Matter of Adelstein v Finest Food Distrib. Co N.Y. Inc.
2011 NY Slip Op 33256(U)
November 3, 2011
Supreme Court, Queens County
Docket Number: 7162/10
Judge: Orin R. Kitzes
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

--X

In the Matter of the Application of
JOEL Adelstein a holder of Thirty-Three and 1/3
(33.33%) of All Outstanding shares of
FINEST FOOD DISTRIBUTING CO. N.Y. INC.
Petitioner,

Index No. 7162/10

-against-

For the Dissolution of FINEST FOOD
DISTRIBUTING CO. N.Y. INC., a
Domestic Corporation,

--X

The following papers numbered 1 to 10 read on this valuation of the Petitioner's one-third (⅓) shares in Finest in furtherance of the Respondents' election under Section 1118 of the Business Corporation Law.

	PAPERS NUMBERED
Petitioner's Memo..	1-2
Respondent's Memo..	3-4
Transcripts..	5
Petitioner's Reply Memo..	6-7
Respondent's Reply Memo-Exhibits..............................	8-10

Upon the foregoing papers, the valuation is determined as follows:

This Court conducted a valuation hearing concerning **FINEST FOOD DISTRIBUTING CO. N.Y. INC** ("Finest") on May 19, 2011. At the conclusion of the hearing the parties were directed to submit Post-Trial Memorandum, and all of their papers were fully submitted to the Court on October 12, 2011.

The within action was commenced by an Order To Show Cause and Petition for the dissolution of Finest on March 23, 2010 and issue was joined on April 27, 2010. In an Order dated, dated June 15, 2010, this Court, *inter alia*, denied respondent's motion for dismissal on res judicata and collateral estoppel grounds, denied respondent's motion seeking dismissal pursuant to CPLR 1003 and 3211(a)(10) for failure to name a necessary party, granted respondent's motion seeking leave for Respondents-Intervenors to intervene in the proceeding for the limited purpose of making a motion to dismiss. The Court also granted the motion seeking an extension of time for Finest to make an election to purchase the shares of Petitioner,

Joel Adelstein pursuant to BCL §1118 in accordance with the parties' Stipulation dated June 9, 2010, for a period of thirty (30) days. The Court denied petitioner's request for judicial dissolution but set the matter down for a Hearing initially scheduled for July 6, 2010 on the issue of judicial dissolution, corporate accounting and inspection of the corporate records. By Notice of Election dated August 20, 2010, the corporation elected under BCL §1118-(a) to purchase Petitioner's shares in accordance with the statute. After Petitioner's attorney was relieved and the matter was stayed, the instant valuation hearing was scheduled and conducted.

At the hearing, the Court first heard testimony from Brian Serotta, CPA of Paritz & Co. as a witness for Respondent as to the valuation of petitioner's share of Finest. Mr. Serotta submitted a three (3) page report based upon his review of Finest's tax returns and the sparse records he found, and conversations with Finest's accountant and principals. In preparing his valuation, Mr. Serotta utilized the capitalized income method for valuation since he could not find any comparable businesses and Finest is not a public corporation that issues stocks or dividends. From the tax returns for a three year period, he made adjustments to salaries, depreciation, and outstanding loans and weighted current earning more heavily, he arrived at average normalized earnings of $206,000. A critical aspect of the capitalization of income approach is arriving at a "capitalization rate". Mr. Serotta utilized a capitalization rate of 20% which translates into 5x earnings. The capitalization rate is based on an analysis of "risk free return, equity risk premium, size premium, an industry premium and a specific company risk". From the sum of these factors, a long-term growth rate is found that was then discounted twenty percent by Finest's lack of marketability.

Serotta explained that the twenty percent discount for lack of marketability was done because of the "difficulty finding somebody to buy a one-third interest. There's really no market. It's a privately-held company. Anybody who bought that one-third interest would conceivably have nothing to say about the company." He also applied other factors in arriving at this discount rate that were designed to take account of Finest's specific risks. These factors included Finest's limited management, and its significant amount of business with A&P stores, which might end due to A&P's bankruptcy. He also factored in Finest's' having growth in sales, but not "dramatic" growth in profits. Based upon his analysis, Mr. Serotta found Mr. Adelstein's one-third interest in Finest to be $230,000.00. Mr. Serotta also discussed Petitioner's expert's report and his disagreement with certain adjustments and calculations made for, *inter alia*, officer's compensation and cash sales that were not reported, and the rate for lack of marketability. Serotta did not believe these adjustments should have been added to Finest's income and improperly inflated Petitioner's numbers.

Petitioner called Paul Marquez, a fully accredited appraiser and CPA of Sigma Valuation Consulting, Inc. to testify at the hearing. Mr. Marquez prepared a report in

connection with his appraisal of petitioner's interest in Finest Food Distribution Co. of NY, Inc. based upon visits to the premises and assistance Brian Serotta (respondent's financial expert retained for the litigation) in reviewing the books and records kept by the business. He also found that the books and records for Finest were "minimal".He also reviewed the tax returns for Finest for the years 2004 through 2010, compiled financial statement trend for the years 2004 - 2009 (prepared by Mr. Serotta), the general ledger, 12 column work sheets, 2010 Form 941 showing employees at the end of 2010, bank statement reconciliation statements for years ending 2007 - 2010, and December 2009 truck manifests for one month only due to his not being provided with those from December 2004 through 2010, which were requested in discovery.

Marquez considered three different methodologies in arriving at a valuation of Finest and utilized the capitalization of earnings approach and the merged and acquired company method to “cross-check” his valuation. In undertaking his valuation analysis, Mr. Marquez first noted that from 2004 to 2010 the sales of Finest Foods basically doubled, going from $5,124,900.00 in 2004 to $10,234,700.00 in 2010. He also noted that while the cost of goods sold increased commensurably, the gross profit margin steadily decreased from a high of 27.5% to 24% in the last two years. It was during this period that the compensation of officers went from virtually zero (there was no salary for officers in 2004 -2006) to more than $500,000.00 per year for two officers. He could find no reason for the gross profit margin of the company to decrease when sales were increasing at a significant rate, other than the existence of unreported sales. In addition, between 2004 and 2010 sales were increasing by approximately 60% while accounts receivable grew only by 40%. Furthermore, accounts payable increased by approximately 50%.

Marquez stated that he utilized a "stress test" to the sales invoices and data provided in discovery to determine whether there were unreported sales. He compared what was being received and invoiced for sales versus what was being reported as paid for those goods. According to this test, the company had a gross margin of profitability of almost 35%, rather than the 25% reported by the Company in its tax returns. Based upon this differential in profitability, given a company like Finest with gross sales of approximately $10,000,000.00, the amount of unrecorded sales was likely to be approximately $1,000,000.00 in 2010. He also based this conclusion on his analysis of the sales invoices, truck manifests and tax returns which showed that the gross profit experienced by the company was higher than that being reported. Consequently, he made a correction in the gross profitability of the company based upon the imputed existence of unreported sales. He then imputed gross profit for the company at the industry-wide level of 35% rather than the lower level of 25% reported by Finest.

Marquez also utilized the capitalization of earnings method to value the company, which is used to value a business based on future estimated earnings to be generated by the company. The underlying valuation principle of the capitalization of earnings method is that the value of a company is equal to the present value of the future benefits of ownership. These estimated future benefits, or cash flows are then capitalized using an appropriate capitalization rate. He selected a weighted average of the normalized after-tax net income for 2006 through 2010 as the appropriate earnings base for valuation purposes, with most recent activity weighted more heavily. The weighted average net income for the period 2006 through 2010 was $486,223.00.

According to Marquez, once the appropriate earnings base has been determined, it is necessary to determine the appropriate capitalization rate. In order to develop a capitalization rate, the discount rate must first be determined. The rate used to discount expected future earnings to present value is the estimated rate of return currently available in the market in alternative investments with comparable risks. As of March 23, 2010 (the date of filing of the Petition for Dissolution), according to Mr. Marquez, the risk-free rate was 4.43% based upon 20-year U.S. Treasury Yield Data. The reported equity risk premium as of the valuation date, according to Mr. Marquez, was 5.2%. An industry risk premium is then added to account for the additional or lower level of risk for a particular industry. For the industry, Mr. Marquez applied the discount for the most comparable category of Wholesale Trade - Other Groceries and Related Products, based on the industry risk premium tables published by Morningstar. Accordingly, a negative premium of 1.74% was applied.

Mr. Marquez then added a premium to account for the smaller size of Finest Foods, when compared to other firms that comprise the average industry return. He used a small stock risk premium of 6.28% based on the Morningstar's Stocks, Bonds, Bills and Inflation 2010 Yearbook. He next considered the risks specific to Finest to further adjust the capitalization rate. According to Mr. Marquez, the company has a record of consistent earnings resulting from persistent sales over the last five years, despite the highly fragmented competition in the New York. Marquez gave much significance in assessing Finest's risk to its having been in business for over fifty years. He also considered that Finest's warehouse is centrally located in a high traffic area, near all major roads. Based on the above considerations he only added an additional 50 basis points as a Company specific risk discount to the average industry return results in a discount rate for net earnings of 14.67%.

According to Marquez, the next step in arriving at a net earnings capitalization rate from the net earnings discount rate requires one to subtract the company's long-term sustainable growth rate. A long-term sustainable growth rate of 2.7%, equivalent to the long-term forecasted GDP growth was utilized for this purpose. This results in a net earnings

capitalization rate to be applied to next year's earnings forecast of 12.0%. Marquez concluded that under the capitalization of earning method, the determined capitalization rate of 12.0% applied to Finest's normalized weighted average net earnings (2006 - 2010) of $486,223 results in a value of $4,051,862 for the Company on a controlling, marketable basis.

Marquez also utilized the merged and acquired company method is a market-based approach, which is used to value a company based on private market sales transactions that have occurred within the industry of companies falling within the same or similar SIC code. Of the databases reviewed, Marquez applied the search results provided by Pratt Stats of the determined valuation multiples of MVIC/Revenues, MVIC/Gross Profit and MVIC/EBITDA in order to determine the value of the company's operations. The MVIC (market value invested capital multiple) is equal to value of the company's equity plus its interest bearing debt. EBITDA represents the company's earnings before interest, taxes, depreciation and amortization. Gross profit is sales revenue less the cost of goods sold. The surveyed transactions resulted in an average MVIC/EBITDA multiple. In order to apply this multiple, Marquez stated that it was necessary to determine the adjusted EBITDA for the Company.

According to Mr. Marquez, the company's adjusted EBITDA ranged from a low of $436,780 in Fiscal 2006 to a high of $1,122,438 for fiscal 2009. Management expects similar results in future years. Accordingly, Mr. Marquez has applied the MVIC/EBITDA multiple of 5.0 to the company's average forward looking EBITDA of $838,143. In addition, he selected and applied a .40x multiple to Finest's normalized revenues and a 1.40x multiple to its normalized gross profit based on Finest's apparent profitability. MVIC includes the value of any debt capital and since Finest has nominal debt capital so MVIC, as calculated, equates to its equity value. Based on this Marquez found the Value (MVIC) of sales to be $ 4,094,000, of gross profit to be $3,990,000, and of EBITDA of $ 4,190,717.

In Marquez' report, he presents the reconciliation of the value indications provided by the capitalization of earnings method and the merged and acquired company methods describe, as follows:

Summary of Control, Marketable Value Indication - Value of Operations

	Control Marketable Value Indications	Weight	Weighted Value
Capitalization of Earnings Method	$4,051,862	70%	$2,836,304
Merged and Acquired Method -MVIC/Sales Revenue	$4,094,000	10%	$ 409,400
Merged and Acquired Method - MVIC/Gross Profit	$3,990,000	10%	$ 399,000
Merged and Acquired Method - MVIC/EBITDA	$4,190,717	10%	$ 419,072
Indicated Control, Marketable Value - Operations		**100%**	**$4,063,800**

In determining an appropriate discount to apply to the company to reflect the lack of marketability of the subject common stock, Marquez stated that in a sale of a small business like Finest, transaction costs are typically incurred at a rate of between 5% and 10% of the sales price. As this company has $10 million in sales, Marquez applied the lower range of these transaction costs to Finest. Based on these considerations, it was Marquez' opinion that a 5% discount is appropriate to apply to the marketable value conclusion for the company. This is shown in his report as follows:

Discount for Lack of Marketability Applied		
Indicated, Fair Value on a Marketable Interest Basis		$4,063,800
Less: Discount for Lack of Marketability	5.0%	(203,190)
Equals: Fair Value on a Non-Marketable Value Basis		$3,860,610

Based upon the foregoing, Marquez concluded that the fair value of a 33.3% interest in Finest on a controlling, non-marketable basis is One Million Two Hundred Eighty-Seven Thousand ($1,287,000) Dollars.

Petitioner also called Joel Adelstein, founding member and President of Finest and owner of one third of its shares stated that he had discussions with his nephews and brothers (owners of the remaining shares of Finest) about purchasing his interest in the business. Those discussions resulted in documents containing buy-out offers which are contained in the report of Sigma Valuation Consulting, Inc. dated May 18, 2011 and were admitted into evidence at the Hearing. One of the documents is dated August 5, 2007, another document is dated November 18, 2007 and a third document is dated March 8, 2009. The offers contained in the individual documents are:

(a) The August 5, 2007 document proposed that "value will be set at $4,500,000.00, one-third of that being $1,500,000.00". This document proposed a payout of fourteen years to Mr. Adelstein commencing January 2008;

(b) The November 18, 2007 document offered a payment to Mr. Adelstein of $1,000,000.00 "payable immediately" in addition to $300,000.00 "payable with terms with immediate down payment".

(c) The March 8, 2009 document offered a buy-out of $1,538,000.00 with a down payment of $338,000.00 and the balance payable at the rate of $10,000.00 per month for one hundred twenty months.

According to Mr. Adelstein, each of the documents referred to above were handwritten by Steven and signed in his presence by his nephews, Steven and Larry Adelstein, and his brothers Jack and Sidney, and the originals placed in the Company's files. Joel signed the documents dated August 5, 2007 and November 18, 2007 but insisted that each document be "subject to approval" of the parties' attorneys on all sides. None of the documents or negotiations resulted in a consummated buy-out agreement or purchase of Joel Adelstein's interest in the Company.

Mr. Adelstein also stated that Finest currently has forty-five to fifty employees and supplies major supermarkets such as Pathmark, Stop-N-Shop, A&P, Waldbaums, Shop Rite, Key Food, Associated Food with Caribbean foods from such countries as Jamaica and Costa Rica. The Company brings in a forty foot container every week containing different items and

has an exclusive distribution relationship for Crix Crackers, Shirley Crackers and Pickapper Sauce. The Company also supplies supermarkets and stores in New Jersey and Philadelphia, including all of the Pathmark's in Philadelphia and all the Shop Rite's in New Jersey. The Company employs seventeen salesmen. Finest has a fleet of six twenty-two foot international trucks. He noted that, while the big stores such pay by check through central billing, Met Foods, C-Town and the small bodegas pay cash on delivery which is collected by the truck driver. These cash sales are not computerized, but are contained in the salesmens' reports. According to Adelstein, about twenty percent of the entire business consists of smaller stores which pay cash in this manner.

Adelstein also stated that, the major competition for Finest is Goya Food Products, but, Goya's prices are higher than Finest's. While he acknowledged Finest has lost customers in the past to competitors, it has always built its business back up as evidenced by Finest's gross receipts having increased every year since 2004. In part this was due to Finest having established contacts that enable it to sell to many major supermarkets today. According to Adelstein, it is virtually impossible to sell to supermarkets without these pre-existing contacts.

As previously noted, Respondents elected to exercise their statutory buy-out option. As was stated in Matter of Pace Photographers, Ltd., 71 N.Y.2d 737 (N.Y. 1988), once the corporation has elected to buy the petitioning stockholders' shares at fair value, "the issue of [majority] wrongdoing [is] superfluous … [f]ixing blame is material under [Business Corporation Law] § 1104-a, but not under [Business Corporation Law§] 1118" "Section 1118(b) directs that, when petitioner and the corporation cannot agree upon fair value, the court upon application of either party shall stay the 1104-a proceedings and determine fair value as of the day prior to the date on which the petition was filed." (Id. at 748.) Consequently, the only issue for this Court to determine in this election to purchase shares pursuant to BCL § 1118 is the valuation of the Petitioner's one-third share in Finest.

"Value should be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business, rather than as a business in the process of liquidation.' *Id*. at. 748 BCL § 1118 does not define "fair value" and does not set forth criteria for the determination of price or other terms of the buy-out. *See*, In re Dissolution of Penepent Corp., Inc., 96 NY2d 186 (2001) "Rather, fair market value, being a question of fact, will depend upon the circumstances of each case; there is no single formula for mechanical application . . . ." Matter of Seagroatt Floral Co., Inc., 78 NY2d 439, 445 (1991.) However, "[t]he three major elements of fair value are net asset value, investment value and market value. The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result . . . ." (Friedman v Beway Realty Corp., 87 NY2d 161, 167 (1995.) In reaching such a determination, the court obviously may take into account the shareholders' agreement provisions regarding value, petitioner's own offer to buy, the corporations alleged efforts to sell the business earlier, and any other pertinent evidence. Matter of Pace Photographers, Ltd., supra.

In the case at bar, the valuation of Joel Adelstein's interest in Finest rests primarily on the credibility of the appraisers and the reliability of their valuation methods. (*See*, In re USA Nutritionals, Inc., 306 AD2d 490 (2d Dept 2003.) In making the valuation, both experts selected an approach which is proper under New York law. (*See*, Friedman v Beway Realty

Corp., *supra*; Blake v Blake Agency, Inc., *supra*.) However, while Petitioner's expert utilized three methods to come to his conclusions, Respondent's utilized only one. The weight to be given to expert testimony is a matter to be determined by the trier of fact [*see*, Topel v Long Island Jewish Medical Center, 76 AD2d 862 (2d Dept. 1980.)], and the extent of the witness's qualifications has a bearing on the weight to be given to his testimony. *See*, Kwasny v Feinberg, 157 AD2d 396 (2d Dept. 1990.) *See also*, Richardson on Evidence [11th Ed.] § 7-304.)

In the case at bar, the testimony and Report from Petitioner's witness Paul Marquez, CPA of Sigma Valuation Consulting, Inc. are credible and reliable. Mr. Marquez is a business appraiser possessing full valuation and financial credentials consisting of the following: (a) accredited senior appraiser of the American Society of Appraisers; (b) certified business appraiser by the Institute of Business Appraisers; (c) certified in financial forensic by the American Institute of Certified Public Accountants; (d) certified management accountant; and (e) certified in financial management by the Institute of Management Accountants. He conducted a thorough process of evaluation for Finest which involved several steps including, inter alia, making a site visit, arriving at an understanding of the business, learning about the industry, taking into account the state of the economy, interviewing management, communicating with others, asking questions, carefully selecting evaluation approaches, reviewing financial statements, making comparisons based on professional studies, and carefully selecting evaluation factors such as the capitalization rate. He methodically chose such critical factors in the evaluation process as the capitalization rate and lack of marketability discount based on studies in the evaluation field. He also showed that he had knowledge of New York law relevant to valuations, e.g., that, in making the valuation, Adelstein's shares would not be subject to a "minority discount," but would be subject to a "lack of marketability discount." Friedman v. Beway Realty Corp., 87 N.Y.2d 161 (1995.) This acumen was also demonstrated by taking into consideration the buy-out offers made to Petitioner by Respondents. Matter of Pace Photographers, Ltd., *supra.* He also took into consideration the testimony of Adelstein that there was considerable business done in cash that would not be noted in the financial statements. He also explained the indications in the financial statements that such unreported sales existed. Significantly, Adelstein's testimony regarding cash sales was not refuted by Respondents. In sum, the court finds that Marquez' valuation report is clear, thorough, professional, and reliable.

Compare this with the testimony and Report of Respondent's witness, Mr. Serotta. While he stated he has performed about fifty valuations, he does not possess "valuation credentials", CFA, CVA, ABV or CBA, which are credentials all possessed by Mr. Marquez. Furthermore, he prepared his three page report primarily relying upon Finest's accountant. He did not take into consideration the existence of cash sales and devised a discount rate that relied extensively on Adelstein's minority interest in Finest. Significantly, he did not take into consideration the buy-out offers and he relied upon only one method of valuation, that was not checked against any other method. In an apparent contradiction, Serotta stated that the gross sales of Finest had "more than doubled" between 2004 and 2010, but claimed that the profitability of the Company had been "basically flat". Yet he acknowledged that the gross profit of the Company, which takes into account the cost of goods sold, also doubled during

that period. In view of the above, the court places diminished weight on the testimony and report of the Respondent's expert concerning the valuation of Finest.

In sum, the court finds that the value of Adelstein's interest in Finest is $1,287,000.00.

The request by Petitioner for an adjustment upon the stock valuation by virtue of the conduct of the remaining shareholders, Steven and Larry Adelstein, in giving themselves salary, distributions and benefits in the amount of $863,621.00, to the detriment of petitioner, is denied. According to petitioner, his unchallenged testimony establishes that he was ready, willing and able to work after his heart attack in 2007, but was prevented from doing so by Steven and Larry Adelstein, who took away his job, reduced and then eliminated his salary and benefits and eventually expelled him from the company. At the same time, Steven and Larry Adelstein each took for themselves salary and benefits ranging from $96,000.00 in 2007 to $255,000.00 in 2010. During the same period, Joel Adelstein received salary and distributions as follows during the same time period: $30,600.00 in 2007; $31,800 in 2008; $10,200 in 2009 and $0 in 2010. According to Mr. Marquez' analysis, the damages to Joel Adelstein by virtue of the foregoing is $863,621.00.

This Court denies Petitioner's request for an adjustment based on Respondent's salary and benefits. First, this adjustment functioned as a component of Petitioner's calculation of the fair value of his shares. Second, this action is limited solely to the valuation of Petitioner's shares in Finest Foods and BCL Section 1104-a is inapplicable. BCL Section 1104-a(b), the provision Petitioner cites for support, expressly applies when "the court [is] determining whether to proceed with an involuntary dissolution pursuant to this section." N.Y. BCL § 1104-a(b). However, the sole issue before the court in this election to purchase shares is the valuation of Petitioner's one-third share pursuant to BCL Section 1118. Any misconduct or self-dealing by Respondents is not relevant to that determination. Matter of Pace Photographers, Ltd., *supra*.

Moreover, Petitioner has failed to prove that the distribution of the salaries satisfies BCL Section 1104-a(b)(2)(d). BCL Section 1104-a(b)(2)(d) provides that "the court may order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of wilful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor." N.Y. BCL § 1104-a(b)(2)(d). When Marquez discussed his adjustments to his valuation to account for the salaries, he did not state or imply that the salaries constituted "wilful or reckless dissipation." Additionally, while Marquez felt that Finest Foods only required one officer salary, not two, he did not indicate that the award of two salaries constituted a transfer of assets without adequate compensation. Furthermore, there is no evidence that the salaries were a transfer of corporate property without just or adequate compensation. Accordingly, the request for an adjustment to valuation based on salary and benefits received by Respondents is denied.

Petitioner's request that he be awarded attorneys' fees and costs in this matter is denied. Petitioner claims that BCL§1118(c)(1), specifies that the court may award attorneys' fees if an election to purchase is made more than ninety days after the filing of the petition for dissolution. However, in a June 9, 2010 Stipulation, Petitioner and Respondents, agreed that "the time for Respondents to make an election pursuant to § 1118 of the BCL is hereby

extended to 30 days after service of a notice of entry in the order deciding the motion to dismiss, subject to further order of the court." Additionally, in an Order of this Court, dated June 15, 2010, granted the portion of Respondents' motion seeking to extend Respondents' time to make an election to purchase Petitioner's shares pursuant to BCL Section 1118 "to the extent the extension is for 30 days, as set forth in the parties stipulation, dated June 9, 2010." As such, Respondents had until September 19, 2010, thirty days after the service of Notice of Entry, to file an election. It is undisputed that Respondents filed an election to purchase Adelstein's shares on August 20, 2010. Consequently, under the circumstances of this case, Respondent's election was timely made and there is no basis to award the petitioner expenses incurred in the proceeding prior to such election, including reasonable attorneys' fees.

The request by Petitioner, for an Order that awards interest at the rate of 9% on the total award herein from the date of filing of the petition, March 23, 2010, is denied. An award of pre-judgment interest from the date the petition was filed is not warranted because of the considerable litigation delays incurred as a result of Petitioner's change of counsel. Petitioner concedes this point. As a result of this change, the court stayed this action until December 30, 2010, and, after present counsel appeared at a conference, the case was adjourned until May 19, 2011. BCL Section 1118(b) states, in relevant part, that "in determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share." N.Y. BCL § 1118(b) (emphasis added). Thus, the Court is not statutorily obligated to award pre-judgment interest, or any interest at all, to Petitioner. In this case, the award of pre-judgment interest from the date of filing would be unjust given the fact that the significant delays in this trial proceeding are wholly attributed to the choice of Petitioner to change counsel.

Furthermore, Petitioner's claim that the Court should award interest from the date of filing because of Respondents' "elaborate" motion to dismiss and an alleged failure to comply with discovery demands, is misplaced. Respondents motion was made in compliance with the CPLR and in no way was this motion frivolous or an abuse of process. Additionally, Petitioner's argument that Respondents failed to comply with discovery demands is misplaced since Petitioner filed a note of issue and certificate of readiness in this proceeding on or about September 21, 2010. Therefore, any discovery disputes after the filing of the Note of Issue, are beyond the dictates of the CPLR and would not impose an obligation upon Respondents. As such, the Court will not award discretionary pre-judgment interest from the date of filing of the Petition.

Finally, Petitioner's request that a pay-out of five (5) years be awarded is denied. Although the court has the discretion to establish payment terms (*see*, Matter of Dissolution of Seagroatt Floral Co., Inc., *supra.*), an extended payout period is not warranted in view of the time that this valuation proceeding has been pending and the time that the Respondents have had to allocate funds for payment. There is no basis or need for this Court to adhere to the pay-out provisions of the buy-out offers since they are not binding contracts.

Based on the above, Respondents shall pay to Petitioner the sum of $1,287,000.00 plus interest at the statutory rate from the date of a copy of the judgment is entered hereon with notice of entry.

[* 11]

A copy of this Order is being sent to the parties' attorneys by means of facsimile transmission on November 3, 2011.

DATED: November 3, 2011

ORIN R. KITZES, J.S.C.