

Pianin v Spier

2005 NY Slip Op 30576(U)

October 11, 2005

Supreme Court, New York County

Docket Number: 601230/2005

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

Pianin
Plaintiff,
- v -
Spier
Defendant

INDEX NO. 601230/05
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

Cross-Motion: Yes No

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

Plaintiff Scott Pianin, who formerly served as the president of defendant Alarmex Holdings, L.L.C. ("Alarmex") and who still holds ownership interests in the company, brought this action against Alarmex, its other members, and its corporate affiliate (1) to challenge an appraisal that was used to determine a buy-back price for Pianin's interest in Alarmex once he had exercised a "put" option and (2) to recover certain payments that Alarmex allegedly owes Pianin under contract. Defendants now move under CPLR 3211 for an order dismissing two of Pianin's three claims, both of which concern the appraisal, for failure to state a claim and to join a necessary party, and because documentary evidence provides a complete defense. Pianin cross-moves for an order directing defendants to deposit about \$ 14.4 million in escrow, on the grounds that defendants acknowledge that they owe Pianin that much for his equity interest.

For the reasons set forth below, defendants' motion is granted and plaintiff's cross-motion is denied.

Claims – In his Verified Complaint, Pianin alleges the following: Alarmex, a Delaware limited liability company which manufactures and sells apparel and accessories, bought the assets of an apparel company named Periscope Sportswear in October 2000. In connection with the asset purchase, Periscope Sportswear's president, Pianin, joined Alarmex as both its president and as a member, in exchange for his capital contribution and services, pursuant to Alarmex's Second Amended and Restated Operating Agreement dated November 2000 among Alarmex, Pianin, William Spier, Jonathan Spier, and Kenneth Sitomer (as later amended, the "Operating Agreement"). At one point Pianin owned a 34.4% interest in Alarmex, but in December 2003 he assigned a 10% interest to "The Pianin 2003 Alaska Trust" (the "Trust"), leaving him with 24.4%. At that time, the Operating Agreement was amended to add the Trust as a party.

The Operating Agreement provided that, under certain conditions, Pianin could exercise

an option (the "Put Option") to require the Spiers to purchase Pianin's and the Trust's interests in Alarmex for their fair market value (the "Put Price."). The Operating Agreement also set forth the method for determining the Put Price: each of the four members (the Spiers, Sitomer, and Pianin) would designate an independent appraiser (an "Appraiser") to value Alarmex as of the date that Pianin exercised the Put Option, with the average of the four valuations comprising the Put Price, which would be "final, binding and conclusive upon all parties." The Operating Agreement also provided that the Appraisers would "be directed" to use certain accounting procedures while valuing Alarmex: the Appraisers would consider Alarmex as a going concern and exclude certain payments or payables due to Alarmex.

On December 22, 2004, Pianin exercised his Put Option, and thereafter each Alarmex member designated an Appraiser to value Alarmex. Pianin's appraiser valued the company at \$ 124 million, while the defendants' Appraisers valued it between about \$ 11.9 million and \$ 16.75 million. The average of these four appraisals was about \$ 42 million.

In his complaint, Pianin alleges that the defendants' Appraisers undervalued Alarmex by failing "to adhere to the terms and conditions set forth for conducting such appraisals" Specifically, Pianin complains that the Appraisers (1) applied "improper and inappropriate" discounts and (2) used information about Alarmex that was unavailable until after Pianin had exercised the Put Option. Based on those allegations, Pianin asserts a claim for breach of the Operating Agreement against the Spiers and Sitomer (first cause of action), and also seeks a declaration that, until he is "paid the full Put Price as properly determined [under] the Operating Agreement", he still owns 34.4% of Alarmex (third). Pianin also asserts a separate claim for breach of the Operating Agreement against Alarmex (second cause of action), on the ground that it failed to (1) pay him a bonus payment for 2004 and distributions he is owed as member and (2) reimburse him for certain business expenses.

Discussion – The first cause of action in connection with the appraisals is severed and dismissed because it fails to state a claim. A court may enforce an agreement between parties to appoint an independent appraiser to value a property as it would enforce an agreement to arbitrate under CPLR article 75. *Liberty Fabrics, Inc. v. Corp. Props. Assocs.* 5, 223 A.D.2d 457, 457 (1st Dept. 1996). If a party to an appraisal agreement participates in the method its set forth by helping to select the appraisers, that party's grounds for attacking the resulting valuations are limited to the grounds it would have to attack an arbitrator's award. *In re Penn C. Corp.*, 56 N.Y.2d 120, 130 (1982). Like an award, an independent appraisal "should be upheld in the absence of fraud, bias or bad faith." *Liberty Fabrics, Inc.*, 223 A.D.2d at 457.

Pianin's alleges that the defendants' appraisers used "improper and inappropriate" methods to value Alarmex. But that charge does not amount to a claim that the defendants or their appraisers committed any fraud, acted in bad faith toward Pianin, or were biased against him. At most, Pianin challenges the appraisers' methodology and alleges that they carried out their work imperfectly, which does not provide any basis for the Court to substitute its judgment for theirs.

The first and third causes of action are also dismissed unless Pianin joins the Trust as a party to this litigation within ten days after he is served with a copy of this decision and the resulting order. The Trust owns 10% of Alarmex under the Operating Agreement and should be included in this action, which affects its partnership interests in the company.

Pianin's cross-motion for an order pursuant to CPLR 2701 directing defendants to put money in escrow is denied. Section 2701 does not apply to actions for money damages, and a court cannot direct defendants to deposit funds merely to ensure that they can satisfy a possible judgment against them. See CPLR 2701; *Rosenblatt v. Seidman*, 243 A.D.2d 699, 700 (2d Dept. 1997). Moreover, defendants have asserted counterclaims against Pianin and do not concede that they owe him \$ 14 million.

Settle order. ^{2005 Room 208} The parties are directed to appear on November 22, at 9:30 a.m. for a status conference.

Dated: October 11, 2005



Helen E. Freedman, J.S.C.

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Check if appropriate: DO NOT POST