

<b>Matter of Schwimmer</b>
2007 NY Slip Op 34386(U)
February 15, 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 January 23, 2007.

**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.**

This Court issued a Decision and Order on January 3, 2003, wherein it dismissed the

petition in the instant proceeding. Thereafter, petitioner moved to reargue the motion pursuant to CPLR §2221(d) and the respondent's summary judgment motion on their counterclaim was scheduled as well.<sup>1</sup>

With respect to the petitioner's motion to reargue, the law is well settled that such a motion may be granted only upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision. *See, Andrea v. DeNemours & Co.*, 289 AD2d 1039 (4<sup>th</sup> Dept. 2001). The majority of the petitioner's argument in support of her motion to reargue concerns her position as to why the filing of the petition for dissolution did not trigger the Shareholder's Agreement. This matter has already been determined by the Court in its previous Decision and Order by finding that the subject petition did, in fact, trigger the buyout provisions of the Agreement. A motion to reargue is not a second chance for an unsuccessful party to advance the same arguments that it has already failed upon. *See, Foley v. Roche*, 68 AD2d 558 (1<sup>st</sup> Dept. 1979). As such, the motion to reargue with respect to those grounds is denied.

The petitioner's argument is likewise unpersuasive with respect to her remaining contentions. Petitioner first argues that the dismissal of the subject petition was improper since the respondents did not seek such relief and instead sought a stay of the proceeding. Although respondents thereafter moved for a stay of the proceeding, the respondents in their verified answer and objections of point an law dated October 12, 2006, specifically sought as relief the dismissal of the petition in its entirety. As such, that determination by the Court was proper. Inasmuch as the petitioner has failed to establish that this Court misapprehended the law or the facts in dismissing the petition, the motion is denied. *See, Barrett v. Jeannot*, 18 AD3d 679 (2d

Dept. 2005).

The respondents have moved for summary judgment with respect to their counterclaim contained in their verified answer and objections in point of law, which seeks specific performance under paragraph 17 of the subject Shareholder's Agreement. Paragraph 17 of the Agreement to which the petitioner was a signatory 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 right or obligation shall be enforceable in a court of equity by decree of specific performance. Any such remedy, however, shall be cumulative and not exclusive and shall be in addition to any other remedies which the parties hereto may have.

*Shareholder's Agreement, paragraph 17.*

This Court has determined in its previous Decision and Order that both the language of the Shareholder's Agreement and the parties' intent in executing same is both clear and unambiguous. Since it has been determined that the filing of the subject petition triggered the buyout provisions of the Agreement, the company has the immediate right to purchase the petitioner's stock pursuant to paragraph 3(d)(iii)(A). If the company fails to act within 90 days, then the non-petitioning shareholders have the right to purchase petitioner's shares within 45 days, pursuant to paragraph 3(d)(iii)(B). The purchase rights can only be exercised if the purchase right for petitioner's stock is established.

Paragraph 6 of the Shareholder's Agreement provides that the parties would agree to the purchase price by executing a Certificate of Value which would include a price and be attached to the Agreement. If no Certificate of Value is executed or if the date of the most recent

certificate is more than 12 months prior to the date of the event giving rise to the purchase rights, the purchase price is to be calculated by the independent certified public accountant then engaged by the company as of the last day of the month immediately preceding the event giving rise to the purchase price. The respondents have presented an affidavit from Joan Roth which attests that there is no current Certificate of Value pursuant to the agreement and this has not been controverted by the petitioner. Since there is no current Certificate of Value, the Agreement provides that “the purchase price and all component parts thereof shall be calculated by the independent certified public accountants then engaged by the corporation, and such calculations shall be 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”. *Paragraph 6(a)(ii)*. The petitioner, as one of the signatories to the Agreement:

acknowledge[d] that the procedure set forth herein for determining the purchase price per share of capital stock is fair and reasonable and is the result of arm’s length and good faith negotiations. Accordingly, the parties agree that except as otherwise provided herein, such procedure is to be used in all circumstances regarding the determination of the value of a shareholder’s shares of Capital Stock, including but not limited to any determination of value in connection with a proceeding instituted pursuant to §1104-a of the New York Business Corporation Law.

*Shareholder’s Agreement, paragraph 6(b)*.

There is no material issue of fact in dispute here which precludes the Court from granting the respondent’s summary judgment motion directing Sirchia & Cuomo to immediately determine the purchase price pursuant to paragraph 6 of the Agreement. The petitioner, in opposing the motion, has failed in her burden required to defeat the motion by making a showing by evidentiary proof in admissible form that an issue of fact exists. *See, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Petitioner expressly

acknowledged that the process set forth in the Agreement was fair and reasonable and she agreed to be bound by the accountant's determination of the purchase price for her shares. In addition, in paragraph 17, petitioner acknowledged the specific performance of the Agreement was the appropriate remedy.

Petitioner has alleged a conflict of interest with respect to Sirchia & Cuomo's calculation of the purchase price, contending that Klaus Baasch of Sirchia & Cuomo previously performed services for Lois Roth. The petitioner, however, has failed to submit an affidavit from Baasch to make a showing of evidentiary proof in admissible form with respect to the allegation. *See, Friends of Animals, Inc., supra*. Instead, petitioner's counsel alleges that he spoke with counsel for El-Roh, who advised him that Mr. Baasch had taken that position. As such, there is nothing in proper evidentiary form before the Court to consider the issue. In addition, it is the primary rule of contract construction that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the agreement, giving a practical interpretation to the language employed and the parties' reasonable expectations. *See, In re Matco-Norca, Inc., 22 AD3d 495 (2d Dept 2005)*. The Shareholders Agreement does not provide a mechanism by which a party may challenge the qualifications of the accountants engaged by the corporation and instead only provides for very specific and narrow circumstances under which the calculations may be disputed after the process is completed. The Agreement states that the calculations "shall be 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." *Shareholders Agreement, paragraph 6(a)(ii)*. Since there is nothing within the four corners of the Agreement providing for the challenge to the accountants, the practical interpretation is that

the parties did not intend to allow such a challenge. Petitioner's argument is without merit and the respondent's motion for summary judgment on their counterclaim is therefore granted.

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

**ORDERED**, that the petitioner's motion for leave to reargue is denied, and it is further

**ORDERED**, that respondent's motion for summary judgment on their counterclaim is granted.

**ENTER**

**Dated: February 15, 2007**  
**Syracuse, New York**

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

<sup>1</sup> After oral argument was heard with respect to the initial proceeding and prior to this Court's issuance of its Decision and Order, the respondents filed a motion for summary judgment on their counterclaim. In the Court's January 3, 2007 Decision it scheduled the respondent's summary judgment motion to be heard on January 23, 2007.