| **Theatre District Realty Corp. v Appleby** |
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| 2013 NY Slip Op 31979(U) |
| August 20, 2013 |
| Sup Ct, New York County |
| Docket Number: 653614/2012 |
| Judge: Melvin L. Schweitzer |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

Theater District Realty Corporation

-v-

Ilana Appleby

INDEX NO. 653614/2012

MOTION DATE ____________

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ | No(s). ____________

Answering Affidavits — Exhibits ____________ | No(s). ____________

Replying Affidavits ____________ | No(s). ____________

Upon the foregoing papers, it is ordered that this motion ~~is~~ by plaintiff for summary judgment is GRANTED

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

Dated: August 20, 2013

J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ............................................................ ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..........................MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ............................................ ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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|---|---|---|
| THEATRE DISTRICT REALTY CORPORATION, Plaintiff, | : | Index No. 653614/2012 |
| -against- | : | DECISION AND ORDER |
| ILANA APPLEBY, Defendant. | : | Motion Sequence No. 001 |

**MELVIN L. SCHWEITZER, J.:**

This is a motion for summary judgment to declare whether shareholders supermajority consent is required under Section 909(a) of the Business Corporation Law (BCL) to approve the sale of a residential and commercial rental building for the purpose of effectuating a Section 1031 Exchange under the Internal Revenue Code (IRC).

Theatre District Realty Corporation (Theatre District) is a real estate corporation whose primary business is leasing both residential and commercial space. The ownership of Theatre District is divided, 55% owned by a trust established under the Will of Decedent Sol Lieberman (Trust) and 45% owned by Ilana Appleby (Ms. Appleby). Theatre District's sole property is 602 Tenth Avenue, New York 10036 (Building). Theatre District proposes a transaction under IRC Section 1031, whereby Theatre District would sell the Building and purchase property in another location within the time limit imposed by the Section to continue its business of leasing residential and commercial space. Theatre District alleges that this transaction should increase the annual profits for Theatre District by 300% over the next three years. Finally, Theatre District alleges it has received many offers for the Building but is unable to sell due to the

[* 3]

opposition of Ms. Appleby who argues that a two-thirds supermajority vote by shareholders is required to sell the Building and she declines to consent.

**Discussion**

Summary judgment is appropriate when there is no bona fide issue of fact. *Silliman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). In order to defeat a motion for summary judgment a party cannot merely assert the existence of a factual dispute but must show that there is a "genuine and substantial issue of fact." *Ball v United Artists Corp.*, 13 AD2d 133, 214 (1st Dept 1961).

Theatre District argues that a two-thirds supermajority shareholder consent under BCL Section 909(a) is not required to sell the building. The test to determine whether Section 909 (a) applies is whether the sale was made in the regular course of *business actually conducted* by the corporation *in furtherance of the objectives of its existence*. *Kingston v Breslin*, 56 AD3d 430, 431 (2d Dept 2008) (emphasis added). Both parties agree that the regular course of business actually conducted for Theatre District is to lease residential and commercial space, thus making the pivotal issue whether the transaction is in furtherance of the objectives of Theatre District's existence.

It is germane to the discussion to define the terms "sale" and "exchange." In his Commentaries, Blackstone stated, "[sale] or exchange is a tran[s]mutation of property from one man to another, in con[s]ideration of [s]ome recompen[s]e in value: for there is no [s]ale without a recompen[s]e; there mu[s]t be quid pro quo." A thorough analysis of Blackstone determines that the transaction at hand is a sale, not an exchange as the Theatre District has cast it. In *In re Leventall*, sales were determined to be within the regular course of business when for the purpose of gaining a business advantage, as here. 241 AD 277 (1st Dept 1934).

Ms. Appleby argues that the entire existence of Theatre District has been devoted to the ownership and operation of a single property, which it now proposes to sell. As such, Ms. Appleby argues, it cannot fairly be stated that sale of that property is in the regular course of business actually conducted by the corporation. In support of this argument, Ms. Appleby cites *Vig v Deka Realty Corp.*, 143 AD2d 185 (2d Dept 1988), as a similar set of facts. In that case the business of a corporation was the management of a single piece of real property. The court stated, "Deka's regular business was managing this one piece of property. It was not actually engaged in the business of selling real property. Thus, the sale of this property, Deka's sole asset, was not made in its usual course of business." *Id.* at 634. The court is not persuaded that *Deka* is analogous to this case. In *Deka* there is no mention of the reason for selling the real property, leaving the essential question of whether the action was in furtherance of the purpose of the corporation's existence unanswered.

The court finds a more applicable analogy in *Barasch v Williams Real Estate Co. Inc.*, 33 Misc 3d 1219 (A) (Sup Ct NY Co 2011) *affd* 100 AD 3d 562 (1st Dept 2012). In *Barasch* the court observed "[a] transaction does not require shareholder approval, and thus will not trigger a shareholder's right to an appraisal, where it does not result in the liquidation in whole or part of the company's business." Furthermore, the court determined that a corporation's sale of property is not considered all or substantially all of a corporation's assets, and the corporation's board of directors need not obtain approval by vote of the stockholders to sell the property where a corporation retains value approximately equal to the asset sold. *Id.* In this case the property is not being sold to liquidate the assets of Theatre District, but instead to reinvest the assets in a similar property that is better suited to provide significant profits for the shareholders. This sale and subsequent purchase of a more profitable property that will be used in the same manner

[* 5]

satisfies the requirement that the transaction be in furtherance of the purpose of Theatre District's existence.

There is no genuine issue of material fact, thus it is appropriate to issue summary judgment in this case. *Silliman* 3 NY2d 395. Because the sale as proposed is in the regular course of business actually conducted by Theatre District, and is also in furtherance of the objectives of its existence, the transaction does not fall under BCL Section 909 (a), and the sale does not require supermajority consent of shareholders.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted.

Dated: August 20, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER