

Ades v Van Dale Indus., Inc.

2023 NY Slip Op 32382(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160305/2021

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. LAURENCE L. LOVE</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>ALAN ADES</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>VAN DALE INDUSTRIES, INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 63M</p> <p>INDEX NO. <u>160305/2021</u></p> <p>MOTION DATE <u>02/17/2023, 02/17/2023</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 62, 66, 67, 69
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 68, 70
were read on this motion to/for DISCOVERY.

Upon the foregoing documents, Petitioner Alan Ades’ Motion (Sequence 002) seeking Partial Summary Judgment pursuant to CPLR § 3212(e) and an Order granting Petitioner’s claim for an advance payment pursuant to BCL § 623(g) of 80% of the \$7,780,050.25 that Respondent Van Dale Industries, Inc. (“Respondent” or “Van Dale”) offered to pay Petitioner for his shares in Van Dale on September 3, 2021 and directing Van Dale to make an immediate advance payment of \$6,224,040.20 (\$7,780,050.25 x .80) to Petitioner, with interest at the statutory rate of 9% from September 3, 2021; directing Van Dale to pay Petitioner’s fees, expenses, and costs incurred in commencing this Special Proceeding; further directing Van Dale to bear Petitioner’s legal fees, expenses, and costs in prosecuting this Special Proceeding, in an amount to be determined at the appraisal hearing, and Petitioner’s Motion (Sequence 003) pursuant to BCL § 623(h)(4), CPLR § 408, and Article 31 of the CPLR, for an order granting leave to take discovery and to serve a set of document requests, take a deposition, and serve a subpoena, and Respondent’s Cross-Motion to

stay these proceedings until the Motion to Reargue resolves in *Ades v. Van Dale Industries, Inc.*, et al., Index No. 656471/2021, is decided as follows:

Van Dale is a New York corporation, established in 1982, that manages and licenses clothing brands. Since Van Dale's establishment in 1982, Petitioner has held shares in Van Dale since its inception in a non-employee, non-management capacity, and currently holds a 19.44% ownership interest in the company. The remaining Van Dale shares are held by Maurice Setton ("Maurice"), who also serves as the Van Dale's President and Chairman of the Board of Directors; Gabriel Ades ("Gabriel") who also serves as Vice President and Secretary; and Jimmie Ades ("Jimmie") who serves as Treasurer.

This petition for a fair value appraisal proceeding arises out of a September 2, 2021, merger transaction duly approved by Van Dale's Board and its shareholders, pursuant to which Alan's shares were to be redeemed for an aggregate cash purchase price of \$7,780,050.25 (\$222,287.15 x 35 owned shares). Petitioner claims that this purchase price did not reflect Van Dale's fair value. Petitioner exercised his dissenters' rights and rejected Van Dale's purchase offer.

Petitioner has commenced a separate proceeding to contest the legitimacy of Van Dale's merger, which is currently pending before this Court. This Court issued a Decision and Order in *Ades v. Van Dale Industries, Inc., et al.*, Index No. 656471/2021, dated July 12, 2023, granting Respondent's motion seeking leave to reargue and motion to dismiss. As such, the branch of Respondent's Cross-Motion seeking a stay is moot. Because arguments concerning a stay are moot, Petitioner's Motion 003 is left unopposed. As respondents pointed out in their Memorandum of Law "If the Court denies Van Dale's cross-motion for a stay, then Van Dale does not oppose Alan's motion for leave to take discovery, provided however that Van Dale reserves all rights to

respond and object to such discovery at the appropriate time.” The Court notes that Van Dale has reserved their rights

This leaves the Court to determine the issues of advance payment, interest, and fees. Under BCL § 623(g), when a company executes a merger that eliminates a minority shareholder, the company must not only offer to purchase the minority shareholder’s shares, but also accompany that offer with an advance payment of 80% of the offered amount if the minority shareholder has submitted their stock certificates to the company as provided BCL § 623(f). Petitioner did not produce his stock as required, but this Court found in its Decision and Order dated July 11, 2022, that Petitioner had good cause for not producing his stock certificates and did not lose his dissenter’s rights. While the exact value of Petitioner’s shares still needs to be determined, logic and fairness dictate that his misplacing of a physical stock certificate that he may or may not have had more than four decades ago should not cost him the undisputed ‘floor’ value to which he is clearly entitled via his dissenter’s rights.

Plaintiff’s request for interest on the advance payment is premature for a few reasons. With respect to interest, BCL § 623(h)(6) states “The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the date the corporate action was consummated to the date of payment.” The Court has yet to determine the fair value of Petitioner’s shares, no insight into Van Dale’s rate of interest has been provided, and a final order is not yet being issued.

Lastly, on the issue of costs, expenses, and attorney’s fees, BCL § 623(h)(7) allows courts presiding over appraisal proceedings discretion to award the dissenting shareholder costs, expenses, and fees under certain conditions. At this time, the Court is not persuaded to award for costs.

ORDERED that Petitioner’s Motion 002 is GRANTED to the following extent:

ORDERED that the Clerk shall enter judgment in favor of Plaintiff and against Defendant in the amount of \$6,224,040.20; and it is further

ORDERED that the branch of Petitioner’s Motion 002 seeking an award of costs, interest, expenses, and attorney’s fees is DENIED, with leave to renew at a later date; and it is further

ORDERED that Respondent’s Cross-Motion for an Order granting a stay is DENIED as moot; and it is further

ORDERED that Petitioner’s Motion 003 is GRANTED as unopposed.

7/14/2023

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE