

<b>Matter of Markowitz v Stevens</b>
2014 NY Slip Op 33207(U)
December 10, 2014
Sup Ct, Kings County
Docket Number: 503263/13
Judge: Carolyn E. Demarest
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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of December, 2014.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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In the Matter of the Application of STEPHANIE MARKOWITZ and JORGE OLIVARES,

Petitioners,

for the dissolution of MARIBELLE'S INC.,

v.

VICTOR FORREST STEVENS and SYLVIA HOLDEN,

Respondents.

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**DECISION  
AND  
ORDER**

Index No. 503263/13

Petitioners Stephanie Markowitz (Markowitz) and Jorge Olivares (Olivares), each a holder of 25% of the stock of Maribelle's, Inc. (Maribelle's or the corporation), petitioned for dissolution of the corporation, pursuant to BCL§1104(a) (1), (2) and (3), claiming that they were deadlocked with respondents Victoria Forrest Stevens (Stevens) and Sylvia Holden (Holden), each of whom also owns 25% of the corporation, in the operation of the business of the corporation, which is a bar known as Mary's. Respondents served an election to buy out the petitioners, pursuant to BCL §1118, which was initially disputed by petitioners as their petition was premised upon BCL§1104(a), and not on BCL §1104-a to which §1118 election is applicable, but ultimately, the election was accepted and the only issue for the Court's determination is the value of the corporation on June 13, 2013, the day prior to the filing of the petition (see BCL §1118(b)).<sup>1</sup>

On February 5, 2014, the parties agreed that Jeffrey Starin, who had apparently originally

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<sup>1</sup>In their Post-Trial Memoranda, petitioners seek to litigate the issue of the Court's alleged "conversion" of their proceeding to one brought under BCL §1104-a so as to validate respondents' election to buy out petitioners' interest, however, the record is clear that petitioners accepted respondents' BCL §1118 election on December 18, 2013 (see Order of December 18, 2013 in this matter), abandoning their defense that the election was improper in this BCL §1104 proceeding, and subsequently proposed Jeffrey Starin to do the valuation, which was accepted by respondents.

brought the bar to the attention of the parties, should perform the valuation of the corporation and that his fees would be paid 50/50 by the two sides to this controversy. Upon receipt of Mr. Starin's report that the value was zero, however, petitioners rejected respondents' offer of \$1500 and sought to obtain their own expert valuation. On May 21, the Court directed the exchange of expert reports by June 23 and depositions of the experts to be conducted by July 11. A hearing was scheduled for July 21, 2014. A request for adjournment by petitioners' counsel on July 17 was declined upon respondents' representation that the expert had arranged to be available on the scheduled date, which had been set in May.

At the hearing on July 21, 2014, petitioners called respondent Sylvia Holden, who testified that she had been the primary manager of Mary's Bar from its opening in October, 2011 until Markowitz became involved in August, 2012. Holden testified that she was entitled to take \$1800 a month in compensation, but was unable to take her full salary due to losses in the business, and was unable to provide a precise statement of salary paid due to inadequate bookkeeping. Holden testified that her co-respondent, Stevens, with whom she apparently resides<sup>2</sup>, did not take any salary or distributions. It was agreed that Holden was the primary, if not sole, day to day operator of the bar beginning in January 2013, but Markowitz controlled the bank account between February and May 2013, until June 2013, when Holden opened a separate account, to which Markowitz also had access and passwords. Holden acknowledged arrears in rent of \$23,000 and outstanding tax liability due to the State of New York of \$34,926.96, in addition to unspecified sums due in promissory notes for loans to the corporation.

Petitioner Stephanie Markowitz testified that she managed the finances and accounting for the corporation from the out-set (except for two weeks in March 2012 when her child was born) until Holden closed the Bank of America account in June, 2013. Markowitz further acknowledged that she relied upon others to operate the business during her father's illness and death after March 2012 and that Holden primarily managed the business from January 2013, although she complained that Holden did not provide requested financial information. Recognizing the deadlock in management, Markowitz testified she sought to buy-out the respondents, making an offer to respondent Stevens of \$40,000 to \$60,000 for his own shares and

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<sup>2</sup>Petitioners Markowitz and Olivares are married. The relationship of the respondents is unclear, but the evidence indicates they reside together and are joined in interest.

the obligations owed to investors. A counter-demand from Holder for respondents' 50% interest was met with a counter-offer that was not answered. Markowitz testified that she then sought an independent buyer and obtained a Letter of Intent from a neighboring bar owner offering \$90,000 to purchase the entire business and assets of Mary's Bar, without assuming any of the existing liabilities, subject to satisfactory due diligence. Markowitz acknowledged the accuracy of a schedule of assets and liabilities provided by respondents' counsel on October 1, 2013, showing total assets of \$46,913.16 and total liabilities of \$273,330.19, but contended that the figures were different on June 13, 2013. She was unable to provide correct information for the valuation date without reference to the general ledger which was in the hands of the accountant and not available in court. Admitting that no payments had been made upon the outstanding notes, Markowitz did not offer evidence to contest the numbers provided by respondents. Called by respondents, Markowitz admitted that she had formed a separate corporation for the purchase of a restaurant, Il Corado, and that the sale had closed on March 8, 2013.

Petitioners called Jeffrey Starin, whose report of March 25, 2014 was admitted without objection. Starin testified that he could not state the value of Maribelle's on June 13, 2013, but believed that his assessment that the business had zero market value on March 25, 2014, based upon his examination of general ledgers, the lease and legal proceedings related to non-payment of rent, tax returns, profit and loss statements, invoices, and daily "closing sheets" from May 27, 2013 to December 1, 2013 reflecting daily revenue, would be equally applicable to June 13, 2013. Starin testified that the business was simply not making money, but was seriously underwater based upon rent and taxes due. The only asset value would be in the lease, which is actually over market rent and therefore not desirable, and fixtures worth approximately \$6,000 to \$8,000 on the market. The liquor inventory was valued at \$4980. Starin discounted the offer of \$90,000 as merely speculative, indicating that debts in excess of the purchase price would have to be paid off as a condition of sale, resulting in a net loss to the parties. Starin concluded, in his written report, that the "unpaid sales tax would kill most deals" and that, he did not believe a buyer could be found for the business in its current condition. If the assets were sold at auction, the value would not exceed \$6000 - \$10,000, to be distributed among the four shareholders. Any such recovery would, however, be completely absorbed by the liabilities.

Respondent Stevens testified on respondents' case that, while he had had a conversation with petitioners regarding their purchase of his shares, no offers were made on either side. Sylvia

Holden similarly testified that Markowitz had discussed the purchase of her shares. Confronted with an e-mail from herself to Markowitz, dated March 2, 2012, containing a demand for \$375,000 for respondents' 50% share of the business, Holden claimed it was not a serious demand, but meant "leave me alone". In any event, the negotiations between the parties regarding possible settlement, while the subject of much of the testimony, are irrelevant.

Holden stated she was familiar with the financial records of the corporation on June 13, 2013 and that the Schedule of Assets and Liabilities prepared by respondents was accurate for that date, except that the sales tax liability would be \$5000 less as a payment had been made.

Finally, respondents called Kenneth Totilo, who was qualified, without objection, as an expert as a Certified Public Accountant experienced in the valuation of businesses. He testified that his review of the assets and liabilities, and the form of ownership, corroborated the report of Jeffrey Starin that the value of the business on June 13, 2013, was zero and that the value of the stock was the same. It is clear, therefore, that there is no evidentiary basis to dispute the conclusions of both experts who testified that Maribelle's, Inc., a/k/a Mary's Bar, has no market value.

While petitioners insist that they were prevented from doing an independent valuation because respondents, who have been in control of the operation of the business since mid-June, 2013, failed to disclose the necessary books and records, according to the Shareholders' Agreement, Markowitz was charged with "managing the day to day operations of the Corporation" (Shareholders Agreement, Paragraph 3.1, Petitioners' Exhibit 1). According to her own testimony, Markowitz retained control of the finances of the business until Holden opened a separate bank account in June 2013, immediately prior to commencement of suit. There can therefore be no reasonable possibility that respondents deprived petitioners of the records necessary to value the business on the valuation date, June 13, 2013, the day before this proceeding was commenced. Moreover, it is noted that, attached to petitioners' counsel's Affirmation in Support of their own valuation, are the documents produced, on January 30, 2014, by respondents in response to petitioners' demand, which appear to comprise what was considered by Starin in preparing his report, including daily closing sheets. The Court further observes that all parties are both shareholders and directors of the Corporation and all parties are therefore responsible for the shoddy bookkeeping practices of which petitioners now complain. The Court perceives no reason to "adjust" the value as stated by the expert witnesses, as

petitioners request. There is no evidence to support petitioners' claims of waste and mismanagement by respondents either before or after they assumed control of the business in mid-June 2013.

**Conclusion**

Accordingly, each petitioner is directed to transfer his or her shares to respondents for the nominal sum of \$1 paid to each petitioner within 15 days. However, as petitioners will no longer be in control of the business and will no longer have an interest therein, both respondents must, upon tender of the petitioners' shares, provide an indemnification and hold harmless personal guarantee against any claims made against petitioners relating to the business of Maribelle's, as well as a general release as to any claims respondents might have (*see In the Matter of Giraud for the Dissolution of De Vos & Giraud, Inc.*, 2007 NY Slip Op 32473[U], 2007 WL 2815333 [Sup Ct, New York County 2007]).

This constitutes the Decision and Order of the Court.



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CAROLYN E. DEMAREST  
JUSTICE OF THE SUPREME COURT