

Levine v Seven Pines Assoc. L.P.

2015 NY Slip Op 30138(U)

January 28, 2015

Supreme Court, New York County

Docket Number: 151958/2014

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

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

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ROBERT M. LEVINE, AS TRUSTEE OF THE
MARION LEVINE REVOCABLE TRUST,

Petitioner,

Index # 151958/2014

-against-

DECISION

SEVEN PINES ASSOCIATES LIMITED
PARTNERSHIP,

Respondent.

Present:
Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1, 2 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 3, 4 _____
Replying Affidavits.....	_____ 5, 6 _____
Exhibits.....	_____
Other.....Memoranda.....	_____ 7, 8 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In motion sequence 001, petitioner Robert M. Levine, as Trustee of Marion Levine Revocable Trust (Levine), moves for an order setting a date for a special proceeding in this matter to determine and fix the fair market value of the Marion Levine Revocable Trust's (the Levine Trust) dissenting limited partnership interest in respondent Seven Pines Associates Limited Partnership (Seven Pines). In motion sequence 004, Levine moves for pretrial discovery in this proceeding, pursuant to CPLR 408 and Business Corporation Law § 623 (h) (4). Motion sequence numbers 001 and 004 are consolidated for disposition.

BACKGROUND

This special proceeding was commenced by Levine to fix the value of the Levine Trust's limited partnership interest in Seven Pines, a single purpose entity whose sole asset is a 304-unit apartment building located at 1 Glenwood Avenue, Yonkers, New York (the Building).

Seven Pines was formed as a general partnership in October 1972 and was converted to a limited partnership on January 1, 1973. It consisted of 12 limited partnership units (LP Units). Under section 5.1A of the Seven Pines' partnership agreement, limited partners were required to make an initial capital contribution of \$122,500 to acquire a full LP Unit interest (Jon Halpern affidavit, exhibit 1). The Levine Trust owns one half of an LP Unit. Section 10.3 of the partnership agreement provided that, upon dissolution, after the payment of Seven Pines' debts and obligations, any balance of profits, or any such losses, would be split 55% to the limited partners, 40% to the managing general partner, and the remaining 5% to a then general partner referred to as BFTG (*id.*).

In October 2013, Seven Pines' general partner, Halpern-Stillman Development Company, decide to merge with Seven Pines Holdings Merger Sub Limited Partnership, and the surviving entity would be a restructured Seven Pines (the Merger). In this transaction, the disinterested limited partners, including the Levine Trust, were given two options, receive a payment of \$650,000 per LP Unit, in the Levine Trust's case \$325,000 for half of an LP Unit, or make a contribution of \$10,000 and acquire a membership interest in the reorganized Seven Pines (the Offer). Seven Pines asserts the Offer's components were derived from its Financial Statements of December 31, 2012 (the 2012 Financials). After receiving the merger proposal and the Offer, Levine requested a number of documents from Seven Pines, including its financial statements as well as a copy of the appraisal referenced in the merger proposal (the 2012 Appraisal), which valued the Building at \$33 million, and an explanation as to how it calculated the value of the LP Units. Seven Pines provided the 2012 Appraisal and an explanation of its calculations, and a list of the limited partners, but, at that time, did not provide financial statements. Concerned with the valuation of the LP Units, Levine sent notice of his intent to dissent.

On January 8, 2014, the Merger was consummated. On January 24, 2014 Seven Pines' counsel sent a letter to Levine offering \$325,000 for the Levine Trust's interest. Seven Pines considered \$325,000 fair value for this interest. Levine asserts that he tried to negotiate in good faith with Seven Pines, but could not reach an agreement by the statutory date to file a petition to fix the value of a partnership interest. Thus, Levine filed this special proceeding.

ANALYSIS

In his first motion, Levine asks the court to set a date for a hearing in this special proceeding. In opposition, instead of arguing against a hearing, Seven Pines, akin to a summary judgment motion, presents its case for fixing the value of the Levine Trust's Interest at \$324,611. New York Business Corporation Law § 623 (h) (4)¹ clearly suggests that an evidential bench trial

¹ Although Seven Pines is a Limited Liability Partnership (LLP), the procedure of Business Corporation Law § 623 (h)-(k) applies to LLPs where there is a failure to agree on the

is permitted, and necessary, to assist the court in determining fair market value where there is a dispute as to the value, as there is here. Therefore, the court grants Levine's request for a trial on this matter.

In his second motion, Levine seeks pretrial disclosure, specifically, of information related to (1) the 2012 Appraisal, (2) Seven Pines' calculations in determining the value for the merger consideration (the Merger Calculations), and (3) the most recent appraisal being relied on by Seven Pines.

Business Corporation Law § 623 (h) (4) also permits the court to order pretrial disclosure, including experts' reports relating to the fair value of the shares, whether or not intended for use at the trial. However, it appears that Levine has access to all information he seeks and needs to present his case.

The first piece of information Levine seeks is the 2012 Appraisal, which he now has a copy of, and all documents and communications in connection with it. Specifically, he seeks all documents and communications in connection with the 2012 Appraisal sent to Signature Bank, as there appears to be a discrepancy between the values contained in the 2012 financials and the actual values relied on for the 2012 Appraisal. While Seven Pines has submitted a spreadsheet showing that there were discrepancies, Levine is entitled to more than a spreadsheet of figures created by Seven Pines without any original documentation attached. Thus, Levine must be provided with Seven Pines' 2012 quarterly financials and any other documents given to Signature Bank in connection with the 2012 Appraisal.

Levine also requested Seven Pines' 2013 quarterly financials, which have now been provided.

The second piece of information Levine seeks is an explanation as to why Seven Pines used a 4.9% capitalization rate in determining the cash merger price in the merger proposal, but the BCS Appraisal, now relied on by Seven Pines, used a 6.75% capitalization rate. Levine also seeks an explanation as to why Seven Pines used the 2012 Net Operating Income in determining the cash merger price when it allegedly knew that the 2013 Net Operating Income would be greater. As these are issues of relevance, the court will permit Levine to seek the deposition of a person with knowledge of these facts.

Finally, Levine seeks Seven Pines' 2014 financials. The court does not agree with his argument that the 2014 financials, 2014 rent rolls, and 2014 vacancy reports are relevant when the fixed amount of the fair value of the shares would be the fair value as of the close of business on the day prior to the shareholders' authorization date (Business Corporation Law § 623 [h] [4]), which at the latest would be January 8, 2014, as argued by Levine.

Levine argues that the rent rolls previously produced by Seven Pines were unnecessarily redacted and would like complete copies. The court sees no issue in producing the rent rolls in

price to be paid for the former limited partner's partnership interest (Partnership Law § 121-1105).

their entirety, and Seven Pines does not object to this request. Thus, Seven Pines must produce all rent rolls relied on for the BCS Appraisal without redaction.

Accordingly, it is

ORDERED that Robert Levine's motion for an order setting a date for a trial in this special proceeding is granted; and it is further

ORDERED that Robert Levine's motion for pretrial disclosure is granted, in part; and it is further

ORDERED that Seven Pines Associates Limited Partnership must produce to Robert Levine on or before February 27, 2015 the following documents (1) Seven Pines' 2012 quarterly financials and any other documents given to Signature Bank in connection with the 2012 Appraisal and (2) all rent rolls relied on for the BCS Appraisal without redactions; and it is further

ORDERED that Seven Pines Associates Limited Partnership must produce within 45 days from service of a copy of this order with notice entry a witness with knowledge of why Seven Pines used a 4.9% capitalization rate and the 2012 Operating Income in determining the cash merger price for deposition at the office of counsel for the petitioner, on a date and time convenient for the parties, and such deposition is limited to the aforesaid issues; and it is further

ORDERED that the parties are directed to call the chambers, no later than February 27, 2015, between the hours of 1 - 2 p.m., (646-386-3765) to discuss trial dates.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2015


GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court