

Pianin v Spier

2006 NY Slip Op 30074(U)

August 9, 2006

Supreme Court, New York County

Docket Number: 0601230/2005

Judge: Helen E. Freedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

Index Number : 601230/2005

PIANIN, SCOTT

vs.

SPIER, WILLIAM

SEQUENCE NUMBER : 003

MONEY JUDGMENT

C

PART 39

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to **NYS SUPREME COURT RECEIVED**

PAPERS NUMBERED
AUG 11 2006
IAS MOTION
SUPPORT OFFICE

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 11 2006

COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 8/9/06 _____ HTO _____

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):

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

PART 39

-----X
SCOTT PIANIN,

Plaintiff,

Index No. 601230/05

-against-

WILLIAM SPIER and JONATHAN SPIER, KENNETH
SITOMER, ALARMEX HOLDINGS, L.L.C. and AHG
LICENSING, INC.,

Defendants.
-----X

Helen E. Freedman, J.S.C.

Plaintiff Scott Pianin ("Pianin"), the former president and current owner of an equitable interest in Alarmex Holdings, L.L.C. ("Alarmex"), moves to confirm an appraisal of his share of Alarmex in the amount of \$14.42 million. In the underlying action, Pianin sues Alarmex, its members William Spier, Jonathan Spier, and Kenneth Sitomer, and its affiliate AHG Licensing, Inc. ("AHG") (collectively, the "Defendants"), challenging an appraisal used to buy out Pianin's equitable interest in Alarmex (first cause of action), seeking bonus and dividend payments and expense reimbursements from Alarmex (second cause of action), and seeking a declaration that Pianin owns 34.4% of Alarmex unless and until Defendants pay him his share of the appraisal price (third cause of action).

In separate actions, Defendants sue Pianin claiming that, among other things, Pianin defrauded Alarmex by accepting kickbacks from one of Alarmex's suppliers that increased the amounts Alarmex would have otherwise paid its supplier, and claim Pianin willfully breached his employment and membership contract with Alarmex. For the reasons stated below, Pianin's motion to confirm the amount of the appraisal award is granted, but entry of judgment is stayed until some

FILED
Aug 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

of the outstanding issues in this action are resolved.

Background:

Alarmex designs, manufactures, and sells sportswear and other clothing. Its operations commenced on October 31, 2000 when William Spier acquired, on behalf of Alarmex, certain assets of Periscope Sportswear, a clothing company that employed Pianin. William Spier invited Pianin to join Alarmex as a minority member when he acquired the assets.

Pianin served as president of Alarmex until December 2, 2004 when William Spier sent Pianin an e-mail placing Pianin on administrative leave. Spier stated in his letter that Defendants had acquired information related to Pianin's alleged participation in a kickback scheme and other fraudulent conduct toward Alarmex. On December 22, 2004, Pianin notified the company that he intended to exercise his "Put Option" under Section 8.1 of the Alarmex Holdings L.L.C. Second Amended and Restated Operating Agreement (the "Operating Agreement"). Pursuant to Section 8.2 of the Operating Agreement, Pianin may exercise the "Put Option" upon Alarmex's terminating him "other than for cause" or upon his terminating his employment for "good reason." If grounds exist for Pianin to exercise the "Put Option," then William Spier is obligated to purchase Pianin's percentage interest in the company, and Pianin must assign his membership interest to Spier. If, however, the company terminates Pianin "for cause," then, pursuant to Section 6.2(j)(ii), "the Company shall be obligated to purchase, and Pianin shall be obligated to sell, his Membership Interest, for the then applicable Appraisal Price."

Section 1.1 of the Operating Agreement defines the "Appraisal Price" as the fair market value of the Company without minority discounts or control premiums. If the corporate members do not agree on the amount of the Appraisal Price, the members each select an appraiser to value the

company. The appraiser must be a "Certified Valuation Expert" who is "qualified as such by any national board or body for certification of persons who are qualified to perform company valuations." The Appraisal Price is calculated by averaging the appraisers' determinations, and this amount is "final, binding and conclusive upon all parties."

In response to Pianin's notification of his intent to exercise the Put Option, Defendants moved by order to show cause for a temporary restraining order and preliminary injunction to prevent the appraisal process from occurring on the ground that Pianin was still an Alarmex employee, notwithstanding his placement on administrative leave. On January 20, 2005, this court denied the preliminary injunction, finding that "it appears Pianin has been effectively terminated and he is no longer employed." That decision did not determine whether Pianin was terminated for cause or other than for cause.

Pursuant to the Operating Agreement's appraisal provision, the parties each selected appraisers. Pianin selected Charles Stryker ("Stryker") from Trenwith Valuation, LLC to value his share of the company. On March 10, 2005, the parties exchanged appraisal reports. Pianin's, William Spier's, Jonathan Spier's, and Kenneth Sitomer's appraisers valued Alarmex and AHG at \$124 million, \$16.75 million, \$11.93 million, and \$15 million, respectively. The average appraisal price equaled approximately \$42 million, and thus Pianin's equitable share equaled 34.4% of that amount or \$14.42 million. On April 5, 2005, Pianin sent the Alarmex's members a letter, notifying them of his resignation from Alarmex. Pianin commenced this action on April 7, 2005.

On October 11, 2005, this court severed and dismissed Pianin's first cause of action for breach of contract because Pianin failed to allege that Defendants breached the Operating Agreement by obtaining their appraisals fraudulently or in bad faith. On March 7, 2006, this court denied

Pianin's motion to reargue that decision. On March 22, 2006, Pianin filed this motion to confirm the Appraisal Price of \$14.42 million, arguing that because this court found no basis to reject the appraisal, it is appropriate to confirm the appraisal award.

Defendants oppose the motion to confirm for the following reasons: 1) although denominated a "motion to confirm," Pianin actually seeks to obtain a minimum award while he is appealing the prior decision that dismissed his first cause of action; 2) the motion is barred by the election of remedies doctrine because Pianin already elected to pursue his first cause of action that seeks to vacate the Defendants' appraisals and enforce his appraiser's determination of \$42.656 million; 3) Pianin's motion to confirm the appraisal is time barred under the one year limitation set forth in CPLR 7510 and CPLR 215(5); 4) the appraisal Pianin commissioned is a product of fraud, bias, or bad faith; and, 5) outstanding litigation issues between Pianin and Defendants render the motion premature.

Pianin argues that the motion is ripe because the appraisal average is a definite amount that was obtained pursuant to the Operating Agreement's appraisal procedures. Pianin argues that his appeal of the prior decision dismissing the first cause of action does not constitute an election of remedies barring this motion because he seeks alternative, not inconsistent relief, and both the breach of contract action and motion to confirm affirm the agreement containing the appraisal provision. Pianin contends this motion is timely because the CPLR 7510 one year limitation period relates to arbitrations and not appraisals, and even if it does apply to appraisals, he commenced this action one week after the parties' appraisers exchanged reports. Pianin asserts his appraiser exhibited neither fraud, bias, nor bad faith, and that Defendants' arguments to disaffirm Pianin's appraisal mirror Pianin's previously rejected arguments to vacate Defendants' appraisals. Pianin argues that the

outstanding litigation does not render this motion premature, but even if outstanding issues require withholding entry of judgment, the amount of the appraisal should still be confirmed.

Discussion:

The Appraisal Price of \$14.42 million is confirmed because it was arrived at according to the Operating Agreement, and Defendants have not demonstrated sufficient grounds for rejecting the amount of the appraisal award. However, entry of judgment is premature because of outstanding issues in this litigation including the grounds for Pianin's termination, and whether judgment should be entered against Spier or Alarmex.

The election of remedies doctrine does not preclude confirming the amount of the Appraisal Price. The election of remedies doctrine will bar the pursuit of alternative relief only if "a party [has] chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must also have gained an advantage, or the opposing party must have suffered some detriment." *331 East 14th St. LLC v. 331 East Corp.*, 293 A.D.2d 361 (1st Dept. 2002). The cases Defendants cite involve the pursuit of two inconsistent causes of action, one that affirms the validity of the contract and one that disaffirms the contract. *See Crossett v. Sweeney*, 144 A.D.2d 955 (4th Dept. 1988). Here, the motion to confirm the appraisal award is consistent with Pianin's first cause of action for breach of contract because in both instances, Pianin affirms the agreement providing for the appraisal. *See Judnick Realty Corp. v 32 West 32nd Street Corp.*, 61 N.Y.2d 819 (1984)(finding that causes of action for specific performance and breach of contract are consistent because both affirm the validity of the contract).

Pianin timely sought to enforce his rights under the Operating Agreement's appraisal provision. The parties exchanged appraisal reports on March 10, 2005, although it is not clear when

the average appraisal award and Pianin's share of that award was determined. Pianin commenced this action on April 7, 2005, Pianin served the motion to confirm on March 14, 2006, and he filed the motion on March 22, 2006. CPLR 7601 provides that the "court may enforce" an agreement to submit a valuation question to an appraiser "as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five." Defendants argue that the motion to confirm the appraisal was untimely based on CPLR 7510, which provides for a one-year limitations period to confirm an arbitration award, and CPLR 215(5), which imposes a one-year statute of limitations for "an action on an arbitration award."

Although an appraisal agreement may be enforced as if it were an arbitration agreement, appraisals and arbitrations are distinguishable and not subject to all of the same formalities. The distinction between arbitration and appraisal awards is important because an appraisal award "should not be subject to challenge for failure to observe the formalities suited only to arbitrators." *Penn Central Corp. v. Consolidated Rail Corp.*, 56 N.Y.2d 120, 128 (1982). Additionally, while an arbitration typically resolves the entire controversy between parties and results in confirmation and entry of judgment on the award, an "appraisal resolves only a valuation question leaving all other issues for resolution at a plenary trial." *Id.* at 127. Although *Penn Central Corp.* involved the "unusual circumstance" where the appraisal award resolved the entire dispute between the parties, the Court observed that:

there is no need to confirm the award in the typical case where valuation represents only part of a dispute or serves as a condition precedent to the exercise of other contractual rights which may also be in dispute. Indeed to require or permit a party to commence a special proceeding for the confirmation of a valuation determination when there are other issues to be resolved at a plenary trial, would only lead to additional litigation and delay, thus defeating the primary objective of the appraisal agreement.

Id. at 130.

Thus, the one year statute of limitations does not apply to Pianin's motion to confirm because confirming the appraisal award will not resolve the entire controversy between the parties, and Pianin timely commenced the underlying action.

Defendants have also not demonstrated a legal basis for challenging Pianin's appraiser's determination. Appraisers have "wide discretion as to methods of procedure and sources of information." *Grosz v. Serge Sabarsky, Inc.* 24 A.D.3d 264, 266 (1st Dept. 2005). *Rice v. Ritz Associates, Inc.*, 88 A.D.2d 513 (1st Dept. 1982). Under CPLR 7601, a dissatisfied party to an appraisal agreement has no greater right to challenge the appraisal than a dissatisfied party to an arbitration agreement. *See Penn Central Corp. v. Consolidated Rail Corp.*, 56 N.Y.2d 120, 130 (1982). The appraisal determination will be upheld in the absence of fraud, bias, or bad faith. *Liberty Fabrics, Inc. v. Corporate Properties Associates 5*, 223 A.D.2d 457 (1st Dept. 1996).

Defendants attack Stryker's methodology and procedure, and challenge the validity of the information on which he relied but make no showing of fraud or bad faith. Specifically, Defendants allege that Pianin failed to disclose to Stryker and Stryker failed to consider the ramifications of Alarmex's litigation against Pianin, Alarmex's allegations that Pianin participated in a kickback scheme, or that Pianin had a personal relationship with the buyer of one of Alarmex's key clients. Spier contends that the personal relationship was significant because Alarmex's business with that critical client depended upon it. However, Stryker spoke with Spier who did disclose the company's allegations against Pianin. Stryker had full access to information, and based his appraisal on Alarmex's financial documents and retail clothing industry trends. The facts upon which Stryker relied are documented in his report and appear to be accurate. *See Liberty Fabrics, Inc. v. Corporate*

Properties Associates 5, 223 A.D.2d 457 (1st Dept. 1996)(upholding an appraisal award and finding no basis for a fraud claim, notwithstanding allegations that a party misrepresented the condition of the property to the appraiser, where the appraiser examined the appraised property itself). Although there is a substantial difference between Pianin's and the Defendants' appraisals, the court will not substitute its judgment for that of the appraisers nor does it have a basis to question methodology, procedure, or the final determination. Appraisers have broad discretion to determine "which of the myriad factors are relevant to a particular valuation ... without interference or direction from the court absent an agreement expressly identifying such factors." *Vitale v. Friedman*, 245 A.D.2d 14 (1st Dept. 1997).

Defendants also argue that Stryker did not act as a "Certified Valuation Expert" because he allegedly did not follow Uniform Standards of Professional Appraisal Practice, and he used a market based approach rather than an earning's based approach to value Alarmex. Defendants submit an affidavit from accountant Michael Raymond ("Raymond") who examined Stryker's report but did not view Alarmex's financial documents. Raymond attests that he was not sure why Stryker used certain methods that "may have caused his valuation to be increased." Raymond's affidavit does not establish that Stryker acted fraudulently. A market based approach is a reasonable appraisal method, and, more significantly, Stryker's methods were not prohibited by the Operating Agreement. While the Operating Agreement explicitly prohibited the application of minority discounts and the consideration of isolated expenses outside the regular course of business, it did not require the appraisers to use a specific appraisal method.

Defendants' remaining arguments do not bear on the appraisal, but relate to whether entry of judgment in favor of Pianin is premature. In view of the issues remaining in litigation, entry of

judgment is stayed until further resolution of those issues.

Accordingly, it is

ORDERED that Pianin's motion to confirm the amount of the Appraisal Price equal to \$14,420,000 is granted, and it is further

ORDERED that entry of judgment is stayed until some or all of the remaining issues are resolved.

DATED: August 9, 2006

ENTER:



Helen E. Freedman, J.S.C.

FILED
AUG 11 2006
COUNTY CLERK'S OFFICE
NEW YORK