SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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IN THE MATTER OF THE APPLICATION OF NEIL A. CARTER, GLENRICK RHOOMS, AND KWAME GYAMFL, PETITIONERS,

FOR THE JUDICIAL DISSOLUTION OF RICWARNER, INC., PURSUANT TO SECTION 1104(A) OF THE BUSINESS CORPORATION LAW.
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DECISION AND ORDER

Index No: 260038/12

In this special proceeding seeking dissolution of a corporation, petitioners seek an order, *inter alia*, pursuant to BCL § 1104-a(d) ordering a downward stock valuation adjustment of nonparty shareholder Bernard Pilgrim's (Pilgrim) stock in respondent RICWARNER, INC. (Ricwarner) and surcharging Pilgrim. Petitioners seek the foregoing relief on grounds that Pilgrim, *inter alia*, willfully and recklessly dissipated respondent's assets and failed to distribute proportionate shares of all corporate assets and profits to petitioners, shareholders in respondent, each of whom own 25 percent of the corporation's stock. Pilgrim opposes the instant motion asserting that the record is bereft of competent proof that he dissipated any corporate assets, such that a downward stock valuation adjustment of Pilgrims' stock in respondent and the imposition of a surcharge are unwarranted. Pilgrim also cross-moves seeking, *inter alia*, and order pursuant to BCL § 1207(a)(2) directing that

the receiver previously appointed by this Court - Carl M. Lucas (Lucas) - call a meeting of all respondent's creditors, provide an accounting of respondent's liabilities and assets, and distribute respondent's asserts in accordance therewith. Petitioners and Lucas oppose Pilgrim's cross-motion seeking distribution of respondent's assets, asserting, *inter alia*, that such distribution cannot transpire until after determination of petitioners' motion, which, if granted would affect the distribution of respondent's assets.

For the reasons that follow hereinafter, petitioners' motion and Pilgrim's cross-motion are denied, with leave to renew.

The instant action is for corporate dissolution. The petition, alleges the following: Ricwarner is a corporation engaged in the business of delivering items as a contractor for nonparty Fed Ex Home Delivery (Fed Ex). Petitioners are shareholders in Ricwarner, who along with Pilgrim, each own 25 percent of Ricwarner's stock and all of whom work for Ricwarner as operators of one of five Fed Ex delivery routes. Prior to becoming a shareholder in Ricwarner, Pilgrim owned and operated one Fed Ex delivery route. At the time, each petitioner also individually owned operated a Fed Ex delivery Route. Because Fed Ex decided that it would no longer grant delivery routes to any entity or person owning less than three delivery route,

petitioners and Pilgrim agreed to form Ricwarner who would acquire Pilgrim and petitioners' routes, that Pilgrim and petitioner's would become equal shareholders in Ricwarner, that Pilgrim and respondents would each operate one of the four routes owned by Ricwarner, and that Pilgrim and petitioners would each draw a salary of $800 from Ricwarner as a result of the operation of the foregoing routes and that Pilgrim and petitioners would equally share Ricwarner's profits. Petitioner's allege that since May 2011, they have not received their agreed upon salary from Ricwarner nor any of Ricwarner's profits, which monies have been deposited in Ricwarner's bank account, which account is solely controlled by Pilgrim. Petitioner's also allege that since the foregoing time, Pilgrim has failed to provide an accounting of Ricwarner's income, has failed to discuss Ricwarner's business with them, has fired petitioner NEIL A. CARTER (Carter), fired and rehired petitioner KWAME GYAMFI (Gyamfi), and has denied petitioners any access or voice regarding Ricwarner's management and affairs. Petitioner's also allege that Pilgrim has deprived them of a substantial sum of money previously awarded to Ricwarner by Fed Ex as a result of acquiring all four delivery routes and that Pilgrim has looted the corporate assets, allocating them for personal purposes. As

a result of the foregoing, petitioners seek to dissolve Ricwarner, liquidate, and distribute its assets to petitioners.

On October 28, 2013, the Court (Aarons, J.) issued an order, which after a hearing granted petitioner's petition and dissolved Ricwarner. The Court found, *inter alia*, that Pilgrim and petitioners each owned a 25 percent share of Ricwarner, that Pilgrim engaged in oppressive conduct warranting dissolution of Ricwarner pursuant to BCL § 1104-a, that for purposes of dissolution, Pilgrim was to provide an accounting of Ricwarner's assets and liabilities, that Pilgrim was to provide petitioners with copies of Ricwarner's books pursuant to BCL § 1104(c), and that Ricwarner's assets upon dissolution would be split evenly between Pilgrim and respondents. The Court ordered that Pilgrim provide the accounting and Ricwarner's records to petitioners within 30 days thereof and further ordered that within 60 days all parties submit a proposed judgment of dissolution and a plan for the liquidation of Ricwarner's assets. Notably, the Court never reached the issue of whether Pilgrim "looted, wasted, or diverted," Ricvwarner's assets within the meaning of BCL § 1104-a, noting, albeit by implication, that such determination could not be made absent an accounting of Ricwarner's assets and liabilities. Indeed, the Court noted that it could, pursuant to BCL § 1104-a(d), upon a finding of wilful or reckless dissipation

by Pilgrim or transfer of Ricwarner's assets, order an adjustment of stock valuations and impose a surcharge.

On December 23, 2013, after being apprised at a settlement conference that Pilgrim failed to comply with the Court's directive mandating the production of Ricwarner's books and an accounting, and upon a finding that Ricwarner had not been dissolved and its assets had yet to be liquidated and distributed, the Court issued an order appointing Lucas as Ricwarner's permanent receiver, who, *inter alia*, was ordered to marshal and liquidate Ricwarner's assets. Lucas was also ordered to comply with those directives in the Court's order dated October 28, 2013, namely, to submit a judgment of dissolution for Ricwarner.

On November 15, 2016, this Court (Barbato, J.) issued an order denying petitioner's application pursuant to BCL 1104-a(d), seeking a reduction of Pilgrim's share in Ricwarner and surcharging him on grounds that he had willfully transferred Rickwarner's assets to himself and his wife, using the same for personal purposes. Noting that BCL § 1104-a(d) did not provide all of the relief requested (BCL § 1104-a[d] authorizes stock re-evaluation not, as sought, share diminution), the Court declined to grant the motion; noting that because Pilgrim had yet to provide the portions of Ricwarner's books in his possession and

had not yet provided an accounting, it was impossible to determine whether he had, in fact, willfully dissipated Ricwarner's assets. The Court did, once again order that Pilgrim comply with the portion of the Court's order dated October 28, 2013, mandating production of Ricwarner's records.

Petitioner's Motion

Petitioner's motion seeking, *inter alia*, an order pursuant to BCL § 1104-a(d) adjusting Ricwarner's stock value and imposing a surcharge upon Pilgrim on grounds that he willfully dissipated Ricwarner's assets, using the same for personal purposes, is denied. Significantly, BCL § 1104-a(d), does not absent, an application by Pilgrim to purchase petitioners' shares pursuant to BCL § 1118, authorize the court to revalue Pilgrim's shares or impose a surcharge upon him. Moreover, because movants aver that Pilgrim has yet to provide them with a complete set of Ricwarner's books, the Court cannot accurately determine the extent to which Pilgrim has willfully dissipated Ricwarner's assets, if any. Moreover, while upon the submission of all papers related to this motion, it appears that petitioners have been provided with all of Ricwarner's books in Pilgrim's possession, in the absence of an independent, accounting, the Court cannot make the determination urged by petitioners.

BCL § 1104-a authorizes the judicial dissolution of a corporation on a myriad of grounds, including when the directors representing "twenty percent or more of the votes of all outstanding shares of a corporation . . . present a petition of dissolution" (BCL § 1104-a[a]). A court is authorized to dissolve a corporation, when it finds, *inter alia*, that

> [t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders . . . [and] [t]he 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

(BCL § 1104-a[a][1], [2]).

BCL § 1104-a[d], also allows a court to

> order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of wilful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor

(BCL § 1104-a[d]). Significantly, the valuation and surcharge prescribed by the foregoing section are to be used only when upon dissolution, the corporation and/or another shareholder seeks to purchase the shares in the corporation held by the proponent of the dissolution as prescribed by BCL § 1118 (*Blake v Blake Agency, Inc.*, 107 AD2d 139, 149 [2d Dept 1985] ["Business

Corporation Law § 1104-a was enacted for the protection of minority shareholders, and the corporation should therefore not receive a windfall in the form of a discount because it elected to purchase the minority interest pursuant to Business Corporation Law § 1118."]; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 194, 195-196 [1st Dept 2005] [In proceeding pursuant to BCL § 1104-a and § 1118, the court correctly adjusted the price of the shares owned by petitioner in respondent's corporation. The court held that "[w]e are satisfied that equity was accomplished by a closing adjustment that did not award petitioner any interest on the $825,000 but also did not award respondent any use and occupancy over and above petitioner's maintenance of $973 a month. This was accomplished in effect by the valuation court, by a 'closing adjustment' that awarded interest to petitioner and use and occupancy above maintenance to respondent in unstated amounts that were deemed to be equal and offsetting. Such adjustment fairly balanced petitioner's right to payment for his shares with interest as of the beginning of the valuation date."]).

In support of the instant application, petitioners submit an affidavit from Brad M. Aron (Aron), an attorney, who details his qualifications and his review of an accounting provided by Pilgrim to petitioners on December 20, 2016. Aron states that in

addition to his licence to practice law, he also holds an LLM in taxation, holds an MBA, and for five years worked at the accounting firms of Deloitte & Touche and Price Waterhouse Coopers. Upon reviewing the foregoing accounting and the documents annexed thereto, Aron concludes that the same fails to provide all financial documents of Ricwarner which were ordered produced by this Court in two separate orders. Specifically, for the period preceding Lucas' appointment as referee in 2013, Ricwarner had two accounts with Chase Bank. With regard to those accounts, Pilgrim failed to provide any of Ricwarner's cancelled checks for the years 2011 through 2013. While Pilgrim provided some records related to one of the foregoing accounts, Aron contends that Pilgrim failed to provide much documentation related to the other account. Despite the foregoing, upon reviewing the documents provided in relation to the foregoing accounts, namely bank statements, Aron was able to ascertain that in 2011, Pilgrim withdrew $107,305.75 from one of the foregoing accounts, transferring large sums of money to Pigrim and his wife's 's personal account. Aron came to the same conclusion regarding $70,800.53 withdrawn by Pilgrim in 2013, and $163,116.88 withdrawn from Ricwarner's second account in 2011. Aron notes that nothing provided by Pilgrim establishes that the sums withdrawn from Ricwarner's accounts and deposited into

Pilgrim's personal account were for any legitimate business purpose. As a result, Aron concludes that the $341,223.16 withdrawn from Ricwarner's accounts between 2011 and 2013, much of which was deposited into Pilgrim's personal account, constitutes a willful dissipation of Ricwarner's assets.

Petitioners also submit the accounting on which Aron relies, and account statements for Ricwarner's two accounts and Pilgrim's personal account.

Pilgrim submits a legion of documents in opposition to petitioners motion, saliently urging the rejection of Aron's affidavit and its conclusions on grounds of bias and Aron's lack of qualifications. Since, as will be discussed below, the salient reason for denial of petitioner's motion is the absence of a complete, independent and comprehensive accounting, Pilgrim's opposition merits no further discussion.

Based on the foregoing, petitioners' motion must be denied. As noted above, while BCL § 1104-a(d) authorizes the Court to "order stock valuations be adjusted and . . . [impose a] surcharge upon . . . a finding of wilful or reckless dissipation or transfer of assets or corporate property," the forgoing statute does not, as urged by petitioners, authorize a diminution of corporate shares, the salient relief sought here. Moreover, the valuation and surcharge prescribed by BCL 1104-a(d) are to be

used only when upon dissolution, the corporation and/or a shareholder seeks to purchase the shares in the corporation held by proponent of the dissolution as prescribed by BCL § 1118 (*Blake* at 149; *Balk* at 195-196). Here, then, insofar as premised on BCL § 1104-(d), where the relief sought falls outside the relief accorded by the statute, the Court cannot grant the relief sought for this reason alone.

To the extent, however, that the Court has already ordered the dissolution of Ricwarner pursuant to BCL § 1104-a(a)(2), it can grant petitioners the relief sought, but which they inartfully seek under BCL § 1104-a(d). To be sure, petitioners actually seek dissolution of Ricwarner and distribution of its assets based on their respective shares in the corporation plus any sums due to them which were willfully withheld and dissipated by Pilgrim. Thus, petitioners actually seek relief pursuant to BCL § 1111(c), which states that

> [i]f the judgment or final order shall provide for a dissolution of the corporation, the court may, in its discretion, provide therein for the distribution of the property of the corporation to those entitled thereto according to their respective rights.

To be sure, upon dissolution of a corporation, the court has broad powers to determine how the assets of the corporation shall be distributed and to what share each shareholder is entitled (*In*

re Seneca Oil Co., 153 AD 594, 596 [4th Dept 1912], *affd*, 208 NY 545 [1913] ["The court might, therefore, provide by its final order for the distribution of the remaining assets among those entitled thereto. To accomplish this it was necessary to first determine the relative rights of the stockholders as between themselves in the distribution of the corporate assets. So far as the exercise of that implied power is necessary to ascertain who are rightfully entitled to share in the distribution, which the court is specifically empowered to direct, and the share to which each is entitled, it must necessarily be given to the court, else the court could not direct any proper distribution of the assets."])

Thus, here, while the Court's statutory authority to grant the relief requested by petitioners under BCL § 1111 is obvious, such relief cannot be granted on the record before it. Significantly, any fair and just order of distribution of Ricwarner's assets must be based on a complete, accurate and unbiased accounting of the Ricwarner's records. This is particularly true here, where it is alleged that Pilgrim has dissipated and looted Ricwarner's assets, converting the same for his personal use. Moreover, where as here, it is alleged that Pilgrim has failed to provide a legion of records - Ricwarner's cancelled checks for the years 2011-2013, which records are

critical to the proper distribution of the remaining corporate assets - it is readily apparent that the Court cannot yet issue any order distributing Ricwarner's assets - let alone an order diminishing Pilgrim's share of Ricwarner's assets by those sums alleged to have been dissipated and converted by him. Indeed, the latter, the crux of petitioners' application is impossible to determine without knowing to whom Pilgrim issued checks on behalf of Ricwarner and for what purpose.

Accordingly, the Court need not address the sufficiency of Aron's affidavit - as urged by Pilgrim - and its conclusions based upon his review of some of Ricwarner's records. Instead, denial of petitioners' motion is warranted based on the foregoing reasons and any order of the distribution of the corporate assets will be issued upon a further application by petitioners, after a forensic accounting of the Ricwarner's records by an accountant of the Court's choosing.

Notably, while petitioners initially assert that Pilgrim has failed to provide cancelled checks for Ricwarner's accounts, Pilgrim has provided the same in his reply papers. To the extent that, as correctly averred by petitioners, reply papers cannot be used to cure deficiencies in the moving papers[1], here, the

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[1] Generally arguments proffered for the first time within reply papers shall not be considered by the court (*Wal-Mart Stores,*

cancelled checks submitted by Pilgrim for the first time in reply are not being considered in support of his cross-motion. Rather, they are being considered as compliance with previous court orders mandating the production of all of Ricwarner's records. Indeed, it inures to petitioners' benefit to have the Court consider the foregoing records since, it finally enables, as discussed above, a comprehensive and independent accounting; such accounting being critical to petitioners' motion seeking distribution Ricwarner's assets and all sums due to them.

While petitioners' motion is denied, the Court, as alluded above, will nevertheless order that petitioners submit all of Ricwarners' records provided to them - including the cancelled

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Inc., v United States Fidelity and Guaranty Company, 11 AD3d 300, 301 [1st Dept 2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2d Dept 2001]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Moreover, prevailing law makes it abundantly clear that the foregoing prohibition is meant to specifically preclude the consideration of new evidence, submitted for the first time on reply in order to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] [Court rejected affidavit submitted with reply papers since it sought to remedy deficiencies in motion rather than respond to arguments made by opponent.]; *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625-626 [1st Dept 1995] [Court rejected defendant's reply papers which included two new documents provided to support a new assertion not previously made in initial motion.]; *Ritt v Lenox Hill Hospital*, 182 AD2d 560, 562 [1st Dept 1992] [Court rejected defendant's reply papers which contained a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion.])

checks provided to them in Pilgrim's reply - to an accountant of the Court's choosing for purposes of a comprehensive accounting. Indeed, this court "is vested with inherent plenary power (N.Y. Const. art. VI, § 7) to fashion any remedy necessary for the proper administration of justice" (*64 B Venture v Am. Realty Co.*, 194 AD2d 504, 504 [1st Dept 1993]), which here includes the appointment of an accountant.

Pilgrim's Cross-Motion

Pilgrim's cross-motion seeking, *inter alia*, and order pursuant to BCL § 1207(a)(2), directing Lucas to call a meeting of Ricwarner's creditors and thereafter, pursuant to BLC 1216(a), directing Lucas to file a final accounting of the Ricwarner's assets and liabilities, is denied.

As discussed above, absent an independent and comprehensive accounting of Ricwarner's records, the Court is unable to determine how Ricwarner's assets shall be distributed - the crux of petitioners' motion. Absent the foregoing accounting, the relief sought by Pilgrim is, thus premature. Indeed, until the Court has a clear unbiased picture of Ricwarner's assets and liabilities as well as how funds were used by Pilgrim prior to Lucas' appointment, the relief sought by Pilgrim must be denied, with leave to renew.

Notably, while the Court is not inclined to grant Pilgrim the relief he saliently requests - directing Lucas to call a meeting and file an accounting in furtherance thereof - because the Court shall assign an independent accountant to examine all of Ricwarner's records, the Court must also direct Lucas to provide all of Ricwarner's records in his possession to the Court's accountant so as to have the same provide a meaningful and comprehensive accounting. Although, the instant remedy is not authorized by the BCL, as noted above this Court can fashion any remedy necessary for the administration of justice (*64 B Venture* at 504). It is hereby

ORDERED that Steven Kaplan (Kaplan), an accountant, with offices at 333 Westchester Avenue, White Plains, NY 10604, be appointed to review Ricwarner's financial records. Upon such review, Kaplan is to provide this Court with (1) a full account of Ricwarner's assets and liabilities; (2) a detailed report of Ricwarner's income and expenditures since it was established through the present; and (3) a detailed report informing the Court to what extent, if any Pilgrim used Ricwarner funds for his personal benefit and/or non-corporate purposes as well as any payments, if any made to petitioners since Ricwarner's incorporation. It is further

ORDERED that Pilgrim and petitioners provide Kaplan with all of Ricwarner's financial records - namely those records previously provided to petitioners, all cancelled checks provided in reply of Pilgrim's cross-motion, and any other financial records in Pilgrim's possession within 30 days hereof. It is further

ORDERED that Lucas provide Kaplan with copies of Ricwarner's financial records in his possession within 30 days hereof. It is further

ORDERED that petitioners serve a copy of this Order with Notice of Entry upon all defendants within ten (10) hereof.

This constitutes this Court's decision and Order.

Dated : 11/2 2017
Bronx, New York

Ben Barbato, J.S.C.