

Matter of Yu v Bong Yu
2018 NY Slip Op 32009(U)
August 15, 2018
Supreme Court, New York County
Docket Number: 656611/2016
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X
In the Matter of the Application of
PATRICK K. YU,

Petitioner,

Index No.: 656611/2016

For Judicial Dissolution of

MOKLAM ENTERPRISES, INC.,

Pursuant to Section 1104-a of the Business Corporation
Law

- v -

BONG YU, MAY YU, RAYMOND YU AND
CATHERINE YU,

DECISION AND ORDER

Respondents.

-----X
Saliann Scarpulla, J.

Petitioner Patrick K. Yu (“Patrick”) commenced this special proceeding by verified petition and order to show cause seeking the dissolution of Moklam Enterprises, Inc. (“Moklam”) pursuant to Business Corporation Law (“BCL”) §1104-a. Respondents Bong Yu (“Bong”), May Yu (“May”), Raymond Yu (“Raymond”), and Catherine Yu (“Catherine”) cross move to dismiss the petition.

Moklam is an entity owned by the Yu family, which funded the Yu family’s various real estate and business activities. Bong and May are the parents of Patrick, Raymond and Catherine. Bong serves as vice president of Moklam, May serves as treasurer, Raymond is president, and Catherine is secretary. Patrick was employed as legal counsel to Moklam and other Yu family entities. Catherine and Raymond are

responsible for the day to day operations of Moklam and other Yu family entities. As of January 2000, the shares of Moklam were apportioned as follows: Bong owned 31 shares, May owned 26 shares, Patrick owned 14 shares, and Raymond and Catherine each owned 24.5 shares. According to Patrick, he now owns 26% of Moklam, and Raymond and Catherine own the remaining 74% of Moklam.

Patrick has had a contentious relationship with his parents and siblings. According to the allegations of the petition, in late 2013, after Patrick and his wife divorced, Patrick chose to sell his house in Scarsdale and move into an apartment in Manhattan, to better manage his deteriorating financial situation. Bong wanted Patrick to remain in the house in Scarsdale. Patrick alleges that because he defied his father's wishes, Bong demanded that Patrick sell his ownership stake in all Yu family entities for approximately \$3 million, which, according to Patrick, was 5% of its fair value, to be paid out over 30 years. Allegedly, Bong directed Moklam and other Yu family entities to no longer use Patrick for legal work, which deprived Patrick of his main source of income, and Bong directed Moklam to stop paying dividends to Patrick.

Patrick then attempted to ascertain the actual value of his shares in the Yu family entities. He sent a letter to Raymond, asking to inspect the books and records of the entities. In response, Patrick claims, he only received a few documents. Patrick also received three demand letters from the Yu family entities. First, he received a letter from Moklam demanding repayment of two promissory notes issued to him in 2005 and 2011 for several hundred thousand dollars, plus interest and expenses. Patrick claims that he and his father had allegedly agreed that payment on the notes would not be expected until

2036. Second, Patrick received a letter from Yuco Equity Corp., a Yu family entity, demanding repayment on a loan in the amount of \$125,000 plus interest, which, according to Patrick, was not supported by a written instrument, and upon which payment had never been demanded. Third, Patrick received a breach notice from his parents, notifying him that his sale of the Scarsdale house constituted a breach of a surety agreement executed between Patrick and his parents in 2012 in connection with the refinancing of his mortgage on the property. The notice provided that Patrick had failed to obtain Bong and May's prior express written consent before he sold the house, and that he withdrew funds from the joint account, even though he was unauthorized to do so, and used those funds for purposes other than were permitted by the surety agreement. His parents alleged \$750,000 in damages from these breaches of the surety agreement.

Further, around that time, Raymond and Catherine amended the operating agreements of two Yu family entities, Guard Hill and 33 East 38th Street, so that Patrick was removed as "managing member."

According to Patrick, these actions were all taken to pressure him to accept Bong's low offer for Patrick's stake in Moklam, and to punish him for not agreeing to sell his ownership stake in Moklam. However, Patrick continued to try and obtain the books and records of the entities to evaluate his interests in the family business. The family allegedly did not provide him with the documents.

The Yu family then commenced three lawsuits against Patrick based on the three demand letters. According to Patrick, this was done to force Patrick to defend himself in

litigations, even though his family knew he was struggling financially, so that he would have no choice but to sell his ownership stake in Moklam.

On January 29, 2016, Raymond and Catherine changed the operating agreements of Guard Hill and 33 East 38th Street, which Patrick alleged was another attempt to increase the pressure on him. The amendments added a capital contribution provision which indicated that Raymond and Catherine could make a capital call, and if any of the members failed to contribute the required amount to the capital call, the member's interest in the LLCs could be foreclosed against.

In August 2016, Patrick settled the first lawsuit, and agreed to pay the full amounts on the notes issued to him by Moklam. Patrick then again demanded to inspect the books and records from Moklam and other entities. Less than a week later, Catherine and Raymond invoked the capital call provision that had been inserted into the operating agreement of Guard Hill. They sent Patrick a letter demanding contributions of approximately \$600,000 to reimburse Bong and May for upgrades and renovations made to property owned by Guard Hill, and to pay off the outstanding mortgage on the property. According to Patrick, this was done to retaliate against Patrick for demanding to inspect the books and records.

In his petition in this action, Patrick alleges that “the Yu family has repeatedly retaliated against Patrick for exercising his rights as a shareholder, has taken steps to put enormous financial pressure on him at a time when they knew very well he was under financial duress, and has denied him any meaningful access to the books and records of Moklam, Guard Hill and East 38th Street. Moreover, they have taken these steps not in an

effort to further the interests of these entities, but to rather to pursue a personal vendetta against Patrick, while at the same time enriching themselves through the acquisition of his shares at a cost far below their fair value.” He maintains that the evidence presented establishes “a coordinate effort to oppress Patrick and eventually force him out of his interests” in the Yu family entities. He maintains that dissolution is therefore required pursuant to Business Corporation Law Section 1104-a.

According to Patrick, the following were the specific oppressive actions taken by respondents to pursue a personal vendetta, and force him out of Moklam: (1) demanding that he sell his interest in all family businesses back to the family for a small fraction of their fair value; (2) cutting off all of his legal work from family businesses, which constituted the bulk of his legal practice; (3) cutting off all dividends from Moklam; (4) demanding repayment of more than \$600,000 in loans from Moklam after assuring Patrick that he would not have to repay them and not demanding payment for at least four years; (5) improperly demanding repayment of more than \$100,000 in wedding and other expenses purportedly lent to Patrick by another family entity more than 10 years earlier; (6) improperly demanding all profits earned by Patrick from the sale of his house; (7) removing him as a managing member from two family business entities in which he had a substantial ownership stake; (8) instituting capital call procedures at these entities and demanding approximately \$600,000 in capital contributions from Patrick in retaliation for Patrick’s requests to examine books and records of family entities; (9) filing three lawsuits against him seeking more than \$1.3 million; (10) refusing to properly respond to his requests for books and records of the

entities in which he is a shareholder despite at least four requests for such information over a 10 month period; (11) refusing to provide access to his own files stored in a building owned by Moklam; and (12) diverting assets from companies partially owned by Patrick to either family businesses in which Patrick has no interest or directly to family members.

Respondents cross move to dismiss the petition. They have a different account of the family relationship and history. According to respondents, Patrick was never interested in the family business. They only employed Patrick at Moklam as an outside lawyer, not in-house counsel, to help him because he had trouble finding a job after law school. Patrick rented office space from the Yu family entities for his legal practice until he moved his law office. In 2005, Patrick changed careers and became a real estate appraiser. He did not work for any Yu family entity from then until 2010, when he became unemployed. The Yu family hired him again as an outside lawyer until 2015. From 1998 through 2015, respondents allegedly paid Patrick \$738,823.57 for his legal work for the Yu family entities and less than 5% of that was for work performed for Moklam.

Respondents further claimed that Moklam has lent Patrick \$900,000 to help him with financial difficulties through the years. Moklam lent him \$600,000 to help him purchase the Scarsdale home in 2005. He signed a stock pledge agreement in connection with that loan. Patrick pledged his shares as security for his loan and was not permitted to exercise any voting rights related to his shares, or receive and retain any dividends, distributions, or interest payable on his shares. The stock pledge agreement was to

terminate upon the full repayment of the loan. Patrick made some payments on this loan, but then started having financial problems. He then asked his family members for financial help again, and Moklam made two additional loans of \$150,000 each to him, pursuant to two 2011 Demand Secured Promissory Notes. These notes were due upon demand or January 31, 2036, whichever came first. The stock pledge agreement was then amended to pledge his shares as security for those loans as well.

After his divorce, Patrick asked his family for financial help again. According to respondents, Bong generously suggested that Patrick sell his shares and offered \$3 to \$4 million staggered over several years to avoid negative tax implications. Respondents claim that they attempted to help Patrick in other ways also. For example, Bong acted as a guarantor for the refinancing of the Scarsdale home, on the condition that Patrick enter into a surety agreement. Patrick then sold the home in breach of the surety agreement.

Because Patrick allegedly found a job in 2015 working for a real estate title company, respondents sought repayment on some of their loans to him. On July 9, 2015, Moklam sent Patrick a notice informing him that he was in default and demanded payment of the 2005 and 2011 notes. After Patrick commenced this action, Moklam filed a motion for summary judgment in lieu of complaint seeking payment of the 2005 and 2011 notes.

According to respondents, Patrick requested to review the books and records in May 2015, and respondents provided the annual profit and loss statements and balance sheets for Moklam and other entities for 2014. In August 2016, Patrick requested several categories of documents from Moklam and other entities and Moklam objected to the

burdensome nature of the request. Patrick then revised his request in September 2016, and Moklam responded by agreeing to provide the information required under the Business Corporation Law, and its governing corporate documents. Specifically, it provided its list of shareholders, annual balance sheets and profit and loss statements for 2013-2015, and its governing corporate documents.

Respondents first argue that Patrick lacks standing to bring a petition for dissolution. Even though he holds more than 20% of the outstanding shares of Moklam, Patrick pledged those shares to Moklam as collateral for the three loans he received from the company. He has not fully repaid the loans due. He repaid the principal, interest and collection charges on two of the loans, but attorneys' fees are still due on those loans, and the August 2011 loan is still due and owing. Respondents next argue that Patrick has not alleged any actionable oppressive conduct under the Business Corporation Law that would justify dissolution. Finally, respondents argue that Patrick has not alleged corporate waste or mismanagement sufficient to support a claim for common law dissolution.

Respondents specifically point out that (1) Patrick was not entitled to receive any legal work from Moklam because he has never been more than an outside attorney and was never promised continuous work; (2) Patrick's rights to receive dividends were pledged, and in any event, Moklam has not distributed any dividends to any shareholders since 2008; (3) Patrick has never been involved in Moklam's management or operations, and Moklam's shareholders' agreement specifically provided that his role was to be a passive minority shareholder; and (4) denial of access to books and records is insufficient

to state a claim for dissolution, and in any event, respondents have fulfilled their disclosure obligations under the Business Corporations Law.

In opposition, Patrick first argues that he has standing to bring a petition for dissolution because his shares are voting, as opposed to non-voting, shares. He also maintains that, in any event, the amendment to the stock pledge agreement is invalid because it was not consented to in writing by the holders of not less than 51% of the total number of outstanding shares as required, and therefore, the stock pledge agreement is not applicable to the remaining outstanding August 2011 note. Further, the stock pledge agreement violates public policy because it effectively prevents Patrick from seeking judicial dissolution. As such, his shares are no longer pledged.

Finally, Patrick maintains that the evidence demonstrates conduct sufficient to warrant statutory and common law dissolution. Respondents undertook a series of actions to pursue a personal vendetta against Patrick and put financial pressure on him, with the goal of enriching themselves by forcing him to give up his shares in Moklam for a fraction of their fair value.

Discussion

Business Corporation Law Section 1104-a provides, in relevant part:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", 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;
- (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

Patrick has repaid the principal, interest, and collection charges on the 2005 loan and one of the two 2011 loans, but attorneys' fees due on those notes are still in dispute, and the second 2011 loan is still owed in full. Therefore, Patrick's Moklam shares remain pledged in accordance with the stock pledge agreement. As per the stock pledge agreement, Patrick is not entitled to exercise any voting rights at this time. As such, he lacks standing to pursue a dissolution of the corporation pursuant to BCL Section 1104-a. Patrick's arguments in opposition are unavailing because they lack both legal and evidentiary support.

"[T]he remedy of common-law dissolution is available only to minority shareholders who accuse the majority shareholders and/or the corporate officers or directors of looting the corporation and violating their fiduciary duty." *Matter of Candlewood Holdings, Inc. (Moore)*, 124 A.D.3d 775, 776 (2nd Dept. 2015) (internal citations omitted).

Here, Patrick states in the petition that the Yu family was engaged in misconduct in its operation of Moklam, and that corporate assets are being wasted, looted, and/or diverted to the benefit of the Yu family and at Patrick's expense, in breach of the fiduciary duty owed to him. He explains that the Yu family has "repeatedly retaliated against Patrick for exercising his rights as a shareholder, has taken steps to put enormous financial pressure on him at a time when they knew very well he was under financial

duress, and has denied him any meaningful access to the books and records of Moklam, Guard Hill, and East 38th Street.” He alleges that respondents are pursuing “a personal vendetta against [him], while at the same time enriching themselves through the acquisition of his shares at a cost far below their fair value,” and sets forth specific facts to support his allegations.

At this point in the litigation, Patrick’s allegations set forth a reasonable basis to believe that further discovery may reveal further evidence of egregious conduct necessary to sustain the claim for common law dissolution. *Lemle v. Lemle*, 92 A.D.3d 494 (1st Dept. 2012). Accordingly, the claim for common law dissolution will not be dismissed at this time. *See generally Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dept. 2012); *Lewis v. Jones*, 107 A.D.2d 931 (3rd Dept. 1985). This proceeding will be converted to an action, the petition will be deemed a complaint with a claim for common law dissolution, and respondents will serve an answer to the complaint.

In accordance with the foregoing, it is hereby

ORDERED that petitioner’s order to show cause seeking the dissolution of Moklam Enterprises, Inc. pursuant to Business Corporation Law §1104-a is denied; and it is further

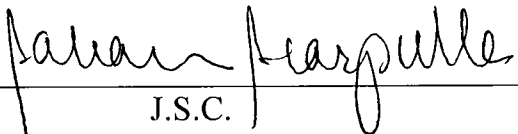
ORDERED that respondents’ cross-motion to dismiss the petition is granted to the extent that the claim for dissolution of Moklam Enterprises, Inc. pursuant to Business Corporation law §1104-a is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the petition is converted into a complaint with a cause of action for common law dissolution; and it is further

ORDERED that respondents shall file an answer to the complaint within 30 days of the date of this order.

This constitutes the decision and order of the court.

Dated: August 15, 2018
New York, New York



J.S.C.
HON. SALIANN SCARPULLA