

<b>Matter of Schwimmer</b>
2007 NY Slip Op 34385(U)
January 3, 2007
Supreme Court, Onondaga County
Docket Number: 2006-5892
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme  
Court of the State of New York,  
held in and for the County of  
Onondaga on October 31, 2006.

**PRESENT: HON. DONALD A. GREENWOOD**  
Supreme Court Justice

**STATE OF NEW YORK**  
**SUPREME COURT COUNTY OF ONONDAGA**

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**In the Matter of the Application of**

**PHILIPPE R. SCHWIMMER**

**Individually and as holder of fifty percent of the  
outstanding voting shares of El-Roh Realty Corp.,**

**Petitioner,**

**For the Dissolution of EL-ROH REALTY CORP.,  
a corporation organized under the laws of the  
State of New York, pursuant to Article 11 of the  
Business Corporation Law.**

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**DECISION AND ORDER  
ON MOTION**

**Index No.: 2006-5892  
RJI No.: 33-06-3585**

**APPEARANCES: JAMES H. CHERNEY, ESQ., OF LATHAM & WATKINS, LLP  
CARTER H. STRICKLAND, ESQ., OF MACKENZIE HUGHES, LLP  
For Petitioner**

**WILLIAM G. BAUER, ESQ. and GORDON FORTH, ESQ., OF WOODS  
OVIATT GILMAN, LLP  
For Respondents**

**ROBERT BALDWIN, ESQ., OF BALDWIN & SUTPHEN, LLP  
As Trustee of the Seymour Roth Living Trust**

**PHILIP BOUSQUET, ESQ., OF GREEN & SEIFTER , PLLC  
Respondent El-Roh Realty Corp.**

The petition in the instant matter was brought pursuant to Business Corporation Law §

1104(a)(1) and (3) and an Order to Show Cause was signed by the Supreme Court (Edward D. Carni, J.S.C.) on September 7, 2006. The petitioner seeks judicial dissolution of El-Roh Realty Corp. (hereinafter El-Roh) on the ground that the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained, and that there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders. *See, BCL §1104(a)(1)(3)*. The petitioner is a 50% shareholder in El-Roh and respondent Joan Roth owns the other 50%. Prior to their ownership, ownership was held by Lewis Roth, who died in November of 2005 and Seymour Roth, who died in September of 2003. Lewis passed his shares to his daughter, Joan, and Seymour passed his shares to his daughter, the petitioner. In addition to the Class A voting stock, various parties hold nonvoting common stock in the corporation, including the Estate of Lewis Roth (Lois Roth, Executrix), the petitioner and Robert F. Baldwin, Esq., as Trustee of the Seymour Roth Living Trust. There are four directors of the corporation: the petitioner, her husband, Jeremy Schwimmer, respondent Joan Roth and Lois Roth. The primary asset of the corporation is the 100% ownership of the stock of Roth Steel Corporation, a corporation engaged in the business of steel and metal recycling. The petition alleges that since the death of Seymour and Lewis, the board of directors has been deadlocked on fundamental issues of significance to the operation of the corporation, particularly with regard to the management and operation of Roth Steel.

The respondents interposed a verified answer and objections in point of law. In their answer, the respondents raise the affirmative defenses that the petition fails to state a cause of action, and that the holders of all issued and outstanding shares of the capital stock of El-Roh are

subject to a Shareholder's Agreement, dated July 13, 1995, which contains provisions that preclude the maintenance of this proceeding. Respondents have also interposed a counterclaim, which alleges that by commencing the instant proceeding the petitioner has triggered the sale of her shares of the capital stock in El-Roh under terms of paragraph 3 (c) and (d) of the Shareholder Agreement, entitling El-Roh or the respondents to purchase the petitioner's shares pursuant to the terms and conditions contained in paragraphs 6 and 7 of the subject agreement. The counterclaim further alleges that respondents are entitled to specific performance of the Shareholder's Agreement and the petitioner is required to offer her shares for sale to El-Roh and remaining non-petitioning shareholders. In addition, the respondents dispute that any deadlock exists between the shareholders. Respondents have also moved to stay the dissolution proceedings pursuant to CPLR §2201 to permit the corporation and non-petitioning shareholders to enforce their rights pursuant to the agreement. At issue, therefore, is whether the language of the Shareholder's Agreement precludes the petitioner from the relief of judicial dissolution.

Paragraph 2 of the agreement addresses the intent of the parties and provides that “[t]he parties believe that it is in their mutual interest to preserve the closely held nature of the corporation. The shareholders desire to grant to each other and to the corporation the right, and the shareholders and the corporation desire to acquire the right, to purchase shares of capital stock under the terms and conditions of this agreement.” Paragraphs 3(c) and (d) address the

issue of a “lifetime transfer”. Paragraph 3(c) provides that

No shareholder shall hereafter affect *any other form of lifetime transfer* of any shares of capital stock, *including without limitation*, transfers that are voluntary, involuntary, by operation of law or with or without valuable consideration, except in accordance with the subparagraphs (I) through (iv) of this paragraph 3(c). In the event of any such purported or attempted transfer made in violation of subparagraphs (i) through (iv)...such shareholder shall automatically be deemed to have offered for sale in accordance with the provisions of paragraph 3(d) below all of the shares of

capital stock then owned by such shareholder.  
Shareholders' Agreement, paragraph 3(c)(emphasis added).

Subparagraphs (i) through (iv) provide for a right of first refusal to the remaining shareholders and a clearly defined procedure by which the shares are to be offered. Subparagraph (i) provides that if the shareholder effectuates a lifetime transfer of any or all portion of his or her shares, the shareholder is required to promptly send written notice to the corporation stating the number of shares offered for sale or transfer, the names and addresses of the proposed transferee and the terms of the proposed transfer and that "the shareholder shall automatically be deemed to have offered to sell such shares of capital stock to the corporation upon the terms and conditions as set forth in the notice." The corporation then has 45 days from the date of receipt of the notice during which to accept or reject the offer. It further provides that "in no event shall the corporation be entitled to purchase less than all of the shares of the capital stock so offered." The corporation is then required to communicate its acceptance or rejection to the offer to the shareholder in writing and if the corporation fails to accept or reject the offer within the time period, it is deemed to have rejected the offer with respect to all of the shares offered under this subparagraph. Subparagraph (ii) provides that if the corporation rejects the offer to sell made by the offering shareholder, each non-offering shareholder has the right to purchase a fraction of the shares of capital stock offered for sale equal to the number of shares of the class of capital stock then owned by that shareholder divided by the total number of issued and outstanding shares of such class of capital stock of the corporation. It further provides that if all of the shares of any class of capital stock offered for sale are not purchased by members of the same class of capital stock, then the non-offering shareholders of the voting common stock have the right to purchase a fraction of the remaining shares offered for sale equal to the number

of shares of voting common stock then owned by that shareholder divided by the total number of issued and outstanding shares of voting common stock. This subparagraph also provides for the 45 days for the non-offering shareholders to indicate their acceptance or rejection. Subparagraph (iii) applies in the event that neither the corporation nor the other shareholders purchase the offered shares of stock. It provides that the shares may be transferred, conveyed or otherwise disposed of the offering shareholder to a proposed transferee on terms and conditions set forth in the shareholder's notice, but only during the 90 day period following the final rejection by the corporation and other shareholders. Upon expiration of the 90 day period, the shares of capital stock made by transferred, conveyed or otherwise disposed of only after the offering shareholder again follows the aforementioned procedure. Subparagraph (iv) provides that in all cases the shares of stock sold, assigned or transferred continue to be subject of the agreement. Paragraph 3(d) states that

In the event a Shareholder shall hereafter do or attempt to do any of the acts proscribed in subparagraphs(a), (b) or (c)....such...transfer shall automatically be null and void and of no force of effect; the non-Shareholder party to the Prohibited Transfer shall acquire no rights with respect to such Capital Stock; and if the prohibited transfer is a Prohibited Sale... such Shareholder shall be deemed to have offered to sell each and all of his shares of Capital Stock upon the terms and conditions of paragraphs 6 and 7 of this Agreement.

Shareholders' Agreement, Paragraph 3(d)(i), (ii) and (iii) .

Paragraph 6 addresses the purchase price to be paid and the method to calculate said purchase price. With respect to preferred stock, the purchase price is to be at a par value plus any accumulated but unpaid dividends thereon as of the closing of the sale. With respect to common stock, the purchase price is to be determined each year by mutual agreement of the shareholders of all of the voting common stock and is to be made within 30 days after the corporation has received financial statements from the corporation's accountants. The purchase

price as determined is to be set forth in a "Certificate of Value" and if no certificate of value is executed, or if the date of the most recent certificate is over 12 months prior to the date of the transfer, the purchase price and all component parts thereof are to be calculated by the independent certified public accountants then engaged by the corporation; with such calculations being "conclusively binding upon the parties unless a party challenging the calculations demonstrates by clear and convincing evidence that the calculations were erroneous by reason of fraud or other gross error." Subparagraph (b) states that the parties acknowledge the aforementioned procedure is "fair and reasonable and the result of arms-length and good faith negotiations. Accordingly, except as otherwise provided herein such procedure is to be used in all circumstances requiring the determination of the value of a shareholder's shares... including, but not limited to, any determination of value in connection with a proceeding instituted pursuant to Section 1104-a of the New York Business Corporation Law." Paragraph 7 provides the terms of payment of the purchase price. In addition, paragraph 17 provides that the right to purchase can be enforced by specific performance. It specifically provides that

The parties acknowledge that they will be irreparably harmed in the event any of the provisions of this agreement are violated and that the damages that may result therefrom will be difficult, if not impossible, to calculate should any dispute arise concerning any matter provided for in this agreement the parties agree that an injunction may be issued restraining any of the foregoing events pending resolution of the controversy. In the event of any controversy concerning any right or obligation of a party such a right or obligation shall be enforceable in a court of equity by a decree of specific performance.

Shareholders' Agreement, Paragraph 17 .

On May 9, 2003, Lewis and Seymour Roth executed an agreement with respect to the amendment of the Shareholders' Agreement.<sup>1</sup> That amendment, however, did not materially effect the terms of the original Shareholder's Agreement.<sup>2</sup>

Where the intention of the parties' is determinable by a written agreement, it is a question of law which may be resolved by the court. *See, Keith v. Houck*, 88 AD2d 763 (4<sup>th</sup> Dept. 1982); *see also, Mallod Construction Corp. v. County Fed. Savings & Loan Association*, 32 NY2d 285 (1973). The court's role is limited to interpretation and enforcement of the terms agreed to by the parties and does not include the rewriting of their contract. *See, Salvano v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173 (1995). These principles of contract interpretation are applicable to corporate affairs and shareholder agreements. *See, Ronnen v. Ajax Electric Motor Corp.*, 88 NY2d 582 (1996). Parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation or violative of public policy. *See, 21 NY Jur. 2d, Contracts* §137, 141. An agreement is not necessarily against public policy because it waives a constitutional or statutory right. *See, Matter of Brooklyn Union Gas Co. v. City of New York*, 83 AD2d 921 (1<sup>st</sup> Dept. 1981).

This Court finds that based upon the clear and unambiguous language of the Shareholders' Agreement, the petitioner's commencement of the instant proceeding triggered the agreement's buyout provision. *See, Doniger v. Rye Psychiatric Hospital Center, Inc.*, 122 AD2d 873 (2d Dept. 1986). In *Doniger*, the court found that the agreement was clear and unambiguous and that the language that the shares must be offered following "any proposed passage or disposition of shares whatsoever *including but not limited to*...sale, delivery, assignment, gift, exchange, transfer [or] distribution" negated any inference that the parties intended to exclude any possible method whereby the ownership interest would be affected including a judicial dissolution proceeding. *Id.* The court held that the words "including but not limited to" were illustrative only and did not limit the broad scope of the terms employed. *See, id.* Interpreting the language

broadly, the court found that the commencement of a dissolution proceeding was a triggering event for the application of the buyout provisions of the agreement. *See, id.* This finding was predicated upon the premise that “[t]he intent of the parties to a contract is presumably expressed by the natural and ordinary meaning of the language employed by them, and such meaning cannot be prevented or destroyed by the courts through construction...to now find that the parties did not intend to consider a proceeding for judicial dissolution as one of the means by which the buyout provisions would be triggered would be to destroy the fair meaning of their words.” *Id.* The First Department recently relied on *Doniger* to reach a similar conclusion. *See, In re Linda B. Johnsen v. ACP Distribution, Inc.*, 31 AD3d 172 (1<sup>st</sup> Dept. 2006). There, the court reasoned that the parties had chosen expansive language in their shareholders’ agreement, which included “in any matter whatsoever” in defining the circumstances that would trigger a sale of shares under the terms of this applicable shareholder’s agreement. *See, id.* There, the court determined that the commencement of an involuntary dissolution proceeding constituted “otherwise disposing of stock in any manner whatsoever.” *See, id.* The court found that the facts fell “squarely within the holding of matter of *Doniger*” and that “in *Doniger* the parties used the phrase ‘including but not limited to.’” Here, the parties chose the expansive language “in any manner whatsoever” in defining the circumstances that would trigger a sale of shares under the terms of the stockholder’s agreement. In both cases, the parties clearly intended to cover the broadest spectrum of events that would trigger the buyout provisions of their agreement. Likewise, in the case at bar, the language employed in the subject Shareholders’ Agreement clearly intended to cover the broadest spectrum of events triggering the buyout provisions of the agreement. As such, it negates any inference that the parties intended to exclude any possible method whereby their ownership interests would be effected; the parties intent of the use of the

language in section 3(c), “any form of lifetime transfer of any shares and, including, without limitation...” was clearly designed to cover all possibilities. The commencement of the instant proceeding and voluntary dissolution by the petitioner has, therefore, triggered the buyout provisions of the Shareholder’s Agreement.

The petitioner’s position that *Doniger* is no longer good law based upon the Second Department’s subsequent decision in *Schimel v. Burkun* is erroneous and ignores the most recent decision on this issue by the First Department in *Johnsen, supra*. See, *Schimel v. Burkun*, 264 AD2d 725 (2d Dept. 1999). In *Schimel*, a specific provision in the applicable agreement a complete and absolute prohibition on dissolution proceedings. See, *id*. The Second Department specifically referenced its prior decision and acknowledged that a shareholder of a closely held corporation could, in fact, enter an agreement as to how dissolution might be affected. See, *id*, citing *In the Matter of the Dissolution of Validation Review Associates, Inc.*, 223 AD2d 134 (2d Dept. 1996). The *Schimel* case addresses only the issue of an absolute prohibition on dissolution and expressly acknowledges the power of shareholders to employ terms to prevent a forced sale of the company. In the present matter, there is no prohibition with respect to a dissolution proceeding. If the right of first refusal is not elected by the non-offering shareholders, dissolution is available. The petitioner’s offering of the self-serving affidavit of Robert Baldwin, Esq. with respect to the original intent of the parties at the time the Shareholder’s Agreement was drafted is not persuasive. Parol evidence is inadmissible absent ambiguity in a contract, which does not exist here. See, *767 3<sup>rd</sup> Avenue, LLC v. Orix Capital Markets, LLC*, 26 AD3d 216 (1<sup>st</sup> Dept. 2006). In any event, it is clear that the Shareholder’s Agreement does not contain a blanket prohibition against judicial dissolution<sup>3</sup>, but only a requirement that a

procedure for a right of first refusal be followed and then the completion of a valuation procedure through a "Certificate of Value" or, in the alternative, by independent certified public accountants engaged by the corporation to determine fair market value.

Based upon the foregoing, the petition is dismissed and the respondents' counterclaim remains. The respondents' motion for stay pursuant to CPLR §2201 is now moot. Respondents' subsequently filed Order to Show Cause<sup>4</sup> in support of their motion for summary judgment on the counterclaim and the petitioner's previously filed opposition thereto is scheduled to be heard on January 23, 2007 at 10:00 a.m. The parties must submit any amendments to their papers based on this Decision and Order by January 12, 2007. Any additional answering papers are due by January 17, 2007 and replies must be served and filed by January 19, 2007.

**NOW**, therefore, for the foregoing reasons, it is

**ORDERED**, that the petition is dismissed, and it is further

**ORDERED**, that respondents' motions for a stay of this proceeding is now moot, and it is further

**ORDERED**, that the respondents' motion for summary judgment on their counterclaim is scheduled as set forth above.

**ENTER**

**Dated: January 3, 2007**  
**Syracuse, New York**

**DONALD A. GREENWOOD**  
**Supreme Court Justice**

<sup>1</sup> That letter agreement also addressed the amendment of the Roth Steel Corporation Shareholder's Agreement, dated July 13, 1995.

<sup>2</sup> The amendment concerned paragraphs 4, 5, 7 and 8 of the original Shareholder's Agreement concern the continuity of the corporation upon Lewis and Seymour Roth's deaths. However, the waiver and release of rights by Lewis and Seymour in El-Roh with respect to paragraph 7 does not materially effect the discussion here, despite Petitioner's contention. Petitioner does not assert that paragraph 3 of the agreement, which triggers the respondent's rights in this proceeding, was rescinded. That paragraph provides specifically that the terms of payment under paragraph 7 will apply to the circumstances triggered by paragraph 3. There is no evidence in the record that the parties rescinded or changed paragraph 3 pursuant to this amendment.

<sup>3</sup> In fact, paragraph 6(b) discussed circumstances where Business Corporation Law §1104-a is utilized, where there is the allegation that judicial dissolution is required under special circumstances.

<sup>4</sup> **The Order to Show Cause was presented to the Court, but never signed.**