

Matter of Marinelli v Trio Asbestos Removal Corp.
2009 NY Slip Op 33178(U)
June 16, 2009
Supreme Court, Queens County
Docket Number: 23882/08
Judge: Bernice Daun Siegal
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Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA Part 5
Justice

_____ x
 In the Matter of the Application of Index
 NICHOLAS MARINELLI, Number 23888 2008
 Petitioner, Motion
 Date February 24, 2008

To Inspect the Books and Records of Motion
 TRIO ASBESTOS REMOVAL CORP., Cal. Numbers 16 & 17
 - against - Motion Seq. Nos. 1 & 2

TRIO ASBESTOS REMOVAL CORP.,
 and CHRISTOPHER HORAN,
 Respondents.
 _____ x

The following papers numbered 1 to 15 read on this motion by petitioner Nicholas Marinelli for a judgment in the nature of mandamus directing respondents to make available the corporation's books and records for inspection and copying to petitioner and his accountant or any other agent of petitioner's choosing; and directing respondents to provide all facilities for such inspection and copying at reasonable times necessary to complete said inspection and copying. Respondents Trio Asbestos Removal Corp. and Christopher Horan separately move for an order dismissing the petition with prejudice, on the grounds that it is barred as a matter of law, pursuant to CPLR 404 and 406.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Affidavit	
-Exhibits(A-E)-Memorandum of Law.....	1-3
Notice of Motion-Affidavit-Exhibits(A-U).....	4-7
Opposing Affidavits-Exhibits(1-3,A-E).....	8-12
Reply Affidavit-Exhibit(A).....	13-15

Upon the foregoing papers these motions are consolidated for the purposes of a single decision and are determined as follows:

Trio Asbestos Removal Corp. (Trio) previously brought an action in this court for the specific performance of an agreement between it and Nicholas Marinelli, for the sale of Marinelli's shares of stock in said corporation. The Hon. Simeon Golar, in an order dated March 30, 2004, inter alia, directed specific performance of the agreement, with Marinelli's shares to be valued as of August 1, 2003, by a method set forth in the parties' shareholder agreement. Pursuant to section 3.4 of the shareholders agreement, valuation of shares in the corporation shall be determined "[b]y the accountants servicing the Corporation using normal and usual accounting practices."

Trio thereafter moved to confirm a valuation of Marinelli's shares and for specific performance of the parties' agreement for the sale of the shares at the price determined by the valuation. The Supreme Court confirmed the valuation and directed specific performance of the agreement for the sale of Marinelli's shares at the share price determined by the valuation. The Appellate Division found that the language of the shareholders agreement did not permit the corporation's accountants to retain an outside expert to perform the valuation. Rather, the shareholders agreement expressly provided that the corporation's regular accountants actually determine a valuation of the shares themselves. Since the corporation's regular accountants relied wholly on the outside expert's report, and did not form an independent opinion of their own, the Appellate Division modified the Supreme Court's order by deleting the provision granting the corporation's motion to confirm the valuation, and substituted a provision denying the motion. The Appellate Division stated that it was not addressing Marinelli's contention that the court should have granted him access to the corporation's books and records, which he sought on his cross motion only in the alternative (*Matter of Trio Asbestos Removal Corp. v Marinelli*, 37 AD3d 475 [2007]).

Following the Appellate Division's order, Nicholas Marinelli moved for an order finding Trio in breach of the shareholders' agreement by failing to provide the valuation of Marinelli's shares as required by section 3.4 of said agreement and dismissing the proceeding, or permitting him to inspect the corporate books and records. Trio cross moved for an order confirming the valuation of the shares and directing respondent to specifically perform his obligations under the shareholder's agreement. The Hon. Augustus Agate, in an order dated April 25, 2008 and a memorandum decision of the same date, determined that the new valuation was identical to the valuation performed by the outside expert and relied upon

the expert's report, and thus did not comply with the Appellate Division's order. The court found that Trio had breached section 3 of the shareholder's agreement, and therefore was not entitled to the remedy of specific performance pursuant to CPLR 7601 against Marinelli. The court granted Marinelli's motion for an order finding Trio in breach of the shareholder's agreement by failing to provide the valuation of the respondent's shares required by section 3.4(d), and dismissed said proceeding. The remainder of Marinelli's motion and the cross motion were denied.

Nicholas Marinelli commenced the within Article 78 proceeding on September 25, 2008, and seeks a judgment in the nature of mandamus directing Trio and its president Christopher Horan make available the corporation's books and records for inspection and copying by petitioner and his accountant or any other agent of petitioner's choosing; and directing respondents to provide all facilities for such inspection and copying at reasonable times necessary to complete said inspection and copying.

Trio commenced another proceeding to confirm the valuation of the Marinelli's shares on December 26, 2008 which is presently pending in another part (*Matter of Trio Asbestos Removal Corp. [Marinelli]*, Index No. 30693).

In the within petition, petitioner states that he is entitled to inspect the corporation's books and records for the following reasons: (1) as a director and officer of Trio he has an absolute right to inspect the books and records to enable him to perform his duties and protect himself against any potential liability because of Mr. Horan's actions; (2) that due to Trio and Horan's refusal to permit him to inspect the books and records, and the pendency of Trio's litigation, he has been excluded from any information as to Trio's operations and Horan's management thereof for over five years; (3) that Horan has expended corporate funds for his personal benefit and that of Horan's family members and he needs to ascertain the nature and extent of said improper payments; (4) that he has not received any distribution of his share of Trio's profits since January 1, 2003 and seeks to ascertain what profits Trio made and distributed to Horan during this period, so that he can receive an equal distribution; (5) that said inspection is necessary to ascertain why Trio's accountants' preliminary estimate of income in 2001 was allegedly incorrect; (6) to ascertain whether payments made by a related corporation known as Kenico Environmental Inc., to Trio were applied for Trio and Kenico's legitimate business purposes or for Horan's personal benefit; and (7) to ascertain the fair market value of petitioner's shares in Trio.

Although Trio's prior action for valuation of Marinelli's shares was dismissed, the court's determination of March 30, 2004 directing specific performance of the agreement between Trio and Nicholas Marinelli for the sale of Marinelli's shares of stock in said corporation, to be valued as of August 1, 2003, by a method set forth in the parties' shareholder agreement, remains law of the case. The Appellate Division and Justice Agate only determined that the valuations offered by Trio failed to conform to the provisions of the shareholders agreement, and resulted the dismissal of those valuation proceedings. Since said dismissal was without prejudice, Trio was not precluded from obtaining a new valuation and commencing a new confirmation proceeding pursuant to CPLR 7601. To the extent that Justice Agate found that Trio and Horan had breached the agreement and were not entitled to specific performance, said determination was limited to the valuation proceeding before him, as his order could not have affected the prior ruling by Justice Golar as regards the parties' agreement for the sale of Marinelli's shares of stock. Despite the problems with the valuation offered by Trio, there is no evidence that the parties have agreed to abandon the agreement to sell the shares of stock.

A CPLR Article 78 mandamus proceeding to compel an inspection is proper so long as the petitioner demonstrates a clear legal right to the requested relief (see *Matter of Association of Surrogates & Supreme Ct. Reporters v Bartlett*, 40 NY2d 571, 574 [1976]). Contrary to respondent's assertions, Mr. Marinelli does not seek to be reinstated as a shareholder or an officer and director of the corporation. The shareholder's agreement specifically identifies Mr. Marinelli as a shareholder, officer and director of the corporation, and there is no evidence that he resigned from these positions. The fact that he has not been actively involved in the day to day operations of the corporation for several years does not establish an ouster from said positions. Furthermore, Section 3.7 of the shareholder's agreement provides that "[u]pon the closing of the sale of the shares of stock under this Agreement, the selling shareholder shall tender his written resignation as an officer, director and employee of the Corporation and all his rights as a Shareholder shall terminate." In view of the fact that there has been no closing of the sale of Mr. Marinelli's shares in Trio, he remains a 50% shareholder, and a director and officer of Trio. Therefore, as petitioner is a director and officer of Trio, he has an absolute right to inspect the books and records of said corporation (see *Matter of Cohen v Cocoline Prods.*, 309 NY 119, 124 [1955]; see also, *Berkowitz v Astro Moving & Storage Co.*, 240 AD2d 450, 451 [1997]; *Matter of Brenner v Hart Sys.*, 114 AD2d 363, 366 [1985]).

Accordingly, petitioner's motion for a judgment in the nature of mandamus is granted to the extent that respondents are directed to make available the corporation's books and records for inspection by petitioner, and respondents are directed to provide all facilities for such inspection at reasonable times necessary to complete said inspection. Said inspection shall take place no later than 60 days from the date of the service of this order and judgment, together with notice of entry.

Respondents Trio Asbestos Removal Corp. and Christopher Horan's separate cross motion for an order dismissing the petition is denied.

This constitutes the judgment and order of the court.

Dated: June 16, 2009

Bernice D. Siegal, J.S.C.