

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND DEPARTMENT

In re Dream Weaver Realty, Inc.

70 A.D.3d 941, 895 N.Y.S.2d 476 (N.Y. App. Div. 2d Dep't 2010) · Decided February 16, 2010

SUMMARY

The court affirmed the judicial dissolution of Dream Weaver Realty, Inc. under Business Corporation Law § 1104 based on irreconcilable dissension and shareholder deadlock. It held that no hearing was required because there was no genuine dispute concerning the existence of the deadlock. The court also modified an order concerning disqualification of the petitioner’s attorney, directing that the motion be denied on the merits rather than as academic.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Santucci, J.P.; Dickerson, J.; Chambers, J.; Sgroi, J.
JURISDICTION	New York
DECIDED	February 16, 2010
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from orders granting a petition for judicial dissolution of a closely held corporation without a hearing and denying as academic a motion to disqualify the petitioner’s attorney.
STANDARD OF REVIEW	The Appellate Division reviewed the legal propriety of judicial dissolution and the denial of the disqualification motion; the opinion does not state a separate formal standard of review.
PRECEDENTIAL VALUE	Published opinion; precedential New York Appellate Division decision.
PARTIES	Stephen T. DeName v. Dream Weaver Realty, Inc.

TOPICS

- dissolution
- corporate law
- civil procedure
- appellate procedure
- costs

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether judicial dissolution of the closely held corporation was warranted under Business Corporation Law § 1104(a) because shareholder dissension produced an operational deadlock.
2. Whether Supreme Court could grant the dissolution petition without conducting a hearing.
3. Whether DeName's motion to disqualify the petitioner's attorney should have been decided on the merits rather than denied as academic, and whether disqualification was warranted.

HOLDINGS

1. Judicial dissolution was properly granted because the dissension between the two equal shareholders created an irreconcilable deadlock that precluded the corporation's successful and profitable conduct.
2. A hearing was not required because there was no contested issue determinative of the dissolution application and no genuine dispute concerning the existence of deadlock and dissension.
3. Supreme Court improperly resolved the dissolution petition before deciding the disqualification motion, but the motion should be denied on the merits because DeName failed to establish the required prior attorney-client relationship and substantial adversity and relatedness between the representations.

KEY QUOTATIONS

“In determining whether dissolution is in order, the issue is not who is at fault-for a deadlock, but whether a deadlock exists” (70 A.D.3d at 942)

“The underlying reason for the dissension is of no moment, nor is it at all relevant to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation’s affairs” (70 A.D.3d at 942)

“A hearing is only required where there is some contested issue determinative of the application” (70 A.D.3d at 942)

“A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (70 A.D.3d at 943)

“Disqualification of a party’s chosen counsel ... is a severe remedy which should only be done in cases where counsel’s conduct will probably ‘taint the underlying trial’” (70 A.D.3d at 943)

FACTUAL BACKGROUND

Dream Weaver Realty, Inc. was a closely held corporation owned equally by the petitioner and Stephen T. DeName. The two shareholders experienced substantial dissension that resulted in a deadlock preventing the successful and profitable conduct of the corporation's affairs. The record showed no genuine dispute concerning the existence of the deadlock or dissension.

PROCEDURAL HISTORY

The petitioner, a 50% shareholder of Dream Weaver Realty, Inc., commenced a proceeding under Business Corporation Law § 1104(a) seeking judicial dissolution based on dissension and deadlock between the two equal shareholders. Supreme Court, Westchester County, granted the dissolution petition without a hearing and denied Stephen T. DeName's motion to disqualify the petitioner's attorney as academic. The Appellate Division affirmed the dissolution order and modified the disqualification order to deny the motion on the merits.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The second order was modified to deny DeName's motion to disqualify the petitioner's attorney on the merits rather than as academic. No further remand was directed.

CASES CITED

- Matter of Kaufmann, 225 A.D.2d 775, 775-76 (N.Y. App. Div. 2d Dep't 1996)
- Matter of Goodman v. Lovett, 200 A.D.2d 670, 670-71 (N.Y. App. Div. 2d Dep't 1994)
- Matter of Neville v. Martin, 29 A.D.3d 444, 444-45 (N.Y. App. Div. 2d Dep't 2006)
- Matter of Sheridan Constr. Corp., 22 A.D.2d 390, 391-92 (N.Y. App. Div. 2d Dep't 1965)
- Aryeh v. Aryeh, 14 A.D.3d 634, 634 (N.Y. App. Div. 2d Dep't 2005)
- Mancheski v. Gabelli Group Capital Partners, Inc., 22 A.D.3d 532, 534 (N.Y. App. Div. 2d Dep't 2005)
- Morin v. Trupin, 728 F. Supp. 952, 957 (S.D.N.Y. 1989)
- Solow v. Grace & Co., 83 N.Y.2d 303, 308 (1994)

OPINION

PER CURIAM.

In a proceeding pursuant to Business Corporation Law § 1104 for the judicial dissolution of a closely-held corporation, the appeal is from (1) an order of the Supreme Court, Westchester County (Rudolph, J.), entered April 23, 2009, which, without a *942hearing, inter alia, granted the petition, and (2) an order of the same court, also entered April 23, 2009, which denied, as academic, the motion of Stephen T. DeName to disqualify Kenneth Gunshor as the attorney for the petitioner in this proceeding.

Ordered that the first order entered April 23, 2009, is affirmed; and it is further, Ordered that the second order entered April 23, 2009, is modified, on the law, by deleting the provision thereof denying, as academic, the motion of Stephen T. DeName to disqualify Kenneth Gunshor as the attorney for the petitioner in this proceeding and substituting therefor a provision denying the

motion on the merits; as so modified, the second order entered April 23, 2009, is affirmed; and it is further, Ordered that one bill of costs is awarded to the petitioner.

The petitioner is a 50% shareholder of a closely-held corporation known as Dream Weaver Realty, Inc. (hereinafter the corporation). Stephen T. DeName also holds a 50% share in the corporation. The petitioner commenced this proceeding pursuant to Business Corporation Law § 1104 (a) for the judicial dissolution of the corporation.

The Supreme Court properly granted the petition for judicial dissolution. The evidence before the court demonstrated that the dissension between the two shareholders “posed an irreconcilable barrier to the continued functioning and prosperity of the corporation” (Matter of Kaufmann, 225 AD2d 775, 775 [1996]). “In determining whether dissolution is in order, the issue is not who is at fault-for a deadlock, but whether a deadlock exists” (id.). “[T]he underlying reason for the dissension is of no moment, nor is it at all relevant to ascribe fault to either party.

Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation’s affairs” (Matter of Goodman v Lovett, 200 AD2d 670, 670-671 [1994]).

Here, the record amply demonstrates sufficient dissension among the parties, resulting in a deadlock, so as to warrant dissolution (see Matter of Neville v Martin, 29 AD3d 444, 444-445 [2006]; Matter of Goodman v Lovett, 200 AD2d at 670-671; Matter of Sheridan Constr. Corp., 22 AD2d 390, 391-392 [1965]).

Moreover, “[a] hearing is only required where there is some contested issue determinative of the application” (Matter of Goodman v Lovett, 200 AD2d at 670; see Matter of Kaufmann, 225 AD2d at 776). Here, the court properly granted the petition without a hearing, as there was no genuine dispute as to the existence of deadlock and dissension (see Matter of Neville v Martin, 29 AD3d at 445; Matter of Goodman v Lovett, 200 AD2d at 670; cf. Matter of Kaufmann, 225 AD2d at 776).
*943The Supreme Court improperly determined the merits of the petition prior to considering DeName’s motion to disqualify the petitioner’s attorney.

Accordingly, the Supreme Court should have determined the motion on the merits rather than denying it as academic. “A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted” (Aryeh v Aryeh, 14 AD3d 634, 634 [2005]). “Disqualification of a party’s chosen counsel... is a severe remedy which should only be done in cases where counsel’s conduct will probably ‘taint the underlying trial’ ” (Mancheski v Gabelli Group Capital Partners, Inc., 22 AD3d 532, 534 [2005], quoting Morin v Trupin, 728 F Supp 952, 957 [1989]). “Therefore, ‘[a] party seeking to disqualify an attorney or a law firm, must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse

and substantially related ” (Mancheski v Gabelli Group Capital Partners, Inc., 22 AD3d at 534, quoting Solow v Grace & Co., 83 NY2d 303, 308 [1994]).

Since DeName failed to make the requisite showing in this regard, the Supreme Court should have denied his motion to disqualify the petitioner’s attorney on the merits. Santucci, J.P., Dickerson, Chambers and Sgroi, JJ., concur.

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