SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. LAURENCE LOVE**	PART	63M

Justice

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ALAN ADES

                      Petitioner,

             - v -

VAN DALE INDUSTRIES, INC.,

                    Respondent.

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INDEX NO.	160305/2021
MOTION DATE	02/25/2022
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for   MISCELLANEOUS   .

Petitioner commenced the instant action by filing a Petition on November 12, 2021 seeking to "[d]irect[] Respondent, in accordance with N.Y. Bus. Corp. Law 623, to make the advance payment to Petitioner required by law" (see NYSCEF Doc. No. 1 P. 13). Respondent cross-moves to dismiss pursuant to CPLR 3211(a)(7).

Petitioner seeks, *inter* alia, pursuant to N.Y. Bus. Corp. Law 623(h) to fix the fair value of his 35 shares (or 19.44%) in Respondent Van Dale Industries, Inc. A related action involving the same parties, *Alan Ades v. Van Dale Industries, Inc. et. al.*, 656471/2021, is also pending before this Court.

Respondent's memorandum of law to dismiss states,

> "This petition for a fair value appraisal proceeding arises out of a September 2, 2021, merger transaction duly approved by Van Dale's Board and its shareholders, pursuant to which Alan's shares (representing 19.44% of Van Dale) were to be redeemed for an aggregate cash purchase price of $7,780,050.25. Alan claims that this purchase price did not reflect Van Dale's fair value. But because Alan failed to timely submit his stock certificates in the Company as required by BCL 623(f), Alan forfeited any rights he held as a dissenting shareholder to seek judicial appraisal of his shares.
> On September 27, 2021, Alan set the Company a Notice of Rejection of Offer, which rejected the purchase price that the Company had offered for Alan's shares.

160305/2021   ADES, ALAN vs. VAN DALE INDUSTRIES, INC.
Motion No. 001

Page 1 of 4

1 of 4

Alan concedes that he has not submitted to the Company within one month of the Notice of Election his stock certificate representing his 35 shares. Alan claims that 'despite having exercised due diligence to find the stock certificate, Petitioner was not able to locate it'" (see NYSCEF Doc. No. 19 P. 4, 6).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]). When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

N.Y. Business Corporation Law 623(h) states, "[t]he following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares."

The Verified Petition affirms, "[w]hile pursuant to the technical requirement of N.Y. Bus. Corp. Law 623(f), Petitioner was required to submit to the Company his certificate representing his 35 shares to the Company within one month of filing his Notice of Election, despite having exercised due diligence to find the stock certificate, Petitioner was not able to locate it" (see NYSCEF Doc. No. 1 Par. 42).

N.Y. Business Corporation Law 623(f) states, "[a]t the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall

160305/2021   ADES, ALAN vs. VAN DALE INDUSTRIES, INC.
Motion No. 001

Page 2 of 4

submit the certificates representing his share to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct."

Petitioner's memorandum of law in opposition to cross – motion highlights the email from Maurice Setton to Petitioner, "[t]he company rejects the certificate demand, noting that you have not fulfilled the requirements of submitting the certificates representing your shares to the Company. Furthermore, the required procedures to replace a share certificate of the Company pursuant to its bylaws and NYCBL Section 508(E) require that you provide the Company with suitable surety bond from a creditworthy insurance company for an amount no less than $7,780,050.25" (see NYSCEF Doc. No. 31 P. 18).

Petitioner's affidavit in opposition continues, "[i]n other words, in an attempt to avoid its obligation under the New York Business Corporation Law to promptly pay Petitioner 80% of the offer, and knowing full well that Petitioner (like the other shareholders of this closely held family business) most likely never received a certificate for his shares over 30 years ago when he became a shareholder of this closely held family owned Company, and knowing full well that there was no need for the Company to be indemnified against any third party vis – a – vis a claim to Petitioner's shares because the Company and its remaining three (3) shareholders knew full well that Petitioner never sold those share, Mr. Setton, Ades nephew, incredibly told Petitioner that he had to deliver to the Company a surety bond whose premium would exceed $140,000. The alleged

160305/2021   ADES, ALAN vs. VAN DALE INDUSTRIES, INC.
Motion No. 001

Page 3 of 4

basis for this demand that Petitioner provide a bond to the corporation to secure a 're-issued' stock certificate was the clause adopted for the first time by the corporation one month earlier when by-laws were adopted by Van Dale" (see NYSCEF Doc. No. 31 P. 18 – 19).
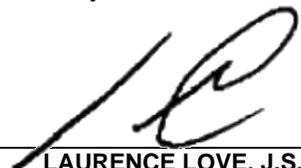
Respondent's Reply affidavit states, "[a]lan cites no legal authority finding 'good cause' to excuse BCL 623(f)'s certificate tender requirement based on burdens or expenses associated with valid corporate requirements. To the contrary, courts have consistently upheld a corporation's right to insist on posting of a bond as a condition to granting replacement stock certificates, and for good reason – the whole point of requiring a bond is that a corporation should not be compelled to risk liability for competing claims on its stock. *See, e.g., Local 381 Pension Fund v. Chemical Bank*, 222 A.D.2d 415 [2d Dept. 1995]) (upholding corporation's insistence on undertaking as condition for granting replacement stock certificates necessary to participate in buyout)" (see NYSCEF Doc. No. 35 P. 3).

As Petitioner has shown "good cause" for not producing the stock certificates and valid reasons for bringing this petition, it is now

ORDERED that Respondent's cross–motion, CPLR 3211(a) (7), to dismiss the Petition is DENIED; and it is further

ORDERED that Respondent shall serve an answer in this Petition within 20 days of service of a copy of this order upon respondents, together with Notice of Entry.

7/11/2022					
DATE				LAURENCE LOVE, J.S.C.	
CHECK ONE:		CASE DISPOSED		x NON-FINAL DISPOSITION	
		GRANTED	X DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE

160305/2021   ADES, ALAN vs. VAN DALE INDUSTRIES, INC.
Motion No. 001

Page 4 of 4

4 of 4