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

PRESENT: HON. BERNARD J. FRIED Justice PART 60

E-FILE

Index Number : 600053/2009

BARASCH, CANDACE CARMEL

VS.

WISLLIAMS REAL ESTATE CO. INC.,

SEQUENCE NUMBER : # 001

OTHER

INDEX NO. 600053-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
Oct 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 28 2009
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 10/27/09

HON. BERNARD J. FRIED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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CANDACE CARMEL BARASCH,

Petitioner,

- against -

Index No. 600053/09

WILLIAMS REAL ESTATE CO., INC., WILLIAMS CORPORATE REALTY SERVICES, LTD., WILLIAMS INTERNATIONAL REALTY SERVICES, LTD., WILLIAMS PM, INC., WILLIAMS MANAGEMENT REALTY CORP., WILLIAMS U.S.A. REALTY SERVICES, INC., REALTY PROGRAMS CORPORATION, MICHAEL T. COHEN, ROBERT L. FREEDMAN, ANDREW H. ROOS, FIRSTSERVICE CORPORATION and FS WILLIAMS ACQUISITIONCO, LLC.,

Respondents.

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APPEARANCES:

For Petitioner:

Wachtel & Masyr, LLP,
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New York, NY 10022
(John H. Reichman
Meagan A. Zapotocky)

-and-

Morgenthau & Greenes, LLP
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New York, NY 10022
(Steven R. Greene)

For Respondents:

Foley & Lardner, LLP
90 Park Avenue
New York, NY 10016
(Peter N. Wang
Jeremey Wallison)

FRIED, J.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. Petitioner Candace Carmel Barasch brings this appraisal proceeding to seek a determination as to the fair value of her shares in respondent Williams Real Estate Co. (Williams) and various of its affiliates (Motion Sequence Number 001).

Respondents move, pursuant to CPLR 404 (a) and CPLR 3211 (a) (7), to dismiss the petition, on the ground that it fails to state a cause of action (Motion Sequence Number 002).

Respondent Williams is a full service New York real estate services company located in New York, New York. Respondents Williams Corporate Realty Services, Ltd., Williams International Realty Services, Ltd., Williams PM, Inc., Williams Management Realty Corp., Williams U.S.A. Realty Services, Inc., and Realty Programs Corporation (the Satellite Companies) are all affiliates of Williams, also located in New York. Prior to October 8, 2008, petitioner owned 34.79 shares, or 10.33%, of Williams stock, as well as a 10.33% interest in each of the Satellite Companies.

In October 2008, Williams allegedly entered into a series of transactions in which Williams transferred substantially all of its assets to a newly formed operating company, merged various Williams entities together, and sold a 65% interest in this consolidated entity to a subsidiary of respondent First Service Corporation (First Service), a Canadian corporation. Petitioner alleges that these asset transfers and the merger each triggered petitioner's dissenters rights under Business Corporation Law (BCL) §§ 623 and 910, as respondents, themselves, recognized in the notices that they mailed to shareholders and in the transaction documents.

According to the petition, the overall transaction occurred in several phases. First, Williams formed a new operating company, Williams Real Estate Operations Co. LLC (Williams New Opco). Then, as provided by various contribution agreements, Williams transferred most of its assets to Williams New Opco, including all of its ownership in two partially owned subsidiaries: WRENJ LLC (Williams NJ) and WRECT LLC (Williams CT).

In return for these transfers, Williams received 999 of the 1000 ownership units that had been created in Williams New Opco, which it then transferred to a newly formed Delaware holding company, Williams New Holdco, in return for units of Williams New Holdco. Williams New Opco then acquired the remaining membership interests in Williams NJ and Williams CT from their individual owners, in exchange for 25% of the units of Williams New Holdco.

Next, each of the Satellite Companies were then merged into Williams, which acquired all of the shares of each of these companies. Upon completion of both the asset transfers and this merger, Williams New Holdco sold 65% of its interest in Williams New Opco to a subsidiary of First Service, and Williams sold 100% of its interest in each of the Satellite Companies to the same purchaser. The petition alleges that respondents then divided up the remaining 35% interest in Williams New Holdco by giving a 15% interest to certain members of management, and another 43% interest to a new Delaware limited liability company referred to in the transaction documents as TaxCo LLC, whose members included individual respondents Roos, Freedman and Cohen.

Williams first obtained approval for all of these proposed transactions from its board of directors on September 29, 2008. That same day, petitioner was sent a Notice of a Special Meeting of the Shareholders from each of the Satellite Companies. Those notices stated that a special shareholder's meeting was scheduled for October 8, 2008, the purpose of which was to obtain approval of the planned merger between each of the Satellite Companies and Williams. Each of the letters advised that

> the transactions contemplated by the proposed Merger Agreement would constitute a fundamental corporate change in the Company that, under the [BCL], gives rise to a shareholder's right to dissent and to receive payment for his or her shares of common stock, no par value per share (the "Common Stock") of the Company. BCL § 623 sets forth the procedure to enforce a shareholder's right to receive payment for shares, a copy of which is attached hereto ...

(*see* Petition, Exh. B).

On October 7, 2008, petitioner also received a Notice of a Special Meeting of Shareholders from Williams, dated September 29, 2008, for another meeting scheduled on October 8, 2008. This notice stated that the purpose of this meeting was, inter alia, to obtain authorization and ratification of the "proposed disposition of substantially all of the assets of [Williams]" (*see* Petition, Exh. C), pursuant to the various contribution agreements and the purchase agreement with the First Service subsidiary, as well as to obtain authorization for the proposed merger of the Satellite Companies with Williams.

Petitioner dissented from all of the proposed transactions, and elected to exercise her statutory appraisal rights under BCL § 623. Petitioner alleges that she dissented, in part, because the individual respondents were failing to treat shareholders equally, and were giving themselves benefits at petitioner's expense. Petitioner provided written notice of her dissent to each of the Satellite Companies and to Williams, in which she demanded fair value of all her shares in the event that Williams proceeded with the transactions, and turned over all of her original shares.

Petitioner alleges that, to date, respondents have not made a written offer to pay her fair value, nor have respondents returned her shares and advised her what interests, if any, she has in the new entities. Respondents also have refused to provide her with information

and documents regarding the transaction. Accordingly, petitioner commenced the instant proceeding, pursuant to BCL § 623 (h), asserting three causes of action for (1) a determination of fair value of her shares, in an amount not less than $4.14 million, (2) immediate payment of 80% of the fair value, as required by BCL § 623 (g), and (3) payment of attorneys' fees and costs. Petitioner additionally requests, inter alia, an order directing respondents to turn over to petitioner all information and documents concerning the transaction between Williams and First Service; grant petitioner leave to take discovery, including depositions of respondents and any expert designated by them; and, restrain and enjoin respondents from making a payment or transferring any assets to respondents Cohen, Freedman and Roos, pursuant to the transaction, or outside the ordinary course of business, until petitioner receives fair value for her shares.

Respondents have now moved to dismiss the petition on the ground that it fails to state a cause of action. Specifically, respondents contend that none of the transactions at issue were sufficient to trigger petitioner's appraisal rights. Instead, respondents contend that the transactions involved only a restructuring of Williams (prior to the sale of shares to the First Service subsidiary), which left Williams and its shareholders, including petitioner, with essentially the same interest in the same assets as they held prior to the restructuring. Respondents argue that a corporate restructuring that merely moves assets from one corporate entity to another, without affecting the ultimate ownership of those assets, cannot be the basis for asserting a right to appraisal and payment of fair value. In any event, respondents argue, even if petitioner's claims against Williams are sufficient to sustain this petition, the complaint should be dismissed as to First Service and the individual

respondents, because the petition seeks only an appraisal under BCL § 623, and no such claim lies against parties other than corporations in which the shareholder has an interest.

In her response, petitioner argues that respondents are estopped from objecting to petitioner's exercise of her appraisal rights by their prior express acknowledgment of such rights in the notices that they sent to shareholders (citing *Matter of McKay v Teleprompter Corp.*, 19 AD2d 815 [1st Dept], *appeal dismissed* 13 NY2d 1058 [1963]), as well as by their failure to treat her as a shareholder following the transactions. Petitioner also requests that I not only deny respondents' motion to dismiss, but exercise my discretion and deny respondents leave to submit an answer to her petition, on the basis that they have chosen to take such a meritless position rather than respond to her petition. Petitioner argues that, insofar as respondents seek dismissal of the petition against First Service and the individual respondents, the motion should be denied, as petitioner has requested certain ancillary relief against these parties, which is not barred by the exclusivity provision of BCL § 623.

BCL § 910 provides that a shareholder who does not assent to a merger requiring shareholder approval, or who objects to any "sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909," has the right to receive payment of the fair value of his or her shares through an appraisal proceeding, as provided by BCL § 623 (*id.*). The statute protects the interests of minority shareholders by preventing them "from being forced to sell at unfair values imposed by those dominating the corporation" (*Matter of Cawley v SCM Corp.*, 72 NY2d 465, 471 [1988][cite omitted]), and by "prevent[ing] a corporation from disposing of a major portion of its property without obtaining prior" shareholder approval *(Dukas v Davis Aircraft*

Prods. Co., 131 AD2d 720, 721 [2d Dept 1987]).

Respondents argue that the petition must be dismissed because none of the transactions described by petitioner constituted either a merger or a sale of "all or substantially all"of Williams' assets, and thus did not give rise to the right to an appraisal. Respondents contend that, prior to the transactions at issue, Williams existed as a network of interrelated companies, each of which, ultimately, was owned by the same six shareholders, in the same percentages. Respondents argue that their "restructuring" of Williams modified this status quo ante only by allowing Williams to streamline its corporate structure by "rolling up" various individual corporations into the newly formed Williams New Opco, which was in turn wholly owned by the newly formed Williams New Holdco. According to respondents, this restructuring merely allowed Williams to consolidate its assets into a single entity, which continued to be owned, ultimately, by the same Williams' shareholders. Respondents note that shareholders of a corporation have no right to dissent when a corporation merely transfers its own assets to a wholly owned subsidiary (citing *Matter of Resnick v Karmax Camp Corp.*, 149 AD2d 709 [2d Dept 1989]); thus, the transfer of assets to Williams New Opco, at a time when it was a wholly owned subsidiary of Williams, was not sufficient to trigger petitioner's appraisal rights.

Respondents additionally argue that the roll-up, and eventual acquisition, of the partially owned subsidiaries Williams NJ and Williams CT, in exchange for a 25% interest in Williams New Holdco, does not alter this analysis, as the BCL does not require shareholder approval of every sale of corporate assets. Rather, the BCL limits such rights to situations in which the corporation is transferring all or substantially all of its assets.

Respondents argue that the exhange of a 25% interest in Williams New Holdco clearly would not meet this standard.

Respondents argue that the merger of the Satellite Companies into Williams also was not a triggering transaction, sufficient to give rise to appraisal rights, because BCL § 910 provides that shareholders of the surviving corporation in a merger cannot dissent. Respondents note that, here, petitioner was a shareholder of Williams, which was the surviving corporation. Although respondents acknowledge that petitioner also was a shareholder of each of the Satellite Companies that were merged into Williams, respondents argue that granting petitioner dissenter rights on that basis would not be warranted, as the transaction did not impact her continuing ultimate ownership of the assets transferred thereby. Respondents additionally argue that granting appraisal rights in these circumstances could generate absurd results, by allowing petitioner to dissent and receive fair value for her shares in the Satellite Companies, while still retaining an "identical interest" in those assets through her shares in Williams. Respondents further argue that petitioner's contention, that they should be estopped from contesting her right to an appraisal, is without merit, because petitioner has not alleged facts sufficient to show that she relied on the statement contained in the shareholder notices to her detriment.

As for the other transactions that petitioner brings up in her petition, such as the sale of 65% of Williams New Holdco's interest in Williams New Opco, and Williams' sale of 100% of its interest in the former Satellite Companies, respondent argues that these transactions are irrelevant to petitioner's claimed appraisal rights. In any event, respondents argue that such sales did not constitute the sale of all or substantially all of Williams' assets

for purposes of triggering appraisal rights, as these transfers had no effect on the ongoing business operations of the transferring corporation. Moreover, respondents contend, petitioner does not argue that these transactions triggered her appraisal rights, but instead, relies solely on the roll-up of Williams into the new operating and holding entities as the source of her rights.

It is well settled that, in determining a motion to dismiss, I "must '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'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005], quoting *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The motion must be denied if the factual allegations, taken together, manifest a cause of action cognizable at law *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Richbell Info. Servs, v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003]). Further, where, as here, evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one, and "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Nor is it relevant whether the pleadings would later survive a motion for summary judgment (*see Porcelli v Key Food Stores Co-0p,*

Inc., 44 AD3d 1020 [2d Dept 2007]; *Palo v Cronin & Byczek*, LLP, 43 AD3d 1127 [2d Dept 2007]).

Respondents' motion to dismiss this petition, on the ground that it fails to plead a cause of action, is denied.

Contrary to respondents' contention, the petition clearly and explicitly alleges that the asset transfers to Williams New Opco and the merger of the Satellite Companies *each* triggered petitioner's right to dissent and seek an appraisal. Thus, petitioner has not relied solely on the alleged roll-up of assets into Williams New Opco, and subsequent transfer to Williams New Holdco, as the source of those rights.

Petitioner has sufficiently alleged facts that would give rise to a right to an appraisal, through her allegations of the merger of the Satellite Companies with Williams. Although it is true that shareholders of a surviving corporation in a merger are not entitled to dissent and seek an appraisal (BCL §910 [a] [1] [A] [ii]), petitioner was also a shareholder of each of the Satellite Companies. Respondents have cited no authority to support their contention that the minority shareholders of a company that is merged into another would automatically lose their rights to seek an appraisal merely because they also are shareholders of the surviving company. Nor is it clear that granting appraisal rights to petitioner for her shares in the Satellite Companies would necessarily generate absurd results. It appears, from the notices sent to the shareholders of the Satellite Companies, that each of the shareholders would be entitled to receive additional shares in Williams upon the extinguishment of their shares in the Satellite Companies (*see* Petition, Exh. B). Even if petitioner were to obtain fair value for those shares, while retaining her original shares of Williams, it is not clear how

that would be an "identical interest" in the assets. At best, respondents' argument raises issues of fact which are not appropriately decided on a motion addressed to the sufficiency of the pleadings.

In any event, in their notices to the shareholders of the Satellite Companies, respondents expressly advised petitioner that the merger would give rise her the right to an appraisal. Even if these notices were not sufficient to estop respondents from contesting such right, such notices in combination with the allegations in the complaint, are sufficient to preclude dismissal of this petition based solely on a challenge to the adequacy of the pleadings.

For purposes of this motion, the petitioner also sufficiently alleges her right to an appraisal based upon the allegations of the sale of 25% of the interest in Williams New Holdco to the individual owners of Williams NJ and Williams CT, the sale of 65% of the interest in Williams New Opco to the subsidiary of First Service, and the sale of 100% of Williams' interest in the Satellite Companies to the same purchaser. While respondents contend that none of these transfers would constitute a sale of all or substantially all of the corporations assets, because they had no effect on the ongoing business of Williams, this argument, too, raises factual issues which cannot be determined on this pre-discovery motion.

However, to the extent that respondents seek dismissal of the petition against First Service and the individual respondents, the motion is granted. The pursuit of an appraisal proceeding against the corporation generally constitutes a dissenting stockholder's exclusive remedy under BCL § 623, although there exists an exception, which permits an action for

equitable relief when the merger is unlawful or fraudulent as to that shareholder (see BCL § 623 [k]; *Alpert v 28 Williams St. Corp.*, 63 NY2d 557 [1984]; *Breed v Barton*, 54 NY2d 82 [1981]). While the petition does contain some allegations of overreaching by the individual respondents, and while claims of breach of fiduciary duty by majority shareholders may be asserted in an appraisal proceeding (*Matter of Direct Media/DMI v Rubin*, 171 Misc 2d 505 [Sup Ct, NY County 1997]), petitioner has not asserted any such cause of action against the individual respondents, and thus fails to allege a sufficient basis on which to obtain injunctive relief against these individuals. Nor has petitioner alleged any facts to show that First Service is a proper party to this petition.

To the extent that petitioner requests that respondents not be granted leave to serve an answer to this petition, and order the parties to proceed directly to an appraisal, the request is denied. Other than the pre-transaction notices, the parties have yet to submit any documents regarding the actual transaction. Therefore, any judgment on this matter would be premature, and respondents may submit an answer, as allowed by CPLR 404 (a), and pursue discovery.

Accordingly, it is

ORDERED that respondents' motion to dismiss (Motion Sequence Number 002) is granted solely to the extent of dismissing the petition against respondents Michael T. Cohen, Robert L. Freedman, Andrew H. Roos, and FirstService Corporation, and the motion is otherwise denied; and it is further

ORDERED that respondents are directed to serve an answer to the petition within 5 days after service of a copy of this order with notice of entry.

DATED: 10/27/09

ENTER:

J.S.C.

HON. BERNARD J. FRIED