

Matter of Kurins v Silverseal Corp.

2008 NY Slip Op 33328(U)

December 2, 2008

Supreme Court, New York County

Docket Number: 603565/07

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: John J. Cann
John J. Gammeterman
Justice

PART 4am
27m

Matter of Andre's Kurins

INDEX NO. 603565/07

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

3e1 ver seal Corp

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED

DEC 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/2/08

John Cal
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

of SilverSeal under Business Corporation Law §1104-a.¹

SilverSeal filed a petition in this Court, seeking a stay of the arbitration, arguing that the majority of the claims alleged in the demand for arbitration were not arbitrable. *SilverSeal Corporation, et. al. v Kurins*, Index No. 111732/2007 (Abdus-Salaam, J.). On September 25, 2007, Justice Abdus-Salaam issued an order granting the motion, and permanently stayed the arbitration. Joint Application, Exh 4.

On October 26, 2007, Kurins commenced this proceeding, seeking judicial dissolution, under Business Corporation Law §1104-a. As an alternative to dissolution, Kurins requested that the Court value his interest in SilverSeal and enter a judgment against Silverman in that amount. Joint Application, Exh 5 at ¶ 4.

SilverSeal served and filed a notice of election to purchase Kurins' stock on November 28, 2007, the same day its board of directors met and passed a resolution approving the purchase of the stock.

The parties filed a joint application, seeking a determination of the correct date for valuing Petitioner's interest in SilverSeal, arguing that a determination as to this date is necessary for them to continue their efforts to resolve this dispute.

Kurins argues that the proper date for the valuation of his interest in SilverSeal is October 25, 2007, the day prior to his filing the Petition which commenced this proceeding. Respondents argue that July 30, 2007, the date prior to the filing of the demand in the related arbitration, should be used as the valuation date. The parties contend that the difference is significant

¹ The demand also contained claims for breach of fiduciary duty; breach of contract; and waste of corporate assets. Joint Application, Exh 2.

because during the time between these dates, SilverSeal increased its assets by an excess of \$1,000,000 in cash. Oral Arg Trans at 7.

Discussion:

The Business Corporation Law provides that, with regard to the purchase and valuation of corporate shares:

(a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph (c) herein. An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable.

(b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares.

BCL § 118 (emphasis added). Thus, the statute is clear that the relevant date for determining the valuation of Kurin's shares is the day prior to his filing the Petition.

Indeed, Kurins argues that there is no basis for using the date the related arbitration was commenced, particularly as Respondents moved to stay that proceeding and argued that the AAA

has no jurisdiction over the §1104-a dissolution claim. Further, Kurins argues that SilverSeal did not file its Election to Purchase until November 28, 2007, which was 120 days after the filing for the demand for arbitration. Thus, even if the date that proceeding was commenced was controlling, their filing was well outside the time limit set forth in BCL § 118. He further argues that if the date from the demand for arbitration governs, SilverSeal's election is untimely, and the dissolution proceeding - - rather than the election to purchase - - must continue.

Respondents contend that, in a separate dissolution proceeding regarding SilverSeal, Kurins formerly sought to use the date on which the damage complaint, rather than the dissolution proceeding, was filed. *See Rodriguez v Silverman*, Supreme Ct, NY County, Index No. 602463/1997. In that action, Kurins and Silverman jointly argued, and convinced the referee, to whom the valuation had been referred to hear and determine, that "[r]egardless of the form which plaintiff's claims originally assumed, the date plaintiff commenced suit controls. Plaintiff in essence selected the valuation date when he commenced this action; its subsequent metamorphosis into a dissolution proceeding cannot expand his rights." Joint Application, App A at 5, *Rodriguez v Silverman* 7/3/02 Decision (internal citations omitted). Respondents argue that the referee's rationale is applicable to the Petition currently before the Court.

The Court however notes that there is a significant difference between the earlier SilverSeal proceeding and the instant one, although both involved changes in a plaintiffs' original filing. In *Rodriguez*, a common law remedy was converted to a dissolution proceeding, but both were before the court. This is distinct from the situation now at issue, where the earlier proceeding was in arbitration.

Moreover, when Respondents elected to purchase Petitioner's interest in SilverSeal, it did

so just over a month from the Court filing, well within its time to elect - - but only if measured from the date of the Court filing. If, however, Respondents' election to purchase is looked at from the date the demand for arbitration was filed, the election was significantly outside the time limit. Even more importantly, SilverSeal's board did not meet to pass the resolution approving the purchase of Kurins' stock until the day it filed its election to purchase, well after the demand for arbitration had been filed and over two months after it had obtained a permanent stay of the arbitration. It, therefore, strains credulity to view the election to purchase as a response to any filing other than that in this Court.

Accordingly, it is

ORDERED that partial summary judgment is granted to Petitioner, and the date for valuation of Petitioner's interest in SilverSeal is October 25, 2007; and it is further

ORDERED that the remainder of this proceeding shall continue.

Dated: December 2, 2008

FILED
 DEC 11 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:

[Signature]

 J.S.C.