

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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In the Matter of the Application of ANTONIO
JOSEPH, JR., M.D., as an Officer, Director and
Shareholder of more than twenty percent of the shares
of DESROCHES, JOSEPH & SCOTT, M.D., P.C.,
and LIONEL E. DESROCHES, M.D., as an Officer,
Director and Shareholder of more than twenty percent
of the shares of DESROCHES, JOSEPH & SCOTT,
M.D., P.C., and collectively owning more than fifty
percent of the shares in DESROCHES, JOSEPH &
SCOTT, M.D., P.C.,

Index No: 30222/07
Motion Date: 9/10/08
Motion Cal. No: 16 & 17
Motion Seq. No: 1

Petitioners,

-against-

For the Dissolution of DESROCHES, JOSEPH &
SCOTT, M.D., P.C., a domestic professional corporation,
DAVID SCOTT, III, M.D., Individually, and as an
as an Officer, Director and Shareholder of DESROCHES,
JOSEPH & SCOTT, M.D., P.C., The People of New
York,

Respondents.

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_____The following papers numbered 1 to 15 read on this order to show cause by petitioners for
an order of dissolution of the corporation known as Desroches, Joseph & Scott, M.D., P.C., and on
this notice of motion also by petitioners: (1) compelling respondent to comply with discovery; or
pursuant to CPLR § 3126, (2) prohibiting respondent from opposing petitioners' claims; or (3)
supporting his defenses in the verified answer; and (4) prohibiting respondent from producing any
corporate documents or records in support of his position in evidence; and in turn (5) permitting the
accounting of the corporation to be conducted and considered complete and final without reliance
upon the corporate documents and records in respondent's possession; (6) striking respondent's
counterclaims which rely upon the corporate documents and records in the respondents's possession;

and (7) awarding costs and reasonable reimbursement of expenses and attorneys' fees resulting from respondent's frivolous conduct.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 8
Verified Answer Pro Se Respondent.....	9
Notice of Motion-Affidavits-Exhibits.....	10 - 14
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Upon the foregoing papers, it is hereby ordered that the motions are decided as follows:

Relevant Facts

This is a special proceeding instituted by Order to Show Cause and Petition on December 13, 2007, pursuant to sections 1104 and 1104-a of the Business Corporation Law of the State of New York, seeking the judicial dissolution of Desroches, Joseph & Scott, M.D., P.C., a medical practice formed on April 7, 2006, with its principal places of business being 134-55 Springfield Boulevard, Jamaica, New York, and 2015 Linden Boulevard, Elmont, New York, in which petitioners Desroches and Joseph, and respondent Scott, each hold a one-third (1/3) interest. The Order to Show Cause directed the parties, by the January 30, 2008 return date, to furnish the Court with financial information, including a statement of the corporate assets and liabilities, and the names of each creditor and claimant of the corporate entity, and specifically directed respondent, by January 9, 2008, to make the financial books and records in his possession available to petitioners for inspection and copying. At the calendar call on the return date of the motion, respondent, who appeared pro se, submitted a verified answer with counterclaims, and thereafter, the parties entered into a written three page stipulation dated January 30, 2008, which the provisions thereof were read into the record by this Court for the purpose of allocution, and states as follows:

1) That there be an accounting of the corporation Desroches, Joseph & Scott, M.D., P.C., whereby the parties agree to use an accounting firm that is mutually acceptable to both parties and the parties agree to share the cost of the accountant. Petitioners will be responsible for 1/3 each of the cost and respondent will be responsible for 1/3 of the cost. That in order to properly account for the expenses, revenues and outstanding liabilities of the corporation, all parties agree to provide to the other and the accountant a list of all expenses incurred from the formation of the corp. to date, as well as all revenue earned for the months of Jan., Feb. and March of 2007, which are the three months that the parties operated under the corporate entity Desroches, Joseph & Scott, M.D., P.C. The parties must provide all written agreements including all lease agreements in relation to the above matter. All documents shall be provided to the accountant within 30 days from the date hereof.

2) Upon the completion of a full accounting of Desroches, Joseph & Scott, M.D., P.C. and proper allocation of monies due and owing to outside vendors and to the parties themselves, the parties will enter into a stipulation to dissolve the corporation upon consent of the shareholders.

3) The parties agree that all parties will be restrained from depositing and withdrawing monies from any bank accounts of Desroches, Joseph & Scott, M.D., P.C. However, the parties do recognize that outside vendors may deposit and withdraw monies from the account, particularly HSBC Bank account # 955906008.

4) The parties agree to use the accounting firm Manzi, Pino & Company, 1895 Walt Whitman Road, Melville, New York, 11747, (631) 420- 5620, to perform the accounting of Desroches, Joseph & Scott, M.D., P.C., pending confirmation that neither [respondent nor petitioners] have ever utilized this accounting firm for any other purpose besides to handle the affairs of Desroches, Joseph & Scott, M.D., P.C. If the accounting firm of Manzi, Pino & Co. proves to be unacceptable, then the parties shall agree to choose another mutually acceptable firm. The accounting shall be completed within 60 days of the date hereof, pending the accountants approval of such date.

Further, at the return date, petitioners submitted the required information they were directed to provide in the order to show cause, as acknowledged on the record by respondent, however, respondent failed to make available for inspection to petitioners the financial books and records in his possession as directed. Nevertheless, the parties agreed that the effect of the stipulation would be dissolution of the corporation on consent, and the ancillary issues asserted in the petition, as well as the counterclaims asserted in the verified answer, shall be severed and continued. The petition was then adjourned to April 2, 2008, to allow the parties to provide all documents to the accountant by February 29, 2008, within thirty days of the stipulation, and for the accounting to be completed. At the April 2, 2008 calendar call, the Court was apprised that despite petitioners' many attempts to obtain respondent's compliance, respondent had neither provided the financial documents to the accountant nor paid his one-third share for the conducting of the accounting, in the amount of \$1,666.67, and thus, the accounting had yet to be conducted. The matter was again adjourned to May 28, 2008, based upon respondent's constant representation that he was seeking legal counsel and needed more time to provide the requested documents. Thereafter, the motion was adjourned to June 18, 2008, and subsequently to July 16, 2008, before being submitted for determination on September 10, 2008, all without compliance from respondent with this Court's directives, and the conducting of an accounting.

It is upon the foregoing that petitioners seek, upon their order to show cause, an order of dissolution of the corporation known as Desroches, Joseph & Scott, M.D., P.C., pursuant to BCL §§ 1104 and 1104-a, and a further order, upon their notice of motion, compelling respondent to

comply with discovery or be prohibited from opposing petitioners' claims, supporting his defenses in the verified answer, or producing any corporate documents or records in support of his position in evidence, pursuant to CPLR §§ 3124 and 3126. Additionally, petitioners seek permission to have the accounting of the corporation be conducted and deemed complete and final without reliance upon the corporate documents and records in respondent's possession, and the striking of respondent's counterclaims which rely upon those documents and records. Lastly, petitioners seek an order awarding costs and reasonable reimbursement of expenses and attorneys' fees resulting from respondent's frivolous conduct.

Discussion

1. Order to Show Cause for Dissolution

Petitioners seek judicial dissolution of Desroches, Joseph & Scott, M.D., P.C., pursuant to sections 1104 and 1104-a of the Business Corporation Law. BCL § 1104, entitled "Petition in case of deadlock among directors or shareholders," states, in pertinent part, the following:

(a) [T]he holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

(1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.

(2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

(3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Moreover, "[s]ection 1104-a of the Business Corporation Law empowers a holder of 20% or more of a closely held corporation's stock to file a petition for dissolution of the corporation on the grounds that those in control have either committed 'illegal, fraudulent or oppressive actions toward the complaining shareholders' or have 'looted, wasted, or diverted for non-corporate purposes' the corporation's assets." Dissolution of Penepent Corp., Inc., In re, 96 N.Y.2d 186, 191 (2001); see, also, Parveen, In re, 259 A.D.2d 389 (1st Dept. 1999).¹

¹ Section 1104-a authorizes the filing of a petition for judicial dissolution under special circumstances, and sets forth, in pertinent part, the following:

In the case at bar, petitioners, one third shareholders individually, who collectively hold more than fifty percent of the shares of Desroches, Joseph & Scott, M.D., P.C., alleged that from the inception of the corporate operation, petitioners deposited revenue that they earned on behalf of Desroches, Joseph & Scott, M.D., P.C. into the joint account of the corporation, in accordance with their agreement. In contravention thereof, they allege that respondent diverted monies from the corporation by charging inappropriate expenses to Desroches, Joseph & Scott, M.D., P.C., for his personal use and benefit, failing to remit payment of his portion of the business loan of the corporation, and failing to make deposits and account for his portion of the revenues generated on behalf of Desroches, Joseph & Scott, M.D., P.C. Based upon the foregoing, the allegations in the petition and its supporting papers are sufficient to establish a prima facie basis for dissolution. Furthermore, as provision two of the January 30, 2008 stipulation, states that the “parties will enter into a stipulation to dissolve the corporation upon consent of the shareholders,” upon the completion of a full accounting and proper allocation of monies due and owing, that branch of the order to show cause for dissolution of Desroches, Joseph & Scott, M.D., P.C., is granted without opposition.

2. Notice of Motion for Discovery

Petitioners also seek an order, inter alia, directing respondent to comply with discovery and provide the aforementioned financial records in his possession. “CPLR § 3101(a) requires, in pertinent part, ‘full disclosure of all matter material and necessary in the prosecution or defense of an action.’ However, the principle of ‘full disclosure’ does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have ‘broad power to regulate discovery to prevent abuse’ (citation omitted).” Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 (2nd Dept. 2007); see, Seaman v. Wyckoff Heights Medical Center, Inc., 25 A.D.3d 598 (2nd Dept. 2006). “What is ‘material and necessary’ is left to the sound discretion of the lower courts and includes ‘any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason’ (citation omitted).” Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000); see, Espady v. City of New York, 40 A.D.3d 475 (1st Dept. 2007); Spencer v. City of New York, 293 A.D.2d 466 (2nd

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, [] entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

(2) The 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.

Dept. 2002). Thus, restricted only by a test for materiality ‘of usefulness and reason’ (id.), pretrial discovery is to be encouraged.” Hoinig v. Westphal, 52 N.Y.2d 605, 608 (1981); see, Parise v. Good Samaritan Hosp., 36 A.D.3d 678 (2nd Dept. 2007); Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000). The bottom line is that discovery should be allowed if the information sought “‘is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable’ (citation omitted).” Matter of Beryl, 118 A.D.2d 705, 706 (2nd Dept. 1986).

While the ‘material and necessary’ standard set forth in CPLR 3101(a) is to be liberally construed (citation omitted), this does not mean that litigants have carte blanche to demand production of whatever documents they speculate might contain something helpful. ‘It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.’” Vyas v. Campbell, 4 A.D.3d 417 (2nd Dept. 2004); Beckles v. Kingsbrook Jewish Medical Center, 36 A.D.3d 733 (2nd Dept. 2007); Auerbach v. Klein, 30 A.D.3d 451 (2nd Dept. 2006); Young v. Baker, 21 A.D.3d 550 (2nd Dept. 2005); Palermo Mason Const., Inc. v. Aark Holding Corp., 300 A.D.2d 460 (2nd Dept. 2002). Here, it is clear that the financial records of subject corporation within the respondent’s possession are both material and necessary on this petition for dissolution. Moreover, as respondent has agreed to such dissolution and further agreed to provide the records to the accountant in order to effect an appropriate and complete accounting prior thereto, that the branch of the motion seeking an order compelling respondent’s compliance would be appropriate.

However, petitioners, in the alternative, seek an order prohibiting respondent from opposing petitioners’ claims, supporting his defenses in the verified answer, or producing any corporate documents or records in support of his position in evidence, pursuant to CPLR § 3126, granting petitioners permission to have the accounting of the corporation be conducted and deemed complete and final without reliance upon the corporate documents and records in respondent’s possession, striking of respondent’s counterclaims which rely upon those documents and records and an award of costs and reasonable reimbursement of expenses and attorneys’ fees resulting from respondent’s frivolous conduct. CPLR § 3126, entitled, “Penalties for refusal to comply with order or to disclose,” states in relevant part:

If any party [who] refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, [] or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In the instant matter, in light of the various discovery failures on the part of respondent, application of CPLR § 3126 is warranted.

Although actions should be resolved on the merits wherever possible, the striking of a party's pleading for a failure to comply with a discovery demand or order is a drastic remedy, and should be granted where a party's conduct is shown to be "willful, contumacious, or in bad faith." Denoyelles v. Gallagher, 30 A.D.3d 367, 368 (2nd Dept. 2006); Greer v. Garito, 27 A.D.3d 617, 618 (2nd Dept. 2006); Ashkenazy v. New York City Housing Auth., 27 A.D.3d 500, 501 (2nd Dept. 2006). While the nature and degree of the penalty to be imposed on a motion, pursuant to CPLR 3126, is a matter of discretion with the court (citations omitted), 'striking [a pleading] is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith' (Espinal v. City of New York, 264 A.D.2d 806, 695 N.Y.S.2d 610)." Kuzmin v. Visiting Nurse Service of New York, 22 A.D.3d 643, 643-644 (2nd Dept. 2005); See, also, Chrostowski v. Chow, 37 A.D.3d 638 (2nd Dept. 2007); E.W. Howell Co., Inc. v. S.A.F. La Sala Corp., 36 A.D.3d 653 (2nd Dept. 2007); Shapiro v. Kurtzman, 32 A.D.3d 508 (2nd Dept. 2006); Assael v Metropolitan Transit Authority, 4 A.D.3d 443 (2nd Dept. 2004); Avenue C Const., Inc. v Gassner, 306 A.D.2d 506 (2nd Dept. 2003); Martin v Hall, 283 A.D.2d 615 (2nd Dept. 2001). Likewise, "[t]o invoke the drastic remedy of preclusion, the Supreme Court must determine the offending party's lack of cooperation with disclosure was willful, deliberate and contumacious" (citations omitted)." Pepsico, Inc. v. Winterthur Intern. America Ins. Co., 24 A.D.3d 742 (2nd Dept. 2005); Lotardo v. Lotardo, 31 A.D.3d 504 (2nd Dept. 2006); Anthony v. Anthony, 24 A.D.3d 694 (2nd Dept. 2005); Patterson v. New York City Health and Hospitals Corp., 284 A.D.2d 516 (2nd Dept. 2001). Thus, as petitioners have made the requisite showing of willful and contumacious behavior on the part of respondent, the branches of the motion for preclusion and the striking of the counterclaims are granted.

Lastly, petitioners also move for an order awarding costs and reasonable reimbursement of expenses and attorneys' fees resulting from respondent's frivolous conduct. Part 130 of the Uniform Rules for the New York State Trial Courts authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where

prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. []

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The “intent of [Part 130.1] is to prevent the waste of judicial resources and to deter [vexatious] litigation and dilatory or malicious litigation tactics.” Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept. 1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006). The Rule further provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a “broad pattern of the [defendant’s] conduct in this regard and not just the question [of] whether a strand of

merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation []." Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452 (2 Dept. 2004). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted)." Id. at 34 (1st Dept.1999).

Here, respondent has asserted spurious and unsupported claims, and engaged in frivolous conduct by ignoring court mandates, causing an overwhelming pattern of delay which has unnecessarily prolonged the resolution of this dissolution action, the crux of which he contends that he desires. Consequently, sanctions are appropriate.

Conclusion

Accordingly, that branch of the order to show cause by petitioners Antonio Joseph, Jr. and Lionel Desroches, seeking an order of dissolution of the corporation known as Desroches, Joseph & Scott, M.D., P.C., pursuant to BCL §§ 1104 and 1104-a, hereby is granted without opposition and upon consent of the parties, pursuant to stipulation dated January 30, 2008. Further, the branches of petitioners' notice of motion for an order compelling respondent to comply with discovery or be prohibited from opposing petitioners' claims, supporting his defenses in the verified answer, or producing any corporate documents or records in support of his position in evidence, pursuant to CPLR §§ 3124 and 3126, as well as the branches of the motion seeking permission to have the accounting of the corporation be conducted and deemed complete and final without reliance upon the corporate documents and records in respondent's possession, and the striking of respondent's counterclaims which rely upon those documents and records, are granted to the extent that respondent David Scott is hereby precluded from opposing petitioners' claims, supporting his defenses in the verified answer, or producing any corporate documents or records in support of his position in evidence. Petitioners are hereby granted permission to have the accounting of the corporation be conducted and deemed complete and final without reliance upon the precluded corporate documents and records in respondent's possession, and respondent's counterclaims which rely thereupon, are hereby stricken.

Moreover, that branch of petitioners motion for an order awarding costs and reasonable reimbursement of expenses and attorneys' fees resulting from respondent's frivolous conduct is hereby granted. Petitioners are awarded costs and reasonable attorneys' fees associated with the making of this motion and the numerous appearances by petitioners' counsel before this Court due to respondent's frivolous conduct, in the amount of \$5,500.00, payable by respondent to counsel for petitioners to the respective firm within forty- five (45) days of service of a copy of this order upon him with notice of entry. Moreover, respondent is directed, within fifteen (15) days of such service with notice, to remit to the accounting firm of Manzi, Pino & Company, 1895 Walt Whitman Road, Melville, New York, 11747, a bank check in the amount of \$1,666.67, representing his one-third share of the retainer fee for the conducting of the accounting. In the event of respondent Scott's failure to comply with this Court's directive to pay his proportionate share of the accounting fee to

the aforementioned firm within the designated time frame, petitioners shall pay respondent's portion of the fee in order to facilitate the accounting, and such amount shall be added to the award of costs and reasonable attorneys' fees, and shall be due and payable at the time that such award shall become due.

Dated: November 19, 2008

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J.S.C.