

[*1]

Matter of Digeser v Flach
2015 NY Slip Op 50041(U)
Decided on January 16, 2015
Supreme Court, Albany County
Platkin, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 16, 2015

Supreme Court, Albany County

In the Matter of the Application of Hank Digeser, as a Shareholder of Gould Erectors & Rigging, Inc., for the Judicial Dissolution of Gould Erectors & Rigging, Inc., and the Petition of Hank Digeser, as a Shareholder of Flach Crane & Rigging Co., Inc., for the Judicial Dissolution of Flach Crane & Rigging Co., Inc., Petitioner,

against

John C. Flach and GOULD ERECTORS & RIGGING, INC. and FLACH CRANE & RIGGING CO., INC., Respondents.

2382-13

APPEARANCES:

The Harding Law Firm

Attorneys for Petitioner

(Charles R. Harding, of counsel)

1343 Balltown Road

Niskayuna, NY 12309

The Baynes Law Firm, PLLC

Attorneys for Respondents

(Brendan F. Baynes, of counsel)

130 Main Street

Ravena, New York 12143

Richard M. Platkin, J.

By this special proceeding, petitioner Hank Digeser seeks the judicial dissolution of two business corporations in which he is a minority shareholder: respondents Gould Erectors & Rigging, Inc. ("Gould") and Flach Crane & Rigging Co., Inc. ("Flach Co."). The majority shareholder, John C. Flach, also is named as a respondent in this proceeding. Dissolution of the corporations is sought under Business Corporation Law ("BCL") § 1104-a, based largely

upon [*2]allegations of oppressive conduct directed at petitioner.^[FN1]

At the preliminary conference in this proceeding, held on November 18, 2013, the Court entered a Discovery Stipulation & Order ("Discovery Order") granting the parties' joint request for broad disclosure. The scheduling deadlines established therein were extended by the Court several times at the request of the parties in order to allow them to complete depositions and obtain appraisals of corporate property.

At a compliance conference held on December 15, 2014, the Court directed that a trial on the dissolution allegations of the petition shall be held commencing on March 30, 2015. In the event that petitioner establishes grounds for dissolution under BCL § 1104-a (a), further proceedings shall be conducted on the issues of "whether to proceed with involuntary dissolution" and other remedial issues.

Pending before the Court are two motions and a cross-motion pertaining to procedural matters, including amendment of the pleadings and additional disclosure.

A. Amendment of Petition

Petitioner moves for leave to serve an amended petition that adds allegations of corporate waste, looting and oppression on the part of Flach. Some of the new allegations concern events prior to the commencement of this proceeding, while other allegations pertain to post-commencement misconduct. Petitioner seeks an order that allows him "to serve the amended petition and provides that the . . . date of valuation of the corporate assets remains April 30, 2013". Additionally, petitioner seeks to reassert the cause of action for an accounting, which previously was dismissed for lack of personal jurisdiction and which also is alleged in a second, separate proceeding (Index No. 4898-13 ["Second Proceeding"]).

A dissolution petition may be amended by leave of court, "with like effect as though originally filed as amended, or otherwise as the court may direct" (BCL § 1107). In general, a motion for leave to amend a pleading shall be freely granted, providing that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit (*Smith v Haggerty*, 16 AD3d 967, 967-968 [3d Dept 2005]).

Petitioner's motion to amend should be granted with respect to the additional allegations

of corporate waste, looting and oppression that allegedly occurred prior to commencement of this proceeding. Allowing petitioner to augment the factual allegations supporting the claimed grounds for dissolution before trial would not result in any prejudice, and respondents do not argue otherwise. Further, no claim is made that the proposed amendments regarding pre-commencement misconduct patently are lacking in merit.

Petitioner's request to add post-commencement grounds for dissolution presents a more substantial issue. As petitioner seeks dissolution pursuant to BCL § 1104-a, the respondent corporations and their majority shareholder had the right under BCL § 1118 to elect to purchase petitioner's shares for their fair value as of the day prior to commencement "The buyout election [*3] accommodates the interests of the respective parties in ensuring the continued functioning of the business, while also protecting the financial interest of the shareholders and creditors" (*Ferolito v Vultaggio*, 99 AD3d 19, 25-26 [1st Dept 2012] [internal quotation marks omitted]). Respondents declined to exercise their BCL § 1118 right with respect to the April 30, 2013 commencement date, and their efforts to obtain the benefit of a later valuation date by seeking the dismissal of this proceeding on jurisdictional grounds proved unsuccessful.

In the Court's view, respondents would be substantially prejudiced if petitioner were permitted to pursue dissolution of the subject corporations based upon allegations of post-commencement wrongdoing while retaining a pre-commencement valuation date for BCL § 1118 purposes. If petitioner's proof of pre-commencement oppression, waste and looting falls short of establishing a basis for relief under BCL § 1104-a, the petition would be subject to dismissal, and any subsequent petition premised upon allegations of post-commencement wrongdoing would be subject to a new BCL § 1118 right of election with an updated valuation date. Petitioner offers no persuasive basis for denying respondents the opportunity to purchase his shares valued as of a date subsequent to the accrual of the grounds for dissolution, as contemplated by BCL § 1118. For this reason, the post-commencement grounds for dissolution should, as a discretionary matter, be denied *nunc pro tunc* treatment and instead treated as the equivalent of the filing of a new petition (*see* BCL § 1107). Accordingly, insofar as petitioner seeks an order that allows him "to serve the amended petition and provides that the . . . date of valuation of the corporate assets remains April 30, 2013", the motion is denied. [\[FN2\]](#)

Finally, the branch of the motion seeking to add a cause of action for an accounting is

denied. Petitioner has failed to demonstrate that the cause of action is not duplicative of his claims for dissolution (*see Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 102 AD3d 1033, 1037 [3d Dept 2013]) or the identical cause of action alleged in the Second Proceeding.

Accordingly, the motion to amend is granted to the limited extent of allowing petitioner to file and serve an amended petition to allege additional pre-commencement waste, looting and oppression, and the motion is denied in all other respects.

B.Discovery

This proceeding was commenced on April 30, 2013, and the Court authorized liberal discovery with respect to the five-year period preceding the date of commencement (*see* BCL § 1118 [b]). Petitioner now moves pursuant to CPLR article 31 for an order allowing disclosure with respect to the period from April 30, 2013 through September 30, 2014. Through a brief attorney affirmation, petitioner asserts that disclosure of post-commencement matters is material and necessary because it relates to continued financial oppression and may provide the basis for the filing of an amended petition. **[FN3]** Petitioner's counsel also asserts that the requested additional **[*4]** disclosure may bear on remedial issues.

As a form of special proceeding, leave of court is required to obtain disclosure in a dissolution proceeding beyond that authorized by BCL article 11 (*see* CPLR 408; *see also* BCL § 1104-a [c] ["corporate financial books and records for the three preceding years"]). In exercising its discretion to grant or deny a request for disclosure, the Court must determine whether the movant has established that the information sought is material and necessary (*Matter of General Electric Co. v Macejka*, 117 AD2d 896, 897 [3d Dept 1986]; *Matter of City of Glen Cove Indus. Dev. Agency v Doxey*, 79 AD3d 1038, 1038-1039 [2d Dept 2010]). Even where such a showing is made, the Court must balance the needs of the party seeking discovery against countervailing interests, including the need for expedition attendant to a special proceeding.

On this record, petitioner has failed to demonstrate a persuasive basis for obtaining additional disclosure. Given the Court's ruling on the motion to amend, disclosure of post-commencement matters is not germane to whether there are grounds for dissolution under BCL § 1104-a (a), the sole issue to be determined at the upcoming trial. Further, petitioner's

assertion that the requested disclosure may be germane to remedial issues is highly conclusory and lacking support in the record. The prospect that the March 30, 2015 trial on the petition may be delayed while petitioner takes discovery with respect to 17 months of post-commencement matters provides an additional basis for the denial of the motion. Accordingly, the request for additional disclosure is denied. [\[FN4\]](#)

C.Consolidation

Petitioner moves to consolidate this action with the Second Proceeding, which was commenced as a protective measure upon respondents' jurisdictional challenge to the instant proceeding. [\[FN5\]](#) The Second Proceeding has been stayed since the preliminary conference in this proceeding pursuant to the stipulated Discovery Order.

Under CPLR 602 (a), a court is vested with the discretion to consolidate actions for trial where they involve common questions of law or fact. While consolidation generally is favored because it serves the interests of judicial economy and efficiency (*Guasconi v Pohl*, 2 AD3d 1201, 1202 [3d Dept 2003]), petitioner has failed to demonstrate any such economies or efficiencies here. Petitioner seeks to join this proceeding, in which discovery is virtually complete and a trial is imminent, with a second, seemingly duplicative proceeding in which issue has not yet been joined. Under the circumstances, the motion for consolidation is denied, and the status of the second proceeding will be assessed upon the conclusion of the grounds phase of this proceeding.

D.Cross-Motion to Compel

Respondents cross-move to compel further deposition testimony from Richard Hermann, Esq. The deposition of Attorney Herrmann was begun on July 14, 2014, but was suspended when the witness invoked the attorney-client privilege in response to questioning concerning certain transactions involving Flach, Gould, Digeser and Digeser's wife. One transaction at issue involved the purchase of real property on Copeland Hill in the Town of Coeymans, New York ("Copeland Hill"), and a second transaction concerned the conveyance of a home owned by Anthony Cifello. Herrmann asserted that he represented Digeser alone in the transactions, and he did not represent Gould.

The attorney-client privilege protects from disclosure communications predominantly of a legal character that were made for the purpose of facilitating the rendition of legal advice and which were intended to be confidential (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 379 [1991]). As the party resisting disclosure, petitioner bears the burden of establishing the applicability of the privilege (*id.* at 377).

With respect to the Copeland Hill transaction, the record shows that while Digeser originally was the contract vendee, the subject property ultimately was purchased by Digeser's wife and Gould. Further, respondents submit proof that Herrmann accepted legal fees from both Ms. Digeser and Gould in connection with the transaction and that Digeser was the only representative of Gould to communicate with Herrmann concerning the transaction. Petitioner does not submit any proof to support the invocation of the attorney-client privilege, dismissing the Copeland Hill issue as insignificant.

Under the circumstances, the Court finds that Digeser's communications with Herrmann regarding the Copeland Hill transaction have not been shown to be protected by the attorney-client privilege within the context of this adverse litigation between Gould and Digeser (*Arkin Kaplan Rice LLP v Kaplan*, 107 AD3d 502 [1st Dept 2013]). Accordingly, the cross-motion to compel is granted with respect to the Copeland Hill transaction, and Herrmann's deposition shall be re-opened for a period of no more than one hour for questioning concerning said transaction. [\[FN6\]](#)

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion to amend is granted in part and denied in part, in accordance with the foregoing; and it is further

ORDERED that petitioner's motion for additional disclosure is denied; and it is further

ORDERED that petitioner's motion for consolidation is denied; and finally it is

ORDERED that respondents' cross-motion to compel is granted to the limited extent indicated herein.

This constitutes the Decision & Order of the Court. The original Decision & Order is being transmitted to respondents' counsel for filing and service; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

January 16, 2015

Richard M. Platkin

A.J.S.C.

Papers Considered:

Notice of Motion to extend the date for discovery, dated September 23, 2014;

Affirmation of Charles R. Harding, Esq., dated September 23, 2014;

Notice of Cross-Motion to compel testimony, October 10, 2014;

Affidavit of Brendan F. Baynes, Esq., sworn to October 10, 2014, with attached exhibits A-D;

Reply Affirmation of Charles R. Harding, Esq., dated October 16, 2014;

Notice of Motion for consolidation and amending petition, dated December 3, 2014;

Affirmation of Charles R. Harding, Esq., dated December 2, 2014, with attached exhibits A-E;

Affirmation of Brendan F. Baynes, Esq., dated December 19, 2014;

Reply Affirmation of Charles R. Harding, Esq., dated December 22, 2014.

Footnotes

Footnote 1: The petition also sought an accounting of the subject corporations, but those causes of action were dismissed for lack of personal jurisdiction (*Matter of Gould Erectors & Rigging, Inc.*, 119 AD3d 1039, 1041 [3d Dept 2014]).

Footnote 2: As petitioner has tied his proposed amendment to retention of the April 30, 2013 valuation date, the Court has no occasion to consider whether the prejudice to respondents could be ameliorated by conditioning leave to amend on petitioner allowing them an additional opportunity to make a BCL § 1118 election with petitioner's shares valued as of the filing date of the amended petition.

Footnote 3: The discovery motion was filed prior to the motion to amend.

Footnote 4: The Court does not foreclose the possibility of allowing additional, narrowly tailored disclosure in this proceeding on issues of remedy and valuation, should petitioner succeed in establishing grounds under BCL § 1104-a (a) and demonstrate that such additional disclosure is material, necessary and not outweighed by any countervailing interests.

Footnote 5: Respondents did succeed in obtaining dismissal of the accounting causes of action for lack of personal jurisdiction, based upon arguments and distinctions that were not made in this Court.

Footnote 6: Respondents have failed to establish a sufficient predicate for compelling Herrmann's testimony regarding the Cifello transaction, and that branch of the cross-motion therefore is denied.

[Return to Decision List](#)