SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of
DONALD GOLD,

Petitioner,

-against-

HAZARDOUS ELIMINATION CORP. and
CATHLEEN COLELLA a/k/a CATHY
COLELLA,

Respondents.

INDEX No. 017735/10

MOTION DATE: August 13, 2012
Motion Sequence # 005, 006

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Support..... XX
Reply Affirmation..... XX

Motion by petitioner Donald Gold to enter judgment against respondents in the amount of $1,035,000 is **granted** to the extent indicated below. Cross-motion by respondent Cathleen Colella for leave to revoke her election to purchase petitioner's shares is **denied**.

This is a petition for the judicial dissolution of a corporation pursuant to § 1104-a of the Business Corporation Law. Petitioner Donald Gold is the owner of 49% of the stock of respondent Hazardous Elimination Corp ("HEC"). HEC is engaged in the business of remediating asbestos, lead, and other hazardous substances in commercial and residential buildings.

Gold, who is a civil engineer, joined HEC in 1989. In 1995, Gold purchased the entire company. In February 1996, Gold sold 51% of the stock to respondent Cathleen Colella, who is now HEC's president. At the time Gold sold Colella her stock, he entered into an employment agreement with HEC to be its principal engineer.

On September 13, 2010, Colella sent Gold a letter, notifying him that he was suspended with pay, pending a meeting of the shareholders on September 24, 2010. By separate letter, Gold was advised that the purpose of the shareholders meeting was to remove him as a director and officer of the corporation.

On September 17, 2010, Gold commenced this proceeding for the judicial dissolution of HEC on the ground of oppressive conduct and waste of corporate assets. In addition to requesting dissolution of HEC, Gold asserted causes of action for an accounting, breach of fiduciary duty, and breach of the employment agreement.

On October 1, 2010, Colella exercised her option to purchase Gold's shares at fair value (BCL § 1118[a[). On February 14, 2011, the parties stipulated to retain Empire Valuation Consultants, LLC to perform an appraisal of the fair value of HEC's stock as of September 16, 2010. The parties further stipulated that Empire's valuation would be binding upon the parties, absent "manifest error." Objections based upon manifest error were required to be served within ten days of receipt of the valuation report. On May 1, 2012, Empire submitted its report, finding that the fair value of Gold's 49 % interest was $1,035,000.

By notice of motion dated June 26, 2012, Gold moves for an order directing Colella to purchase his stock for $1,035,000 pursuant to the stipulation, or, in the alternative, to enter judgment against respondents in that amount. Gold argues that the valuation report is binding on Colella because she failed to object to the report within the required ten day period.

Colella cross moves for an order permitting her to revoke her election to purchase Gold's shares. In support of her cross-motion, Colella alleges that on June 19, 2012, HEC received notice that on June 15 the New York City Controller had denied a claim for work performed by HEC in the amount of $858,078. Colella asserts that the Controller's denial of the claim was received too late to effect the Empire valuation report. Colella asserts that HEC will be required to write off an additional $2,186,484 in receivables due from Skanska Mechanical & Structural, Inc, the contractor for whom the work on the City project was performed.

In any proceeding seeking judicial dissolution pursuant to BCL § 1104-a, any other shareholder or the corporation may, at any time within 90 days after the filing of the petition or at such later time as the court may allow, elect to purchase petitioner's shares at fair value and upon such terms as may be approved by the court (Business Corporation Law § 1118[a]). Such an election to purchase the petitioner's shares is irrevocable, unless the court, in its discretion, for just and equitable considerations, determines that such election is revocable (Id).

The legislative purpose in rendering a § 1118 election irrevocable is to prevent the majority shareholder from making an election, prolonging negotiations as to fair value, and then revoking the election, thus delaying the dissolution proceeding and exhausting the petitioning shareholder's resources (***In re Penepent Corp.***, 96 NY2d 186, 192 [2001]). Once an election is made, subsequent events, such as the death or retirement of the petitioning shareholder, are not grounds for determining the election to be revocable (Id). Nor should the majority shareholder be permitted to revoke her election once the fair value of petitioner's shares has been determined (***In re F.P.D. Realty Corp.***, 267 AD2d 111 [1st Dept 1999]).

The court determines that the parties having stipulated to be bound by the valuation report, it is conclusive as to the fair value of petitioner's shares. The subsequent write off of receivables is not grounds for allowing respondent to revoke her election. Accordingly, respondent's cross motion for leave to revoke her election to purchase petitioner's share is **denied**.

Petitioner's motion to enter judgment against respondents is **granted** to the extent that petitioner may settle a judgment against respondent Cathleen Colella in the amount of $1,035,000 with interest from the valuation report date, May 1, 2012 (See ***In re F.P.D. Realty Corp***., **supra**, 267 AD2d at 112). Upon settling the judgment, petitioner shall tender his HEC stock to respondent.

So ordered.

Dated SEP 21 2012

J.S.C.

ENTERED

SEP 25 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE