

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

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THEATRE DISTRICT REALTY CORP., :

Plaintiff, : Index No. 653614/2012

-against- :

ILANA APPLEBY, :

Defendant. :

**MEMORANDUM OF LAW OF PLAINTIFF
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Plaintiff, Theatre District Realty Corp ("Theatre District"), submits this memorandum of law in support of its motion for summary judgment, declaring that a super-majority consent under Section 909(a) of the Business Corporation Law is not required to approve the sale of a residential and commercial rental building it owns for the purpose of effectuating a Section 1031 Exchange under the Internal Revenue Code.

Section 909(a) of the Business Corporation Law only applies to a sale of a corporation's assets not in the ordinary course of its business that results in the liquidation or termination of that corporation's business. In this instance, after the proposed sale and exchange has been effectuated, Theatre District will continue its current business of leasing residential and commercial space in a new building or buildings it intends to purchase with the proceeds of the sale. Its business will not terminate or change.

Furthermore, the right to effectuate such an exchange is specifically recognized in Theatre District's certificate of incorporation which authorizes Theater District to "purchase, lease, rent, exchange or otherwise acquire real estate"... and to sell, rent, lease, mortgage, exchange... or otherwise dispose of such real estate (see Exhibit D to moving affidavit of Zachary Baumgarten) ("Baumgarten Affidavit") and would be undertaken in the regular course of Theatre District's business.

FACTS

Theatre District, is the owner of a Building located at 602 Tenth Avenue New York, New York 10036 (the "Building") in which it leases both residential and commercial space. A trust established under Article Fifth of the Will of the Decedent Sol Lieberman ("Trust") owns 55% of the outstanding shares of Theatre District and its remaining shares are owned by Defendant, Ilana Appleby ("Ilana"), the daughter of the Decedent.

The Trust is a "sprinkle trust" whose beneficiaries are Decedent's son, Israel, and his descendents. At the time of the Decedent's death Israel had two children, Isabel Baumgarten ("Isabel") and Abraham Lieberman ("Avi"). The Trust was established by the Decedent because Israel is physically disabled and receives Social Security income.

The Decedent died on September 1, 1989. Decedent named Ilana and her husband, Tom Appleby ("Tom") executors of his Estate and trustees of the Trust. As discussed below, on March 28, 2011 Ilana was removed as

executor by order of the Surrogate's Court, New York County, Tom resigned as Executor and Ilana and Tom resigned as Trustees of the Trust. Zachary Baumgarten, the husband of Isabel, became the sole successor Executor and Trustee.

Under the Decedent's Will the bulk of his assets, consisting of various real estate, holdings passed under the Will's residuary clause, Article Fifth. 45% of such assets were bequeathed to Ilana and the remaining 55% of such assets were bequeathed to the Trust.

At his death Decedent was the sole shareholder of Is-Ila Realty Corp. ("Is-Ila") a real estate corporation which owned several parcels of improved real properties in Manhattan located at 138 W. 19th Street, 511 W. 20th Street and 519 Broome Street and a vacant lot at 517 Broome Street.

The Property and Building at issue here were owned by another corporation, 600-602 Tenth Avenue Realty Corporation ("Realty Corporation") in which the Decedent maintained a 52% interest and his cousins maintained a 48% interest. Realty Corporation also owned a building on adjoining property located at 600 Tenth Avenue. Pursuant to a Memorandum Agreement dated March 21, 1986 between the Decedent and the other shareholders of Realty Corporation it was agreed that the Decedent's stock interest in Realty Corporation would be surrendered and exchanged for the Building and Property at issue here which would be transferred to the Decedent or his designee.

The transaction with the Decedent's cousins concerning the Property and the Building was only finalized by Ilana and her husband, Tom, as executors of Decedent's Estate after Decedent's death. Ilana, instead of transferring the Property and the Building to Is-Ila, which would have been consistent with Decedent's business history, established a new corporation, Theatre District (then known as Dor v Dor Corporation) and transferred the Building and Property to that entity. She also arranged for the preparation and filing of the certificate of incorporation for Theater District that specifically authorized Theater District to effectuate the sale and exchange of Property.

Pursuant to Decedent's Will the Trust retained a 55% stock interest in Theater District and Ilana held a 45% stock interest.

Removal of Ilana and Tom as Fiduciaries

Israel, Isabel and Avi were very concerned with the manner in which Ilana and Tom, as co-executors and co-trustees, were managing the properties owned by Decedent or his corporations. Accordingly, in November 2009, Israel, Isabel and Avi commenced a proceeding in the Surrogate's Court, State of New York, New York County, file number 1989-4135 directing Ilana and Tom to account with regard to their management of the properties and income of the Estate and Trust, surcharging Ilana and Tom by reason of their wrongful conduct, acts of waste, diversion of income and assets and mismanagement and to remove Ilana and Tom as Executors

and Trustees. Israel, Isabel and Avi also requested the Court to appoint a representative of Petitioners to manage the assets and Property of the Estate and Trust. See Exhibit G to Baumgarten Affidavit.

By order dated March 10, 2011 (Exhibit H Baumgarten Affidavit) the Surrogate's Court directed Ilana and Tom to file an accounting and scheduled a hearing concerning the request to remove them as fiduciaries. Thereafter, by order dated March 28, 2011, (Exhibit I) Ilana was removed as co-executor. Additionally, as that order recites, Tom resigned as co-executor and Tom and Ilana resigned as co-trustees of the Trust.

The March 28, 2011 Order further provides that Zachary Baumgarten ("Zachary"), the husband of Isabel, "be and he is hereby appointed as successor trustee in place and stead of Ilana L. Appleby and Thomas Appleby, the present trustees and as successor sole executor in place and stead of Ilana L. Appleby and Thomas Appleby." This appointment was made with the consent of Isabel and Avi based upon Zachary Baumgarten's real estate background and expertise. Additionally, Isabel and Avi became the sole directors of Theatre District.

1031 Sale and Exchange

The Building and Property at 602 Tenth Avenue is presently the sole asset of Theatre District. The Building has 14 apartments, 12 of which are regulated by the New York City Rent Stabilization Code, and commercial store space. The Building is in need of significant and costly renovations.

Based upon these circumstances Zachary Baumgarten along with Isabel and Avi, concluded that the Building could not properly generate sufficient funds or generate a profit due to the high cost of renovations and because of the rent restrictions imposed by the New York City Rent Stabilization Code.

Zachary Baumgarten determined that a profitable arrangement could be made by effectuating a 1031 sale and exchange under the Internal Revenue Code. Through this exchange the Building and Property would be sold and within the statutorily imposed 180 day period, Theatre District could use the sales proceeds to acquire other real property to lease, for the purpose of generating income and also postpone the payment of any capital gain taxes. This type of exchange should increase the annual profits of Theatre District by 300% over the next 3 years.

Theatre District has marketed the Building and Property and has come to satisfactory sale terms with a number of purchasers. However, potential buyers have been reluctant to enter into sales contracts without the consent of all shareholders because of the possibility that the sale may be governed by Section 909(a) of the Business Corporation Law. This provision requires that a two-thirds majority of the shareholders consent to a sale of all or substantially all of a corporation's assets, unless such sale is in the usual or regular course of business.

However a 1031 exchange does not require super majority approval. The corporation is not being liquidated or terminated and the replacement

property will be used to continue the same type of business as the corporation is presently performing. Accordingly, the transaction is being undertaken in the usual and regular course of business of Theater District's business.

Additionally, although the other real estate holdings owned by the Decedent at the time of his death were owned by Is-Ila, the holdings of both entities should be considered as one for this purpose as they were all solely owned and controlled by Decedent. Under such circumstances, all or substantially all the assets of the Decedent's real estate holdings should not be deemed to be sold by this transaction in any event.

Any argument that there may be alternative ways to make the corporation profitable – which in this instance would not be true – is completely irrelevant. The only issue here that need be addressed is whether a majority or super majority vote is required to effectuate the 1031 exchange. The majority shareholder is not seeking to liquidate the assets of Theatre District, but is only seeking to effectuate a 1031 exchange that would continue the business of Theatre District with different real property, in the same manner as before.

Ilana has refused to consent to the sale and exchange notwithstanding the profitable opportunities that such an exchange would create for Theatre District and the profits it would generate for the beneficiaries of the Trust. For this reason Theatre District is seeking a declaratory judgment that only a

majority vote of the shareholders is required to effectuate this 1031 exchange.

ARGUMENT

1. Standards For Summary Judgment

Summary judgment may be granted pursuant to CPLR section 3212, when there are no bona fide issues of fact. *Silliman v. Twentieth Century Fox Film Corp.* 3 N.Y.2d 395 (1957). In order to defeat a motion for summary judgment a party cannot merely assert the existence of a factual dispute but must show that there is a "genuine and substantial issue of fact," *Ball v. United Artists Corporation*, 13 A.D. 2d 133, 214 N.Y.S.2d 219 (1st Dep't 1961).

Defendant, in her answer, admits that Theater District is now and always has been in the business of real estate rental. (See Exhibit B to Baumgarten Affidavit, ¶2) The 1031 exchange replacement property would be used to conduct the same type of business as Theatre District is presently conducting but only at a different location. Such a transaction would clearly be in the usual and regular course of business of Theatre District, is expressly authorized by its Certificate of Incorporation which was prepared and filed at Ilana's direction, and therefore need only be approved by a majority vote of its shareholders. Accordingly, as no bona fide issues of fact exist, summary judgment should be granted.

2. Two-Thirds Majority Shareholder Consent Under BCL §909(A) Is Not Required To Sell The Building

Section 909(a) of the Business Corporation Law requires two-thirds majority consent of all shareholders in order to

"sell, lease, exchange or other disposition of all or substantially all the assets of a corporation, if not made in the usual or regular course of the business actually conducted by such corporation."

This provision has long been interpreted as being restricted to situations in which a corporation's assets are being sold or liquidated or where the purpose of the transaction is to substantially change the nature and business of the corporation from what it had conducted previously.

In *Matter of Avard*, 5 Misc.2d 817, 144 N.Y.S.2d 204 (Sup. Ct. Oneida Co. 1955) a knitting corporation without obtaining consent of two thirds of its shareholders, approved the sale and disposition of its assets at its plant in Utica New York in order to move its business to South Carolina because it was no longer profitable to operate in Utica. In approving the transaction without the necessity of a two-thirds vote of the shareholders, the court stated that

"The time-honored test to determine the need for stockholders consent 'is not the amount involved, but the nature of the transaction, whether this sale is in the regular course of the business of the corporation and in furtherance of the express objects of its existence, or something outside of the normal and regular course of the business.' *Matter of Timmis*, 201 N.Y. 177..... The instant transactions do not involve the investment of respondent's assets in a substantially different business of a kind in which it was not authorized to engage, nor the exchange of its stock for the stock of another corporation, nor were they *pro*

tanto going out of business in any vital department or branch of respondent's business."

Likewise in *Dukas v. Davis Aircraft Products Co., Inc.*, 131 A.D.2d 720, (2d Dep't. 1987), the defendant corporation was engaged in the business of designing, manufacturing and selling restraints used in aircraft. The corporation conducted its manufacturing operations out of a building located in Northport, New York. The corporation entered into a transaction to "exchange" its only building and place of operations for another building owned by a third party at a different location. The Court noted that this exchange was undertaken for economic purposes and that the corporation would continue in the same business as it had before. Accordingly the corporation was not required to obtain shareholder authorization for an exchange transaction which did not result in the liquidation of the corporation's business. The Second Department observed that "the transaction in question was merely a transfer of [the corporation's] operations from one building to another. In this regard, there is no factual dispute that [the corporation] has engaged in the same business as it had prior to the exchange."

In *Matter of Rohner* 6 N.Y.2d 280 (1959) the Court ruled that "ordinarily the sale by a real estate corporation of its sole asset is not outside the regular course of business so as to require stockholder consent [unless]such sale is pursuant to a prior plan of corporate dissolution." Here of course there is no request or plan to dissolve the corporation; to the

contrary, the very purpose of the transaction is to continue the same business purpose by entering into a sale and section 1031 exchange under the Internal Revenue Code so that the corporation can continue its business of owning and leasing real estate to residential and commercial tenants

The 1031 sale and exchange transaction that Theatre District wishes to enter into would be in furtherance of the objects of its existence, and thus, does not require two-thirds shareholder approval because it does not fall within the purview of the statute.

CONCLUSION

For the foregoing reasons, plaintiff's motion for an order granting summary judgment in its favor and declaring that the super-majority consent of §909(a) of the Business Corporation Law is not required for the sale and exchange of the building located at 602 Tenth Avenue, New York, New York 10036 pursuant to Section 1031 of the Internal Revenue Code, should be granted in all respects.

Dated: February 13, 2013
New York, New York

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