

Levakis v 60-15 Main St. Enters., Corp.

2007 NY Slip Op 31342(U)

May 15, 2007

Supreme Court, Queens County

Docket Number: 0025192/2004

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

VASSILIOS S. LEVAKIS

Plaintiff,

-against-

60-15 MAIN STREET ENTERPRISES, CORP.
d/b/a THE PALACE DINER

Defendant

Index No: 25192/04

Motion Date: 3/28/07

Motion Cal. No.: 20

Motion Seq. No.: 4

Before addressing the motion, the court, sue sponte, amends the prior Order, dated June 6, 2006, which granted the motion of Mary Levakis to intervene as a party defendant to the extent of adding that the summons and complaint filed in this action is amended by adding thereto MARY LEVAKIS as a party defendant and the clerk shall amend the records accordingly..

Accordingly, the caption of the action as amended shall be as follows.

VASSILIOS S. LEVAKIS

Plaintiff,

-against-

60-15 MAIN STREET ENTERPRISES, CORP.
d/b/a THE PALACE DINER and
MARY LEVAKIS

Defendant

Index No: 25192/04

The following papers numbered 1 to 13 read on this motion by defendant, 60-15 MAIN STREET ENTERPRISES, CORP., for summary judgment directing that the plaintiff comply with the stock purchase contract.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 5
Answering Affidavits-Exhibits.....	6 - 8
Answering Affidavits-Exhibits.....	9 - 10
Replying Affidavits.....	11 - 13

Upon the foregoing papers it is ordered that this motion is determined as follows.

In view of the issues raised by the various expert valuations, the fair value of the plaintiff's interest in the defendant corporation shall be determined by a referee to be appointed to "hear and report". The parties are directed to appear for a conference on Friday, June 1, 2007 at 10:00 a.m. in courtroom 46 of the Court located at 88-11 Sutphin Blvd. Jamaica, N.Y.

The plaintiff, the owner of a one third interest in the corporate defendant d/b/a as the Palace Diner (hereinafter the corporation), commenced this action on November 8, 2004 to, inter alia, compel the corporation to purchase his interest in accordance with the Shareholders Agreement. The action was subsequently converted to an action for judicial dissolution pursuant to Business Corporation Law (BCL) § 1104-a by the stipulation of the parties dated March 2, 2005. The corporation then served a Notice of Election, dated April 28, 2005 (BCL § 1118) to purchase the plaintiff's shares in the corporation.

Mary Levakis, the plaintiff's former wife, moved to intervene as a defendant, and the motion was granted by Order dated June 6, 2006. During the pendency of the action and before granting intervention, the plaintiff and the corporation entered into a series of stipulations, referred to as the "Stock Purchase Contract", wherein they designated the experts to value the diner business and the corporation's real property, agreed to be bound by the experts' determinations and set out a schedule for the payment of the purchase price for plaintiff's share.

The defendant now moves for summary judgment directing the plaintiff to complete the sale of his interest in the corporation in accordance with the terms of the "Stock Purchase Contract" for amount the experts determined to be the fair market value of the plaintiff's interest. The defendant, intervener, objects to granting summary judgment essentially on the grounds that the experts retained by the plaintiff and the corporation in violation of this court's TRO, have grossly undervalued the diner

business and the real property of the corporation.

When a corporation elects to purchase the minority shareholder's shares, and the parties are unable to agree upon the fair market value of the shares the court may determine the fair market value of the shares (see BCL §1118[b]). Valuation is measured as of the day preceding the date on which the petition pursuant to BCL § 1104-a was filed (BCL §1118[b]) which in this case is November 8, 2004.

The plaintiff and the corporation retained Heidi F. Muckier of HFM Valuation and Consulting Services, Inc. to value the diner business. Using the what she calls the "Market Approach", and applying the market multiple obtained from Pratt's Stats and Biz Comps. to the corporation's 2004 gross income as determined by the New York State Dept. of Taxation and Finance in the sales tax audit, estimated that the 100% value of the business is \$764,746.00 and the plaintiff's 1/3rd share is \$252,366.00. Timothy Chen, of A Team Realty, Real Estate Appraisers & Consultants, was hired to appraise the real property. Using the Sales Comparison Approach and Income Approach he found that the estimated value of the real property, as of February 1, 2005, is \$2,860,000.

In support of her claim of gross undervaluation, Mrs. Levakis submitted the valuation reports of her expert accountant, David S. Marcus of Marcus & Company, LLP and expert real estate appraiser Stephen E. Gutleber, Jr. of Silver Bay Appraiser and Consultants, Inc. she retained in the context of the matrimonial action. Mr. Marcus' valuation also involved the application of a "valuation multiple" obtained from Pratt's Stats to the corporation's normalized 2002 "net income" and to an enhanced "net income" for the same year arriving at a 100% value of \$260,000 and \$2,958,767, respectively. Plaintiff's 1/3rd share was valued at \$87,000 and \$986,000 respectively. Mr. Gutleber, using a Sales Comparison Approach and Cost Approach found that the estimated value of the real property is \$4,600,000.

Insofar as the court is able to determine, the basis for the significant discrepancy in value of the diner business is due largely to the "market multiple" used by the accountants. Nowhere in their reports, however, do they explain the choice of the multiple and its significance. With respect to the real property, the discrepancy seems to be based upon the choice of comparables. These discrepancies cannot be resolved on the papers alone.

The court notes that Mr. Marcus also calculated the value of the business using the method contained in the Shareholders

Agreement. In so doing he found, using the reported gross income and an enhanced gross income for 2002, the value to be \$298,000 and 781,000 respectively. However, the method set forth in the Shareholders Agreement is not triggered by this action (see Matter of Pace Photographers, 71 NY2d 737 [1988]; Johnsen v. ACP Distribution, Inc., 31 AD3d 172 [2006]).

Mrs. Levakis' claims that the motion for summary judgment should be denied because the "Stock Purchase Agreement" was entered into in violation of the court's TRO is unpersuasive. The TRO was imposed to protect her pecuniary interest in the corporation and the conduct alleged to have violated the TRO did not impair, diminish or compromise her interest.

Dated: May 15, 2007
D# 31

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J.S.C.