

decision dated December 4, 2007. That second decision declined to apply a lack of marketability discount to the shares and therefore increased the value of the Petitioners' interest from \$42,840.00, which had been the value in the first decision, to \$61,200.00. [Record, Volume I, pp. 15-18]. The Court itself realized at oral argument on a later post-trial motion filed to stay execution on the judgment, that it had in fact misapplied the marketability discount which was to be for the value of the shares, and had attempted to transfer that marketability discount to the sale of the assets at liquidation. Also notably, DAPA Communications, Inc. is an operating company and is not in liquidation. Dapacom is a closely held company and there generally is no market for the shares of such companies. Therefore, the second decision of the Court dated December 4, 2007 must be vacated, as it failed to apply a lack of marketability discount for closely held shares, a discount which is mandated by the case authorities. This Court should then enter judgment for the Appellant in accordance with the facts and case authorities or, in the alternative, remand to the lower court for reconsideration in accordance with the facts and case law authorities.

B. THE LOWER COURT ERRED IN FAILING TO VALUE DAPA COMMUNICATIONS, INC. AS AN OPERATING BUSINESS.

i. The Court Of Appeals Has Mandated A Standard To Be Used In Valuing A Corporation Under NY BCL § 1118

The Petitioners filed for judicial dissolution pursuant to New York BCL §1104-a. The Appellant subsequently elected to buy out the shares of the Petitioners pursuant to New York BCL §1118. [Record, Volume I, pp. 47 & 48]. The New York Court of Appeals has decided numerous cases under New York BCL § 1118 and the Court of Appeals has clearly mandated a standard which is to be used in doing a valuation. "The objective of a proceeding under Business Corporation Law § 1118 ... is to determine what a willing purchaser in an arms-length

transaction would offer for Petitioners' interest in the company as an operating business.”

Matter of Seagrott Floral Co., Inc., 78 N.Y.2d 439, 576 N.Y.S.2d 831 (1991); Matter of Pace Photographers, 71 N.Y.2d 737, 530 N.Y.S.2d 67 (1988); Matter of Blake v. Blake Agency, 107 A.D.2d 139, 486 N.Y.S.2d 341 (2nd Dept. 1985). Note that the standard is what an arm's length purchaser would offer for the interest, that is, the value of the shares or stock, that the petitioner owns.

At trial, the Appellant presented expert testimony as to what the value of Dapacom was on the day before Petitioners filed their Petition, July 12, 2005, the date relevant for valuation purposes. The Appellants' expert Darren Graff utilized a number of methods in order to reach a determinative value for the shares of DAPA Communications, Inc. Several of these methods calculated the value of the Petitioners' shares in an on-going concern basis. Those calculations showed that, using an on-going concern method of valuation, the value of Petitioners' interest (the value of their shares) was zero. [Record, Volume I, pp. 215-220].

Appellants' expert, as an alternative, also performed a valuation using an asset based value or, in essence, a liquidation based value. That method of valuation determined the value of the Petitioners' shares before applying any discount was \$49,782.00. The Appellants' expert then applied a 25% discount for lack of control of the corporation or, \$12,446.00. He also applied a 30% discount for the lack of marketability of the shares or \$11,201.00. The Appellants' expert then determined that the fair market value of the 34% equity interest of the Petitioners on a liquidation basis was \$26,136.00, or rounded, \$26,000.00. [Record, Volume III, pp. 526-551]. Using the figures of the Appellant's expert, if there were no discount applied for lack of control, then the 30% discount for lack of marketability as applied to the value of the

34% interest without discounts of \$49,782.00 would yield a discount amount of \$14,934.60 and subtracting that amount would show that the value of the Petitioners' shares was \$34,847.40.

ii. The Petitioners Presented No Evidence As To The Value Of Dapacom As An On-Going Concern.

In sharp contrast, the Petitioners' expert, while stating in his expert report that "There are a number of generally accepted methods in use for valuating a closely held business asset none of which is necessarily superior to the others," [Record, Volume II, p. 444], decided to use only a liquidation value for the assets even though DAPA Communications, Inc. or Dapacom is an operating concern. In fact, under cross-examination by Mr. Keenan, counsel for the Appellant, the Petitioners' expert was asked directly if he used the standard mandated by the Court of Appeals in determining his value for DAPA Communications, Inc.

"Q. All right. Now, sir, I am going to ask you - - now, sir, did you do a calculation to determine on the basis what a willing purchaser in an arms length transaction would offer for the corporation as an operating business rather than as a business in the process of liquidation in regards to DAPA Communications?"

A. I did not. [Record, Volume I, p. 122].

During further cross-examination, the Petitioners' expert made extremely clear the fact that he did not use the form of valuation mandated by the Court of Appeals.

"Q. So, to be clear, you made no calculation as to the 34 percent interest in an ongoing business?"

A. I determined it was not appropriate to use, that's correct.

Q. And so, you didn't actually make the calculation of what the dollar value of that business would be?"

A. As I said, I deemed in inappropriate to use that method, so no.

Q. So, no, you didn't make the calculation?

A. That's a true statement.

Q. Okay. You assumed a liquidation value?

A. True. [Record, Volume I, pp. 122 & 123].

In fact, nowhere during the trial did the Petitioner present any evidence of the value of Dapacom other than a liquidation value. The Petitioners' expert clearly did not follow the criteria and standard established by the Court of Appeals. Therefore, the evidence presented by the Appellant as to the value of the Petitioners' interest in Dapacom calculated on an operating concern basis is uncontested by the Petitioners. Notably, the Petitioners' expert also failed to apply a discount for lack of marketability of the shares of the closely held corporation.

In its decision, the lower Court employed an asset based value, or in effect a liquidation value. However, DAPA Communications, Inc. was an operating concern at the time the Petition was filed by Petitioners, it was still an on-going operating concern at the time the Appellant elected to buy out the shares of the Petitioners pursuant to New York BCL § 1118, and at the date of this appeal Dapacom is still an on-going operating concern. Therefore, pursuant to the governing case law of the New York State Court of Appeals, the lower Court should have valued Dapacom on the basis that it was an operating concern and the lower court should not have used a liquidation or asset base value. Consequently, this Court should vacate the Judgment and Order of the lower Court and enter judgment for the appellant in accordance with the governing case authorities or, in the alternative, remand the case for reconsideration in conformity with the governing case authority requiring the Petitioners' interest in Dapacom to be valued on an on-going concern basis.

iii. The Statutory Scheme Developed By The New York State Legislature Requires Valuation As An On-Going Concern.

Under the system developed by the New York State Legislature, minority shareholders who hold in the aggregate at least twenty percent (20%) of the shares of a corporation may petition for judicial dissolution of the corporation under special circumstances. New York Business Corporation Law §1104-a. In other words, under this section of the BCL minority shareholders who hold a specific percentage of shares have the power to force a liquidation of the corporation, if there is oppression or wrongdoing on the part of the majority shareholders.

However, the legislature also provided that within a statutory time period, another shareholder, or the corporation itself, may elect to buy out the interest of the petitioning shareholder. New York Business Corporation Law §1118. Once that election is made, under the legislative scheme mandated by the New York Legislature, the minority shareholder loses the ability to force the liquidation of the corporation's assets. Absent a shareholder's agreement which addresses the question of liquidation (which situation did not exist in the instant case), the minority shareholder is then compelled by the legislative scheme to accept the value of his or her shares in an on-going concern with the relevant date for valuation being the day before the 1104-a petition was filed. Because of the legislative design of the statutes, the lower court could not unilaterally decide to employ a liquidation value for Dapacom, an operating business.

Accordingly, the judgment entered at the direction of the lower court must be vacated and judgment entered for the Appellant or, in the alternative, the case should be remanded for reconsideration by the lower Court in accordance with the legislative intent of the statutes involved.

iv. The Value Of The Petitioners' Shares Is The Relevant Question

In determining the value of a petitioner's interest in a corporation under NY Business Corporation Law § 1118, the relevant question is the value of the shares held by the petitioner. This fact is made clear by the words of the statute.

b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the **fair value of such shares**, the court, upon the application of such prospective purchaser or purchasers or the petitioner, may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the **fair value of the petitioner's shares** as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. 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 at an equitable rate upon judicially determined fair value of his shares. NY BCL § 1118(b) [Emphasis added].

Therefore, it was improper for the lower Court to focus on the value of the assets of the corporation or the value of corporation itself. The statute mandates that the relevant question is the value of the shares owned by the Petitioners.

C. THE SELECTION OF A VALUE FOR DAPA COMMUNICATIONS BY THE LOWER COURT WAS ARBITRARY AND CAPRICIOUS

At trial, the Court was presented with two vastly different opinions as to the value of Dapacom by the respective experts for the Petitioners and the Appellant. The Petitioners' expert stated that his belief as to the fair market value of the common stock of DAPA Communications was in the range of \$728,000.00 to \$755,000.00 for the value of the entire company. [Record, Volume II, pp. 443-446]. The Appellant's expert, in sharp contrast, found the value of Dapacom to be \$167,088.00. [Record, Volume III, p. 545]. To that figure, the Appellants' expert Darren

Graff applied fair market value adjustments in the amount of \$20,670.00. Mr. Graff therefore fixed the orderly liquidation or asset based value as of July 12, 2005 at \$146,418.00. [Record, Volume III, p. 545]. The Court was free to choose between the amounts offered by either expert. However, the Court did not accept the testimony of either the Appellant's or the Petitioners' experts, but instead the Court assigned an arbitrary value to the assets of the company of \$180,000.00. Himelein J. stated "The Court has reviewed the testimony and the exhibits and concludes that the liquidation value of the company is \$180,000.00." [Record, Volume I, p. 14]. In its revised decision of December 4, 2007, the Court also held that the total value of all the assets of DAPA Communications, Inc. was \$180,000.00. [Record, Volume I, pp. 15-18]. Nowhere in either decision does the Court explain how it calculated the \$180,000.00, or the rationale behind the figure. Furthermore, while there was testimony at the trial by the Petitioners that some of the assets were worth more than the amounts reflected on the company's balance sheets, the judge specifically in his second decision rejected that contention. The Court stated that it accepted the testimony of the Appellant's witness and gave it more weight than the testimony of Ms. Rateau, one of the Petitioners.

Both parties introduced evidence of what the company's assets were worth at a sale. Therefore, the Court evaluated this company on the basis of its liquidation value and the Court gave Stanley Czock's testimony on value more weight than the testimony of Ms. Rateau. [Record, Volume I, p. 17].

Consequently, the lower Court established no factual basis for the reason it did not accept either the Appellants' or Petitioners' expert's opinions of the value of the company. In fact, because the Appellants' expert prepared his report directly from the company's balance sheet as of July 12, 2005, and because the Court specifically rejected the Petitioners' statement that there were substantial items which were left off the balance sheet and which were very valuable, it

becomes impossible to understand how the Court could have increased the value of the company by approximately \$33,600.00 when there are no items on the balance sheet to support such an increase, and the Court has given no rationale or reason for the increase. Therefore, the lower Court's decision as to value of DAPA Communications, Inc. is not in accordance with the facts, is in fact arbitrary and capricious and must be vacated by this Court. Consequently, this Court should vacate the Order and Judgment of Himelein J. dated December 18, 2007 and enter judgment for the Appellant or, in the alternative, remand to the lower Court for reconsideration in accordance with the evidence as submitted by the parties.

CONCLUSION

This Court must vacate the decision of the lower Court because there were a number of serious flaws in the value which it assigned the Petitioners' interest to DAPA Communications, Inc. after trial, and pursuant to New York BCL § 1118. First, the Court failed to apply a 30% discount for the lack of marketability of the shares of DAPA Communications. Secondly, the Court became conceptually confused and attempted to apply a discount based on the difficulty in selling the assets of the company. This in fact, was incorrect and the discount which was mandated by the case law must be applied because the shares themselves are not easily marketable. Thirdly, the Court used an incorrect method of valuation. Since DAPA Communications, Inc. was and is an operating on-going concern, the authorities mandated that in valuing the company the Court must use an on-going concern value. Fourthly, the Court selected an arbitrary amount for the value of the company. Such amount did not accord with the facts or the evidence as submitted by the parties. For each of these reasons, the Court should vacate the judgment and remand to the lower Court for reconsideration in accordance with the law.

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Respectfully submitted,

By: John J. Keenan, Esq.
KEENAN AND STONE, PLLC
Attorneys for Appellant
207 Lake Street, Suite 2 Street
Hamburg, New York 14075
(716) 646-9400

TO: Larry Kerman, Esq.
Blair and Roach, LLP
Attorneys for Petitioners
Respondent in Appeal
2645 Sheridan Drive
Tonawanda, New York 14150
(716) 834-9181