

At a Civil Special Term of the
Supreme Court, held in and for the
County of Erie, State of New York,
on the 20 day of February, 2016.

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ERIE

ROSS M. CELLINO, JR.,

Petitioner,

v

**CELLINO & BARNES, P.C. and
STEPHEN E. BARNES,**

Respondents.

DECISION

INDEX NO.: 806178-2017

On May 10, 2017, a Petition was filed seeking judicial dissolution of respondent, Cellino & Barnes P.C., under Business Corporation Law (BCL) §§ 1104(a)(1) (2) and (3). On July 27, 2017, an Amended Petition for Dissolution was filed, which set forth additional allegations in support of dissolution. On the same day, respondents, Cellino & Barnes, P.C. and Stephen Barnes, filed a motion to dismiss and thereafter filed an Answer on August 15, 2017. On October 13, 2017, petitioner filed a cross-motion seeking the appointment of a temporary receiver. The motion and cross-motion were heard on December 6, 2017. An order on the cross-motion was filed on February 6, 2018. The outstanding matter addressed in this Decision is respondents' motion made pursuant to CPLR §§ 404, 3211(a)7 and 3212.

"On a motion to dismiss pursuant to CPLR 404, the petition is entitled to all favorable inferences, and the motion must be denied if the petitioner states any facts upon which he is prima facie entitled to relief. "Lack v. Kreiner, 91 A.D.2d 813, 813 (3rd Dep't 1982) (citations omitted). Likewise, a "motion to dismiss under CPLR 3211 (a) (7) should not be granted unless, within the four corners of the pleading, liberally construed, the pleaders have failed to state a cause of action, or unless documents and other submissions establish conclusively that the pleaders have no cause of action...Every favorable inference must be afforded the facts alleged in the petition and in the various motion papers submitted by the nonmoving party." Schwaneer v. Collins, 17 A.D.3d 1068, 1069 (4th Dep't 2005) (internal citations omitted). Viewing the 267 paragraph Petition in that light, the Court finds that the Petition sets forth causes of action for dissolution pursuant to BCL §§ 1104(a)(1) and (3). However, other than simply repeating the language contained in BCL 1104(a)(2), the Petition contains no facts to support relief on the grounds that the shareholders are so divided that the votes required for the election of directors cannot be obtained. Accordingly, respondents' motion to dismiss pursuant to CPLR §§ 404 and 3211(a)(7) is granted in part and denied in part.


Respondents also moved for summary judgment under CPLR 3212. "To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact." Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980) (citing to CPLR 3212(b)). Here, in response to the motion, petitioner submitted sufficient proof to raise questions of fact on the issue of whether dissolution should be granted pursuant to BCL 1104(a)(1) and (3). The

respondents' motion for summary judgement is therefore denied and a hearing will be held to determine "the validity of the application" for dissolution. Application of Weiss, 32 A.D.2d 279, 280 (1st Dep't 1969).

Counsel for petitioner is to prepare and submit an Order in 30 days, attaching this Decision.

DATED: Buffalo, New York

February 20, 2018

A handwritten signature in blue ink, reading "Deborah A. Chimes", is written over a horizontal line.

HON. DEBORAH A. CHIMES, J.S.C.