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

THEATRE DISTRICT REALTY CORP.,

Plaintiff,

-against-

ILANA APPLEBY,

Defendant.

Index No. 653614/2012

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

PRELIMINARY STATEMENT

Defendant Ilana Appleby submits this memorandum of law in opposition to the motion of the plaintiff, Theatre District Realty Corp. (hereinafter, "Theatre District"), for summary judgment declaring that a super-majority consent under Business Corporation Law section 909(a) is not required for the sale of plaintiff's sole asset as part of a "like-kind" exchange under Internal Revenue Code § 1031, and in support of a declaratory judgment holding that a super-majority is required.

Defendant is the owner of 45% of the outstanding shares of plaintiff. The plaintiff was formed specifically to hold title to, rent and manage an apartment building with ground floor commercial space located on the West Side of lower Manhattan at 602 Tenth Avenue (the "Building"). See the Affidavit of Ilana Appleby sworn to on March 6, 2013 accompanying this

memorandum (the "Appleby Affidavit"), ¶ 2. Plaintiff owns no other properties and never has in its twenty years of existence. It has no non-realty assets other than the rent stream flowing from the Building. It has no other business or function apart from owning and managing the Building. Appleby Affidavit, ¶ 3.

Plaintiff opposes the proposed sale on the ground that the price is too low and that additional marketing efforts should be made to find a buyer willing to pay more. She also believes that the potential for capital appreciation is better in New York City than in the location where plaintiff proposes to reinvest the sales proceeds. Appleby Affidavit, ¶¶ 4-7.

ARGUMENT

A. THE POWER TO ENGAGE IN BUSINESSES AUTHORIZED BY THE CERTIFICATE OF INCORPORATION VERSUS BUSINESS ACTUALLY CONDUCTED BY THE CORPORATION

Summary judgment shall be granted where there is no genuine issue of material fact and judgment is warranted as a matter of law. CPLR § R3212. Summary judgment may be granted in favor of a non-moving party without the necessity of that party filing a cross-motion. CPLR § R3212(b). Defendant, for the reasons stated below, asks that summary judgment enter in her favor declaring that a two-thirds super-majority shareholder approval is required for the sale of the Building.

Business Corporation Law § 909(a) requires the approval of two-thirds[1] of the outstanding voting shares of the corporation for such a sale unless such sale is "made in the usual or regular course of the business actually conducted by such corporation." The purpose of the statute is to prevent a corporation "from disposing of a major portion of its property without obtaining prior approval of its shareholders." *Dukas v. Davis Aircraft Product, Inc.,* 131 A.D.2d 720 (2nd Dept. 1987).

Plaintiff points to its certificate of incorporation, which authorizes the sale and exchange of real property. Affidavit of Zachary Baumgarten, para. 4, Exhibit D. Such an authorized activity, plaintiff argues, should be deemed to be "made in the usual or regular course of business," and thus not require a supermajority vote. Memorandum of Law in Support of Motion for Summary Judgment, pp. 2, 4, 8 and 11.

The court should not find this argument persuasive. Only prior to the enactment of the Business Corporation Law was this the law. No shareholder approval was required for a sale of the corporation's assets where the certificate of incorporation indicated it was organized for the purpose of owning and dealing in real property. *Eisen v. Post,* 3 N.Y.2d 518, 169 N.Y.S.2d 15 (1957). In 1963, however, the legislature enacted the Business Corporation Law, and in section

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[1] BCL 909(a)(3) was amended in 1997 to add subparagraph (A) thereof, which provides that a simple majority will suffice for corporations so providing in their certificate of incorporation or for corporations incorporated after the effective date of that clause. Because the plaintiff was incorporated in 1993, and its certificate of incorporation does not provide that a simple majority will suffice for the sale of all of its assets, a two-thirds supermajority is required, per subparagraph (B) of BCL 909(a)(3). See 1997 N.Y. ALS 449, §58; 1997 N.Y. LAWS 449; 1997 N.Y.S.N. 476.

909 overruled *Eisen.* The insertion of the phrase "business actually conducted" was intended to adopt the position advanced by Justice Fuld in his dissent in *Eisen,* which said:

> A corporation empowered to buy, sell and generally trade in real estate may not be said to be carrying on that 'business' if its entire corporate life has been devoted to owning, managing and operating but a single piece of property. There is, it seems almost self-evident, a great difference between a company which owns, or has owned, a number of lots or buildings and it, or has been, engaged in turning them over--that is, buying, selling and buying again--and a company which acquires but one piece of property, as an investment and not for resale, derives all of its income from it and spends all of its time and energies upon its operation and management. The 'business' of a corporation, its 'regular course of business', just as that of a partnership or an individual, is the business upon which it is actually engaged, not the business which it was originally authorized to carry on.

Eisen v. Post, 3 N.Y.2d at 22; *see Boyer v. Legal Estates, Inc.,* 44 Misc.2d 1065 (Sup. Ct., Kings County, 1965; *Edbar Corporation v. Sementilli,* 2 Misc.3d 1001, 784 N.Y.S.2d 920 (Sup. Ct., Bronx County, 2004).

Thus Business Corporation Law section 909(a) requires the court to look to the actual activities of the corporation, rather than those authorized by the organizational document, to determine whether a proposed action is made in the regular course of business. *McKay v. Teleprompt Corp.,* 19 A.D.2d 815, 243 N.Y.S.2d 591 (1st Dept., 1963).

In this case, as in *Eisen, supra,* the entire existence of the plaintiff has been devoted to the ownership and operation of a single property—which plaintiff now proposes to sell. As such, as Justice Fuld's dissent argued in *Eisen,* it cannot be fairly stated that a sale of that property is in the regular course of business "actually conducted" by plaintiff. Accordingly, a supermajority approval should be required.

A similar situation existed in the case of *Vig v. Deka Realty Corp,* 143 A.D.2d 185, 531 N.Y.S.2d 633 (2d Dept., 1988). In that case the business of the corporation was the management of a single piece of real property. It had authority in its charter to buy and sell real estate. The court stated:

> [T]he plaintiffs point to Deka's certificate of incorporation which, as noted above, authorizes the corporation to sell real property. The statute, however, applies to sales "not made in the usual or regular course of the business actually conducted by such corporation" (Business Corporation law § 909[a] [emphasis added]; see generally, Eisen v. Post, 3 N.Y.2d 518, 526, 169 N.Y.S.2d 15, [Fuld, J. dissenting], rearg. denied 4 N.Y.2d 805, 173 N.Y.S.2d 1027, 149 N.E.2d 540; Stratford May Corp. v. Euster, 24 A.D.2d 935, 265 N.Y.S.3d 272, lv. denied 17 N.Y.2d 420, 268 N.Y.S.2d 1026, 215 N.E.2d 530; Boyer v. Legal Estates, 44 Misc.2d 1065, 255 N.Y.S.2d 955). Deka's regular business was managing this one piece of property. It was not actually engaged in the business of selling real property. Thus, the sale of this property, Deka's sole asset, was not made in its usual course of business. Consequently, the sale required shareholder approval. Since Deka's shareholders refused to give their approval, specific performance cannot be granted.

531 N.Y.S.2d at 634.

The same reasoning should apply here. There is no dispute that 602 Tenth Avenue is and has always been the only asset of the plaintiff, or that it has never sold realty before. Appleby Affidavit, ¶ 3. There is no genuine issue of material fact. As a matter of law, therefore, defendant is entitled to summary judgment declaring that a 2/3 majority stockholder vote is required to sell the Building. *Vig v. Deka Realty Corp, supra,* 531 N.Y.S.2d at 634; *Boyer v. Legal Estates, Inc., supra, Edbar Corporation v. Sementilli, supra.*

B. THE CASES CITED BY PLAINTIFF ARE DISTINGUISHABLE

The cases cited by plaintiff in its memorandum of law in support of its motion are distinguishable. *Matter of Avard,* 5 Misc.2d 817, 144 N.Y.S.2d 204 (Sup. Ct. Oneida Co. 1955), predated the Business Corporation Law. It framed the issue of the necessity of shareholder approval by reference to authorized business activity: whether a sale is "in furtherance of the express objects of existence," a reference to authorization by the certificate of incorporation. It concluded that the "instant transactions do not involved the investment of respondent's assets in a substantially different business *of a kind in which it was not authorized to engage,"* and accordingly held that shareholder approval was not required (Emphasis supplied). With the advent of the "business actually conducted" test of section 909(a) this analysis is no longer germane.

Dukas v. Davis Aircraft Products Co., Inc., 131 A.D.2d 720 (2d Dept. 1987) is distinguishable because there the business of the corporation was not related to real estate. The business—the manufacture and sale of restraints used in aircrafts—was to be moved from one factory to another, and the business itself would continue as before. The sale of real property pertained to the factory but not the business itself. Here, in contrast, the business has always been the operation of a particular piece of real property. That business cannot continue unabated once that property has been sold. *Vig v. Deka Realty Corp, supra,* 531 N.Y.S.2d at 634.

Matter of Roehner, 6 N.Y.2d 280 (1959) cited on page 10 of plaintiff's memorandum, followed the majority ruling in *Eisen* and therefore, like *Eisen,* was repudiated by the passage of the Business Corporation Law four years later. *Edbar v. Sementillo, supra.*

B. THE PROPOSED "LIKE-KIND" EXCHANGE IS IMMATERIAL, AND A GENUINE ISSUE OF MATERIAL FACT EXISTS IN ANY EVENT

Plaintiff argues that the "business" of the corporation is real estate ownership and management and that an exchange of one property for another will not materially change the nature of the plaintiff's business, which will continue as before. Memorandum of Law in Support of Motion For Summary Judgment, pp. 10-11.

For the reasons argued above, a single-asset real estate corporation, as a matter of law, cannot be said to be engaged in the business of sale and exchange of real property where, as here, the entire corporate existence has been devoted to the ownership, rental and management of a single piece of property. *Vig v. Deka Realty Corp, supra,* 531 N.Y.S.2d at 634; *Boyer v. Legal Estates, Inc., supra, Edbar Corporation v. Sementilli, supra.* For this reason, the fact that the company will acquire different realty and continue in existence has no relevance. Unlike *Dukas v. Davis Aircraft Products Co., Inc., supra,* we are not dealing with a mere change in factory location. The new enterprise will be fundamentally different from the present one.

Business Corporation Law § 909(a), requiring a 2/3 majority vote of the shareholders, expressly applies to sales where the consideration paid consists of "cash or other property, real or personal."

Furthermore, while the proposed exchange may be of "like-kind" properties for tax purposes, it cannot be said that 602 Tenth Avenue and its proposed replacement are alike. Plaintiff proposes to reinvest the sales proceeds in commercial property elsewhere in the country. Appleby Affidavit, ¶¶ 6-7. The character of the proposed new property is wholly different from the present property. Appleby Affidavit, ¶¶ 6-9. The change of location is a radical departure from corporate precedent. All the interested parties live in the greater metropolitan area. Mr. Baumgarten and the beneficiaries of the trust that owns 55% of plaintiff's stock live in Brooklyn. The defendant resides in Fairfield County, Connecticut. By purchasing property elsewhere in the country the shareholders lose the ability to have ready access to the property and face-to-face contact with its tenants, and instead become absentee landlords. Disputes will be resolved in a distant court. Supervision of management, repairs and improvements will be difficult. The real estate market continues to stagnate in many parts of the country, while the value of the subject property has soared within the past few years, like many similar properties in Manhattan. Appleby Affidavit, ¶¶ 7-9. For all these reasons it cannot be fairly stated that the business of the corporation would be unchanged by the proposed exchange. At the very least, there is a genuine issue of fact as to whether the company's business would continue unchanged, and accordingly plaintiff must be denied summary judgment. CPLR 3212.

CONCLUSION

For the foregoing reasons defendant asks that plaintiff's motion for summary judgment be denied, and that an order enter granting summary judgment in favor of defendant and

declaring that a two-thirds super-majority consent under Business Corporation Law section 909(a) is required for the sale and exchange of the building located at 602 Tenth Avenue, New York, New York 10036.

Dated: March 7, 2013
New York, New York

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