

<b>Matter of Borriello v Jersey Lynne Farms, Inc.</b>
2017 NY Slip Op 31077(U)
May 17, 2017
Supreme Court, Kings County
Docket Number: 515269/2016
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 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 30<sup>th</sup> day of March, 2017.

PRESENT:

HON. SYLVIA G. ASH, Justice.

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In the Matter of the Application of DORINE BORRIELLO, for an Order and Judgment pursuant to BUSINESS CORPORATION LAW 1104 and/or 1104-a dissolving JERSEY LYNNE FARMS, INC.,

DECISION AND ORDER

Petitioner,

Index # 515269/2016

- against -

JERSEY LYNNE FARMS, INC., MICHAEL LOCONTE, DIANE SCHMIDT and MARIA PENNEY SELIGSON,

Respondents.

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2
Opposing Affidavits (Affirmations) _____	3, 4
Reply Affidavits (Affirmations) _____	5, 6

Petitioner, DORINE BORRIELLO ("Borriello"), moves for an Order appointing a receiver under Business Corporation Law ("BCL") §1113. Respondents, JERSEY LYNNE FARMS, INC. ("Jersey Lynne"), MICHAEL LOCONTE, DIANE SCHMIDT, and MARIA PENNEY SELIGSON, cross-move to dismiss the petition for dissolution of Jersey Lynne for failure to state a cause of action and upon documentary evidence.

### *Background*

Borriello, who is a 25% shareholder of Jersey Lynne, filed the instant petition for dissolution on August 30, 2016 under BCL §§1104 and 1104-a. Jersey Lynne is a wholesale distributor of food and related products that sells goods to grocery stores and restaurants. According to the petition, there are “irreconcilable internal dissension among the shareholders” of Jersey Lynne and Respondents have operated Jersey Lynne “illegally, fraudulently and in an oppressive manner toward the Petitioner.” Borriello alleges that, at the time of her employment with Jersey Lynne, the company operated profitably but that since her termination in November 2011, the company has been losing money sustaining operating losses in 2014 in the amount of \$174,202 and in 2015 in the amount of \$163,733. Borriello further alleges that she has been shut out of participating in the management of the company since her termination and that Respondents have failed to provide her with full or complete financial reports on a timely basis. The main item of “dissension” referenced in the petition is Borriello’s disagreement with the renewal of the lease between Jersey Lynne and Caterina Realty, LLC (“Caterina”). Caterina owns the property leased by Jersey Lynne and its sole members consist of the same family members involved in this dissolution proceeding. The disagreement over the lease was the subject of a derivative action which culminated in a trial before this Court. At the trial, after Borriello presented her case-in-chief, this Court granted Defendants’ motion for a directed verdict on August 16, 2016, finding there was no evidence that Defendants breached any fiduciary duty to Caterina by its lease with Jersey Lynne. Borriello filed the instant petition less than a month later on August 30, 2016.

In their motion to dismiss the petition, Respondents argue that Borriello cannot seek dissolution under BCL §1104 because she is not a 50% shareholder in the corporation. Further, that Borriello cannot obtain dissolution under BCL §1104-a because her allegations against Respondents of waste and oppressive conduct are conclusory. Respondents point out that Borriello signed a separation agreement and general release in 2012 in exchange for a severance package. Thus, that Borriello’s claims of being “freezed out” and abruptly terminated are without merit. In addition, Respondents contend that Jersey Lynne’s lack of profits does not serve as a

basis for dissolution under BCL §1104-a. Further, that Borriello's interpretation of Jersey Lynne's financial statements is incorrect and leads to her mischaracterization of Jersey Lynne as an unprofitable business. Respondents state that, in 2015, Jersey Lynne had a positive net income of \$10,467.00.

With regards to Borriello's second cause of action for the appointment of a receiver, Respondents argue that the petition lacks specific facts regarding waste and loss of Jersey Lynne's assets, and thus that the petition fails to state a cause of action for the appointment of a receiver. Finally, that Borriello's third cause of action seeking the production of books and records under BCL §1104-a[c] must be dismissed because this provision is a discovery device incidental to a dissolution proceeding and does not serve as an independent vehicle for seeking books and records of a corporation.

By way of opposition to Respondents' motion, Borriello contends that "Respondents have made substantially all decisions affecting Jersey Lynne without involving Petitioner at all—most glaringly causing Jersey Lynne to renew its lease with Caterina." That due to Respondents' mismanagement of Jersey Lynne, the company is sustaining consecutive year losses which are exacerbated by Respondents' refusal to hire a replacement for Ken Seligson, its late Chief Financial Officer. Further, that Respondents have failed to appropriately address Jersey Lynne's financial affairs and have instead used the lease with Caterina as an artificial means to keep the company on financial life support.

#### *Discussion*

In considering a motion to dismiss for failure to state a claim under CPLR § 3211[a][7], the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While factual allegations contained in a complaint are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Where a motion to dismiss is based on documentary evidence under CPLR § 3211[a][1], the claim will be dismissed “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Because it is undisputed that Borriello holds only 25% of the shares of Jersey Lynne, Borriello cannot seek judicial dissolution under BCL §1104. However, under BCL §1104-a, “holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation...may present a petition of dissolution on...the...grounds [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/or “[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.”

In this context, the terms “illegal” and “fraudulent” take on their generally accepted common law definitions (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 70 [1984]). “Oppressive actions” refer to conduct where “a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus,” or “corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on [his or her] investment” (*In the Matter of Charleston Square, Inc.*, 295 AD2d 425, 426 [2d Dept 2002]).

With the foregoing principles in mind, the Court finds that Respondents are entitled to dismissal of Borriello’s petition for dissolution. Insofar as Borriello contends that she has suffered “oppressive action” by being excluded from participation in management, her separation from Jersey Lynne as an employee / officer stems, indisputably, from a negotiated separation agreement for which she was paid a severance package. Thus, as a matter of law, Borriello cannot claim to have been improperly “frozen out.”

In addition, not only are Borriello’s allegations of waste conclusory, but “waste” refers to the “misappropriation of corporate assets for private purpose” (*Cunningham v 344 6th Ave Owners Corp.*, 256 AD2d 406, 407 [2d Dept 1998]). Here, the petition fails to allege that any of the individual Respondents are misusing corporate assets for their personal gain. A

corporation's lack of profitability does not constitute waste for purposes of BCL §1104-a. To the extent Borriello proffers the Caterina lease as evidence of Respondents committing waste or engaging in oppressive conduct, this Court has already determined the propriety of said lease pursuant to a trial.

To state simply, there is nothing alleged in the petition that would support a basis to dissolve Jersey Lynne. Similarly, nothing in the petition indicates a need to appoint a receiver.

Accordingly, the Respondents' motion to dismiss the petition must be granted and the petition is dismissed.

This constitutes the Decision and Order of the Court.

E N T E R,



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**SYLVIA G. ASH, J.S.C.**