

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

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 652444/2020

JOHN VAN HORNE, LEE SANDERS, ALLEN GREENE,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

ZOHAR BEN-DOV, CHRISTY MARTIN, 74-84 THIRD
AVENUE MERGER CORP., 74-84 THIRD AVENUE CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for partial summary judgment is GRANTED and their motion for sanctions is DENIED.

Plaintiffs established that business judgment was not exercised in connection with the freeze-out merger. In response, defendants failed to raise a triable issue as to whether there was actually a valid independent proper corporate purpose for the decision. Ben Dov's explanations are legally insufficient. They raise either the same "rank pretext" previously rejected, or are new, after-the-fact rationalizations that have no foundation, make no sense, or were clearly not the actual bases for the freeze-out determination at the time (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 402 [1st Dept 2021] [affidavit with belated claims not raised earlier created only a "feigned issue" insufficient to defeat summary judgment]). Though the preliminary-injunction decision is not law of the case, there is no evidence that would warrant a different result. Indeed, disposition of the New Jersey divorce proceedings only bolsters plaintiffs' case. Therefore, the July 13, 2020 decision (Dkt. 35) and its rationale is conclusively reaffirmed. There has been no showing of consideration of even a minimal legitimate corporate benefit before approval of the transaction. If "these circumstances do not warrant an injunction, it is hard to imagine when one would ever be issued" (*id.* at 2).

There is no basis for sanctions, however, on this record. Though defendants did not even raise a triable issue that they exercised business judgment or that their

justifications met the minimal applicable standard, the court is not convinced that defendants' conduct was frivolous or that they did not verily believe they could effectuate the merger even though they were wrong.

It is ORDERED that, within one week, the parties shall confer on issues that need to be resolved before entry of judgment and they shall either address them in a joint letter or if there are no issues a proposed judgment shall be submitted, which should be e-filed and emailed to the court.

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6/4/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER