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

PRESENT: BARBARA R. KAPNICK Justice

PART 39

THOMAS ABRAHAM

- v -

HANHUI LIU

INDEX NO. 602895/06

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

Settle Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/10/10

BARBARA R. KAPNICK J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

Settle Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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IN THE MATTER OF THE APPLICATION OF THOMAS ABRAHAM and PHILIP JOHN, HOLDERS OF MORE THAN TWENTY PERCENT OF ALL OUTSTANDING SHARES OF ELITE TECHNOLOGY NY, INC.,

Petitioners,

-against-

HANHUI LU and YONG HONG FAN

Respondents,

FOR THE DISSOLUTION OF ELITE TECHNOLOGY NY, INC.

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DECISION
Index No. 602895/06
Mot. Seq. Nos.
004 and 005

BARBARA R. KAPNICK, J.:

Motions sequence numbers 004 and 005 are consolidated for disposition.

In this proceeding, petitioners Thomas Abraham and Philip John, the holders of 98 shares of the common stock of Elite Technology NY, Inc. ("Elite" or the "corporation"), a photocopier distribution business,[1] seek a judgment:

(1) dissolving Elite in accordance with Business Corporation Law ("BCL") 1104-1;

(2) appointing a receiver for Elite pursuant to the provisions of BCL 1202;

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[1] Petitioners' shares constitute 49% of Elite's outstanding common shares. Respondents Hanhui ("Henry") Lu and Yong Hong ("Jane") Fan collectively own 102 shares or 51% of the outstanding shares of Elite.

(3) awarding actual damages and reasonable attorney's fees against respondents; and

(4) directing Elite and respondents to provide a complete accounting to petitioners of the financial activity and books and records of the corporation for the past three (3) years.

By Decision/Order dated February 26, 2007, the Hon. Helen E. Freedman, *inter alia*, (i) stayed the petition pending the valuation of petitioners' shares pursuant to BCL 1118; (ii) referred the issue of the fair value of petitioners' shares in Elite as of August 16, 2006, as determined in accordance with BCL 1118, to a Special Referee to hear and report with recommendations; and (iii) authorized the Special Referee to direct disclosure pursuant to CPLR 4201.

The matter was referred to Special Referee Louis Crespo who directed discovery pursuant to an Interim Order dated April 18, 2007. The Special Referee thereafter held a hearing on February 13, 14, 15 and 19, 2008, and issued a 49-page report dated August 12, 2008, in which he recommended that:

(1) petitioners' interest in Elite be valued at $3,220,820.00;

(2) the terms and conditions of a buy-out be provided as may be approved by the Court;

(3) that the Court award costs and disbursements, two-thirds to petitioners and one-third to respondents; and

(4) that the parties be responsible for their respective attorneys' fees.

Petitioners now jointly move, under motion sequence number 004, for an order pursuant to CPLR 4403 and 22 NYCRR 202.44, (i) confirming in all respects the Report of the Special Referee; and (ii) setting a pay-out period of no more than six months by which respondents shall pay to petitioners the sum of $3,220,820.00, with interest from August 16, 2006 at the rate of 4%.[2]

Respondents move, under motion sequence number 005, for an order pursuant to CPLR 4403 confirming in part and rejecting in part the Report of the Special Referee.[3]

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[2] The Referee recommended "that a deferred payment schedule for the fair value be ordered (BCL § 1118[a]; *Matter of Taines v Gene Barry One Hour Photo Process,* 123 Misc2d 529, 538 *aff'd* 108 AD2d 63, *lv. denied* 67 NY2d 602)" (Conclusions of Law, ¶ 81), but the Referee did not rule on the length of such a schedule. Petitioners argue that a pay-out schedule of no longer than six months would be appropriate. *See, Matter of Joy Wholesale Sundries,* 125 AD2d 310 (2nd Dep't 1986).

[3] The motions were both marked withdrawn by Orders of this Court dated November 2, 2009, after this Court was notified that the case was settled. The settlement, however, was never finalized. The prior Orders of this Court are, therefore, vacated and the motions restored for disposition.

Petitioners cross-move for an order pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70[g]) striking all matter appearing after page 25 in the 47 page affirmation in support of respondents' motion, on the ground that respondents never obtained permission to submit papers in excess of the 25-page limit set forth in Rule 17, or, alternatively, for leave to file a 21-page Memorandum in Opposition to respondents' motion.

The cross-motion is denied for the reasons stated on the record on March 25, 2009, and respondents are granted leave nunc pro tunc to exceed the page limit of 25 pages.

"Generally, New York Courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented. Courts will confirm a Referee's report to the extent that the record substantiates his findings and they may reject findings not supported by the record (citation omitted)." *Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Comm. of City of N.Y.*, 81 AD2d 64, 70-71 (1st Dep't 1981), *rev'd on other grounds*, 55 NY2d 512 (1982).

Respondents argue that this Court should reject portions of the Special Referee's report on the grounds, *inter alia*, that the

Special Referee erred in making normalization adjustments based, in large part, on the opinions of petitioners' expert, Daniel Tinkelman, CPA, who respondents argue should not have been qualified as an expert.[4] Specifically, respondents argue that the Special Referee failed to properly consider that Mr. Tinkelman is not accredited as a valuation expert by any accreditation organization and was previously involved in only one other valuation proceeding. Rather, respondents argue that the Special Referee should have given greater weight to the opinions of their expert, Martin Lieberman, who is accredited by the American Institute of Certified Public Accountants ("AICPA") and the American Society of Appraisers and has done valuations of 260 companies.

The Special Referee, however, specifically reviewed Mr. Tinkelman's credentials in determining the level of his expertise, noting in Paragraph 43 of his Findings of Fact that Tinkelman

> is a Certified Public Accountant and was a Professor of Accounting at Pace University for eleven years. Currently, he is a Professor of Accounting at Hofstra University. He is a graduate of Harvard College (BA), SUNY Albany (M.S.) and NYU (Ph.D.), all three degrees are in accounting. Before academia, Tinkelman worked in

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[4] As a result of normalization adjustments, the Special Referee increased the income of Elite for 2004 from $145,000.00 to $945,000.00, and increased the income of Elite for 2005 from $200,000.00 to $924,000.00 [the numbers are approximate].

> accounting (Arthur Andersen Co.; WPP Group; and consulting). Tinkelman has no specific certification in valuation of businesses, but was once retained to value a telephone-card company. He has taken Continuing Education Courses in valuation and has taught aspects of it in academia. He is also a member of AICPA and New York State Society of Certified Public Accountants.

The Special Referee thus concluded that in Paragraph 10 of his Conclusions of Law that

> [b]oth Lieberman and Tinkelman are competent to opine on the issue of valuation of Elite. I deem them qualified in the field of valuation and reject respondents post-trial contentions with respect to the learned opinion by Tinkelman. The two have divergent opinions with respect to the valuation of Elite, but both exhibited similar methodologies. Their respective opinions are admissible, but I only give them the weight I believe they deserve (*Felt v Olson*, 51 NY2d 977).

Respondents also argue that the Special Referee improperly relied on a survey conducted by Robert Half, a head hunter, for purposes of determining the "normal" salary of controllers. Respondents contend that there is no evidence that the data collection methodology used by the survey was reliable and/or generally accepted by business valuation experts as reliable, and that the Referee should have adopted the methods of valuation utilized by Mr. Lieberman, who respondents argue properly compared the salaries and other payments made to each officer with those set forth in the salary survey published by the Economic Research Institute ("ERI").

Petitioners, on the other hand, argue that the ERI survey relied upon by respondents supports that the normalized compensation figures determined by the Referee were reasonable.

Moreover, the Referee specifically considered respondents' objection to the Robert Half survey, but concluded that "Robert Half is a major American Staffing firm, and a member of the S&P 500." (Conclusions of Law, ¶ 37). He further found that

> Tinkelman's analysis of the compensation and commissions paid to all four principals was reasonable and supported by the record. I found his opinion credible, rational, based on objective facts, and supported by the evidence (citations omitted).

(Conclusions of Law, ¶ 38).

Respondents also contend that the Special Referee erred (i) in failing to tax-affect Elite's earnings as was done by the Court of Chancery in *Delaware Open MRI Radiology Assocs. v Kessler*, 898 A2d 290 (Del. Ch. Ct. 2006); (ii) in excluding operating results for 2006 from his computation of fair value;[5] (iii) in

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[5] The Referee considered Lieberman's opinion that income should be tax affected at 25%, and noted that there were "differences in valuation opinions on whether one should tax affect S-Chapter companies such as Elite that do not pay corporate taxes." However, he found Tinkelman's opinion that "it is not appropriate in the build up of a risk rate (Ibbotson data) to impute taxes where as here he starts with a rate on federal securities that are taxable, and added in a risk factor for

rejecting Lieberman's application of a specific company risk discount to the valuation of Elite, including the so-called "key-person" discount and a special risk factor discount related to Elite's small size, and (iv) in accepting Tinkelman's assertions that respondent Fan's compensation should be normalized on the basis of her services as a controller rather than as a chief financial officer.[6]

Petitioners, on the other hand, argue that the Referee properly exercised his discretion in, *inter alia*, determining the appropriate discount rate to be applied, and in accepting Tinkelman's opinion that Fan's position at Elite was the equivalent of a controller, rather than of a chief financial officer, and that said conclusion was supported by Fan's own deposition testimony as to her background, experience and duties.

It is well settled that

> [t]he determination of the fact-finder as to the value of a business, if within the range of the testimony presented, will not be disturbed on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques.

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corporate investments from earnings that are taxable" to be persuasive. (Findings of Fact, ¶ 50).

[6] According to respondents, Fan was in charge of, and had responsibility for, all accounting matters for Elite since the inception of the company in 1993.

L'Esperance v L'Esperance, 243 AD2d 446, 447 (2nd Dep't 1997). *See also, Charland v Charland*, 267 AD2d 698 (3rd Dep't 1999).

Based on the papers submitted and the oral argument held on the record, this Court finds that the Special Referee exercised his discretion in evaluating the credibility of the parties' expert witnesses and their valuation techniques, and that the record substantiates his findings.

Accordingly, the motion by petitioners to confirm the Report of the Special Referee in its entirety is granted, and respondents' motion, to the extent it seeks to reject portions of the Report, is denied.

Settle Order (which shall provide for the payment of the sum of $3,220,820.00, together with interest from the August 16, 2006 at the rate of 4%, over a one-year period).

Date: November 10, 2010

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.