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Giaimo v Vitale
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Decided on April 25, 2011
Supreme Court, New York County
Friedman, J.
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Supreme Court, New York County

Application of Robert T. Giaimo, individually and as Co-Executor of the Will of EDWARD P. GIAIMO, JR., Deceased, for the Judicial Dissolution of EGA ASSOCIATES, INC., Petitioner,

against

Janet Giaimo Vitale, Respondent.

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Marcy S. Friedman, J.

These proceedings were brought by petitioner, Robert Giaimo, against respondent, Janet Giaimo Vitale, to dissolve EGA Associates, Inc. (EGA) and First Avenue Village Corp. (FAV). EGA and FAV are family owned, closely held corporations whose assets are 19 residential buildings in Manhattan, some of which contain commercial space, and cash. At the time the proceedings were commenced, petitioner served motions for preliminary injunctions. On August 3, 2007, the court issued temporary restraining orders enjoining transfers of each corporation's property except in the regular course of business. By stipulation dated October 11, 2007, the parties continued the TROs and adjourned the petitions pending discovery. Respondent Vitale subsequently elected to purchase petitioner's shares in the corporations. By stipulation dated November 15, 2007, the parties agreed to refer the matters to a referee "to establish fair value under respondent's election." The stipulation provided for the parties to contact the court "in the event respondents either request the sale of a building to satisfy tax requirements or request a board meeting." The stipulation also stated: "The TRO shall continue in effect until altered by the court. The motions [for preliminary injunctions] are adjourned pending the foregoing." The parties then conducted protracted discovery between themselves or before Special Referee Louis Crespo. The fair value hearing was held before the Special Referee on January 5-7, 9, 12, 14-16, 20-23, and 28-29, February 4-5 and 18, and March 3, 2009. The parties' time to submit memoranda of law was extended to October 15, 2009. The Special Referee issued a Report & Recommendation (Report), dated June 30, 2010.

Petitioner moves to confirm in part, modify in part, and reject in part the Special

Referee's Report. Respondent Vitale cross-moves to reject in part and confirm in part the Report. Petitioner has also served two contempt motions: The first (TRO Contempt Motion) seeks an order holding respondent Vitale in contempt for violating the August 3, 2007 TRO, appointing a temporary receiver, and directing respondent Vitale to "provide full and unfettered access to the books and records" of the corporation.[FN1] The second seeks an order finding respondent Vitale in contempt "for her fraud on the court by concealing assets" of the two corporations at the fair value hearing, and for "an order directing that the undisclosed assets of FAV and EGA be included in their values, without setoff or deduction." By cross-motion, respondent seeks an order holding that if the record of the fair value hearing is reopened to include additional assets, additional set-offs should also be made for taxes, interest, and professional fees.

I. Motions to Confirm or Modify Referee's Report

The standards for review of a referee's report are well settled. On a motion for review, the court may confirm or reject the report in whole or in part, "make new findings with or without taking additional testimony," or order a new hearing. (CPLR 4403; *Matter of Cohen [Four Way Features, Inc.]*, 215 AD2d 341 [1st Dept 1995].) The report of a referee should [*2]ordinarily be confirmed where the referee "clearly defined the issues, resolved matters of credibility, and made findings substantially supported by the record." (*Rosenbloom v Gurary*, 59 AD3d 274 [1st Dept 2009]; *Poster v Poster*, 4 AD3d 145 [1st Dept 2004], *lv denied* 3 NY3d 605; *Halperin v Halperin*, 282 AD2d 340 [1st Dept 2001].)

In valuing EGA and FAV, both parties' experts used the net asset value approach. The parties do not challenge the values that the Referee found, using this approach, for the properties owned by the corporations.[FN2] Rather, their dispute over the Referee's Report centers on two main issues:

First, in determining the fair value of petitioner's shares, the Referee did not apply a discount for lack of marketability (DLOM). Petitioner argues that the Referee's determination was correct in this respect, while respondent argues that such a discount should have been applied.

Second, the Referee held that the value of the corporations' assets should be reduced by the present value of taxes on built-in capital gains (BIG). Following the formula articulated

in *Murphy v U.S. Dredging Corp.* (74 AD3d 815 [2d Dept 2010] [*Murphy*]) for calculating the present value of the BIG, the Referee reasoned:

> "Thus, I find for both EGA and FAV the property value of the specific properties as of August 1, 2007 should be applied against the multiple of the estimate[d] growth rate of value 3.0% over a 10-year period from which the future value as of August 1, 2017, is then derived (current market rate at growth rate for 10 years). The cost basis for the properties as reflected in the record should then be deducted from the future value, leaving a balance that represents the future embedded gain.' The B.I.G. calculated at 45.87% should then be applied against the future embedded gain' (not a so-called blended federal/state rate') and that sum should be discounted at 10% discount rate to obtain the present value of tax liability.' The present value of tax liability' is the B.I.G. that should be applied as a liability against the balance of the corporations' total assets."

(Report at 167, ¶ 157 [internal citations and parentheticals omitted].) Petitioner argues that a deduction for the BIG should not have been made, but that "[i]f the deduction for [the] BIG is not rejected in its entirety, then the calculation should be modified slightly to allow for a reduction for the costs of sale of the properties 10 years hence before determination of the capital gains tax and reduction to present day value." (Pet. Memo. In Support at 2.)[FN3] Respondent argues that the [*3]Referee's "recommendation to present value' the BIG should be rejected and that 100% of the BIG should be used." (Resp. Memo. Of Law in Support of Cross-Motion at 19.) Respondent also contends that if the court follows the present value approach, it should take into account additional corporate taxes incurred because EGA and FAV are C corporations. (*Id.*)

It is well settled that the fair value of a dissenting shareholder's shares"is to be determined on their worth in a going concern, not in liquidation." (*Beway*, 87 NY2d at 167 [applying standard for fair value determination under Business Corporation Law § 1118 to fair value determination under § 623].) Thus, "in fixing fair value, the test to be applied is what "a willing purchaser, in an arm's length transaction, would offer for the *corporation* as an operating business." (*Id.* at 168 [internal citations and quotation marks omitted] [emphasis in original], quoting *Blake*, 107 AD2d at 146.)

As the Court of Appeals has noted, "[v]aluing a closely held corporation is not an exact science. Accordingly, courts in such proceedings confront a variety of evidence and methods aimed at determining the price of minority interests in closely held corporations — legal entities that by their nature contradict the concept of a market' value." (*Matter of Seagroatt*

Floral Co., 78 NY2d 439, 445 [1991].)

Here, the Special Referee was confronted with sharp legal disputes and unsettled law as to the appropriate methodologies to be followed in assessing marketability and potential capital gains tax liability. As discussed more fully below, he issued a thoughtful, exhaustive Report on these complex issues. While the court does not agree with the Referee's stated reasons for not applying a DLOM, there is support in the record for his decision not to do so. The court also finds that there is support in the record for the Referee's calculation of the BIG. The award will therefore be confirmed in these respects.

DLOM

It is well settled that a percentage discount against value is not the only way that illiquidity of the shares of a closely held corporation may be taken into account, but that "whatever the method of valuing an interest in [a closely held corporation], it should include consideration of any risk associated with illiquidity of the shares." (*Seagroatt*, 78 NY2d at 447, 445-446 [holding that illiquidity was satisfactorily taken into account in calculating investment value of close corporation, where expert testified that lack of marketability was a factor in his choice of capitalization rate].) In *Beway* (87 NY2d at 169-170), a case involving determination of the fair value of a minority shareholder's stock in close corporations that owned real estate, the Court of Appeals expressly disapproved imposition of a discount for the minority status of dissenting shares, but upheld application of an "unmarketability discount."

The court is of the opinion that in declining to discount for lack of marketability, the Referee erred in distinguishing *Beway* on the ground that it was not a case in which a DLOM was applied in valuing the shares of an entity which, like EGA and FAV, "only holds residential real property and cash and has not engaged in real estate and mortgage financing." (Report at 155, ¶ 118.) In fact, *Beway* remanded for calculation of a DLOM for close corporations, each of which owned "as its sole asset a parcel of income-producing . . . real estate." (87 NY2d at 164.) Nor is the fact that the *Beway* properties had mortgages, whereas the subject properties do not, a relevant basis for distinguishing *Beway*. (*See* Report at 155, n 27.)

The Referee's decision is consistent with *Vick v Albert* (47 AD3d 482 [1st Dept 2008]),

[*4]which declined to apply discounts, apparently for both minority lack of control and lack of marketability, in valuing a partnership. The Court reasoned that "[t]he unavailability of the discounts is particularly apt here, where the business consists of nothing more than ownership of real estate." (*Id.* at 484.)[FN4] This court does not find that there is a relevant distinction between the methodology to be applied in evaluating the lack of marketability of a partnership, as opposed to a close corporation, which holds real estate. However, *Vick* may not be followed to the extent that it is inconsistent with *Beway*.

In declining to apply a DLOM, the Referee also accepted the reasoning of petitioner's expert, Z. Christopher Mercer, a business appraiser. (Report at 156, ¶ 119; 157, ¶¶ 121-122.) Mercer testified that the appropriate "level of value" in a fair value appraisal is "control value of a business [which] refers to the value of the enterprise as a whole." (Mercer Tr. at 1811, 1814.) He attempted to justify this level of value as consistent with *Beway*, reasoning that *Beway* requires valuation of the business as a going concern, and that such valuation is control value or valuation of the enterprise as a whole, which is inconsistent with minority or lack of marketability discounts. (*See id.* at 1814-1818.)[FN5]

Notwithstanding Mercer's significant credentials, his testimony in this regard cannot be credited as it is, in fact, inconsistent with *Beway*. As stated above, *Beway* provides that fair value is to be determined based on the worth of a dissenting shareholder's shares in a "going concern." (87 NY2d at 167.) While a discount for minority lack of control is impermissible, the illiquidity of the shares must be taken into account and, under *Beway*, a DLOM or other means of considering illiquidity is not considered inconsistent with valuation on a going concern basis. [*5](*Id.* at 169-170.)[FN6]

While the court rejects the Referee's articulated reasons for declining to apply a DLOM, the court nevertheless finds that the decision not to apply a DLOM is appropriate on this record. As *Seagroatt* notes, the determination of fair value is a "question of fact [which] will depend upon the circumstances of each case; there is no single formula for mechanical application." (78 NY2d at 445. *Accord Matter of DeAngelis v AVC Servs., Inc.*, 57 AD3d 989 [2d Dept 2008].) As discussed more fully below, in determining the built-in gains tax issue, the Referee specifically made a finding of fact, which is amply supported by the record, that the availability of similar properties on the open market is limited and that a buyer would accordingly buy the properties that EGA and FAV own through the corporations. (*See infra* at 10.) This finding of the marketability of the corporations' shares is

as relevant to the determination as to whether to apply a discount for lack of marketability as it is to whether to reduce the value of the corporations by embedded taxes. The court accordingly holds that the Referee's award on the DLOM should be confirmed.

BIG

In arguing that the Referee erred in calculating the built-in capital gains taxes, respondent contends that the First Department holding in *Wechsler v Wechsler* (58 AD3d 62 [2008]), rather than the Second Department holding in *Murphy v U.S. Dredging Corp.* (74 AD3d 815, *supra*), is controlling. *Murphy* reduced the BIG to present value, whereas *Wechsler* did not. The *Wechsler* Court discussed the differing approaches as to whether to reduce the taxes to present value, noting that the "merits and demerits" of each approach were elucidated by the majority and dissenting opinions in cited federal authorities. However, the Court expressly held that the appeal "does not require us to reach a conclusion about which of the two approaches is preferable with respect to the issue of embedded taxes." (58 AD3d at 68-69.) More particularly, the methodologies before the *Wechsler* Court were whether to reduce the value of the corporation by the BIG or whether to reduce the value by the "historical rate" of taxes paid by the corporation, and not whether to reduce the BIG to present value. (*Id.* at 69.) In *Murphy*, the Court expressly considered whether to reduce the BIG to current value in valuing a close corporation which, as noted above, held real estate and engaged in leasing and mortgage financing transactions. It distinguished *Wechsler* on the ground that none of the appraisers in the *Wechsler* case applied a discount for built-in gains based on present value. (74 AD3d at 817.) The *Murphy* Court also noted that the "[c]orporation's intention was to hold its real property for a lengthy period of time." (*Id.*)

Here, the court finds that there was a sound legal and factual basis for the Referee's decision to reduce the BIG to present value. The present value approach requires the court to estimate the period of time over which the appreciated assets of the corporation will be sold, whereas deduction of the full BIG as of the date of valuation "avoids the need for and uncertainties of prophesying as to when the assets will be sold." (*Wechsler*, 58 AD3d at 68 [internal quotation marks and citations omitted] [discussing this criticism of the present value [*6]approach raised in federal authorities].) In the instant case, however, the Referee's use of a 10 year holding period before sale of the assets has strong support in the record:

EGA and FAV are both corporations with a history of never having sold any of their real properties. There is no evidence in the record that they have any financial reason to sell properties in the foreseeable future. Moreover, both parties' appraisers used a 10 year holding period in calculating the net asset value of the properties. (*See* Report at 126, n 21 [and testimony cited therein].) The court further finds that the record supports the Referee's findings that the availability of properties similar to those owned by EGA and FAV on the open market is "tight," and that the hypothetical buyer cannot avoid the BIG by purchasing the properties on the open market rather than through the "corporate wrapper." (*Id.* at 161, ¶ 138; 162, ¶ 140.)

Given the lack of precedent in this Department on the issue of whether the BIG should be reduced to present value, the support for that approach in the Second Department, and the factual support in the record for the 10 year projection, the Court does not find that the Special Referee committed legal error in following the present value approach.

In so holding, this court rejects petitioner's contention that no deduction at all should be made for the BIG. Petitioner's support for this contention rests largely on cases from other states which decline to consider the tax consequences of the sale of any assets unless there is evidence that the corporation was actually undergoing liquidation on the valuation date. (*E.g. Brown v Arp & Hammond Hardware Co.*, 141 P3d 673, 688 [Sup Ct Wyoming 2005]; *Paskill Corp. v Alcoma Corp.*, 747 A2d 549, 554 [Sup Ct Del 2000].) These cases treat an assumed liquidation as inconsistent with valuation of the corporation as an ongoing concern. While the reasoning of the cases has much to recommend it, New York follows the contrary view that it is irrelevant whether the corporation will actually liquidate its assets, and that the court, in valuing a close corporation, should assume that a liquidation will occur. (*See Wechsler*, 58 AD3d at 73.)

Finally, petitioner summarily asserts that the expenses of the sale of the properties in 10 years should be deducted from the projected sale proceeds. (Pet. Memo. In Support at 13.) Petitioner does not set forth legal authority, or any factual basis, for calculating such a deduction. The court is therefore unable on this record to determine whether a reduction in value for non-tax liquidation costs should be allowed. Given the already protracted nature of the proceedings, the court declines to hold a supplemental hearing on this issue. (*See Wechsler*, 58 AD3d at 77-78.) Respondent's equally summary assertion that additional corporate taxes should be taken into account (Resp. Memo. In Support at 19) is rejected for

the same reason.

Additional Issues

Percentage of the Parties' Ownership of Shares in the Corporations

Respondent argues that the Special Referee erred in concluding that petitioner and respondent are each 50% owners of EGA and FAV. (Resp. Memo. In Support at 23.) Petitioner argues that the Referee's finding is supported by the record.

The Special Referee's finding that petitioner and respondent are each 50% shareholders of both EGA and FAV was based on the decision of the Appellate Division in *Giaimo v EGA Assocs. Inc.* (68 AD3d 523 [2009]). (Report at 38, ¶ 116; 87, ¶¶ 292-293.) This finding was error. The Appellate Division decision declared that the purported transfer and sale of one share of stock of EGA from decedent Edward Giaimo, Jr. to respondent Janet Vitale is null and void. However, the decision did not declare that petitioner and respondent are therefore now equal [*7]shareholders. Rather, it directed EGA to cancel any share certificates issued after the date of the purported sale, March 13, 2007, and "to issue new share certificates to Edward's estate and to Janet in the same share amounts as reflected in the certificates that existed as of March 12, 2007." (68 AD3d at 524.) Moreover, the decision concerned only EGA, not FAV.

Respondent makes a prima facie showing that the share certificates in existence prior to the purported sale, dated March 14, 2006, reflected ownership of EGA shares in the following amounts: Edward Giaimo, Jr. — 66 67/100; Janet Vitale — 66 67/100; Robert Giaimo — 66 66/100. (Resp. Ex. 14.) In opposition, petitioner does not address these share certificates. Instead, he cites an affidavit by respondent characterizing each sibling's interest as one-third, and produces prior share certificates that gave each sibling a one-third interest. (Pet. Reply Aff., ¶ 27; Ex. 9 [Vitale Aff., ¶ 3]; Pet. Reply Aff., ¶ 24; Ex. 11.) This evidence is insufficient to raise a triable issue of fact, as petitioner fails to make any showing that the 2006 certificates are not the certificates in effect immediately prior to the purported sale that the Appellate Division set aside, or that they do not conclusively demonstrate the amount of the siblings' respective shares prior to such sale.

It is undisputed that Robert Giaimo and Janet Vitale each inherited 50% of Edward Giaimo, Jr.'s shares in EGA. Adding 50% of Edward Giaimo, Jr.'s shares to the share

amounts reflected in the 2006 certificates, the court finds, as a matter of simple arithmetic, that petitioner now owns 99.995 shares or 49.9975% of the total EGA shares, and respondent now owns 100.005 shares or 50.0025% of the total EGA shares.

As to FAV, respondent makes a prima facie showing that Edward Giaimo, Jr. transferred one share of stock to her on or about March 12, 2007 (Resp. Ex. 10), and that this transfer was never challenged by petitioner. (Resp. Memo. In Support at 23.) Respondent also cites petitioner's Response to her Notice to Admit, acknowledging the percentage of shares owned by Edward Giaimo, Jr., Robert Giaimo and Janet Vitale prior to the sale of one share to respondent. (Resp. Ex. 12, ¶ 28.) Petitioner fails to make any showing in opposition that he submitted evidence to the Referee that the sale was invalid.

It is undisputed that Robert Giaimo and Janet Vitale each inherited 50% of Edward Giaimo, Jr.'s shares of FAV. Thus, adding 50% of Edward Giaimo, Jr.'s shares to the share amounts acknowledged in the Response to the Notice to Admit, the court finds, as a matter of simple arithmetic, that petitioner now owns 84.495 shares or 49.70% of the total FAV shares, and respondent owns 85.505 shares or 50.30% of the total FAV shares.

FAV Disputed Properties

Four properties of which FAV is the record owner are the subject of an action by Antoinette Giaimo contesting FAV's ownership (*Giaimo v FAV Corp.*, Sup Ct, New York County, Index No. 102750/2008 [Antoinette Giaimo action]). The Special Referee determined that the percentage of the total value of equity attributed to these properties should be placed in escrow pending disposition of the action. (Report at 175-177, ¶¶ 190-195.) Petitioner argues that the Special Referee erred by placing the value of the shares attributable to the disputed properties in escrow, and that if the value is placed in escrow there should be a termination date for the escrow based on respondent's failure to prosecute the Antoinette Giaimo action since 2008. (Pet. Memo. In Support at 18.) Respondent argues that the court should "carve-out" the value of the disputed properties, and that the judgment should provide that respondent will pay [*8]petitioner such value only if FAV is determined in the Antoinette Giaimo action to be the owner. (Resp. Reply Memo. at 22.)

The Referee cited the Antoinette Giaimo action as "the matter that raises the issue of ownership over the properties." (Report at 175, ¶ 191.) This action was not filed until after

the valuation date and therefore does not support the Referee's finding of a dispute as of the valuation date. The court notes that the record also includes a July 12, 2007 letter (Resp. Ex. 8) from Antoinette Giaimo's then attorney, another member of the Giaimo family, to petitioner's then attorney, asserting Antoinette Giaimo's claim that the four properties had been wrongfully transferred out of her name to FAV by Edward Giaimo, Jr. who allegedly forged her signature. The court finds that this letter, but another instance of internecine warfare, is of extremely limited probative value to establish a bona fide dispute as to ownership of the properties, especially taking into account that the Antoinette Giaimo action was not brought until 10 years after the alleged fraudulent transfer. Petitioner also persuasively points out that respondent Vitale, who is Antoinette Giaimo's executor, would be in position, when prosecuting the Antoinette Giaimo action, to act against FAV's, and therefore against Robert Giaimo's, interest. (Pet. Reply Memo. at 24.) Such a conflict cannot be countenanced. Under these circumstances, the court concludes that the Special Referee properly included 100% of the value of the four properties in valuing the FAV shares, but that the value of the shares attributable to the four properties should not have been placed in escrow pending the outcome of the Antoinette Giaimo action.

Choses In Action

The Special Referee valued "choses in action" by EGA and FAV against the estate of Edward Giaimo, Jr. for rents skimmed by him during his management of the corporations. He further concluded that the percentage of total value of equity attributable to the choses in action should be placed in escrow pending disposition of a separate action to be brought against the estate to recover on the choses. (Report at 170-172 [EGA]; 175, ¶ 188 [FAV].) Petitioner challenges the escrow directive, while respondent argues that the choses in action should not have been included as an asset of the corporations or, if included, should not have been valued at full value.

The court holds that the Special Referee's determination on the choses in action is supported by the record. The court is unpersuaded by respondent's contention that the choses in action should not be valued because they were not included in a tax return for Edward Giaimo, Jr.'s estate filed by petitioner and respondent as co-executors. (*See* Resp. Memo. In Support at 25.) Respondent's citation to Internal Revenue Code § 2053(a)(3) (26 USC), for the proposition that the Code authorizes a deduction for claims against an estate, is plainly insufficient to show that the potential claims were required to be listed in the tax return.

Respondent also fails to show that the Referee improperly calculated the set-offs. There is support in the record for the Referee's determination to limit the choses in action to claims accruing 6 years before the valuation date; to calculate the amount of unreported income from skimmed rents based on the parties' stipulation (Resp. Ex. 18); and to set off cash from skimmed rents that was identified as having been obtained by Edward Giaimo, Jr. within the six year limitations period or was not shown to have been obtained by him prior to the six year period. (*See* Report at 105, ¶ 353; 170-172; 174-175.) Nor does respondent make any showing that competent evidence was presented to the Referee that the claims will be uncollectible from the estate. [*9]

As petitioner and respondent are co-executors of Edward Giaimo, Jr.'s estate, litigation of the choses in action against the estate does not implicate the potential conflict identified above (*supra* at 15) in connection with the litigation of the Antoinette Giaimo action. The judgment should, however, provide for termination of the escrow in the event that respondent fails to cooperate in the prosecution of the choses in action or for other good cause.

Deferred Payment

The Special Referee authorized respondent's payment of the fair value award under a deferred payment schedule, with 1/3 of the award to be paid within 60 days, 1/3 to be paid within 120 days, and 1/3 to be paid within 180 days of "service and entry of the judgment" with interest. Respondent argues that the entire payment should be deferred for 180 days. (Resp. Memo. In Support at 29.) Petitioner does not object to an installment schedule but seeks to move the first payment up from 60 to 30 days and argues that a default in any of the payments should result in acceleration of the remaining payments. (Pet. Memo. In Support at 19.)

Business Corporation Law § 1118(a) provides that a shareholder may elect to purchase the shares of a shareholder who has petitioned for dissolution of the corporation for "fair value and upon such terms and conditions as may be approved by the court." The Referee recommended the installment schedule due to the magnitude of the payment (over $24 million) and the "likely need to obtain financing." (Report at 180, ¶ 209.) The Referee's recommendation on the terms of payment is within the scope of the reference, and the court accepts the recommendation. In declining to defer the entire payment for six months, the

court notes that respondent rests on its attorney's affirmation that it will take six months to obtain financing and does not submit any competent evidence in this regard. In addition, as found in a prior order, dated December 18, 2008, denying petitioner's request for a bond, respondent Vitale "submitt[ed] evidence showing that she independently owns properties which have been appraised at approximately $16 million, are free of mortgages, and are therefore available if needed to finance the purchase of petitioner's shares." (Prior Order at 2 [Ex. 8 to Pet. Reply Aff.].) The judgment should contain a provision permitting petitioner to move on notice to accelerate the payments if any payment is missed.

Interest

Business Corporation Law § 1118(b) provides: "In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares." Petitioner argues that interest should be at the rate of nine percent, while respondent argues that the Referee's recommendation of four percent was correct.

While petitioner now claims that respondent engaged in misconduct that supports the higher rate of interest, petitioner acknowledges that he did not present evidence of misconduct to the Referee. Contrary to petitioner's contention, the court finds that a recommendation by the Referee on interest was clearly within the scope of the reference, and that, having failed to present evidence bearing on the issue to the Referee, petitioner has waived the right to do so. (*See Hexcel Corp. v Hercules Inc.*, 291 AD2d 222 [1st Dept 2002], *lv denied* 98 NY2d 607. See also Johnson v Chapin, 73 AD3d 447 [1st Dept 2010].)

In any event, the court finds that the alleged wrongdoing, discussed more fully below in connection with petitioner's TRO Contempt Motion, does not rise to the level that would warrant [*10]the statutory rate of interest for the entire period. In view of respondent's request for a deferred payment schedule, however, the court holds that interest should be awarded at the rate of nine percent from service of a copy of the judgment with notice of entry until final payment of the judgment.

Delivery by Petitioner of Shares Inherited from Estate of Edward Giaimo, Jr.

Respondent contends that petitioner should be required to deliver to respondent all

shares that he will receive from the estate of Edward Giaimo, Jr. free and clear of all liens. (Geller Aff. In Support of Cross-Motion, ¶¶ 44-46.) Although this issue was within the scope of the reference, respondent makes no showing that it was raised before the Referee. The court accordingly declines to hear the issue on this motion. (*See Hexcel Corp.*, 291 AD2d at 223.)

Conclusion

The court accordingly holds, for the reasons set forth above, that the Referee's Report should be confirmed, as modified to the extent set forth in this decision.

II. TRO Contempt Motion

Contempt

It is well settled that "[t]o sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed." (*McCain v Dinkins*, 84 NY2d 216, 226 [1994].) In addition, "prejudice to the right of a party to the litigation must be demonstrated." (*Id.* Judiciary Law § 753[A][3].)

Petitioner claims that respondent Vitale violated the August 3, 2007 TRO in a number of respects, including making illegal loans to herself, giving herself raises without authorization of the Board of Directors, making unauthorized capital expenditures, and making questionable payments and unexplained credit card charges. (Kalban Aff. In Support ¶¶ 14, 21-31.)[FN7] Petitioner fails to demonstrate that respondent's alleged acts violated the TRO, or to raise a triable issue of fact in this regard.

The August 3, 2007 TRO for each corporation provided:

"Ordered that pending the hearing of this Petition, Respondents Janet Giaimo Vitale, as a shareholder, director and officer, and Joseph O. Giaimo, as a director and, if already elected, an officer, and each of them is hereby temporarily restrained (a) from transferring any real property; and (b) from transferring any personal property, whether securities, cash, physical property, personal property or property of any other kind or description, including cash, out of the corporation, except in the ordinary course of business; (c) from destroying or removing any records of the corporation from the Offices or any other place in which they

may be kept; and (d) from conducting any shareholder or directors' meetings."

The alleged illegal loans to which petitioner refers are not cash transfers by respondent Vitale to herself but, rather, respondent Vitale's failure to collect "receivables" or fees for management services provided by EGA and FAV to various real properties owned by Vitale and other members of the Giaimo family. While the failure to collect such fees is not condoned, it is not a "transfer of property" within the meaning of the TRO and therefore does not violate an [*11]unequivocal mandate of the court.

As to the alleged illegal raises, respondent Vitale makes an undisputed showing that she began to receive a $3000 per week (or $156,000 per year) salary when she assumed management of EGA and FAV in April 2007, and that her salary did not increase after issuance of the TRO on August 3, 2007. (*See* Resp. Ex. I.) The court notes that her salary is far from unreasonable, given the magnitude of the corporations' holdings.

As to the capital improvements, while the court questions whether they should have been made without prior authorization of the board of directors, the TRO does not expressly prohibit capital improvements and petitioner submits no legal authority that capital improvements are not expenditures in the ordinary course of business for a real estate holding company. On this record, the court therefore cannot find that the making of the improvements violated the TRO. (*See generally Chung v Maxam Props., LLC*, 52 AD3d 423 [1st Dept 2008] ["[A]ny ambiguity in the court's mandate should be resolved in favor of the would-be contemnor"] [internal quotation marks and citations omitted]; *Matter of King v King*, 249 AD2d 395, 396 [2d Dept 1998], *lv dismissed* 92 NY2d 877 [contempt finding improper unless "act complained of is clearly proscribed"].) Moreover, petitioner does not make any showing that any of the improvements was not necessary to preserve the property. Indeed, while the capital expenditures totaled the substantial amount of $1.6 million (Horgan Aff. In Support, ¶ 17[b]; Schedule B), petitioner does not dispute that his own expert at the fair value hearing gave testimony that the buildings owned by the two companies require repairs or renovations in the amount of nearly $5.7 million. (Resp. Ex. H.)

As to petitioner's claim that respondent Vitale has made false filings, petitioner demonstrates that in September 2007, respondent Vitale filed the 2006 New York City Real Property Income and Expense Report (RPIE) based on the false financial information in the

books maintained by Edward Giaimo, Jr. (Kalban Aff. In Support, ¶ 14.) Respondent Vitale does not dispute that although she filed amended tax returns to correct the false information in the returns filed by Edward Giaimo, Jr., she has never corrected the 2006 RPIE. (Resp. Memo. In Opp. at 16.) This omission, although not to be condoned, does not qualify as a contempt of the TRO which restricted transfers of property and did not address the performance of other corporate responsibilities.

As to plaintiff's assertion that respondent Vitale has made questionable payments (e.g., to the Department of Buildings or to building superintendents employed by the corporations) or unexplained credit card charges, petitioner fails to make any evidentiary showing as to the impropriety of any such payments or charges. Petitioner's assertion amounts, rather, to a request for discovery of the corporations' books — the subject of a separate branch of the motion.

In sum, petitioner has not met his burden of establishing that respondent Vitale has violated the TRO. In so holding, the court notes that prior to issuance of the TRO on August 3, 2007, and prior to respondent Vitale's assumption of the management of EGA and FAV in April 2007, these corporations were run by petitioner's and respondent's now deceased brother, Edward Giaimo, Jr. It is undisputed that he ran the corporations without respect for corporate formalities, and committed serious financial improprieties, if not crimes, including maintaining two sets of books for each of the corporations — one false and one showing actual assets; skimmed rents, which were not reflected in the false books, from the properties owned by the [*12]corporations; accumulated over 10 million dollars in cash from the skimming which was hidden in bags in his or his mother's homes; and filed false federal, state, and city tax returns. (Kalban Aff. In Support, ¶ 11.) It is also undisputed that since her assumption of the management, respondent Vitale has filed amended tax returns, and retained accountants to prepare corrected financial statements for the corporations. Petitioner asserts, but fails to prove, that respondent Vitale took these steps at his insistence rather than on her own initiative. Petitioner does, however, raise questions as to certain of respondent's management practices. The evidence shows that respondent Vitale has not ended Edward Giaimo, Jr.'s practice of not collecting fees for management services provided by EGA and FAV for real properties owned by members of the Giaimo family. Some of respondent Vitale's acts also do not appear to comply with the requirements of the corporations' by-laws. For example, while petitioner does not demonstrate that respondent

Vitale increased her salary after the TRO was issued, she appears to have set her salary prior to the TRO without compliance with paragraph 27 of the by-laws which provides that "[t]he salaries of all officers of the corporation shall be fixed by the board of directors." (Pet.'s TRO Contempt Motion, Ex. 9.) As discussed above, respondent Vitale also has not to date filed a corrected 2006 RPIE. For the reasons stated above, however, these acts, although problematic, do not violate an unequivocal mandate expressed in the TRO. They therefore do not constitute contempts.

Receiver

To the extent that petitioner seeks appointment of a temporary receiver based on the acts on which the contempt motion is based, petitioner's motion must also fail. CPLR 6401 (a) authorizes the appointment of a receiver where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." It is well settled that "[t]he drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties . . . There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers." (*Matter of Armienti*, 309 AD2d 659, 661 [1st Dept 2003] [internal quotation marks and citations omitted].) Here, the allegedly wrongful acts identified by petitioner must be viewed in the context of respondent's extensive efforts to regularize and restore responsibility to the management of the corporations. The record, as a whole, does not clearly establish the need to protect the corporations' assets. Appointment of a receiver is therefore not proper. (*See Quick v Quick*, 69 AD3d 828, 829 [2d Dept 2010].)

Petitioner's request for appointment of a receiver is also barred by laches. Since 2007, petitioner has had extensive discovery of the books of the corporations. While there have apparently been some disputes over document production and delays, it is undisputed that respondent Vitale provided petitioner's representatives access to corporate records at the corporations' office on eight occasions in September and October 2007, and in March 2008. (*See* Vitale Aff. In Opp., ¶ 55; Resp. Ex. S.) For example, in 2007, respondent Vitale provided payroll records which showed her salary. (*See* Vitale Aff. In Opp., ¶ 30.) In 2009, she provided financial statements for the corporations for 2008 and bank statements for 2008 and 2009, as well as invoices for certain capital expenditures made in 2009. (Resp. Ex. U.) Respondent Vitale also acknowledged in her deposition in 2008 that she had not yet filed a corrected RPIE for 2006. Yet, petitioner waited for three years between the issuance of the

TRO and the service of this motion to allege misconduct by respondent Vitale. Indeed, although petitioner moved in 2008 [*13]for an order requiring respondent Vitale to post a bond to secure her election to purchase petitioner's shares, he did not allege that she had engaged in mismanagement or waste of the corporations' assets, as this court found in a decision, dated December 18, 2008, denying petitioner's motion. Petitioner's allegations of wrongdoing are made only after the Special Referee's issuance of his determination, with which petitioner is not fully satisfied, of the fair value of petitioner's shares. The conclusion that this motion was brought to gain leverage in the resolution of the fair value issue is inescapable.

Access to Records

Petitioner seeks "unfettered access" to the books and records of EGA and FAV. Under long-standing precedent, as a general matter a director has an absolute right to inspect corporate books and records. (*Matter of Cohen v Cocoline Prods. Inc.*, 309 NY 119 [1955]. *Accord People v Greenberg*, 50 AD3d 195 [1st Dept 2008], *lv dismissed* 10 NY3d 894.) However, as this right is an incident to the director's performance of his or her directing duties, it may be abrogated or limited, as where the director ceases to perform such duties. (*Cohen*, 309 NY at 123-124 [absolute right to inspect terminates where director is removed from office, even if removal occurs during lawsuit to compel inspection].) Where a director files a corporate dissolution proceeding and there is an election to purchase that director's shares under Business Corporation Law § 1118, the director's access to the corporation's books and records may properly be limited to records for the period prior to the commencement of the proceeding — i.e., records probative of the value of the director's interest in the corporation. (*Matter of Public Relations Aids, Inc. [Levitt]*, 109 AD2d 502, 510 [1st Dept 1985]. *See also Estate of Mandelbaum v Five Ivy Corp.*, 72 AD3d 574 [1st Dept 2010].)

Here, petitioner had extensive discovery of the corporations' books and records both in the course of this proceeding and in a Surrogate's Court proceeding in Westchester involving the estate of Edward Giaimo, Jr. Petitioner makes no showing that the discovery was inadequate to enable him to prosecute the fair value hearing. Petitioner also is not actively functioning as a director. Notably, petitioner has never moved to restore his preliminary injunction motions seeking full access to the corporations' records and agreed, in the November 15, 2007 stipulation, to adjourn the motions pending the fair value hearing.

Under these circumstances, the court concludes that petitioner's request for access to the books and records of EGA and FAV should be denied.

III. Contempt Motion Alleging Concealment of Assets at Fair Value Hearing

Petitioner claims that respondent should be sanctioned for contempt of court based on her alleged failure to disclose the existence of "Management Fee Receivables" (receivables) for services provided, in the six years prior to the valuation date, by EGA and FAV to Edward Giaimo, Jr., Antoinette Giaimo, and respondent Vitale for properties owned by them.[FN8] (Kalban Aff. In Support, ¶ 16.)[FN9] [*14]

"[F]raudulent and perjurious conduct during the course of judicial proceedings may [] warrant punishment by contempt." (*317 W. 87th Assocs. v Dannenberg*, 159 AD2d 245 [1st Dept 1990].) Here, however, there is no basis for a finding of contempt on respondent's part based on concealment of assets. Petitioner does not dispute that the receivables were never recorded on the books while the corporations were managed by Edward Giaimo, Jr. Respondent Vitale contends that after she took over the management of the corporations, her accountants determined that such receivables needed to be recognized, and that they filed amended tax returns in November 2008 reflecting such receivables for EGA for the fiscal years ending March 31, 2005 through March 31, 2007, and for FAV for the years ending October 31, 2004 through October 31, 2006. (Geller Aff. In Opp., ¶ 4; Resp. Memo. at 11.) Respondent's accountants contend that they met with petitioner's accountants in November 2008, advised them that the receivables were reflected in the amended tax returns, and gave petitioner's accountants access to their workpapers. (Zeman Aff., ¶ 4.) Petitioner's accountants deny that the receivables were discussed in the November 2008 meeting. (Moise Aff., ¶¶ 3-5.)

Even assuming for purposes of this motion that the receivables were not discussed at the November 2008 meeting, petitioner fails to demonstrate, or to raise a triable issue of fact as to whether, respondent concealed assets, given the extensive discovery afforded to petitioner in this case. Petitioner was undisputedly aware of the filing of the amended tax returns, but makes no showing that he ever requested or was denied the workpapers prior to conclusion of the hearing. Indeed, petitioner appears to acknowledge that the workpapers were not "explicitly requested" until March or June 2009. (Kalban Reply Aff., ¶ 24, n 2.) As held above, petitioner does not claim that he did not have adequate discovery in connection

with the fair value hearing. Although petitioner now asserts that respondent frustrated discovery, petitioner never moved before the court to compel discovery. Petitioner also acknowledges that in April 2009, he received financial statements for EGA for the year ending March 31, 2008 and for FAV for the year ending October 31, 2008, and that these financial statements referred to sums "due from affiliated entities." (Geller Aff. In Opp., ¶ 11, n 4; Kalban Reply Aff., ¶ 22.) Yet, petitioner makes no showing that he sought to re-open the hearing to address these assets. On this record, the contempt motion should be denied.

ORDER

It is hereby ORDERED that the motion of petitioner and the cross-motion of respondent to confirm or modify the Referee's Report are granted to the extent set forth in the decision; and it is further

ORDERED that the parties shall confer in an effort to agree on the terms of a judgment consistent with the decision and that, in the event they are unable to reach agreement, judgment shall be settled on notice; and it is further

ORDERED that petitioner's motions for contempt are denied.

Dated: New York, New York

April 25, 2011

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MARCY FRIEDMAN, J.S.C.

Footnotes

Footnote 1: This motion, by its terms, seeks relief only in the EGA proceeding.

Footnote 2: As the Court of Appeals has explained, "[t]he three major elements of fair value are net asset value, investment value and market value. The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result." (*Matter of Friedman v Beway Realty Corp.* [*Beway*], 87 NY2d 161, 167 [1995].) Net asset value is generally the applicable standard for evaluating real estate or investment holding companies, while investment value is the primary criterion on which fair

value is based for a business such as an insurance brokerage. (*Matter of Blake v Blake Agency, Inc.*, 107 AD2d 139,146 [2d Dept 1985], *lv denied* 65 NY2d 609.)

Footnote 3: All references in this section of the decision are to papers submitted in connection with the parties' respective motions to confirm or modify the Special Referee's Report.

Footnote 4: In holding that a DLOM is particularly inappropriate with respect to a real estate holding company, *Vick* cites two of a long line of Second Department cases which hold that a DLOM "should only be applied to the portion of the value of the corporation that is attributable to goodwill." (47 AD3d at 484, citing *Cohen v Cohen*, 279 AD2d 599, 600 [2d Dept 2001]; *Cinque v Largo Enters. of Suffolk County, Inc.*, 212 AD2d 608 [2d Dept 1995].) In following *Vick*, the Referee noted that there was no showing that EGA or FAV has goodwill. (Report at 157-158.)

This court notes, however, that the rationale for limiting the DLOM to goodwill is unclear. The cases do not set forth the rationale and, indeed, in *Murphy* (74 AD3d 815, *supra*), the Second Department applied a DLOM to all of the assets of a close corporation which, as noted above, held real estate and engaged in leasing and financing transactions. In doing so, it questioned the cases limiting the DLOM to goodwill, albeit without explanation. (*Id.* at 818.) There is also other authority in the First Department that does not limit the DLOM to goodwill. (*See Hall v King*, 265 AD2d 244, 245 [1st Dept 1999] [applying DLOM to all corporate assets of antique reproduction business, "in light of the absence of a noncompete clause between the parties"]; *Matter of Cohen v Four Way Features, Inc.*, 240 AD2d 225 [1st Dept 1997], *affg* 168 Misc 2d 91 [applying DLOM, without explanation, in valuing shares of film corporation].)

Footnote 5: Mercer testified: "So, using a marketability discount brings us to a nonmarketable minority value. And that value is not a proportionate interest in a going concern. So, once again, no conceptual basis for doing this if we're valuing at an enterprise level. It would convert a financial control value to something lower or an illiquid, effectively, an illiquid minority interest value to apply a control premium." (*Id.* at 1825-1826.)

Footnote 6: In contrast, in states which, unlike New York, have adopted the Model Business Corporation Act, fair value is determined without discounting for lack of marketability or minority status, with exceptions not here relevant. (Model Business Corporation Act §13.01 [4][iii].)

Footnote 7: All references in this section of the decision are to papers submitted in connection with the TRO contempt motion.

Footnote 8: The court notes that the amounts of the receivables are not significant in relation to total value of the corporations. (*See* Zeman Aff., Ex. H.)

Footnote 9: References in this section of the decision are to papers submitted in connection with the subject contempt motion.

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