ORIGINAL

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY** **PART 35**
**Justice**

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**NISSIM KASSAB,**

**Petitioner,**

**-against-** **Index No.: 711061/15**
**Motion Date: 9/26/17**

**AVRAHAM KASAB, MALL 92-30 ASSOCIATES LLC, and CORNER 160 ASSOCIATES, INC.** **Mot. Seq. 14**

**Respondent,**

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**AVRAHAM KASAB,**

**Plaintiff,**

**-against-** **Index No.: 711073/15**

**NISSIM KASSAB,**

**Defendants,**

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The following papers read on this motion by Avraham Kasab (Avraham), pursuant to CPLR 4404, to modify this Court's bench trial decision, dated August 3, 2017

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affirmation -Exhibits A-J..... | EF 89-98 |
| Memorandum of Law..... | EF 99 |
| Notice of Cross-Motion..... | EF 102 |
| Memorandum in Opposition to Motion and in Support Of Cross-Motion..... | EF 103 |
| Affirmation in Opposition to Motion and In Support Of Cross-Motion..... | EF 104-119 |
| Memorandum of Law in Reply (A. Kasab)..... | EF 122 |
| Memorandum of Law in Reply In Support of Cross-Motion..... | EF 124 |
| Reply Affirmation in Further Support of Cross-Motion ..... | EF 125 |

Upon the foregoing papers it is ordered that the motion is denied and the cross-motion is granted to the extent indicated.

Untimely Cross-Motion

Initially, the Court notes that there is ample appellate authority for it to entertain the plaintiff's cross-motion, if indeed it is untimely. CPLR 2214(b) requires cross-motions to be served at least seven (7) days before the return date of the main motion. It appears this was done. Nonetheless, where the issues raised by the untimely cross-motion are already properly before the motion court, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the merits of the untimely cross motion (*see e.g. Wernicki v Knipper*, 119 AD3d 775, 776-777 [2d Dept 2014]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887 [2d Dept 2016].) Here, Avraham's motion was made on August 18, 2017, on the fifteenth day (15th) following the Court's August 3, 2017 decision, and Nissim Kassab's (Nissim) cross-motion was made just eleven (11) days later, on August 29, 2017. The issues raised by both are identical, namely modifications to this Court's opinion, order, declaration and judgment, and a correction in the valuation of the corporation which is the subject of the dissolution proceeding brought by the plaintiff. Accordingly, the issues contained in the cross-motion are already properly before the Court (*see Wernicki, supra)*, the delay is *de minimus*, and this Court shall entertain both the motion and cross-motion, keeping in mind the goals of judicial economy, rectifying errors in its determination, and promptly and fully resolving matters before it on their merits.

Modification of the Court's August 3, 2017 Order

CPLR 4404(b) provides that

> After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

(CPLR 4404 [Consol., Lexis Advance through 2017 released chapters 1-332]). However, in this Court's 26-page decision[1], its findings and the reasons therefor, both legal and equitable, were made clear. This Court paid close attention to the witnesses' testimony and demeanor while testifying, and its findings of fact rested in large measure on the credibility of each of the individual witnesses (*see e.g. Gall v Colon-Sylvain*, 151 AD3d 698, 698 [2d Dept 2017].) The Court shall address the Avraham's requests *seriatim*.

On August 27, 2012, Nissim executed two promissory notes in favor of Avraham, his brother, the first in the amount of $355,000, and the second in the amount of $100,000. The first note required the payment of interest at the rate of 4.35% , with the total principal and interest due on in a lump sum payment on December 31, 2016. The second note required the payment of the principal and interest on March 25, 2016. Avraham secured the notes by obtaining pledges from Nissim of his interests in a corporation and limited liability company owned by the brothers. Nissim signed pledge agreements whose section 6.2(iii) provided in relevant part: "Secured Party may at any time, or from time to time, in its sole discretion (A) extend or change the time of payment and/or performance and/or manner, place or terms of payment and/or performance, of all or any of the obligations of Borrower under the Note." The pledge agreements further provided: "5.1. Events of Default. The following shall be deemed to be events of default hereunder: ***5.1.3 The breach by pledgor of any material representation, warranty, covenant, agreement or obligation under the Shareholder's Agreement [or Operating Agreement] of the Company to be executed hereafter***5.1.4 (i) The consent of the Pledgor to the appointment of a receiver *** or (vii) the entrance of any order, judgment or decree upon an application of a creditor of pledgor by a court of competent jurisdiction approving a petition seeking appointment of a receiver *** of all or a substantial part of Pledgor's assets when such order, judgment or decree is not vacated within sixty (60) calendar days."

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[1] "Justice Dufficy's 26-page post-trial decision is of the sort we don't see often enough in New York business divorce cases, providing a thorough description of the case's complex procedural history followed by detailed findings of fact, a highly useful summary of the expert testimony on valuation, and a thorough analysis of governing law and its application to the facts, all in service of a creative remedy promoting an economically sensible separation of the brothers' business interests." (Peter Mahler, https://www.nybusinessdivorce.com/2017/08/articles/summer-shorts/summer-shorts-three-must-read-decisions/, accessed on October 24, 2017).

In August, 2014, Avraham sent Nissim a Notice of Modification changing the maturity dates of the notes to August 20, 2014, and raising the interest rates to 14%. Nissim did not pay the notes on August 20, 2014. Avraham filed a notice of motion for summary judgment in lieu of a complaint in the New York State Supreme Court, Nassau County, seeking to recover on the notes (*Kassab v Kassab*, Nassau Index No. 10903/13). There was another action pending between the brothers in the New York State Supreme Court, Queens County (*Kassab v Kassab*, Queens Index No.711061), and by a decision and order, dated February 27, 2014, the Honorable Steven M. Jaeger transferred the Nassau action to this court for a joint trial.

It is axiomatic that "there exists in every contract certain implied-by-law covenants, such as the promise to act with good faith in the course of performance ***," (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68 [1978].) "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and citation omitted]; *Lonner v Simon Prop. Grp., Inc.*, 57 AD3d 100 [2d Dept 2008].) The implied covenant of good faith and fair dealing required Avraham to exercise his discretion in that manner. (*See Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 41 AD3d 269, 270 [1st Dept. 2007]["Although the ORJ Agreement made the acceptance of plaintiff's orders and the timing of deliveries subject to Rolex's discretion, the implied covenant obligated Rolex to exercise such discretion in good faith, not arbitrarily or irrationally "]; *Outback/Empire I, Ltd. P'ship v Kamitis, Inc.*, 35 AD3d 56 [1st Dept 2006] ["although certain provisions allowed the plaintiff, in its sole and absolute discretion, to terminate its obligations under the lease, the plaintiff was required to carry out its contractual obligations incident to the exercise of its discretion in good faith"].)

After trial, as stated in the Court's decision, (p.23), the Court found that Nissim had not demonstrated to its satisfaction that the acceleration of interest on the subject loans was motivated by bad faith on Avraham's part, i.e., a retaliatory purpose, as opposed to a doubt as to Nissim's creditworthiness. This is based upon the disingenuous acts of both brothers in misappropriating corporate funds (Nissim), under-reporting income (Avraham), using corporate funds to pay legal expenses (Avraham), as well as the testimony that Nissim had gambling debts. However, the Court nonetheless found that whether or not there was good

faith in the use of the interest-escalation clause was academic, since, at the deposition of Avraham as well as the inception of the trial, it was agreed by Avraham's former and present counsel that the enhanced interest on the notes would not be sought. Hence, based upon that fact, and the fact that the maturity dates of the notes had passed, this Court found that the issue of enhanced interest was academic, and declined to award same. This Court adheres to that finding. Accordingly, this Court declines to enhance the rate of interest to 14% on the loans to Nissim from Avraham.

The rate of interest and the terms and conditions of the purchase of a minority shareholder's shares are discretionary matters for the court to determine (*see* Business Corporation Law § 1118 [a], [b], [c][2]) ; *In re Fleischer*, 107 AD2d 97, 101 [2d Dept 1985]; *In re Seagroatt Floral Co.*, 167 AD2d 586, 589 [3d Dept 1990] *mod on other grounds* 78 NY2d 439 [1991]; *Matter of Elniski v Niagara Falls Coach Lines, Inc.*, 101 AD3d 1722, 1723 [4th Dept 2012].) In the Second Department, an award of 9% from the valuation date to the date of entry of the judgment has been found to been an "equitable rate" pursuant to Business Corporation Law § 1118 (b) (*see Matter of Murphy v United States Dredging Corp.*, 74 AD3d 815, 820 [2nd Dept 2010].) Accordingly, this Court shall not replace the statutorily mandated interest provisions under CPLR 5004 with a "nominal rate" that is unsupported, at Avraham's counsel's insistence.

Likewise, the Court finds that ninety (90) days is sufficient for Avraham to exercise his right to purchase Nissim's shares, should he be so inclined. Thus, the Court declines to grant an extension past the ninety days, or any stay of the enforcement of its decision.

This Court also declines to permit counsel for Avraham to submit a new expert appraisal of the corporation on the last day of trial, and declines to do so now. Avraham's counsel had every opportunity to present this evidence during the trial, and waited, for some inexplicable reason until the trial was nearly over. During the eight days of trial, this Court permitted the parties ample leeway to submit all of the evidence in support of their cases. The Court shall not entertain any further evidence at this point in time.

As to attorneys' fees, the Court has already made an award to Avraham of $25,000 for attorneys' fees in the action involving the loans to Nissan. Avraham, despite given ample time, has failed to submit documentation of further costs. At this late date, the Court will not entertain any further evidence on this issue to augment that award. The Court does recognize

that Avraham's motion, which is herein denied *in toto*, has caused Nissim to expend further legal costs in order to respond, in connection with his petition for dissolution. However, since there was no request from Nissim for legal fees, the Court will not *sua sponte* award same.

New Requests Made in Reply Papers

This Court shall not consider arguments raised by Avraham for the first time in his reply papers, since Nissim was not afforded an opportunity to respond to them (*see Matter of Krausz v Ashkenazi*, 147 AD 3d 949, 951 [2d Dept 2017); *Ramsarup v Rutgers Cas. Ins. Co.*, 98 AD3d 494, 496 [2d Dept 2017][*Supreme Court should not have considered the contention that was raised for the first time in reply papers*]).

The Cross-Motion

Counsel for Nissim correctly states that the Court, despite the prolixity of its decision, order and judgment, failed to adjust the valuation of the subject corporation, to reflect the loans made by each of the shareholder brothers. The total of the shareholder loans of $672,920 was deducted by the valuation expert from the appraisal of the value of the corporation. Avraham, who is the majority shareholder, did not produce any documents evidencing the amount of the debt that was owed to each shareholder (brother). This Court found that the brothers made investments in the corporation in approximate proportion to their ownership interests of 25%/75%. Based upon the foregoing, it is reasonable to attribute 25% of the amount of the loans, or $168,230, (25% of $672,920) to Nissim, and to make an adjustment to him of that amount in the calculation of the fair value of his shares.

Thus, based upon the forgoing, the Court amends its findings, order and judgment to reflect that the fair value of Nissim's shares as of May 7, 2013, before interest, is $3,338,403.

Accordingly, it is,

**ORDERED** that the motion by Avraham for modification of this Court's August 3, 2017 decision is denied; specifically, the request for enhanced interest on the promissory notes, submission of additional appraisals, or additional evidence of any kind, modification

of the interest rate on the purchase of Nissim's shares, and additional time in which to purchase Nissim's shares is **DENIED**; and it is further,

**ORDERED** and **ADJUDGED** that the Court's August 3, 2017 judgment is amended to reflect that the fair value of Nissim's shares as of May 7, 2013, before interest, is $3,338,403; and it is further,

**ORDERED** that the Court shall not consider any additional requests for legal fees by Avraham Kassab.

The forgoing constitutes the decision and order of this Court.

**Dated: October 27, 2017**

**TIMOTHY J. DUFFICY, J.S.C.**