

**Pianin v Spier**

2006 NY Slip Op 30230(U)

March 7, 2006

Supreme Court, New York County

Docket Number:

Judge: Helen E. Freedman

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

PRESENT:

PART 39

Index Number : 601230/2005

PIANIN, SCOTT

vs

SPIER, WILLIAM

Sequence Number : 002

REARGUMENT/RECONSIDERATION

*C*

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAR 13 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/7/06

*HJ*  
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 IAS PART 39

-----X  
SCOTT PIANIN,

Plaintiff,

Index No. 601230/05

-against-

WILLIAM SPIER, 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 reargue a decision entered on November 30, 2005 and seeks leave to amend the First Amended Verified Complaint. In the underlying action, Pianin sues Alarmex, its members William Spier, Johnathan Spier, and Kenneth Sitomer, and its affiliate AHG Licensing, Inc. ("AHG"), alleging breach of the company's operating agreement and challenging an appraisal used to buy out Pianin's equitable interest in Alarmex. Pianin served as Alarmex's president until December 2004 when the company placed him on administrative leave. In a separate action, the parties are litigating the circumstances leading up to his placement on administrative leave and his eventual resignation.

For the foregoing reasons, the motion to reargue is denied except that the conditional dismissal of the third cause of action is modified and reinstated, and the motion seeking leave to amend the complaint is denied.

*Background:*

Alarmex designs, manufactures, markets, and sells clothing, predominantly sportswear. Its

operations commenced on October 31, 2000 when William Spier acquired on behalf of Alarmex certain assets of Periscope Sportswear, another clothing company. At that time Pianin served as the president of Periscope Sportswear. William Spier invited Pianin to join Alarmex as a minority member when he acquired the assets. Pursuant to the Alarmex Holdings, L.L.C. Operating Agreement (the "Operating Agreement"), Pianin initially obtained a 25% interest in Alarmex in exchange for a capital contribution of \$500,000 and an additional 5% in exchange for his contribution of certain services to Alarmex. In 2002, Pianin exercised his right and option under the Operating Agreement, making his membership interest, after a 4.4% adjustment, 34.4%. Pianin also owns a 34.4% interest in AHG, the licensor of Alarmex's brands. (Alarmex and AHG are hereinafter referred to collectively as the Company.)

On December 23, 2003 Pianin assigned 10% of his equitable interest in the Company to the "Pianin 2003 Alaska Trust," with "The Alaska Trust Company" (the "Alaska Trust") as trustee. On December 12, 2005, the Alaska Trust reassigned that interest back to Pianin.

After new members joined Alarmex, the Operating Agreement was amended to reflect changes in the corporate structure. Section 8 of the Alarmex Holdings L.L.C. Second Amended and Restated Operating Agreement ("Amended Agreement") provided for a "Put Option" that Pianin could exercise upon the termination of his employment. Under the Amended Agreement, the other members could buy out Pianin's equitable interest in the Company in an amount called the "Put Price," which equaled Pianin's percentage of the "Appraisal Price" of the Company.

Section 1.1 of the Amended Agreement defined the Appraisal Price as the fair market value of the Company without minority discounts or control premiums. In the event that the corporate members could not agree on an appraisal price, each member would select an appraiser. Under the

Amended Agreement, the appraisers' valuation was "final, binding and conclusive upon all parties."

Section 8.3 of the Amended Agreement provided for Spier to pay Pianin the portion of the Put Price that required an appraisal 10 days after the determination of the Appraisal Price. In addition, the agreement required Pianin to assign his entire interest subject to the Put Option to Spier and relinquish his entire membership interest in the Company.

On December 22, 2004, Pianin exercised his Put Option and on March 10, 2005, the parties exchanged appraisal reports. Pianin's, William Spier's, Jonathan Spier's, and 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 the Put Price, or Pianin's equitable share, equaled \$14,420,000.

*Claims:*

Pianin's First Amended Verified Complaint sought damages in the amount of \$42,656,000, equal to Pianin's equitable interest according to his appraiser's valuation from the Spiers and Sitomers for an alleged breach of the appraisal provisions of the Amended Agreement (first cause of action), damages from Alarmex for failure to pay bonus payments, distributions and reimbursement for business expenses allegedly owed under the Amended Agreement (second cause of action), and a declaration that Pianin remains the lawful and rightful owner of 34.4% of Alarmex and is entitled to all rights as such until he is paid the full Put Price (third cause of action). Defendants sought to dismiss the first and third causes of action contending that the complaint failed to state a claim, documentary evidence provided a complete defense, and Pianin failed to include a necessary party, The Alaska Trust.

In an order entered on November 30, 2005, this court severed and dismissed the first cause

of action because it failed to allege the requisite fraud, bad faith, or bias needed to overturn an appraisal. Additionally, the November 30 order dismissed the third cause of action unless Pianin joined the Alaska Trust as a party to the action within 10 days after he was served with a Notice of Entry and Order.

Pianin now moves to reargue, contending that the court used a standard that was too deferential to the appraisers' determinations. Pianin also seeks leave to amend the complaint to add a breach of contract action against William and Jonathan Spiers for failure to pay him the Put Price within 10 days of the appraisal, a claim against the defendants for breach of the implied covenant of good faith, and a fraud claim against the defendants and the appraisers as additional defendants and alleges that the defendants and appraisers acted in bad faith and with bias. Pianin also moves to modify the November 30 order regarding the third cause of action because on December 12, 2005 the Trust reassigned its interest to Pianin and thus no longer constitutes a necessary party in this action.

The Defendants oppose the motion to reargue and amend the complaint, contending that the allegations in the proposed second amended complaint are speculative, and the claims are duplicative of the already dismissed claims and or they fail to state a claim. Defendants do not oppose modifying the order in light of the Alaska Trust's reassignment of its 10% interest back to Pianin.

*Discussion:*

Pianin's motion to reargue should be denied. As stated in the November 30 order, a dissatisfied party to an appraisal agreement has no greater right to challenge an appraisal than a dissatisfied party in an arbitration proceeding. *In re Penn C. Corp.*, 56 N.Y.2d 120, 130 (1982). The appraisal should be upheld in the absence of bias, bad faith, or fraud. This deferential standard is

not limited to special proceedings brought under CPLR 7601. *See Rice v. Ritz Associates*, 88 A.D.2d 513 (1982)(upholding the deferential standard applied to an appraisal made pursuant to the parties' contract where the action was not brought under CPLR 7601). The purpose of an appraisal provision is to avoid court intervention in valuation disputes, especially in a case such as this one where the parties agreed in advance that the appraisal would be final and binding on all parties and provided for an average of appraisal valuations in order to account for disparate results.

The portion of the November 30 order related to the third cause of action is hereby modified. Pianin's First Amended Verified Complaint's third cause of action sought a declaration that until Pianin is paid the full Put Price he is still the lawful and rightful owner of 34.4% of Alarmex and is entitled to all rights as such. Because the Trust has reassigned its interest to Pianin, it is no longer an interested party and the third cause of action remains.

Pianin next seeks leave to amend the complaint. Although leave to amend complaints should be liberally granted, in order to conserve judicial resources, it is necessary to examine the merits of the proposed pleading and deny leave to amend when the proposed pleading does not state a cause of action. *See Konrad v. 136 East 64<sup>th</sup> Street Corp.*, 246 A.D.2d 324 (1<sup>st</sup> Dept. 1998).

Pianin seeks to amend the complaint to add a breach of contract claim against the Spier defendants for their failure to pay Pianin the Put Price of \$14.42 million. The November 30 order denied Pianin's cross-motion directing defendants to put money in escrow under CPLR 2701 because CPLR 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. Additionally, the defendants asserted counterclaims against Pianin and do not concede they owe him \$14.42 million. Now, Pianin seeks the \$14.42 million in damages by adding a breach of contract action

\* 7 ]

against the Spier defendants for failing to pay him that amount within 10 days of the appraisal. Pianin has not explained why he did not include this breach of contract action in the original complaint. The defendants argue that this proposed action fails to state a claim because under CPLR 7601 courts should enforce appraisals like arbitrations under Article 75 of the CPLR, and arbitrations are unenforceable until one party moves to vacate, modify, or confirm the award. Although the parties may voluntarily satisfy the award and avoid the need for a judgment, in order to obtain the enforcement benefits of a judgment, the winner in an arbitration should apply to the court for a confirmation of the award. *McKinneys Consolidated Law of NY*, Practice Commentaries CPLR 7507:2 (1998).

Here, the Put Price is in dispute and none of the parties have moved to modify, vacate, or confirm the award. Pianin may not enforce the appraisal price before it is entered as a judgment or the parties agree that the defendants owe Pianin \$14.42 million in exchange for Pianin's interest in the Company.

Pianin seeks to add a claim against the defendants for breach of the implied covenant of good faith and fair dealing, alleging that defendants failed to fulfill their contractual obligations in good faith. The breach of the duty of good faith claim is duplicative of the breach of contract action that the November 30 order dismissed because the defendants do not owe a duty to Pianin separate from their contractual obligations. *See New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 319-320 (1995). *See also Apfel v. Prudential-Bache Securities Inc.*, 183 A.D.2d 439 (1<sup>st</sup> Dept. 1992). Pianin has already acknowledged this claim is duplicative of his earlier breach of contract claim in Paragraph 47 of the First Amended Verified Complaint when he stated that "the Spier Defendants and Sitomer breached the Operating Agreement and Amendment and violated the implied duty of

good faith and fair dealing implied within every agreement.”

Finally, Pianin seeks to add claim of fraud against the current defendants and the defendants’ appraisers. The elements of a fraud cause of action include a misrepresentation of a material existing fact, falsity, scienter, deception and injury. *Friedman v. Anderson*, 23 A.D.3d 163, 166 (1<sup>st</sup> Dept. 2005).

In order to support his new fraud claim, Pianin alleges that the defendants and appraisers exercised bias and bad faith when they had “discussions” where the defendants directed their appraisers to undervalue the company, that the appraisers then applied a loss of marketability discount that considered pending litigation risks, and that the appraisers relied on information available after the date Pianin exercised his Put Option. Pianin’s allegations cannot support a fraud cause of action because they merely amount to appraisers’ information gathering techniques. Because shares of a closely held corporation are not traded on the public market, appraisers typically consider various factors when valuing closely held corporations. *See In the Matter of Lawrence R. Blake v. Blake Agency, Inc.*, 107 A.D.2d 139 (2<sup>nd</sup> Dept. 1985). Interviewing management in order to assess the corporation’s value does not on its own evidence bias or bad faith. Pianin’s own appraiser stated in his report that he spoke with management and requested documents from management to assess the value of company.

Loss of marketability discounts are also accepted practice in valuing closely held corporations. In *Matter of Blake v. Blake Agency, Inc.*, 107 A.D.2d 139 (2<sup>nd</sup> Dept. 1985), the court found that “a discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market.” The appraisers’ loss of marketability assessment did not include a minority discount for Pianin’s minority shareholder

interest, and that was the only explicitly prohibited discount under the Amended Agreement's Appraisal Price provision. All of the appraisers valued the company as a whole and then calculated Pianin's percentage interest, rather than valuing the corporation, calculating Pianin's share, and then applying a further discount because of his minority shareholder status. Additionally, the general rule that "...appraisals are akin to statements of opinion which generally are not actionable" *Stuart v. Tomasino*, 148 A.D.2d 370 (1<sup>st</sup> Dept. 1989), should apply in this case where the appraisers considered various sources and methods, rendering their appraisals highly subjective.

Pianin also contends the appraisers relied on improper data. The appraisers' reports indicated that they relied on financial data corresponding with the fiscal quarters ending December 2004, the time when Pianin exercised his Put Option. The appraisers' reports also disclose all of the financial data, applicable industry trends, and relevant risks that could impact the company's fiscal future. Pianin does not allege that the actual data listed in the reports contained falsified information. He merely disputes the methods, procedure, and assumptions on which the appraisers relied, and appraisers have wide discretion in what methods to use and sources of information to rely on. *See Rice v. Ritz Associates*, 88 A.D.2d 513, *aff'd* 58 N.Y.2d 923 (1983).

Pianin also fails to plead the causation element of fraud. Even accepting his allegations that the loss of marketability discount was improper, the defendants' appraisals were below his appraiser's valuations without applying the discount. Additionally, although the appraisers spoke with management, they also heavily relied on industry trends and financial documents when valuing the company. This information is listed in their reports and their accuracy is not disputed. Absent more specific allegations of bias, bad faith or fraudulent intent, the fraud claim cannot stand against the defendants, and Pianin fails to allege sufficient facts to add the appraisers as defendants.

Accordingly, it is

ORDERED that Pianin's motion to reargue is denied, and it is further

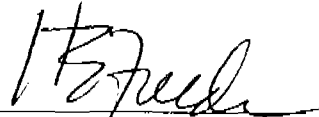
ORDERED that November 30, 2006 order is modified to the extent that the third cause of action in First Amended Complaint is reinstated, and it is further

ORDERED that Pianin's motion seeking leave to amend the complaint is denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: March 7, 2006

ENTER:

  
Helen E. Freedman, J.S.C.

**FILED**  
MAR 13 2006  
COUNTY CLERK'S OFFICE  
NEW YORK