Matter of Bonamie v Ongweoweh Corp.
2016 NY Slip Op 33039(U)
December 14, 2016
Supreme Court, Tompkins County
Docket Number: EF2016-0173
Judge: Richard W. Rich, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK

SUPREME COURT COUNTY OF TOMPKINS

In the Matter of the Application of

DANIEL F. BONAMIE,

Petitioner,

For Judgment Confirming the Appraiser's Award

DECISION & ORDER
IND. NO.EF2016-0173
RJI NO. 2016-0494-M

Against

ONGWEOWEH CORPORATION,

Respondent.

APPEARANCES:

James S. Gleason, Esq.
Hinman, Howard & Kattell, LLP
For Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902-5250

John R. Forbush, Esq.
Harris Beach, PLLC
For Respondent
99 Garnsey Road
Pittsford, New York 14534

BEFORE: HON. RICHARD W. RICH, JR.

RICH, J.

The parties are shareholders in the closely held corporation, Ongweoweh. Francis Bonamie serves Chairman of the Board of the corporation and Petitioner served as the CEO of the corporation, until he was terminated on February 14, 2014.

There was a shareholders' agreement entered into between the parties on January 1, 2008. The corporation has 100 outstanding shares, with the Francis C. Bonamie Revocable Trust owning 37 shares, Carol L. Fish owning 25 shares and Daniel F. Bonamie owning 38 shares.

Section 3.2 of that agreement provides in pertinent part as follows:

"Upon an 'Involuntary Termination' . . . of an Affected Shareholder as an employee, officer, or director of the Corporation, the Corporation shall purchase all of the shares of stock of said shareholder at a price determined in accordance with Section 5 hereof, plus 10%, said purchase price to be paid in full within 90 days of such Involuntary Termination . . ."

The parties proceeded with the valuation of Daniel's shares, but in May 2014 came to a disagreement concerning that valuation. Daniel Bonamie then brought an action in court to dissolve the corporation. Corporate dissolution was denied by Judge Mulvey, in a decision dated November 12, 2014. The decision directed that the parties proceed to value the shares pursuant to the terms of the shareholder agreement, which covered "Transfer Upon Involuntary Termination of Employment." Judge Mulvey's decision was appealed and upheld by the Third Department at 130 AD3d 1291 (2015).

Pursuant to the agreement, the parties each hired an appraiser. Following their appraisals, the chosen appraisers were far apart and were not able to agree upon a valuation. A third appraiser was then chosen, pursuant to the consent of the parties. In the midst of that, additional litigation occurred on multiple issues, including litigation concerning whether the third appraiser could have access to the work product of the first two appraisers. The third appraiser set a valuation figure, with which the parties now agree.

In the present action, Daniel Bonamie seeks a judgment for the appraised value of his shares, together with a 10 percent premium provided for in the agreement, and interest from May 14, 2014. That date is 90 days after Daniel's termination from employment. Section 3.2 of the shareholder agreement provides for full payment to the affected shareholder within that time period.

The corporation agues that interest should not be assessed, as the valuation was not determined until the report of the third appraiser, Williamette Management Services, dated October 4, 2016. The RJI in the instant matter is dated October 12, 2016. The corporation also seeks surrender of Daniel Bonamie's shares upon payment of the share value.

The Williamette appraisal put the value of Daniel Bonamie's shares at $2,620,000 and

$2,882,000 with the 10% premium. The prejudgement interest sought by the Petitioner would be well above half a million dollars.

Oral arguments were heard in court on November 18, 2016 and counsel have submitted written memoranda.

The company argues that Daniel Bonamie never placed the corporation on notice that he was seeking prejudgment interest, that he failed to raise the issue in previous litigation and is thus estopped from now raising the issue. They further argue that under the terms of the shareholder agreement payment within the ninety days from termination would not be possible in any event. The company argues that in the event that interest is appropriate, that the parties, in the context of a payment plan, agreed to prime rate interest and not statutory interest.

The shareholder agreement provides for a "Certificate of Value" of the corporation and a procedure for an annual update of that value (Section 5.2). If there is such a certificate within fifteen months of the event, then that certificate of value establishes the market value of the shares (Section 5.2[a]). Section 5.2[b] provides that if there is not such a certificate within fifteen months of the event (and in this case there is no argument that there is) for a sixty-day period for the parties to agree on a value. In the event there is no such agreement the matter is passed to Section 5.3 of the agreement entitled "Appraisal." The disposing shareholder and corporation are given ten days to select their own appraisers. The agreement provides that if the appraisers are not able to agree within thirty days as to a value that they shall select a third appraiser, whose appraisal is binding. In the instant case, the parties agreed upon a third appraiser, instead of having the first two appraisers select the third appraiser. The agreement thus provides for a 100-day period before selection of a third appraiser comes into play. There is no time frame provided for the selection of the third appraiser or the time allowed for completion of the third appraisal.

The plaintiff argues that the corporation has had the use of the money for 29 months and should reimburse him for the time value of that money. They allege that prejudgement interest is discretionary under CPLR Section 5001. Respondent argues interest is not appropriate under the CPLR as there was no breach of the agreement and that discretionary interest is inappropriate under the circumstances. They differentiate cases wherein such discretionary interest was allowed.

> CPLR Section 5001, Subdivision a, states, "Interest shall be recovered upon a sum awarded because of an act of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except, that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

The court agrees that pursuant to the decision of Judge Mulvey and the ensuing appeal to the Third Department that there was no finding of a breach of the shareholder agreement.

The parties have negotiated and worked through the provisions of the agreement and have come to an agreement on the value of the stock.

In D. v. O., 77 Misc.2d 938 (Family Ct., NY Co., 1974) discretionary interest was allowed in an action to collect child support arrears.

In Hynes v. Iadarola, 221 AD2d 131 (2nd Dept., 1996) prejudgment interest was allowed in a civil forfeiture proceeding, the court finding that the equities called for it as against one convicted for misconduct in the related criminal action.

The court in Grossman v. Pendant Realty Corp., 221 AD2d 240 (1st Dept., 1995), app denied, 88 NY2d 919 (1996), denied prejudgment interest, finding no bad faith or ill dealing on the defendant's part.

"It has been held that a breach of fiduciary duty action qualifies for the recovery of prejudgment interest under CPLR 5001 (*Anderson v. Weinroth*, 13 Misc.3d 1204(A), 824 N.Y.S.2d 752 [Sup Ct. New York County 2006] citing *Gibbs v. Breed, Abbott & Morgan*, 181 Misc. 2d 346, 354, 693 N.Y.S.2d 426 [Sup Ct. 1999] *reversed on other grounds* 279 AD2d 887, 720 N.Y.S.2d 578 [1st Dept. 2001]). Also, prejudgment interest may be awarded where it is found that defendants 'wrongly withheld plaintiff's money' (*see Eighteen Holding Corp. v. Drizin*, 268 AD2d 371, 701 NYS2d 427 [1st Dept. 2000] [stating that the 'IAS court's award of prejudgment interest would nonetheless have been proper in light of the circumstances that defendants wrongly withheld plaintiff's money.'] . . . Plaintiff, having prevailed on his Complaint which sought money damages for breach of fiduciary duty, has a right to prejudgment interest." Zuckerman v. Goldstein, 2009 NY Slip Op 32239(U) at pages 12-13 (S. Ct., NY Co., 2009).

The case of Buttles v. Natale, 226 AD2d 986 (3rd Dept., 1996), app denied, 88 NY2d 810 (1996), has been cited by the corporation. The matter involved an agreement to establish an auto dealership. Plaintiffs was brought on, pursuant to General Motor's requirements, as a 'seasoned operator.' He was made a director and given a 15% stake in the company (15 of 100 shares). Pursuant to the agreement he was to buy seven shares of the corporation at the conclusion of years one through four and eight shares at the conclusion of year five. The dealership ran into financial trouble, had payment issues with General Motors and plaintiff was fired as dealer/operator. Plaintiff sued under several theories. The parties stipulated to amending the complaint, that the jury was to determine share value, that the plaintiff would be given a judgment for 15% of the value and that the plaintiff reserved his argument on appeal that he should obtain an additional 36% of the corporate value (i.e., the shares that he was supposed to buy but did not buy). Plaintiff also demanded prejudgment interest at the trial level. The Appellate Division found that the matter played out pursuant to the agreement and plaintiff's status as a minority shareholder and as an at will employee. They found that the stock purchase provisions were created pursuant to GM requirements for the dealer/operator, which were extinguished upon plaintiff's firing. The Appellate Division citing the language of CPLR 5001(a), found that the matter did not involve a breach of contract or interference of property

rights (interference with title, possession or enjoyment of property rights). Basically, since the matter played out pursuant to the agreement between the parties, prejudgment interest was not justified.

In Grosz v. Serge Sabersky, Inc., 24 AD3d 264 (1st Dept., 2005), cited by the Petitioner, upheld prejudgment interest as of a particular date. The action involved consigned art work, some of which the consignee lost. The First Department found that the trial court had discretion to award prejudgment interest. They clearly do under the statute. The issue is whether that discretion should be exercised. Prejudgment interest was allowed as of the date the consignee admitted that he lost the consignor's art work and agreed to pay for the same. Consignor had been placing his art work there for decades. This court views the time frame, the admission of fault by the consignee, and his promise to pay at the time of admission, to be the factors of importance in the case and the factors which in essence provided extraordinary circumstances. We see no such circumstances here.

This court finds the Buttles v. Natale case to be on point, as in the instant case the matter played out in accord with the terms of the agreement between the parties with no breach (a breach would allow prejudgment interest pursuant to the terms of the statute), bad faith dealing (*see,* Grossman v. Pendant Realty Corp, *supra.*) or other extraordinary circumstance being shown. Those extraordinary circumstances would include breach of a fiduciary duty (*see,* Zuckerman v. Goldstein, *supra*) or public policy considerations (D. v. O., *supra*; policy disfavoring deadbeat parents in child support cases) (Hynes v. Iadarola, *supra.*: policy disfavoring those who have gained through their criminal activity)(Aurecchione v. New York State Div. Of Human Rights, 98 NY2d 21, 26 [2002][cited by Petitioner]; policy involving lost wages in civil rights cases).

This matter played out in accord with the terms of the agreement of the parties. While that process was not easy, there has been no breach of the agreement shown. While there has been negotiation and litigation, as one might expect in a matter involving large sums of money, no bad faith dealing or breach of a fiduciary duty has been established. There are no public policy or extraordinary circumstances established which would demand that the court exercise the discretion provided in CPLR Section 5001(a) or in the case law interpreting the same. The terms of the agreement which on the one hand call for payment within 90 days and on the other hand provide for a process which would take at least 100 days, militate against the award of prejudgment interest. No fault, admission or unduly delayed promise to pay was involved, as in Grosz v. Serge Sabarsky, Inc., *supra.* The court thus denies the application of Daniel Bonamie for prejudgment interest.

It is therefore,

Ordered that the appraisal of the share value by Williamette Management Services, a third appraiser consented to by the parties and whose appraisal report has now been agreed to by the parties, is confirmed, and it is further

Ordered, that Petitioner, Daniel Bonamie, shall surrender his shares of stock in Ongweoweh Corporation to the said corporation upon payment by Ongweoweh Corporation of $2,882,000.

This constitutes the decision, opinion and order of the court.

Dated: December 14, 2016

RICHARD W. RICH, JR.
Acting Supreme Court Justice