlock, is denied. There are no pleaded demands for such relief by the respondents and their answer, the opposing affidavit of Manfra and the affirmation of respondents' counsel served by such respondents in response to the petition all deny that there is any basis for dissolution under BCL §1104 as now alleged by such respondents. Respondent Manfra is thus seeking judgment on the petitioner's pleaded claim for dissolution pursuant to BCL §1104 which is advanced as the second cause of action in the petition served herein. Under these circumstances, the relief demanded is not available to the respondent under CPLR Articles 4 or 32 or BCL §1104. In addition, the moving papers failed to demonstrate a lack of merit in the petitioner's pleaded claims for dissolution under BCL §1104-a on the grounds of fraudulent and/or oppressive conduct on the part of respondent Manfra. These claim are asserted as the first ground for dissolution in McCoun's petition. The respondents' reliance upon a purported concession by the petitioner that dissolution pursuant to §1104 on deadlock grounds is appropriate due to dissension between the two co-owners of the corporate respondent is belied by the petitioners' cross motion for summary judgment on his pleaded claims for dissolution under BCL §1104-a on grounds of fraudulent and oppressive conduct. Those portions of the respondents' motion wherein they seek an order granting dissolution pursuant to BCL §1104 are thus denied.

The remaining portions of the respondents' motion for summary judgment on the counterclaim for recovery of amounts allegedly due respondent Manfra are denied. "It is well established that summary judgment should only be granted where there are no material and triable issues of fact (*Gitlin v Chirinkin*, 98 AD3d 561, 949 NYS2d 712 [2d Dept 2012], quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). It is equally well established that issue finding, as opposed to issue determination, is the key to summary judgment" (see *Moss v JNK Capital Ltd.*, 211 AD2d 769, 621 NYS2d 679 [2d Dept 1995], *aff'd*. *Moss v JNK Capital Ltd.*,

85 NY2d 1005, 631 NYS2d 280 [2d Dept 1995]; *Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 261, 479 NYS2d 992 [2d Dept 1984]), and that the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Gitlin v Chirinkin*, 98 AD3d 561, *supra*). Here, the moving papers failed to demonstrate, by proof in admissible form, that as a matter of law, the petitioner is liable for payment of one-half of the amounts expended by respondent Manfra to defray the business and operating costs of the corporate defendant including the taxes, interest and penalties allegedly owing to the New York State taxing authorities. Questions of fact, including those of credibility touching upon the issue of liability as well as the issue of damages, were not eliminated by the moving papers and no proof in admissible form sufficient to warrant judgment as a matter of law on such issues was submitted. The respondents' motion for summary judgment is thus denied.

Also denied is the cross motion (#003) by the petitioner for summary judgment on its pleaded claims for dissolution under BCL §1104-a and/or §1104. The remedy of summary judgment is not available to a petitioner in special proceedings such as the instant one since determination of the petition is, by statutory mandate, to be made summarily by the court pursuant to CPLR 409 except where questions of fact exist, in which event, the matter shall be tried (*see* CPLR 410). In any event, the moving papers failed to eliminate all questions of fact, including those of credibility, by the tender of proof in admissible form sufficient to establish the petitioner's entitlement to dissolution under either of the statutory basis claimed. The remaining portions of the cross motion wherein the petitioner seeks a severance of his other pleaded claims including an accounting of assets and liabilities from the respondents and the recovery of monies owed as wages and/or damages and discovery with respect thereto are also denied. The denial of summary judgment appears to have rendered these demands academic. In any event, these claims are so very closely related to the matters before the court on the pending dissolution claims that a severance thereof would be impracticable and a waste of judicial resources. Nor is the petitioner entitled to discovery with respect thereto in light of the January 11, 2013 stipulation certifying the matter as ready for determination.

In view of the foregoing, the motion (#002) by the respondents and the cross motion (#003) by the petitioner, for among other things, summary judgment, are both denied. Counsel for the parties are reminded that the matter is scheduled for trial before the undersigned on **September 4, 2013** and the petition (#001) is hereby adjourned to that date.

DATED: _____

7/17/13



THOMAS F. WHELAN, J.S.C.