

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of
HILLEL BRONSTEIN, as a holder of more
than twenty percent of all outstanding
shares entitled to vote in an election
of directors of PRESTIGE BAY PLAZA
DEVELOPMENT CORP.,

Index No. 112675/96

Petitioner,

For the dissolution of PRESTIGE BAY
PLAZA DEVELOPMENT CORP.

-against

SAM SHALEM and IRVING PERGAMENT,

Respondents. *Per*

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CAROL E. HUFF, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Respondents Sam Shalem and Irving Pergament move (a) for a protective order (CPLR 3103) striking petitioner Hillel Bronstein's First Request for Production of Documents, (b) to compel depositions and (c) to schedule a prompt trial of this valuation proceeding. Petitioner moves for summary judgment in the amount of \$7,520,000, or, in the alternative, the posting of a bond in that amount, together with an injunction against encumbering or depleting the assets of the parties' company, Prestige Bay Plaza Development Corp. ("Prestige").

For the reasons set forth below, respondents' discovery motion is denied, and petitioner's motion is granted to the extent of directing respondents to post a bond in the amount of \$16 million.

The Discovery Motion

The background of this dispute is set forth in this court's January 28, 2000 order (the "Prior Order"), familiarity with which is presumed. As relevant here, this is a proceeding, pursuant to Business Corporations Law ("BCL") § 1118, to determine the value of petitioner's 29.5% interest in Prestige and approximately twenty other entities which own the 967,250 square foot Bay Plaza Shopping Center. The Prior Order granted petitioner's motion for leave to conduct discovery, and authorized the service of various draft discovery demands which had been attached to petitioner's moving papers. However, in order to avoid unnecessary duplication, the court directed petitioner to "thoroughly review documents already provided . . . and to modify the demands accordingly" (Prior Order at 4).

Respondents move to strike petitioner's document demand on the grounds that it was not modified as required by the Prior Order, and that it is overbroad and irrelevant. As to the first ground, the Court finds that the revised demands substantially comply with the Prior Order. Although the categories of documents demanded are similar in many respects to those identified in the draft demands, the duplication was necessary because respondents admittedly have not produced all the documents for all the time periods specified in each category. Respondents are not, of course, obligated to produce any document previously supplied, but may simply note the fact of production where appropriate. As their motion demonstrates, respondents have fully catalogued their previous production, and will thus not be confronted with great difficulty in avoiding the production of duplicate documents.

Respondents' challenge to the breadth and relevancy of the demands is also rejected. The document demand was in the record on the prior motion, and the court authorized the service of the demand "as set forth" by petitioner. In any event, the court finds the demands for the individual respondents' financial statements and documents post-dating the valuation date to be potentially relevant to the value of petitioner's interests (see, Kay v Kay, 223 AD2d 684 [2d Dept 1996]; Saltzman v IRS, 131 F3d 87 [2d Cir 1997]). The requests for documents pre-dating the valuation by up to six years are also reasonable under the circumstances (see, e.g., Matter of Gerzof v Coons, 168 AD2d 619 [2d Dept 1990]).

Accordingly, the motion for a protective order is denied. Respondents are directed to respond to the outstanding document demands within thirty days of notice of entry of this order. Depositions shall commence ten days after service of respondents' discovery response.

Motion for Partial Summary Judgment and Related Relief

Petitioner seeks partial summary judgment in the amount of \$7,520,000, representing the value placed on his interest in the Prestige entities by respondents' preliminary Appraisal Report dated December 14, 1999. The motion is denied. Assuming, arguendo, that partial summary judgment is even available in a BCL § 1118 valuation proceeding, its grant would be inappropriate under the circumstances. First, as noted in the Prior Order, the parties' so-ordered stipulation of August 6, 1999 contemplated that the appraisals would not to be deemed final, and provided without limitation that the parties' submissions "shall not preclude either party from modifying or supplementing such reports" (see, Prior Order at 3). Respondents' Appraisal Report

thus cannot be given conclusive, collateral estoppel effect on this motion. Even if a downward modification of the report's estimate is unlikely, such speculation cannot support an award of summary judgment.

Furthermore, in establishing fair value in a statutory appraisal proceeding, the opinion of a party's expert is but one of a number of factors to be taken into consideration (see, Matter of Cohen, 168 Misc.2d 91 [Sup Ct NY Co 1995], aff'd 240 AD2d 225 [1st Dept 1997]). "That each party present[s] their views of the value of petitioner's share through expert testimony does not require or even invite the court to measure value using or rejecting either or both opinions of value [and does not] exonerate the court from formulating a value" (Matter of Cohen, *supra*, 168 Misc.2d at 95). Accordingly, "[n]o single methodology or set of factors is mandatory" (Matter of Cohen, *supra*, 240 AD2d at 225). The BCL anticipates that value is to be set following a hearing at which all relevant evidence is considered. Petitioner's reliance on cases involving voluntary advance payments in valuation proceedings (see, e.g., Alpert Broadcast Market Corp., 1992 WL 350776 [SDNY 1992]) or party admissions in plenary fee disputes (see, Ruskin, Mosrou, Evans & Flatschek v Beal, 212 AD2d 687 [2d Dept 1995]), is misplaced.

Petitioner's motion to require respondents to post a bond, however, is granted. BCL § 1118(c)(2) provides that

The court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares.

"The primary purpose of the bond requirement under section 1118(c)(2) is to protect minority shareholders against tactical fluctuations in their share prices during the valuation process" Matter of 212 East 52nd Street Corp., 185 Misc 2d 95, 99 [Sup Ct. NY Co 2000]; see, Smith v Russo, 230 AD2d 863 [2d Dept 1996]). A court may also order an undertaking where there are serious allegations of financial impropriety, or significant questions raised regarding respondents' ultimate ability to satisfy the buy out price (see, In Re Kastleman, 234 AD2d 181 [1st Dept 1996]; Matter of 212 East 52nd Street Corp., supra). The existence of a serious dispute over the value of the shares may also be a factor (In Re Kastleman, supra).

In support of his motion for a bond, petitioner notes that respondents' salaries increased from \$384,000 in 1997 to \$ 1.4 million in 1998, and possibly up to \$1.7 million in 1999. Additionally, in 1999, the Prestige entities owed \$95 million in mortgage loans as compared to only \$89 million in assets, and the individual respondents borrowed an additional \$19 million on Prestige's behalf. At the time, Prestige had only about \$4 million in cash on hand.

Petitioner values the Bay Plaza Shopping Center at \$209 million. Respondents place its worth in the \$150 million range. As noted, respondents have preliminarily assessed petitioner's interest at \$7.5 million, as compared to the \$25 million value now claimed by petitioner himself.

Respondents do not dispute the accuracy of the above-cited figures, other than to point out that they are based upon draft financial statements and are thus subject to revision. In response to the charge regarding inflated salaries, respondents claim that the increased payments represented deferred compensation owed in view of their past

sacrifices on behalf of Prestige. Finally, although respondents aver that Prestige "will be in a position to make payment" when the valuation is complete, they do not substantiate this promise in any meaningful fashion. Instead, they allude to unnamed "third-party sources which would likely be willing to fund the balance," and suggest that the court could order that payment be made from future operations.

While petitioner has not substantiated allegations of any serious impropriety at this juncture, he is entitled to the protection of a bond due to the drastically varying preliminary valuations of his interest and the questions raised regarding Prestige's financial capability (see, In Re Kastleman, supra). Accordingly, the court directs that respondents post, or cause to be posted on behalf of the Prestige entities, an undertaking in the amount of \$16 million within thirty days of notice of entry of this order. In view of this determination, petitioner's request for related injunctive relief is moot.

Accordingly, it is

ORDERED, that respondents' motion for a protective order is denied, and respondents are directed to respond to the outstanding document demands within thirty days of notice of entry of this order, with depositions to commence ten days after service of respondents' discovery response, and it is further

ORDERED, that petitioner's motion for summary judgment is denied, and it is further

ORDERED, that respondents are directed to post, or cause to be posted on behalf of the Prestige entities, an undertaking in the amount of \$16,000,000.00 to


secure payment of petitioner's ultimate recovery in this valuation proceeding, within thirty days of notice of entry of this order, and it is further

ORDERED, that petitioner's motion for a preliminary injunction is denied.

DEC 13 2000

Dated: _____

ENTER:



CAROL E. HUFF
J.S.C.