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 7th day of November, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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HOWARD MINTZ AND SUSAN MINTZ-BELLO, AS CON-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	94-120 129-144
Opposing Affidavits (Affirmations)	145-159
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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, moved, by order to show cause, under motion sequence number three, for an order directing Shelley to: (1) immediately produce copies of any and all documents and information regarding suspected, possible, or actual environmental contamination at the Georgetowne Shopping Center (the Shopping Center), (2) provide them with the names, addresses, and telephone numbers of any and all environmental consultants or other professionals that she has consulted with respect to suspected, possible, or actual environmental contamination at the Shopping Center, and (3) pay them the fees and costs associated with such motion, including, without limitation, reasonable attorneys' fees. That motion, as discussed below, has been resolved except for the issue of whether the Mintzes were entitled to the fees and costs associated with that motion. Shelley cross-moves, under motion sequence number four, for an order: (1) setting a firm appraisal exchange date, and (2) determining that, to the extent that the Mintzes fail to exchange appraisals on the date set by the court, that the Mintzes shall forfeit any right to

purchase her interests in the Company, and that she shall have the right to purchase the Mintzes' interest in the Company.[1]

BACKGROUND

The Company is a closely held corporation and a family business, whose sole significant asset is 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.

Following major disagreements among Shelley and the Mintzes with respect to the Company which resulted in a deadlock and unsuccessful mediation, the Mintzes, by a

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[1]To the extent that Shelley's cross motion also sought an order directing the Mintzes to provide her with any and all reports obtained by the Mintzes regarding the possible or actual environmental condition of the Shopping Center, or, in the alternative, directing that the Mintzes provide a certification from Howard confirming that the Mintzes have not sought lender financing requiring such reports, with an explanation of how they intend to complete a purchase of her interests in the Company without such lender financing, has been resolved by the providing of all such reports by the Mintzes and the payment by Shelley of one-half of the costs of the Mintzes' Phase I report.

Purchase Notice dated September 27, 2012, sought to purchase Shelley's shares in the Company pursuant to section 8.2 of the Shareholders' Agreement, entitled "Right of First Offer." Subsequently, Shelley sought to purchase the Mintzes' shares in the Company by serving her own Purchase Notice on October 4, 2012. A dispute then arose as to whether the Mintzes were entitled to purchase Shelley's shares or whether Shelley was entitled to purchase the Mintzes' shares under the Shareholders' Agreement.

On April 25, 2013, the Mintzes filed this action, and on June 24, 2013, the Pazers interposed an answer, containing 12 counterclaims. Following a motion and cross motion for partial summary judgment by the Mintzes and Shelley, respectively, the court rendered a decision and order dated December 30, 2013, in which it determined that since the Shareholders' Agreement provided that only the first Purchase Notice served following a deadlock and unsuccessful mediation was valid and effective and the Mintzes served the first Purchase Notice on September 27, 2012, they were entitled to a declaration that Shelley was irrevocably obligated as of September 27, 2012 to sell her shares to them. It further directed that Shelley must submit to and complete the appraisal process prescribed by the Shareholders' Agreement within the time frame set forth in it by selecting a qualified appraiser within 10 days following service upon her of that decision and order, and by thereafter proceeding as set forth in the Shareholders' Agreement.

Pursuant to section 8.2 (c) (i) of the Shareholders' Agreement, the buyout process was to be conducted with the purchase price of the shares determined in the following manner.

The Mintzes and Shelley were required 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.

This section of the Shareholders' Agreement further provided that:

> "In making the Determinations, the Qualified Appraisers are expressly instructed not to (and shall not) value the shares of stock being sold, but rather they shall determine the full pro rata share of net liquidation asset value which such Offered Shares represent (as if all Corporation assets were sold on the open market, after reasonable and diligent marketing and net of all reasonable and customary selling costs and expenses) and the net asset value of all Corporation assets after payment of all Corporation liabilities fully distributed to all Shareholders pro rata, and thus no minority, marketability, or other discounts shall be considered or applied in determining the Purchase Price."

It additionally set forth that "[t]he parties acknowledge and agree that the primary asset of the [Company] is real property, and that this is likely the only asset requiring appraisal as to value (because cash on hand and other liquid assets shall merely be valued at full face value)." Section 8.2 (c) (iv) 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. 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."

On September 13, 2013 (prior to the court's December 30, 2013 decision and order), Shelley had sent Howard a draft Phase II Environmental Site Assessment Report by Roux Associates, Inc. (Roux), an environmental engineer, which she had retained at the time that she was attempting to purchase the Mintzes' interest in the Company and was seeking to obtain a bank loan to finance this purchase. Shelley had obtained a Phase I Environmental Site Assessment Report, dated July 15, 2013, from Roux in connection with such anticipated bank loan. The draft Phase II report by Roux showed, as a result of subsurface investigation activities conducted at the site on August 29, and 20, 2013, 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 (which is now occupied by Pearle Vision), and that this issue required further investigation and remediation. At the time that

Shelley sent Howard the draft report, she asked the Company to retain environmental counsel to investigate the matter further and advise as to remediation procedures, but Howard refused to do so without further information. Subsequently, the Mintzes sought the production of the final report by Roux, but Shelley refused to provide it since this was prepared for her personally and not for the Company, and she had paid for it personally.

By an e-mail dated March 24, 2014 to the Mintzes' attorney, the Shelley's attorney sought to have a schedule set for the appraisers. Thereafter, by the Mintzes' order to show cause dated May 22, 2014, they moved, under motion sequence number three, to compel production of the final report by Roux and any other documents and information provided by Roux, and for an order requiring Shelley to pay the fees and costs associated with their motion, including their attorneys' fees. That motion was largely resolved by Shelley providing a copy of Roux's redacted Phase I Environmental Site Assessment Report, dated July 15, 2013, and Roux's final Phase II Summary Report, dated May 2, 2014, with attachments, and the payment by the Mintzes to Shelley of one-half of the costs for these reports, and by a so-ordered stipulation dated June 16, 2014, which directed Shelley and Howard to both provide supplemental affidavits stating that they were not aware of any other environmental information other than what they had provided to each other, which Howard and Shelley then provided (which are dated June 19, 2014 and June 20, 2014, respectively).

Since the Mintzes sought additional environmental testing, the June 16, 2014 stipulation further provided that the Mintzes would have five weeks to secure any

environmental reports that they deemed appropriate, and Shelley and Dina expressly authorized the Mintzes to make such arrangements with Pearle Vision as they saw fit in order to enable this testing to take place by Howard's environmental consulting firm, Impact Environmental Closures, Inc. (Impact Environmental). This stipulation also set forth that the Company shall not incur any expense relating to the additional environmental investigation by Impact Environmental, and that the Mintzes shall bear all costs relating to it. Impact Environmental conducted a Phase II investigation and rendered a report. Upon Shelly's request, the Mintzes provided her with a copy of the results of this report.

Shelley e-filed her cross motion, under motion sequence number four, on June 5, 2014. In her cross motion, Shelley seeks to have the purchase of her shares in the Company move forward by having the court set a firm appraisal date. She asserts that despite her requests, in several letters, to have the appraisals completed, the Mintzes have refused to submit their appraisal report. The Mintzes oppose Shelley's cross motion, asserting that they still need further information about the possible contamination by the dry cleaning business and now need to go to the City regulatory authorities and engage in a process which may take several months in order to find out what, if anything, needs to be done and in order to get the government regulators to sign off on a remediation plan.[2]

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[2] The court is aware that, as of the date of this decision and order, the parties continue to work together in good faith to move forward with the remediation process and that the current status of that process, including but not limited to, the projected time to complete the remediation and the anticipated expenses related thereto have changed since the initial submission date of the motions. However, the changing circumstances relating to the remediation efforts do not alter this court's ultimate conclusion

Oral argument of Shelley's cross motion was held on July 29, 2014.[3] The remaining unresolved issues raised in the cross motion which must now be addressed by the court is whether Shelley must await the quantification of the costs of the remediation required by New York governmental environmental authorities.[4]

DISCUSSION

Initially, the court notes that the only unresolved issue raised in the Mintzes' motion is their request for fees and expenses associated with the costs of their motion, including their reasonable attorneys' fees. They argue that Shelley acted in bad faith by not immediately producing Roux's redacted Phase I Environmental Site Assessment Report, dated July 15, 2013, and Roux's final Phase II Summary Report, dated May 2, 2014. The court, however, does not find that Shelley engaged in any sanctionable conduct, which would warrant the imposition of such costs or fees, and, therefore, this branch of their motion must be denied.

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[3]At oral argument, the issue of authorizing the Mintzes to enter into a lease between the Company and Fairway Markets was resolved and memorialized by an order dated September 9, 2014, which provided that such lease would only be effective and binding on the Company only if and when the Mintzes close on their purchase of Shelley's shares and that no liability to Fairway Markets would accrue on the part of the Pazers in connection with the lease to Fairway Markets.

[4] While the instant motion resolves the issues of whether or not the appraisal process must await the conclusion of the environmental remediation process, it does not address the valuation date upon which the appraisers are to base the appraisals. Pursuant to the October 30, 2014 order of this Court, issued after a status conference with the parties, the issue of fixing the actual valuation date for purposes of any appraisals is to be addressed by the parties in plenary motion practice.

The Mintzes, in recent e-mails to the court sent in September 2014, now additionally seek to be reimbursed by Shelley for one-half of the costs of the Impact Environmental's Phase II investigation, which was conducted pursuant to the June 16, 2014 so-ordered stipulation. Shelley refuses to pay one-half of these costs, citing to the language in that stipulation, which provided that the Company would not incur any expense relating to that investigation and that the Mintzes would bear all of the costs relating thereto. The Mintzes assert that despite this language in the stipulation, since they provided Shelley with copies of the results of Impact Environmental's testing and its report, she should share in these costs. They point to the fact that the costs were split with respect to the prior sharing of the earlier environmental reports, and argue that this same division of costs should be followed with respect to this testing and report. However, as noted in Shelley's attorney's e-mails, this issue was not raised anywhere in the Mintzes' motion and is not properly before the court. Furthermore, the Mintzes have failed to submit any proof of the amount of the costs actually incurred, but, rather, seek $20,000 for additional environmental costs in connection with the Phase II investigation, as well as further unspecified future work on the dry cleaner contamination problem. Consequently, the Mintzes' request for this relief must be denied.

In turning to the cross motion, Shelley, in seeking to set a date by when the appraisal reports must be exchanged, points out that many months since the court rendered its December 30, 2013 decision and order, which directed that the Mintzes' purchase of Shelley's shares proceed as set forth in the Shareholders' Agreement. She also points out

that during this time period, the Company is and continues to remain in a state of paralysis due to disagreements between them and the Mintzes, which was the very reason that the parties had sought to buy each other's shares and that this lawsuit resulted. She states that this is harming the business because necessary decisions in the Company are not being made. She asserts that the Mintzes are attempting to stall their purchase until the mortgage on the Shopping Center becomes due in 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 this purchase. She also asserts that since she is a guarantor of the mortgage, she is concerned about potential liability to the bank based upon her guaranty in the event that her shares are not purchased by the Mintzes prior to April 15, 2015.

The Mintzes, in opposition, argue that they now need to perform additional investigation and have government regulators engage in a process to quantify what remediation is necessary, and that this process will take many months to complete. The Mintzes have submitted the affidavit of Kevin Kleaka, a vice-president and partner at Impact Environmental, who asserts that there must be further investigation in order for a comprehensive remediation plan to be formulated and its cost quantified, and that there must be an approval of a remediation plan in compliance with all regulatory and legal requirements by the relevant governmental authorities. The Mintzes' attorney, at oral argument, further contended that upon going to the City regulators, there may not only be costs to remediate

imposed by governmental authorities, but that there could also be potential lawsuits by nearby residences if it turns out that their homes were contaminated.

The court, in addressing this issue and the parties' arguments, notes 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). 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).

Thus, 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. "In 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]). 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.

Where parties agree to appraise corporate assets, including real property at full market value, it is to be appraised at full fair market value as if the property were sold under the circumstances which then exist (*see Fukilman v 31st Ave. Realty Corp.*, 39 AD3d 812, 813 [2d Dept 2007]). Contrary to the Mintzes' argument, it is unnecessary for the remedial work to actually be performed or to evaluate in precise detail the exact remedial work which needs to be performed in order to appraise the Company and to complete their purchase. Rather, purchase price determination may be made based upon due diligence and reasonable appraisals which take into account the environmental factors.

Shelley points out that the environmental factor with respect to any contamination from the former dry cleaning business can be quantified, noting that her environmental engineer was able to anticipate the costs associated with this problem to be between $150,000

and $300,000.[5] Furthermore, Shelley, in her affidavit, attests that she has received offers from third parties to purchase the Shopping Center, the most recent of which was for $55 million. She also states that she was able to secure lender financing predicated on a valuation of over $55 million in connection with her previous efforts to purchase the Mintzes' shares in the Company, and that she remains ready, willing, and able to buy out the Mintzes' shares based on a $57 million valuation. The Mintzes have not asserted that they were unable to secure lender financing due to any contamination issue nor have they adequately explained why their appraiser is unable to quantify the contamination factor based upon what a purchaser on the open market would be willing to pay at this time and based upon the information presently known.

While the Mintzes contend that since 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, this contention is devoid of merit. 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]).

"[U]ncertainty concerning future events should not bar attempts to assign value to an asset" (*Burns v Burns*, 84 NY2d 369, 375 [1974]). The potential environmental

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[5] See footnote 2 above.

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. 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.[6] 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, comports with precedent, appraisal practices and common sense.

Shelley, in her cross motion, also seeks an order determining that, to the extent that the Mintzes fail to exchange appraisals on the date set by the court, that the Mintzes shall forfeit any right to purchase her interests in the Company and that she shall have the right to purchase the Mintzes' interest in the Company. Section 8.2 (d) provides that if all of the Offered Shares are not purchased as described in that Article, then the Selling Shareholder (i.e., Shelley) "shall be free to consummate the sale of all or any portion of the Offered Shares to any Person at any price and terms within twelve (12) months of the date of the completion of the appraisal process," and "there shall be no further preferential right of any Shareholder(s) [i.e., the Mintzes] to buy any such previously Offered Shares under this

[6]As to financial adjustments (i.e., how much funds are in the Company's bank account, the amount owed for real estate taxes), the Company's accountant shall perform these adjustments.

section 8.2 otherwise during such twelve (12) month period, and this section 8.2 shall be automatically thereupon deemed null, void and deleted from this Agreement as to any and all such previously Offered Shares." Thus, under this section, the Mintzes, upon their failure to move forward with their purchase of Shelley's shares, shall forfeit their preferential right, pursuant to their first served Purchase Notice, to purchase them. As to Shelley's right to purchase the Mintzes' interest in the Company, this issue is not addressed in the Shareholders' Agreement and, since, as of this time, the Mintzes have not yet forfeited their right to purchase her shares, it need not be addressed at this time.

CONCLUSION

Accordingly, it is,

ORDERED that the Mintzes' motion, to the extent it was not previously resolved, is denied, it is further

ORDERED that Shelley's cross motion is granted to the extent that the parties are directed to proceed with the exchange of appraisals in accordance with the provisions of the shareholder agreement ten (10) days after notice of entry of the court's determination of the valuation date which, pursuant to the court's October 30, 2014 order, will be determined by a separate motion.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT