

Rosenthal v Erber

2023 NY Slip Op 32750(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 650771/2021

Judge: Jennifer G. Schechter

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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: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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INDEX NO. 650771/2021

TED ROSENTHAL,

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION + ORDER ON
PETITION**

JEFFREY ERBER, 87TH STREET OPTICAL CORP,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 10 were read on this petition for DISSOLUTION.

Ted Rosenthal and Jeffrey Erber each own 50% of the shares of 87th Street Optical Corp. (the Company), a New York corporation that operates a boutique optical store called Jeffrey's Manhattan Eyeland on the Upper West Side of Manhattan. Erber runs the store while Rosenthal is a passive shareholder. On February 3, 2021, Rosenthal filed a petition to dissolve the Company. On March 9, 2021, Erber made a Business Corporation Law (BCL) § 1118 election to purchase Rosenthal's interest in the Company based on its fair value as of the day before the petition was filed (February 2, 2021 [the Valuation Date]). On March 27, 2023, the court held a fair value hearing to determine "what a willing purchaser in an arm's length transaction would offer for [Rosenthal's] interest in the company as an operating business" (*Matter of Seagroatt Floral Co.*, 78 NY2d 439, 445 [1991]; see *Friedman v Beway Realty Corp.*, 87 NY2d 161, 167 [1995] ["Fair value requires that the dissenting stockholder be paid for his or her proportionate interest in a going concern, that is, the intrinsic value of the shareholder's economic interest in the corporate enterprise"]). Both sides called expert witnesses. Erber and a representative of the Company's landlord testified as well (see Dkt. 90). The court also considered the parties' post-hearing briefs (Dkts. 88-89).

The court begins with the parties' dispute over the amount of rent owed to the Company's landlord as of the Valuation Date. Rosenthal contends the outstanding rent totals \$95,576, as indicated in an October 18, 2021 invoice that the landlord produced in response to a subpoena (Dkt. 44 at 2). Erber, however, maintains that the outstanding rent totals \$384,497.59, based on a letter from the landlord dated January 18, 2022 (Dkt. 70 at 2). The court does not credit this wholly-unbelievable letter or landlord's testimony about the veracity of this amount. The letter was sent after the landlord made a prior contrary representation in response to the subpoena and is suspect to say the least. The January-2022 letter states that the amount owed is "as of February 3, 2021" (see *id.*). The only plausible reason the landlord used this date is that it was at Erber's direction (the landlord's

representative does not recall why). Indeed, the date is in a smaller font than the rest of the letter, suggesting that it was copied and pasted there.

Even assuming that it had a proper evidentiary foundation, the court does not find the invoice that the rebuttal report relied on to be reliable (*see* Dkt. 89 at 15-17). Under these circumstances, where the landlord values its relationship with Erber, given the other vacancies in the building and since the court did not find there to be any credible testimony or evidence to support the \$384,497.59 purportedly owed in rent (much of which is likely uncollectible as barred by the statute of limitations and thus would not affect the value of the Company anyway), the court finds that the Company owed \$95,576 in rent on the Valuation Date (*see* Dkt. 89 at 10-18).

Next, the court agrees with Rosenthal that the Company's books and records are unreliable and that they conflict with its tax returns (*see id.* at 7-10). Erber has complete control of the operations of the Company and could have ensured there was a clear record of the Company's financials but failed to do so (he certainly could have called the Company's accountant to explain the discrepancies if he wanted to).

Thus, the court largely agrees with the valuation approach of Rosenthal's expert, including his normalizing adjustments and exclusions (Dkts. 42, 43; *see* Dkt. 89 at 18-22). His reports were thorough and the court found him to be a credible witness. The court, however, disagrees with certain aspects of his valuation. As discussed below, while the court does not credit the affirmative report of Erber's expert, some of the critiques in his rebuttal report were persuasive (*see* Dkt. 69).

While taking an equally weighted average of the four methods of valuation was reasonable and provides the court with a good sanity check for the valuation, as usual in this type of proceeding, the valuations are somewhat inflated (*see In re Appraisal of Dole Food Co.*, 114 A3d 541, 557 [Del Ch 2014] ["the battling experts tend to generate widely divergent valuations as they strive to bracket the outer limits of plausibility"]). The court finds that the growth rates used for the DCF and capitalization of earnings methods are far too optimistic and that many of the comparable companies used for the guideline public company method are not that comparable. In a case with far more money at stake the court likely would have considered making more granular findings to recalculate each valuation. Here, however, the court finds that an across-the-board 20% reduction to these valuations should fairly account for these aggressive assumptions. This is perhaps somewhat more of an adjustment than necessary, but the court finds it prudent to take a conservative valuation approach under these circumstances given the nature of the business--a boutique optical shop on the Upper West Side being valued as of the middle of the pandemic. The result of these reductions is a DCF valuation of \$497,600, a capitalization of earnings valuation of \$556,000 and a guideline public company valuation of \$536,000.

The court also finds that the multiple of 2.7 applied for the guideline transactions method is unjustifiably high and admittedly optimistic (*see* Dkt. 42 at 32 [it is "based on the upper quartile of the range"]). As with the guideline public company valuation, the companies from which this multiple was derived are not sufficiently similar so the court finds this multiple to be too aggressive. "Of the multiples calculated for the nine retail optical stores, two of the stores had multiples of 2.9x and 2.7x, while the multiples of the other seven stores ranged from .8x to 2.4x and the weighted average multiple of the nine stores is actually 2.4x" (Dkt. 69 at 5). The court will apply a more conservative multiple of 2.0, reducing the guideline transactions method valuation to \$396,822 (\$198,411 x 2).

These reductions result in an equally weighted average of \$496,606 (*see* Dkt. 42 at 33). After applying the remaining three adjustments (adding cash and cash equivalents of \$82,786, subtracting the \$95,576 in rent owed to the landlord, and subtracting the SBA EIDL long-term debt of \$150,000), the fair value of the Company is reduced to \$333,816 (*see id.*).

The court, moreover, finds that an arms' length purchaser would likely account for the fact that Erber might retire in a few years (or after a sale) and that the value of the business without him would be diminished (*cf.* Dkt. 43 at 6). While there is no perfect way of accounting for this risk (e.g., the loss of goodwill from customers who patronize a small Upper West Side business due to Erber being the proprietor), the fair value of the Company should reflect this reality and thus a modest adjustment of \$50,000 is warranted (*see Matter of Seagroatt Floral Co.*, 78 NY2d at 445 ["Valuing a closely held corporation is not an exact science" and "will depend upon the circumstances of each case; there is no single formula for mechanical application"]). This results in a fair value of \$283,816.

By contrast, the court was unpersuaded by the methodology of Erber's expert (*see* Dkt. 68), and his responses on cross-examination reinforced the court's conclusion (Dkt. 89 at 6-7; *see* Dkt. 86 at 3-6; *see also, e.g.*, Dkt. 90 at 160-63). Despite the discussed shortcomings, "relatively speaking, [Rosenthal's] expert was more helpful, because his work demonstrated how different assumptions and inputs affected [the Company's] value" while, for the reasons set forth below, Erber's expert appears to merely have been hired to proffer an opinion "to defeat [Rosenthal's] claims" (*see In re Dole Food Co., Inc. Shareholder Litig.*, 2015 WL 5052214, at *35 [Del Ch Aug. 27, 2015]). Indeed, that Erber's expert could conclude based on the record evidence that the Company was worth \$0 significantly undermines his credibility. The notion that the Company is worthless is belied by the significant value Erber continues to derive from it (*see* Dkt. 89 at 5).

The gaps and inconsistencies in the Company's financial records were exacerbated by Erber's failure to provide all of those records to his expert. Erber's expert only relied on the Company's tax returns but not on its Quickbooks or financial statements (*see* Dkt. 90 at 158). It is troubling that an expert would purport to render a serious opinion on the Company's value based only on its tax returns, knowing his client could easily have given him a more complete set of records. Erber's expert explicitly noted that his analysis was

predicated on the information in the tax returns being accurate and that such information was not being verified (*see* Dkt. 68 at 19). Since it seems the information on the tax returns is not accurate, particularly as there are significant inconsistencies with the financial records, the analysis in Erber's affirmative expert report is unreliable.

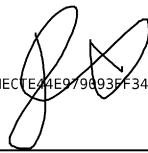
This is a problem of Erber's own making. He made the strategic decision to not provide his expert with the Company's underlying financial records or have his accountant address the inconsistencies at trial, which suggests he knows that the data on which his expert relied is unreliable and is being used to support an artificially low valuation to depress Rosenthal's recovery. This further undermines his credibility.

The court also finds that the Company's month-to-month lease does not adversely affect its value, as it is clear from the landlord's testimony that it values the stable tenancy given other vacancies and that a prospective purchaser would not likely be concerned about losing the space.

Erber's other arguments are unavailing and the court declines to opine on other issues affecting fair value that were not raised by the parties.

For these reasons, the court finds that the fair value of the Company as of the Valuation Date is \$283,816. The court further finds that it would be equitable for Rosenthal to recover 9% interest from the date the petition was filed (February 3, 2021) to the date of payment (BCL § 1118[b]; *see Blake v Blake Agency, Inc.*, 107 AD2d 139, 151 [2d Dept 1985], *accord Ferolito v Arizona Beverages USA LLC*, 2014 WL 5834862, at *22 [Sup Ct, Nassau County Oct. 14, 2014]). Neither party presented any compelling evidence to justify awarding interest below the usual statutory rate.

Accordingly, it is ORDERED that by August 29, 2023, the parties shall jointly prepare, e-file and email the court a Word version of a proposed judgment requiring Erber to pay Rosenthal the sum of \$141,908, with 9% pre-judgment interest from February 3, 2021 to the date payment is made, with Rosenthal to simultaneously tender his shares in the Company to Erber.

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JENNIFER G. SCHECTER, J.S.C.

8/8/2023
DATE

CHECK ONE:

<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER