

At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February, 2015.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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HOWARD MINTZ AND SUSAN MINTZ-BELLO, AS CO-TRUSTEES OF THE MAX MINTZ QTIP TRUST, AND SUSAN MINTZ-BELLO, AS TRUSTEE OF THE SUSAN MINTZ-BELLO GRANTOR RETAINED ANNUITY TRUST DATED SEPTEMBER 24, 2012 (THE "MINTZ TRUSTS"), INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTORIA HOLDING CORP.,

Plaintiffs,

- against -

Index No. 502127/2013

ROCHELLE PAZER, DINA BASSEN, LISA PAZER AND ASTORIA HOLDING CORP.,

Defendants.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>212, 214-225</u> <u>245-260</u>
Opposing Affidavits (Affirmations) _____	<u>226, 228-235, 239</u> <u>263-267</u>
Reply Affidavits (Affirmations) _____	<u>237-238, 244</u>
_____ Affidavit (Affirmation) _____	_____
Memoranda of Law _____	<u>213, 227, 236</u> <u>261, 262, 268</u>

Upon the foregoing papers, in this action by plaintiffs Howard Mintz (Howard) and Susan Mintz-Bello (Susan), as Co-Trustees of the Max Mintz QTIP Trust, and Susan Mintz-Bello, as Trustee of the Susan Mintz-Bello Grantor Retained Annuity Trust dated September 23, 2012 (collectively, the Mintzes), individually and derivatively on behalf of Astoria Holding Corp. (the Company), against defendant-counterclaim plaintiff Rochelle Pazer (Shelley) and defendants Dina Bassen (Dina), Lisa Pazer (Lisa), and the Company (collectively, the Pazers), the Mintzes, move, by order to show cause, under motion sequence number six, pursuant to CPLR 2221, for an order granting them leave to reargue the court's decision and order dated November 7, 2014 (the Exchange Date Decision) and/or to renew their opposition to Shelley's cross motion for an order setting a firm date for the parties to exchange appraisal reports, which was granted by the Exchange Date Decision, and upon such reargument and/or renewal, for an order denying Shelley's cross motion. Shelley moves, under motion sequence number seven, for an order aligning the valuation date for the appraisals (the valuation date) so as to be contemporaneous with the date on which the appraisals are exchanged (the exchange date).

BACKGROUND

The Company is a closely held corporation and a family business, whose sole significant asset is the Georgetowne Shopping Center (the Shopping Center), which is located at 2181-2195 Ralph Avenue, in Brooklyn, New York, and is comprised of approximately 140,000 square feet of leased commercial real estate. Pursuant to the

Company's Shareholder Agreement dated July 31, 2011 (the Shareholders' Agreement), Shelley has a 52.031% ownership interest in the Company, and the Mintzes hold the remaining percentage of ownership interest, and Shelley and the Mintzes each have a 50% voting interest in the Company. Susan and Howard (who are brother and sister) and Shelley and Dina (who is Shelley's daughter) are the Company's directors and officers, and Lisa (who is Shelley's other daughter) is also an officer of the Company. Shelley is the manager of the Company and the Shopping Center, and she handles their day-to-day affairs.

After years of dispute between the Mintzes and the Pazers, resulting in deadlock in the Company and unsuccessful mediation, the Mintzes, on April 25, 2013, filed this action seeking a declaration as to whether they were entitled to purchase Shelley's shares in the Company or whether Shelley was entitled to purchase their shares in the Company under section 8.2 of the Shareholders' Agreement entitled "Right of First Offer." Following a motion and cross motion for partial summary judgment by the Mintzes and Shelley, respectively, the court, in a December 30, 2013 decision and order, determined that since the Mintzes served the first Purchase Notice on September 27, 2012, they were entitled to purchase Shelley's shares, and it directed that the appraisal process be completed as required by and within the time frame prescribed by the Shareholders' Agreement. It further directed that a qualified appraiser be selected within 10 days following service upon Shelly of that decision and order, and that the parties then proceed as set forth in the Shareholders' Agreement.

The purchase price of Shelley's shares was to be determined, pursuant to section 8.2 (c) (i) of the Shareholders' Agreement, by requiring the Mintzes and Shelley to each select a qualified appraiser, who would determine "the final and binding Purchase Price" for the shares, which was to "be equal to the appraised fair market value of all assets of the [Company] . . . less all of [its] liabilities, multiplied by a fraction the numerator of which is the number of Offered Shares, and the denominator of which is the total number of voting shares issued and outstanding for the [Company] (collectively, the 'Determination')." If the higher determination of these two appraisals were to vary by 10% or less from the lower determination, the purchase price would be the average of these two determinations. If the determinations were to vary by more than 10%, then, within 30 days after the delivery of the determinations, the qualified appraisers selected by Shelley and the Mintzes were to appoint a mutually acceptable qualified appraiser who would be empowered to select only from which of the two determinations was closest to his or her determination, and this determination selected by him or her would be the final, binding, and conclusive purchase price of the shares.

Section 8.2 (c) (iv) of the Shareholders' Agreement provided that the purchase price for the offered shares, as determined by this procedure, would be final, conclusive, and binding on the Company, Shelley, and the Mintzes, and required that the full purchase as so determined be paid in cash within 30 days after it was so determined. Significantly, section 11.12 of the Shareholders' Agreement, entitled "Time of the Essence," stated that "[e]xcept

as otherwise provided herein, time is of the essence in connection with each and every provision of this Agreement."

Despite Shelley's repeated efforts to set a deadline on which to exchange appraisal reports, the Mintzes would not agree to a deadline, resulting in an extended delay from the time of the court's December 30, 2013 decision and order and approximately two years since Mintzes' Purchase Notice dated September 27, 2012. Consequently, following a motion by the Mintzes regarding discovery requests regarding possible environmental contamination at the Shopping Center, Shelley, on June 5, 2014, cross-moved for an order setting a firm appraisal exchange date, and determining that, to the extent that the Mintzes failed to exchange appraisals on the date set by the court, that the Mintzes would forfeit any right to purchase her interests in the Company, and that she would have the right to purchase the Mintzes' interest in the Company.

In opposition to Shelley's cross motion, the Mintzes argued that they needed to delay the purchase of Shelley's shares on the basis that there were dry cleaning related chemicals in soil ground water and soil vapor from a dry cleaner, who had occupied a store at the Shopping Center more than 13 years ago, and that this environmental issue required further investigation and remediation. Specifically, they contended that they needed further information about this contamination by the dry cleaning business, and needed to go to the City regulatory authorities and engage in a process which could take several months in order to get the City regulators to sign off on a remediation plan. They stated that, therefore, their

buy-out of Shelley's shares needed to be indefinitely postponed until such time as a remediation plan was completely formulated and its cost quantified.

Shelley, however, pointed out that the Company remained in a state of paralysis due to disagreements between her and the Mintzes and that this was harming the business. She asserted that the Mintzes were attempting to stall their purchase until the mortgage on the Shopping Center becomes due on April 15, 2015 in order to avoid paying a penalty of about a million and a half dollars if they have to pre-pay the mortgage in order to finance their purchase. She also expressed her concern about potential liability to the bank, as a guarantor of the mortgage, in the event that her shares were not purchased by the Mintzes prior to April 15, 2015.

The court, in the Exchange Date Decision dated November 7, 2014, granted Shelley's cross motion and directed the parties to proceed with the exchange of appraisals in accordance with the provisions of the Shareholders' Agreement. In so holding, the court, in the Exchange Date Decision, noted that section 8.2 (c) of the Shareholders' Agreement provided that the purchase price for the shares was to "be equal to the appraised *fair market value* of all assets of the [Company] . . . less all of [its] liabilities, multiplied by a fraction" which represented the portion of the shares being sold as compared to the total number of issued voting shares (emphasis added). It observed that the appraisers, in rendering their appraisals to determine the purchase price of the shares to be sold, were expressly instructed, in this section of the Shareholders' Agreement, to determine the full pro rata share of net

liquidation asset value which such shares represent, which was clarified therein as meaning the value of these shares as if the Company's assets "*were sold on the open market, after reasonable and diligent marketing and net of all reasonable and customary selling costs and expenses,*" and were also to determine the net asset value of the Company's assets after payment of all of its liabilities fully distributed to all shareholders pro rata, without considering or applying any minority, marketability, or other discounts in determining the purchase price (emphasis added).

The court, in the Exchange Date Decision, therefore, found that, pursuant to the unambiguous terms of the Shareholders' Agreement, the appraisers are required to appraise the Company at fair market value and determine this value as if its assets were being sold on the open market. It noted that "[i]n general, 'the market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell'" (*936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.*, 10 NY3d 628, 632 [2008], quoting *Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975], *rearg denied* 37 NY2d 924 [1975]; see also *Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729 [1996]). It found that in view of this market-oriented basis for the determination of the purchase price, the assessor may consider whether the factor of environmental contamination would depress the Shopping Center's value and whether a buyer of the property on the open market would have demanded an abatement in the purchase price to account for the contamination.

The court, in the Exchange Date Decision, observed that where parties agree to appraise corporate assets, including real property at full market value, such assets are to be appraised at full fair market value and such property valued as if it were sold under the circumstances which then exist (*see Fukilman v 31st Ave. Realty Corp.*, 39 AD3d 812, 813 [2d Dept 2007]). It, therefore, explicitly rejected the Mintzes' argument that a delay of the buy-out process was required, and held that contrary to that argument, it was unnecessary that there be a detailed evaluation and quantifying of the exact remedial work needed to be performed in order to appraise the Company and to complete their purchase of Shelley's shares. Rather, it found that purchase price determinations could be made based upon due diligence and reasonable appraisals which take into account the environmental factors.

The court, in the Exchange Date Decision, specifically rejected the Mintzes' argument that since section 8.2 (c) (i) of the Shareholders' Agreement provided that the purchase price must be determined "less all of [the Company's] liabilities" and after payment of all liabilities, they must await a final determination of any liability for remediation before an appraiser can determine the purchase price. The court found this argument to be devoid of merit since the potential of future liability based upon potential contamination is not a present liability of the Company which is due and payable, but rather it is merely "contingent, possible and in futuro" (*Matter of Northville Indus. Corp. v State of New York*, 14 AD3d 817, 818 [3d Dept 2005]).

The court, in the Exchange Date Decision, further noted that “uncertainty concerning future events should not bar attempts to assign value to an asset” (*Burns v Burns*, 84 NY2d 369, 375 [1974]). It pointed out that the potential environmental contamination is simply one of the factors, along with other factors, such as the rent roll, the state of the real estate market, and comparable sales and rentals, that the appraisers must consider in determining the appropriate value of the Company. It found that an appraiser may make an appropriate adjustment to account for any risk of a negative effect on market value based upon the possibility of a diminution in value of the property at issue by reason of the need for future claimed cleanup and remediation costs. It held that rendering such an appraisal now, rather than waiting an indefinite time period for a future determination by governmental regulators regarding the possibility of required remediation and any potential liability for cleanup costs, comported with precedent, appraisal practices, and common sense.

Since there was a dispute between the parties as to the date on which the shares should be valued and they agreed to have that issue addressed by a separate motion, the court, in an October 30, 2014 order, directed Shelley to file and serve a motion regarding the determination of the valuation date. The court, therefore, directed that the exchange of appraisals take place 10 days after notice of entry of the court’s decision and order determining the valuation date to be rendered following Shelley’s motion. On November 10, 2014, Shelley e-filed her instant motion to align the valuation date so as to be

contemporaneous with the exchange date. On December 10, 2014, the Mintzes e-filed their instant motion for reargument and renewal.

DISCUSSION

The Mintzes' Motion as to Reargument

In addressing the Mintzes' instant motion, it is noted that a motion to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; *see also McDonald v Stroh*, 44 AD3d 720, 721 [2d Dept 2007]; *Matter of Hoffmann v Debello-Teheny*, 27 AD3d 743, 743 [2d Dept 2006]; *Daluise v Sottile*, 15 AD3d 609, 609 [2d Dept 2005]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 [3d Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY3d 1005 [1992], *rearg denied* 81 NY3d 782 [1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984]; *Richardson Lindenbaum & Young*, 14 Misc 3d 1223[A], 2007 NY Slip Op 50130[U], *3 [Sup Ct, Kings County 2007], *affd in part, appeal dismissed in part* 56 AD3d 645 [2d Dept 2008]; *Bankers Trust Co. of Cal. v Payne*, 188 Misc 2d 726, 729 [Sup Ct, Kings County 2001]; *American Trading Co. v Fish*, 87 Misc 2d 193, 195 [Sup

Ct, NY County 1975]). Moreover, "a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]; see also *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 874 [2d Dept 2010]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]; *McGill*, 261 AD2d at 594; *Matter of Mayer*, 192 AD2d at 865; *Foley*, 68 AD2d at 567-568).

The Mintzes, insofar as they seek reargument of the Exchange Date Decision, merely attempt to rehash their prior arguments, which were already fully considered and determined by the court. They have failed to provide any facts or law demonstrating that the court, in arriving at its conclusion, misapprehended or overlooked the applicable law or facts.

Specifically, the Mintzes reiterate their argument that it must first be determined how pervasive and severe the contamination is, what needs to be done to address it, and what that the remediation will cost before the purchase price can be determined. They assert that every contamination problem is unique to the facts of the particular property involved, and that an appraiser is incapable of evaluating how a purchaser on the open market might value the Company's assets. They, again, argue that "all liabilities" must be deducted from the fair market value of the Company's assets and that, therefore, the scope and extent of the contamination by the dry cleaner must be fully investigated and assessed, the necessary remedial measures determined, and the costs of the liability for remediation quantified before the purchase price can be determined. This argument, however, was already specifically

addressed and rejected by the court in the Exchange Date Decision. As discussed by the court in the Exchange Date Decision, while the environmental condition of the Shopping Center and the existence of contingent liabilities may be considered in setting the purchase price, it does not provide a legal basis to prevent the buyout process contemplated by the Shareholders' Agreement and previously ordered by this court from moving forward. Appraisers need not wait until the actual costs of remediation are determined with certainty in order to appraise the value of the Company, but, rather, they may consider the potential environmental contamination as a factor in determining the appropriate value of the Company and make an appropriate adjustment to account for any risk of a negative effect on market value based upon the possibility of a diminution in value of the Shopping Center by reason of the need for future claimed cleanup and remediation costs (*see 936 Second Ave. L.P.*, 10 NY3d at 632). As previously noted, a motion for reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Haque v Daddazio*, 84 AD3d 940, 942 [2d Dept 2011]; *Foley*, 68 AD2d at 567; *American Trading Co.*, 87 Misc 2d at 195).

The Mintzes also now argue that the court misapprehended the law and facts because the Shareholders' Agreement does not impose a deadline for the exchange of valuation reports, and the law requires that a "reasonable" time be allowed to exchange those valuation reports. They contend that the Exchange Date Decision does not provide the "reasonable" time the appraisers require in order to prepare accurate valuation reports and compels them

to “rush” into making a valuation. This argument is devoid of merit. As previously discussed, a purchase price determination may be made based upon due diligence and reasonable appraisals which take into account the environmental factors. Moreover, a “reasonable” time does not require an indefinite postponement of the buyout process for years. In this regard, it is noted that while counsel for the Mintzes had represented at oral argument on July 29, 2014 that the costs of remediation would be fixed in “a couple of months,” it is now six months later and the Company’s environmental consultant now estimates that there will not be an approved remediation plan until March 2016. As set forth above, the Shareholders’ Agreement, in section 11.12, embodies a time is of the essence provision, and it also contains other provisions that manifest the intent of the parties to have the buyout process proceed an expeditious manner. Thus, waiting until March 2016 would be contrary to the expressed intent of the Shareholders’ Agreement. Moreover, further delay would be manifestly prejudicial to Shelley, who remains liable, as a 52% shareholder, for at least 52% of the liabilities of the Shopping Center and must carry 52% of the Shopping Center’s costs, and who is faced with the expiration of the Shopping Center’s present mortgage in April 2015 and corresponding liability as a guarantor of that mortgage.

Consequently, inasmuch as the Mintzes have failed to demonstrate that the court has misapprehended the law or facts and have simply rehashed arguments already considered and rejected by the court, their motion, insofar as it seeks reargument of the Exchange Date

Decision, must be denied (*see* CPLR 2221 [d] [2]; *Foley*, 68 AD2d at 567; *American Trading Co.*, 87 Misc 2d at 195).

The Mintzes' Motion as to Renewal

With respect to the Mintzes' motion insofar as it seeks renewal, the court notes that a motion for leave to renew must be based upon new facts that were not offered on the original motion, and which would change the court's prior determination (*see* CPLR 2221 [e] [2]; *Joseph v Simmons*, 114 AD3d 644, 644 [2d Dept 2014]; *Aronov v Shimonov*, 105 AD3d 787, 788 [2d Dept 2013]; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Wilkins*, 97 AD3d 527, 528 [2d Dept 2012]; *Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011]; *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628, 629 [2d Dept 2010], *lv dismissed in part, denied in part* 15 NY3d 888 [2010]; *Pena v New York Mexicana Car & Limousine Serv. Corp.*, 31 AD3d 407, 408 [2d Dept 2006]). The party seeking renewal must have a "reasonable justification" for the failure to present such facts on the original motion (CPLR 2221 [e] [3]; *see also Deutsche Bank Natl. Trust Co.*, 97 AD3d at 528; *Bank of N.Y. Mellon v Izmirligil*, 88 AD3d 930, 932 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 882 [2d Dept 2011]; *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 985, 986 [2d Dept 2010]; *Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884 [2d Dept 2009]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2d Dept 2007], *lv dismissed* 12 NY3d 892 [2009]). "A motion for leave to renew is not a second chance freely given to

parties who have not exercised due diligence in making their first factual presentation” (*Joseph*, 114 AD3d at 644, quoting *Elder v Elder*, 21 AD3d 1055, 1055 [2d Dept 2005]; see also *Aronov*, 105 AD3d 787; *Rose v Levine*, 98 AD3d 1015, 1015-1016 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co.*, 97 AD3d at 528; *Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009]; *Matter of Allstate Ins. Co. v Liberty Mut. Ins.*, 58 AD3d 727, 728 [2d Dept 2009]).

The Mintzes, in seeking renewal, argue that new facts have arisen since the time that Shelley’s cross motion was fully submitted and argued on July 29, 2014, which warrant renewal and denial of Shelley’s cross motion. The Mintzes specify that they have now retained environmental legal counsel, Michael Bogin (Mr. Bogin), who has advised them to submit the dry cleaner contamination site to the New York State Brownfield Program (BCP), and that investigation of the dry cleaner contamination has been ongoing at the Shopping Center, first by Impact Environmental Closures, Inc. (Impact), and then by Tenen Environmental (Tenen), an independent environmental consultant recommended by Mr. Bogin. They assert that Impact advised the court on August 10, 2014 (prior to the Exchange Date Decision) that the contamination was more extensive than had been previously found by Roux Associates, Inc. (Roux) (who had been retained by Shelley in September 2013), and that, on September 30, 2014 (which was also prior to the Exchange Date Decision), Tenen had estimated costs of the environmental liability to be between \$470,000 and \$1,750,000, which was significantly higher than Roux’s estimate. These facts, however, are not newly discovered since they were previously made known to the court by the Mintzes through

various written submissions, conference calls, and at the October 30, 2014 court appearance. Indeed, the court, in the Exchange Date Decision, specifically acknowledged that it was aware that there were changing circumstances relating to the remediation efforts, but that this did not alter its ultimate conclusion. Thus, since the court was aware of these facts prior to rendering the Exchange Date Decision and it considered them in rendering that decision, they do not constitute a valid basis for renewal (*see* CPLR 2221 [e] [2]).

The Mintzes also rely upon investigative findings reported by Tenen on a November 18, 2014 conference call, which took place after the Exchange Date Decision, as new facts constituting a basis for renewal. They assert that Tenen advised the parties that its recent additional testing and investigation had revealed contaminated soil vapor and air vapor inside the tenant space two stores over from the dry cleaner, and that, therefore, the scope and extent of the contamination has still not been fully delineated. However, this merely constituted an update of the work that Tenen was performing in advance of submitting the Company's BCP application. The cost estimate that Tenen had provided to the Company on September 30, 2014, and of which the Mintzes informed the court, by letter dated October 7, 2014, remains consistent with Tenen's current estimate of total project remedial cost of approximately \$1,750,000, as reflected in the Company's recently filed application to the BCP. Moreover, Tenen's estimate in the BCP application reflects that the cost of remediation can be presently quantified. In any event, the court, as noted in the Exchange Date Decision, is aware that the extent of remediation is being regularly updated.

Nevertheless, an appraiser can estimate the present fair market value of the Company, taking into consideration this factor. Thus, these facts would not change the court's prior determination in the Exchange Date Decision.

The Mintzes additionally argue that if they are forced to close before there is an approved remediation plan by the BCP, their existing financing to purchase Shelley's shares will most likely evaporate. That is, while the Mintzes, in opposition to the Shelley's prior cross motion did not previously assert that they were unable to secure lender financing due to any contamination issue, they now state that their current refinance lender has advised them that it will require a remediation plan approved by the BCP as a condition to closing its loan. They assert that the court should, therefore, overturn the Exchange Date Decision because, otherwise, they may not be able to afford to purchase Shelley's shares.

The Mintzes, however, have not submitted any supporting documentation from their lender or explained whether or if they have sought financing from other lenders. They simply state that they will try to dissuade the existing lender from enforcing this requirement and also will seek an alternate refinance lender. In this regard, it is noted that Shelley previously attested, in support of her prior cross motion, that she was able to obtain financing for the prospective purchase of the Company without such a government approved remediation plan.

The Mintzes' claimed inability to obtain a mortgage based upon an alleged environmental condition, which has existed for over 13 years without any attempt at

remediation, does not constitute a new fact which would change the court's prior determination in the Exchange Date Decision since it is not a valid basis for indefinitely postponing the buyout of Shelley's shares. The Mintzes are not compelled to purchase Shelley's shares and may elect to forfeit this right if they are unable to afford to make such purchase. Notably, Shelley remains ready, willing, and able to purchase the Mintzes' shares in the Company at the present time (as opposed to some unspecified date in the future) despite the Shopping Center's alleged environmental condition. Thus, since the court finds that the Mintzes have failed to set forth any new facts which would change the court's prior determination, their motion, insofar as it seeks renewal, must be denied (*see* CPLR 2221 [e] [2]; *Foley*, 68 AD2d at 567; *American Trading Co.*, 87 Misc 2d at 195).

Shelley's Valuation Date Motion

As to the date upon which the valuation of the Company should be based, Shelley, in support of her instant motion, argues that the appraiser should use a current date, which is aligned with the exchange date of the appraisal reports. She notes that the prior date, which was agreed to between her and the Mintzes before their respective summary judgment motions were decided, was October 31, 2012, which is now over two years ago. She points out that she has been severely prejudiced by the delay in the exchange date. Specifically, she asserts that she has lost opportunities due to not receiving the proceeds of the sale since she could have used these proceeds to finance other investments during this two-year period. She also asserts that there are continuing liabilities that accompany the ownership of the

Shopping Center, which she has been forced to incur due to the Mintzes' delay in effectuating the sale of her shares. She further points out that she has also incurred costs in financing the operation of the Shopping Center and in funding maintenance projects there.

While the Mintzes rely upon the fact that in November 2012, their attorney agreed with Shelley's attorney, in e-mails, to set October 31, 2012 as the valuation date, these e-mails in November 2012 could not constitute a binding stipulation since this valuation date was agreed to by counsel prior to the commencement of this action on April 25, 2013 (*see* CPLR 2104). In fact, such purported agreement occurred before the court had rendered its December 30, 2013 decision and order, which determined that the Mintzes could purchase Shelley's shares in the Company. At the time that the October 31, 2012 valuation date was set, the parties contemplated that the exchange of appraisals would occur at a time contemporaneous with that date.

Notably, the November 18, 2012 e-mail from Alan Guttenberg, Esq. in response to the November 16, 2012 e-mail from Steve Shore, Esq. regarding the selection of the exchange date, stated that the Mintzes had agreed to the October 31, 2012 valuation date proposed by him “[i]n the interests of moving the . . . buyout forward as quickly as possible.” This statement reflects that the October 31, 2012 date was chosen to allow the appraisers to prepare a valuation contemporaneous with the buyout. Due to the passage of over two years since October 31, 2012, however, the use of this past date would necessarily cause a

manifestly unfair result, which could not possibly have been contemplated at the time that Shelley, by her counsel, agreed to that date.

Moreover, contrary to the Mintzes' argument that the parties entered into a final and binding agreement as to the October 31, 2012 valuation date in this e-mail exchange, this e-mail exchange between counsel did not constitute an unambiguous integrated agreement embodying all of the relevant terms between the parties, but, rather, it was made in the context of broader negotiations concerning the buyout process, as delineated in the Shareholders' Agreement,. Thus, these e-mails cannot simply be read in a vacuum, but are inextricably intertwined with the Shareholders' Agreement since the essential terms and factors for implementing the valuation date are not reflected in such e-mails, but are set forth in the Shareholders' Agreement.

As to the Shareholders' Agreement, it is well established that “[a] written contract “will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose”” (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003], quoting *Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 248 [1942], quoting 3 Williston, Contracts § 618). ““When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations”” (*Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826, 827 [2d Dept 2012], quoting *Willsey v Gjuraj*, 65 AD3d 1228,

1230 [2d Dept 2009], quoting *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]).

Here, upon reading the Shareholders' Agreement as a whole, and giving practical interpretation to the language employed and the parties' reasonable expectations, the court finds that it requires that a current valuation be used. In this regard, it is noted that the parties acknowledged, in sections 4.8 and 8.2 of the Shareholders' Agreement, that the Company cannot effectively function in the event of a deadlock. Significantly, the Shareholders' Agreement set forth short time frames regarding the purchase of shares in section 8.2, as well as a time is of the essence provision in section 11.12, which indicate an intent to expeditiously move forward with an appraisal and sale. Indeed, the very purpose of the Shareholders' Agreement was to avoid a lengthy dissolution process. The use of the October 31, 2012 valuation date, as urged by the Mintzes, would vitiate the Shareholders' Agreement, whereas setting the valuation date for a time reasonably contemporaneous with the exchange date, as sought by Shelley, is consistent with the purpose of the Shareholders' Agreement and ensures that the purchase price reflects the fair market value of the Company.

Moreover, the use of a current date as the valuation date is consistent with accepted appraisal practice. As observed in the industry-leading treatise, the "Appraisal of Real Estate," there are instances in which a sale is "negotiated months or even years before the closing or final disposition of the property" and, in those circumstances, the valuation performed at the negotiation stage is misaligned and "an adjustment for changes in market

conditions between the date the contract is signed and the effective date of value may be appropriate” (The Appraisal of Real Estate, at 53 [Appraisal Institute, 12th ed]). Thus, it is an industry norm for an appraisal to be updated and made current so as to align it with the closing when the passage of time renders stale the conditions present at the time of the initial appraisal. Here, the October 31, 2012 valuation date, to which the parties agreed over two years before the exchange date and ultimate purchase of Shelley’s shares, is now stale and misaligned with the exchange date and the current market conditions. Furthermore, the application of this appraisal principle is particularly appropriate here in view of the fact that since 2012, Shelley has remained a co-owner of the Company, with her funds tied up in the Company, and causing her to have to bear the management burdens and liabilities associated with maintaining this interest.

The Mintzes contend that they are not responsible for the delay in moving forward with the exchange of the appraisals because Shelley, on September 13, 2013, had only sent Howard a draft Phase II Environmental Site Assessment Report by Roux, but refused to promptly turn over the final report by Roux on the basis that it had been prepared for her personally and not for the Company, and she had paid for it personally. However, it is undisputed that the Mintzes continue to seek a delay in the exchange date due to the environmental condition. In any event, the fact remains that there has been a substantial delay from the time of the November 2012 e-mails, resulting in a misalignment of over two years between the October 31, 2012 valuation date and the exchange date which shall now

take place. Such misalignment would result in a skewed and inaccurate approximation of the fair market value when the Company shares are actually sold in contravention of the language and intent of the Shareholders' Agreement.

Moreover, every contract contains an implied duty of good faith and fair dealing to ensure that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks omitted]). To use a date of well over two years ago would unfairly afford a windfall to the Mintzes, who are benefitting from Shelley's equity while her funds are financing 52% of the Shopping Center's operations.

Therefore, in accordance with the intent and purpose of the Shareholders' Agreement, the date at which the appraisal reports should appraise the Shopping Center should be a current date, i.e., the date of this decision and order, in order to accurately reflect current conditions and not conditions which existed over two years ago. Consequently, the granting of Shelley's motion is warranted.

CONCLUSION

Accordingly, the Mintzes' motion for reargument and/or renewal of the Exchange Date Decision is denied. Shelley's motion for an order aligning the valuation date for the appraisals so as to be contemporaneous with the exchange date is granted. The valuation date shall be the date of this decision and order, and the exchange of appraisals shall proceed,

in accordance with the provisions of the Shareholders' Agreement, 10 days after notice of entry of this decision and order.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in cursive script, appearing to read "David Schmidt".

J. S. C.

HON. DAVID I. SCHMIDT