**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**
**PRESENT: HON. MARYLIN G. DIAMOND PART 48**
*Justice*

WARREN COLE,

Plaintiff,

- v -

HARRY MACKLOWE,

Defendant.

**INDEX NO. 604784/99**

**MOTION DATE**

**MOTION SEQ. NO.**

**MOTION CAL. NO.**



**Upon the foregoing papers, it is ordered that:** In anticipation of the bench trial on the damages portion of this action, the parties have requested a ruling from this court on whether the defendant, in attempting to establish the value of plaintiff's equity interests in certain properties, may present expert testimony regarding the applicability of discounts reflecting the alleged lack of marketability of these interests and plaintiff's alleged lack of control over these properties.

**Background**

The plaintiff Warren Cole was employed by defendant Harry Macklowe from April, 1988 to April, 1999. Macklowe is the chairman of Macklowe Properties, an unincorporated real estate investment and development business. At some point during the early 1990's, Cole became Macklowe's closest employee, generally characterized as his "right-hand man." In the Fall of 1994, Macklowe orally advised Cole that he had decided to give him a 10% equity interest in all Macklowe investment projects going forward. Thereafter, Cole drafted two separate agreements, one of which is a contract dated July 22, 1996 and the other of which is an addendum dated November 20,1998, in which he was given, *inter alia,* a 10% equity interest in numerous designated real estate properties owned by Macklowe. Macklowe signed both documents. However, by the beginning of April, 1999, Cole and Macklowe's relationship had deteriorated and they both agreed that Cole should leave the company. That same month, Macklowe indicated to Cole that he did not consider the agreements to be binding and would not abide by their terms.

In this action, Cole seeks to enforce the two agreements. By decision and order dated May 17, 2007, the First Department found that the agreements were enforceable and remanded the matter to this court for a determination of damages. *See Cole v. Macklowe*, 40 AD3d 396 (1st Dept 2007). Thereafter, upon the parties' respective motions regarding the proper calculation of damages, this court held that Cole's damages should be calculated by determining, *inter alia*, the value of Cole's interests based on market conditions which existed as of the time of the breach. On appeal, the First Department affirmed this ruling. *See Cole v. Macklowe*, 64 AD3d 480 (1st Dept 2009).

Macklowe construes these rulings as signifying that Cole's damages should be calculated based on the fair market value of Cole's equity interests. He defines fair market value as what a willing buyer will pay a willing seller, neither of whom is obligated to buy or sell. He argues that a determination of the fair market value of Cole's interests must include discounts reflecting the fact that Cole holds only a minority share of the designated properties and that his interests are unmarketable because of, *inter alia*, his lack of control over these properties. As Macklowe points out, a discount for lack of control, also known as a "minority discount," "reflects the lower value of minority shares due to the minority shareholder's inability to influence corporate decisions." *Eisenberg v. C.I.R.*, 155 F3d 50, 52 n.7 (2nd Cir 1998). A discount for lack of marketability is applied when valuing property that cannot be sold freely or for which there is no readily available market. *See Amodio v. Amodio*, 70 NY2d 5,7 (1987). Macklowe seeks to present expert testimony establishing the applicability of these discounts and the extent to which they reduce the value

of Cole's interests.

Cole opposes Macklowe's request for leave to present such expert testimony. He argues that, in fact, he is not a willing seller. Rather, he argues that this action to recovery monetary damages is more akin to an involuntary sale arising from the misconduct of the party holding a majority interest in the properties. Citing to case law and various statutes which address analogous disputes, he claims that no discount should be applied.

**Discussion**

Clearly, Cole is correct in arguing that the calculation of damages herein does not involve a willing seller. Indeed, the damages portion of the trial will be conducted only because Macklowe was found to have breached his contractual agreement to extend to Cole an equity interest in various properties, each of which is owned by a Macklowe-controlled limited liability company or limited partnership. As Cole points out, in cases involving the involuntary sale of the interests of a minority owner who has essentially been forced out of a company, the minority owner is entitled to receive the "fair value" of these interests. *See Friedman v. Beway Realty Corp.*. 87 NY2d 161, 167 (1995

"Fair value" has been defined by the courts as a party's "proportionate interest in a going concern, that is, the intrinsic value of the [member's] economic interest" in the company. *Friedman v. Beway Realty Corp.*. 87 NY2d at 167. *See also Matter of Cawley v. SCM Corp.*, 72 NY2d 585, 587-588 (1988). It has been similarly defined by the Court of Appeals as "'what a willing purchaser in an arm's length transaction would offer for [the party's] interest in the company as an operating business.'" *In re Dissolution of Penepent Corp.*, 96 NY2d 186, 193 (2001)(citations omitted). *See also Vick v. Albert*, 47 AD3d 482, 484 (1st Dept 2008).

In this respect, the courts have held that minority discounts may not be utilized in determining "fair value" since they would otherwise deprive minority owners of their proportional interest in the company, thus preventing such owners from achieving a fair appraisal remedy. *See In re Dissolution of Penepent Corp.*, 96 NY2d at 194; *Friedman v. Beway Realty Corp.*. 87 NY2d at 167. Moreover, in *Friedman*, the Court of Appeals observed that where the majority members are essentially buying-out the minority's interests, reducing the fair value of minority shares to reflect their owners' lack of power in the administration of the company "will inevitably encourage oppressive majority conduct, thereby further driving down the compensation necessary to pay for the value of minority shares." *Id.* at 169. For these same reasons, the Court in *Friedman* implicitly recognized that a marketability discount may not applied where, as here, it is essentially based on the minority's lack of control. *Id.* at 171.

Macklowe, however, argues that this ban on the use of discounts is limited to a narrow line of cases involving four special contexts: (1) dissolution proceedings under Limited Liability Company Law §§ 701, 702, Limited Partnership Law § 114(3) and Partnership Law § 62 brought by an oppressed minority partner or member, (2) proceedings under Business Corporation Law §§ 623 and 501(c) where a minority or dissenting shareholder seeks to sell his stock after the corporate majority takes significant action deemed inimical to the minority, (3) dissolution proceedings brought by a minority partner or member under Business Corporation Law §§ 1104-a and 1118 623, as well § 501(c), where the majority elects to buy-out the dissenter and (4) proceedings for the purchase of the interests of a deceased partner or member by the surviving partners and members. According to Macklowe, since none of these four contexts are present in this case, the value of Cole's interests may properly be discounted. This court disagrees.

Macklowe has not pointed to any decision which even suggests that the use of discounts may only be banned where one of these contexts is present, irrespective of whether the public policy underlying the ban would otherwise be advanced. Indeed, until the First Department issued its 2008 decision in *Vick v. Albert*, 47 AD3d at 482, the ban on the use of discounts was limited to proceedings brought under statutes which either expressly entitled the minority owner to receive "fair value" or expressly proscribed discounting and treating holders of the same class of stock differently. In *Vick*, even though the First

Department found that the applicable statute, Partnership Law § 73, did not bar discounts, it nevertheless discussed a number of the policy rationales underlying the ban and concluded that the application of the discounts sought by the surviving partners in valuing their deceased partner's interest "would deprive [his survivors] of the value of decedent's proportionate interest in a going concern, since they would not receive what they would have received had the entire entity been sold on the open market unaffected by a diminution in value as a result of a forced sale..." 47 AD3d at 484.

Thus, the fact that none of the four contexts listed by Macklowe is present herein is not dispositive of the issue. Rather, the issue turns on whether the policy concerns underlying the ban on the use of discounts are present in this case. The court is persuaded that they are.

First, Macklowe's repudiation of Cole's equity interests is clearly analogous to oppressive majority conduct intended to preclude or limit the minority from exercising its ownership rights. This action by Cole to vindicate his minority rights is equivalent to statutorily-based proceedings involving dissolution, buy-outs or sell-offs. In all such instances, the statutory objective of obtaining, as the Court of Appeals stated in *Friedman*, "a fair appraisal remedy" for the dissenting minority, *Friedman v. Beway Realty Corp.*. 87 NY2d at 167, is not achieved by the use of discounts since what is involved is essentially a forced sale. Second, as in *Friedman*, the use of discounts to reduce the value of minority interests would reward the majority for misconduct or oppressive action since it was Macklowe who exercised his majority control of the properties by repudiating his agreement with Cole and it is Macklowe who would benefit from the use of discounts which reduce the value of Cole's interests, thus limiting the amount of damages Macklowe will have to pay. Third, as in *Vick*, "the unavailability of the discounts is particularly apt" since "the business consists of nothing more than ownership of real estate..." and their application would deprive plaintiff of what the value of his interests would have been had each of the designated properties been sold on the open market. *Vick v. Albert*, 47 AD3d at 484.

Finally, as with buy-out and sell-off proceedings brought pursuant to statute, this action does not involve the sale of minority interests to third parties for whom "the value of the shares is either the same or less than it was in the hands of the transferor because the third party gains no right to control or manage the corporation." *East Park Limited Partnership v, Larkin*, 893 A2d 1219, 1232 (Md Ct of Spec Apps 2006), cited in *Vick*, 47 AD3d at 484. Rather, it is the majority owner, Macklowe, who is essentially purchasing Cole's interests, thus consolidating or increasing his ownership and control of the properties. Under the circumstances, the use of discounts "when selling to an 'insider' would result in a windfall to the transferee." *East Park Limited Partnership v, Larkin*, 893 A2d at 1232.

Accordingly, Macklowe's request for leave to present expert testimony regarding the applicability of minority and marketability discounts is hereby denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on October 5, 2010 at 2:00 p.m. for a pre-trial conference.

ENTER ORDER

**Dated:** 9/25/10

MGD

**MARYLIN G. DIAMOND, *J.S.C.***

**Check one: [ ] FINAL DISPOSITION**

**[X] NON-FINAL DISPOSITION**