MS # 002

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

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In the Matter of the Determination of the Value of Shares of
Harlem River Yard Ventures, Inc. (now, Harlem River Ventures II, Inc.)

Index No. 602341/07

* * *

Hunts Point Terminal Produce Cooperative Association, Inc.,

Petitioner,

v.

Harlem River Yard Ventures, Inc.,
Harlem River Yard Ventures II, Inc., and
Francesco Galesi,

Respondents.

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EDWARD H. LEHNER, JHO:

The issue before me in this special proceeding commenced pursuant to BCL §623 is to determine the value as of March 12, 2007 (the "Valuation Date") of the ten shares of stock petitioner owned in Harlem River Yard Ventures, Inc. ("Harlem"), whose major asset was a lease for approximately 100 acres of land in the South Bronx (the "Property") that will expire in the year 2090. The parties stipulated that the matter before me is to be determined as the decision and order of the court.

In August 1991 the New York State Department of Transportation leased the Property to Harlem for a term of ninety-nine years (the "Lease") at an annual rental in an amount at least equal to six per cent of all gross revenues. After five years the minimum annual rent is set at $400,000 and after nine years the minimum is set at $500,000.

By sublease dated February 19, 1997, Harlem leased for a term expiring December 31, 2076 a portion of the Property (approximately 9.3 acres) to USA Waste Services of NYC, Inc."to operate a waste transfer station thereon." Such sublease was subsequently transferred to Waste Management, Inc. ("Waste"). The sublease rent is based on the amount of waste transferred at the site, including tipping fees received from the City, with there being no minimum rental. After acquiring ownership of an addition parcel of approximately eight acres from the Urban Development Corporation, Harlem entered into a sublease dated January 5, 1999 for approximately 16 acres with a subsidiary of the News Corporation for a colorizing plant for the New York Post (the "Post") at an initial rental of $1.7 million per year, with increases provided for in future years. In October 2006, a sublease was entered into for a ten acre site to be used by Federal Express ("FedEx") as a package transfer facility at a rental that increases to approximately $2.5 million per year. All of the subleases were entered into on a net basis, with all costs for building construction and operation to be borne by the sublessees, with Harlem being responsible only for certain infrastructure work.

There is a fourth site on the Property of approximately 12.5 acres that has not been rented and apparently had not been leased for decades prior to the execution of the Lease. The experts placed a value on this site based on projections that a tenant would be procured within four to six years after the Valuation Date, with the experts differing on the rental that could be obtained and the probability of obtaining a tenant within such period. There is also a 28 acre site that was intended for intermodal use (transfer of cargo between rail and trucks) that has not been subleased, but from which some income has been obtained from occasional use. Harlem also owned, through a wholly owned subsidiary, property in Schenectady, NY, for which there is little dispute as to value.

Occupancy of the aforesaid 28 acre site is limited to use for intermodal purposes (Article 6;

§7.02), and development of all portions of the Property is to be in accordance with a land use plan (§§ 7.01, 8.02). Should the Lease be assigned, Article 4 thereof provides for the sharing with the State of any resulting profit. Similar provisions apply to movies received upon a refinancing which are not reinvested in the Property.

Experts for both sides also ascribed added value to Harlem based on potential income: i) from the erection of billboards for which no revenue had been obtained prior to the Valuation Date, there having been uncertainty as to the legality thereof; ii) from Consolidated Edison for an easement granting it the right to bury cables under the Property, for which there was no agreement as of the Valuation Date; and iii) from the City of New York for a taking in connection with the reconstruction of the Willis Avenue Bridge, for which the City in 2006 offered $1,448,000, which was paid in June 2007, which condemnation remains the subject of continuing litigation.[1]

By agreement dated March 14, 2007, Harlem was merged into respondent Harlem Yard Ventures II, Inc. ("Harlem II"), with the intention that the corporation would elect to be taxed under subchapter "S". By notice dated March 30, 2007, petitioner served a notice of dissent to the merger and demanded the payment of the fair value of its shares pursuant to BCL §623. By letter dated April 27, 2007, petitioner was notified by Harlem II that it had changed its name to that of the corporation that had merged into it (hereinafter referred to as "HRYV"), and offered to purchase petitioner's ten shares for $902,660. Pursuant to BCL § 623(g), a check for $722,128, being 80% of the offered purchase price, was forwarded to petitioner on May 8, 2007. Petitioner declined to accept said offer and commenced this proceeding in July 2007 for a judicial determination of the

[1]See, Waste Management of New York, LLC v. City of New York, 80 AD3d 435 (1st Dept. 2011).

value of its ten shares. It was agreed that the date as of which the shares are to be valued is March 12, 2007.

When the ten shares were issued to petitioner, it then represented 5% of the outstanding shares of Harlem. As a result of the issuance of shares to an employee of Harlem and other associates of respondent Francesco Galesi, a director and the controlling shareholder of Harlem, petitioner's ten shares represented 4.6% of the corporation's outstanding shares as of the Valuation Date. Petitioner maintains that for the purpose of this proceeding it is entitled to be considered a 5% shareholder. It made no payment for its shares and has received no monies as a consequence of its ownership. It was originally envisioned that, as a result of the huge cooperative food market it operated in the southeast Bronx, petitioner would be helpful in developing a portion of the Property as an intermodal transportation site.

In determining the value of petitioner's shares it was agreed that the court should not consider events occurring after the Valuation Date, except to the extent the event was known or knowable. The parties also agreed that although the business of Harlem was the subleasing of real property, its value should be determined by employing business valuation principles, and thus based on an after-tax basis.

Petitioner contends that on the Valuation Date Harlem had a value of approximately $128 million and that petitioner's 5% ownership interest would make its shares worth approximately $6 million, with a reduced amount if it is determined that it has only a 4.6% interest. It further maintains that the value should be increased to $7 million (assuming a 5% ownership) because of the value added to the surviving corporation after the merger by reason of it becoming a subchapter "S" corporation. Apparently since petitioner is a cooperative corporation it could not be a shareholder of such a corporation [see, Matter of Seagroatt Floral Co., Inc., 78 NY2d 439, 449 (1991)], and thus it asserts that the merger resulted in it being squeezed out as a shareholder. Respondents contend that the value of Harlem as of the Valuation Date was approximately $31 million.

It is also contended by petitioner that: the receipt by Galesi of shares of Waste valued at over $13 million issued by it to him without payment pursuant to an agreement executed on the very day Waste signed its sublease was a breach of fiduciary duty; Galesi improperly received fees for guaranteeing certain obligations of Harlem; Galesi received excess management fees; and Harlem had working capital in excess of that needed to fund operations. Petitioner further seeks, pursuant to BCL § 623(h)6 and 7, interest at 9% from the Valuation Date on the fair value of its shares (less the amount previously paid to it), together with attorneys fees and expenses incurred.

The Shares of Waste Received by Galesi

It is acknowledged that in February 1997, on the very day that Harlem entered into the sublease with Waste, Galesi entered into a so called "Master Agreement" with Waste pursuant to which he received, without payment, shares of Waste (a publicly traded corporation) worth over $13 million. Said agreement was executed in the same office as the sublease. A few shares were also to be issued to Harlem, which subsequently transferred them to an employee of Harlem and other associates of Galesi. Galesi had separate counsel for that transaction and contends that he received the shares for his expertise and connections with New York public officials that would be helpful to Waste in its operations here. However, he acknowledges that under the terms of said agreement he had no personal obligation to perform any services for Waste and that if he were to have died the day after the execution thereof, his estate would be entitled to retain the shares. However, the affidavit of Mr. David Sutherland-Yoest, the then president of Waste, sworn to September 9, 2009, asserts that the shares were issued because it was intended that Galesi would subsequently perform services for Waste. The Master Agreement, of which Harlem was also a party, was signed on its behalf by David Buicko, a Vice President who subsequently received some of the shares that were issued to Harlem. It provided that the obligation of Waste to issue said shares was conditioned on the truthfulness of the various representations and warranties made by Harlem relative to the sublease and, significantly, was also conditioned on "the execution and delivery of the sublease" and progress in obtaining a permit for the project [¶ 5]. Petitioner thus claims that receipt of the shares by Galesi was a misappropriation of corporate assets as the shares should have been issued to Harlem and thus increased the value of its outstanding shares.

Respondents contend that the foregoing claim is barred by the statute of limitations as it was first raised in this proceeding commenced more than ten years after the consummation of the subject transaction, and that petitioner waived the claim and consented to the execution of the Master Agreement.

While the subject shares were issued in 1997 and the claim in this proceeding asserting a breach of fiduciary duty by Galesi was not interposed until 2007, the statute of limitations does not bar the claim because the statute was tolled while his fiduciary relationship as a director of Harlem continued. In People v. Ben, 55 A.D.3d 1306 (4th Dept. 2008), the court summarized the law as follows (p. 1308):

> "Causes of action for breach of fiduciary duty are governed by a three-year statute of limitations when only monetary damages are requested, and a six-year statute of limitations when equitable relief is sought (see CPLR 213; Bouley v. Bouley, 19 A.D.3d 1049, 1051). <u>The statute of limitations is tolled 'until the fiduciary has openly</u>

repudiated his or her obligation or the relationship has been otherwise terminated (Westchester Religious Inst. v. Kamerman, 262 A.D. 2d 131)'." (emphasis supplied)

Accord: Golden Pacific Bancorp v. Federal Deposit Insurance Corporation, 273 F.3d 509, 518 (2d Cir. 2001); 196 Owners Corp. v. Hampton Management Co., 227 A.D.2d 296 (1st Dept. 1996); Steele v. Anderson, 2004 WL 45527 (N.D.N.Y.).

The defense that the transaction was approved by Harlem's board of directors in 1997 lacks merit as such board cannot be considered disinterested as it consisted of Galesi and long-term employees of Harlem and other Galesi companies who had received shares that Waste had issued to Harlem. Nor did the evidence show any knowing ratification at a 1998 board meeting attended by Stephen D'Arrigo (now deceased) who was appointed at that meeting to be the petitioner's representative on the board. He was not a lawyer nor did he have counsel present, and there were volumes of papers presented at the meeting, with there being no prior opportunity and little opportunity thereat for an examination thereof. Also there was no admissible credible evidence of any corporate ratification consented to by D'Arrigo or any other representative of petitioner.

Upon the evidence presented, I find that the aforesaid receipt of shares of Waste by Galesi to be a breach of fiduciary duty by him and a misappropriation of corporate assets. The Master Agreement recites no past consideration by Galesi, who had no obligation to perform any services thereunder other than the implied obligation, as controlling shareholder of Harlem, to see that the sublease, which provided for no minimum rental, was executed by Harlem and that it took appropriate steps to further the project. Galesi had no prior significant expertise in the waste industry and anything to be done with respect to furthering the project would be done by Harlem, which should have received anything of value transferred by Waste as additional consideration for entering into the sublease. Since this claim of breach of fiduciary duty is inextricably intertwined with the valuation determination, the said shares of Waste valued at $13 million, which should have been delivered to Harlem, will be considered as an asset of the corporation for the purposes of determining the value of its shares in this proceeding, without an interest factor prior to the Valuation Date. See, in general, Lubena v. Pal, 243 AD2d 416 (1st Dept. 1997); Edmonds v. Amnews Corporation, 224 A.D.2d 358 (1st Dept. 1996).

Petitioner's Share Interest in Harlem

Since petitioner acknowledges that it had no preemptive or other right that would prohibit Harlem from issuing additional shares, which were validly issued to long-term associates of Galesi, I find that on the Valuation Date it owned 4.6% of the corporation's outstanding shares. Any reference in certain memoranda to petitioner being a 5% shareholder merely represented an approximation of its percentage of ownership.

Minority Discount

It is the law in New York, in dealing with shares of a closely held corporation, that " in determining fair value, a minority shareholder's stock should not be further discounted because of its minority status", as to:

> "impose upon petitioning minority shareholders a penalty because they lack control would violate two 'central equitable principles of corporate governance.' First, a minority discount would deprive minority shareholders of their proportionate interest in the corporation as a going concern. Second, it would result in shares of the same class being treated unequally. . .."
> [In re Dissolution of Penepent Corporation, 96 NY2d 186, 194 (2001)]

In Friedman v. Beway Realty Corp., 87 NY2d 161 (1995), it was stated that (p. 169):

> "A minority discount on the value of dissenters' shares would also significantly undermine one of the major policies behind the appraisal legislation embodied now in Business Corporation Law § 623, the remedial goal of the statute to protect minority shareholders from being forced to sell at unfair values imposed by those dominating the corporation while allowing the majority to proceed with its desired corporate action." (citations omitted)

In summarizing the procedure for valuing a minority shareholder's interest, the court in Friedman wrote that "there is no difference in analysis between stock fair value determinations under Business Corporation Law § 623 and fair value determinations under Business Corporation Law § 1118" (p. 168), and concluded (pp. 168-169):

> "Thus, we apply to stock fair value determinations under section 623 the principle we enunciated for such determinations under section 1118 that, in fixing fair value, courts should determine the minority shareholder's proportionate interest in the going concern value of the corporation as a whole, that is, what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business. . . ."

Marketability Discount

Regarding marketability, in Matter of Seagroatt Floral Co., Inc., supra, it was stated that a valuation of an interest in a closely-held corporation "should include consideration of any risk associated with illiquidity of the shares," and "while lack of a public market for the shares of a closely held corporation should certainly be considered in determining what a willing purchaser would pay for such shares. . .there is no single method for calculating that factor" (p. 446). See also, Blake v. Blake Agency, Inc., 107 AD2d 139, 149 (2nd Dept. 1985).

Here petitioner asserts that the discount should be no more than 10%, while respondents urge a discount of 30%. Based on a consideration of all of the testimony and evidence before me, especially the uncertainties regarding the ability to sell shares of Harlem on an available market and the aforesaid restrictions set forth in the Lease, I find that the existing circumstances warrant a marketability discount on the value of the corporation of 22.5%, with the proviso that no discount will be applied to non-operating assets which may be considered as liquid and are not needed for the operation of the corporation, and thus available for immediate distribution to shareholders.

The Tax Benefits From Being a
Subchapter "S" Corporation

The parties dispute whether in valuing petitioner's shares, consideration should be given to the tax benefits resulting from the merged corporation eventually becoming a subchapter "S" corporation. It has been held that the 1982 amendment to BCL §623(h)(4) "authorizes courts to consider and accord weight to relevant postmerger factors, . . .including the prospective tax benefits of a given transaction" [Cawley v. SCM Corp., 72 NY2d 465, 472-473 (1988)], and that "the tax advantages attendant to corporate actions, must be distributed proportionately among all shareholders,. . .and the dissenters. . .given their aliquot share of the benefit" (id. p. 467). Accordingly it has been ruled that "fair value determinations should take into account the subsequent economic impact on value of the very transaction giving rise to appraisal rights" (emphasis supplied) [Friedman v. Beway Realty Corp., supra at p. 167].

Respondents argue that since petitioner was never a shareholder in the merged corporation and, as a cooperative corporation, could not be shareholder in a subchapter "S" corporation, any corporate tax benefit to HRYV resulting from such a subsequent change in taxable status should not be considered in the determination of the value of the shares of Harlem. I agree with such position. Since any benefit from a change in tax status is not a direct benefit from the merger, it cannot be deemed to alter the then value of petitioner's shares as the "very transaction" cannot be said to have had an economic impact on the value of the shares of HRYV. In Cawley v. SCM Corp., supra, relied upon by petitioner, a tax benefit to the merged corporation ensued as a direct result of an available deduction "susceptible to precise calculation before the merger. . .and arose from the accomplishment of the merger" (p. 473). That is not true here as the merger transaction itself had no affect on the value of the surviving corporation, as the only basis for ascribing value to it, greater than the value of Harlem was its decision to be taxed under subchapter "S".

Valuation

Both parties have agreed that the value of Harlem should be determined based on income. Initially it is observed that to make factual conclusions as to future income based on what was known or knowable on the Valuation Date clearly is not an easy task. Here the Lease term would not expire for over 80 years after said date, a portion of the Property had been vacant for decades, and negotiations were then pending with respect to the Con Edison easement and the City condemnation, and no income had been obtained from billboards. Also, since the rental to be received from Waste is based on the amount of waste tonnage from Bronx County handled at the site (including tipping fees), the experts were required to offer opinions on the amount of future waste to emanate from that county. These projections were essentially based on the few years of experience resulting from Waste's operation thereat, which showed increases for a few years, with a decrease in the months preceding the Valuation Date.

Recognizing the difficulties inherent in valuations of closely held corporations, it was observed in Matter of Seagroatt Floral Co., Inc., supra, (p. 445) that "[v]aluing a closely held corporation is not an exact science. . .(and)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." That court went on to hold that the value of such an interest is "what a willing purchaser in an arm's length transaction would offer for petitioner's interest in the company as an operating business" (p. 445). See also, Friedman v. Beway Realty Corp., supra; Blake v. Blake Agency, Inc., supra; De Angelis v. AVC Services, Inc., 57 AD3d 989 (2nd Dept. 2008).

Petitioner's expert, William F. Chandler, stated in his report dated November 21, 2008, that in his valuation of the corporation's operating assets he "discounted the reasonably expected future after-tax cash flows of (Harlem) from its operating business" (p. 3), and employed a discount rate of 7.2%. In establishing a value of the Post and FedEx subleases he employed the actual lease rentals (slightly reduced in the first few years of the Post sublease because of an existing settlement of a dispute) through the year 2022, deducted expenses (including income taxes) to arrive at a net cash flow, and then applied a 3% increase for each year thereafter until the application of a 7.2% discount rate resulted in no net income for the year, and then applied the said discount rate to the various yearly calculations of net cash flow to obtain a present value of the sublease.[2] The same process was followed in evaluating the Waste sublease, the fourth unleased parcel, and the intermodal site, with the important difference being that since there were no fixed rentals that could be used in calculating the values thereof, Chandler estimated the income that he believed would be obtained from each of these sites.

There was no dispute between the parties as to debt, and the only dispute with respect to expenses on the Post site related to management fees, with Chandler asserting that a management fee

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[2]See tr., June 2, 2011, pp. 4-6, 19.

of 3% was appropriate, while respondents maintained that 4% was a proper fee. As to the FedEx site, in addition to a similar controversy as to the management fee, the parties dispute the proper handling of $4.6 million of infrastructure costs, with the controversy being whether the costs were incurred prior to the Valuation Date and are reflected in the financial statements issued prior thereto, or were incurred thereafter and considered debt.

Respondents' expert, Terrence L. Griswold, rejected the discounted cash flow method with regard to the Post and Waste sites, stating in his report dated April 5, 2007 (p. 21), that while the "strength of this method is that it facilitates the analysis of operational practices and their impact upon the business' value. . .[i]ts weakness. . .is that it relies heavily upon projections of cash flows or net income which, for some firms, are difficult to make with accuracy." Consequently he stated that he employed the "capitalization of income method (which) utilizes historical results to determine the value of a company's owners' capital," and opined that "this method is. . .a reasonable one to use in valuing a going concern when a company's historical income, at least if adjusted, is considered to be a good proxy for that expected in the future", with a segregation of excess working capital and non-operating assets. (p.22) Griswold "determined that Harlem's adjusted results for the three most recent years ended 2004 through 2006 were most representative of expected future results" (p. 25), with greater weight given to the results for the later years. After calculating a weighted average for actual rentals received for these years, Griswold employed a 3% capitalization rate increase for each subsequent year. Then, following the procedure employed by Chandler, but using a 10.3% discount rate he determined the value of these two subleases[3] on a joint basis. For the FedEx sublease (for which there was no history, it having been executed in late 2006) and for the other sites, Griswold

[3]See tr., June 2, 2011, pp. 6-10, 19-20, 23.

employed the same discount cash method used by Chandler, but arrived at lower values principally because of his higher discount rate and lower estimates of income on sites which had no fixed sublease rentals.[4]

In addition to the reports by the two aforesaid appraisers, respondents also submitted an appraisal by Joel Leitner, a real estate expert who testified at trial. Also before the court were real estate appraisals submitted by others which had been prepared in connection with previously proposed financing by Harlem.

Considering all the arguments presented by the experts, I conclude that on balance the preferable method of valuation to be employed herein is the discounted cash flow method advocated by Chandler as it principally relies on actual rental obligations of the sublessees, who are nationally known companies who had expended considerable sums in erecting structures on the Property and had a consequent incentive to honor such obligations. As indicated above, Griswold used the same method as Chandler for valuing the sites other than the two occupied by the Post and Waste.

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[4]See tr. June 2, 2011, pp. 24-26.

Parties' Conclusions as to Value

Based on the above procedures and employing the different discount rates, the parties, through their experts, came to the following conclusions as to the value of the following six sites as of the Valuation Date (in millions):

Site	Petitioner	Respondents
Waste	$38.27	$26.14 (combined, Waste and Post)
Post	17.40	
FedEx	21.94	13.40
Fourth	23.67	2.45
Intermodal	4.14	0.62
Schenectady	0.41	0.37

The parties also asserted the following values of other assets of Harlem (in millions):

Source	Petitioner	Respondents
Billboards - signage	$1.66	$0.48
Bridge condemnation	3.72	1.33
Con Edison easement	4.67	0.86
Excess working capital	3.48	2.50

Discount Rate

The most significant dispute herein affecting value is the applicable discount rate to be applied to bring a stream of future income to present value as of the Valuation Date. Chandler employed a 7.2% rate, with Griswold using a rate over 40% higher at 10.3%. Both business appraisers based their opinions on guidelines suggested by Ibbotson, who is considered by both as the leading authority on business valuation. The essential dispute relates to the appropriate classifications based on the nature and size of the business that was engaged in by Harlem, with

Chandler employing a 4.8% reduction in risk based on the nature of its business, with a 3.9% increase in risk based on its size. On the other hand, Griswold made no reduction based on the industry factor, but added a 6.5% additional risk factor based on the relatively small size of the business.

Considering all of the evidence as to the nature and size of the business of Harlem, which does not conveniently fit into the various categories set forth by Ibbotson, I conclude based on the relatively small size of the business, but with quality tenants who had invested significant sums in the construction of the structures to be occupied, and the unique nature of the business, that the appropriate discount rate to be applied in valuing the assets is 8.5% which rate will be applied to all valuations herein.

<u>Asset Valuations</u>

<u>Post Sublease</u>

The only dispute regarding the amounts deducted from income by the experts in valuing this parcel related to the management fee. In light of the fact that this is a net lease for the entire property, with little management duties required on behalf of Harlem, I find that the 3% management fee used by Chandler is more appropriate than the 4% fee deducted by Griswold.

Since I have found that the discount cash method employed by Chandler is the proper method of valuation to be used and petitioner has determined the present value of the subleases using various discount rates, including 8 ½%[5], and (except with respect to the calculations for management fees)

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[5]See p. 15 of petitioner's post-trial memorandum of law.

the parties have not disputed the accuracy of the calculations employed to arrive at said amounts,[6] I conclude that the present value of the asset represented by the Post sublease is $13.49 million, subject to reduction for the reasons and in the manner set forth in the following paragraph.

Although I have concluded that the amount of management fees to be deducted in calculating future income should be 3% of rentals, as advocated by petitioner, the deductions actually made by Chandler in his projections for years subsequent to 2007 are all less than 3%. After counsel were advised in a conference call on June 21, 2011 that I did not believe that the percentage should be reduced for future years, petitioner's counsel provided, by letter dated June 22, 2011, calculations that indicated the respective amount of reduction to the total value of Harlem that would ensue if the deduction for management fees were set at either 3% or 4% of income. Said letter shows that a 3% management fee would reduce the overall value of Harlem by .2%. Since in respondents' counsel's letter of June 27, he interposed no objection to petitioner's calculations and method of resolving this issue, I will in calculating the overall value of Harlem reduce the total amount by the aforesaid .2%, without adjusting herein the findings on the individual sites.

The FedEx Sublease

The only dispute relating to this parcel, in addition to that described above with respect to the Post sublease, relates to whether $4.6 million of infrastructure costs were expended before or after the Valuation Date. I find that the proof does not establish that such costs were incurred prior to said date and thus such sum must be deducted from the valuation of this sublease. Chandler's

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[6]See, tr. of May 24, 2011, p. 6. While at the conference there was a dispute as to whether Chandler increased actual lease rentals in the years prior to 2022 by 3%, the parties subsequently agreed that he used actual lease rentals in his calculations for such years.

"assumption that (because) FedEx will take possession on March 1, 2007. . .all infrastructure costs have been substantially completed by that date" (report p. 62) is not supported by the evidence, as respondents have adequately shown that the infrastructure costs were incurred thereafter. Thus, for the reasons set forth above with respect to the Post sublease, I conclude the present value of the FedEx sublease is $16.59 million, subject to the aforesaid infrastructure deduction.

The Fourth Site

This portion of the Property has been vacant for decades prior to the Valuation Date. While through the years Harlem had several prospective tenants for the site, none of the negotiations resulted in the leasing thereof. The appraisers have placed rental values on the site on assumptions that it would be rented within four to six years from the Valuation Date. Chandler opined that this parcel of 12.5 acres could "be developed into a facility similar to that on the FedEx site" (report p. 33), and that a rental could be obtained similar to that being paid by FedEx, ranging from $5 per square foot in years three to five, increasing to $6.53 per square foot in the twentieth year. Griswold originally gave no value to the parcel, but after Leitner issued his report, Griswold based a value on a rental of $3 per square foot, which he discounted by 50% based on the uncertainty of obtaining a tenant.

In light of the history of many prospective businesses having considered leasing the parcel without a successful conclusion to any of the negotiations, and the fact that the site has now been vacant for decades, I conclude that Chandler, who has given it a value in excess of that given to the site occupied by FedEx, has substantially overvalued it, while Griswold, with the large risk component he placed on a likely rental, has substantially undervalued it. Considering all that was known or knowable on the Valuation Date with respect to the likely future rental of this site, I find its then value to be $10,000,000, which value is reflective of any infrastructure costs that may have to be incurred by HRYV.

The Waste Management Site

The income from this site is based on the amount of waste tonnage handled as well as tipping fees received from the City. Chandler forecast that the quantity of waste handled would increase to 3400 tons per day. For the eighteen months prior to the Valuation Date the daily tonnage handled was generally in the range of 3000 tons per day, and Griswold did not believe that such tonnage would increase in the future.

From the evidence, I believe, considering among other factors the improved condition of housing in the Bronx, that the estimates as to the future tonnage made by Chandler are more realistic and thus accept his projections and, upon application of the 8 ½ discount rate, find the value of this sublease as of the Valuation Date to be $29.33 million.

The Intermodal Site

This portion of the Property is limited by the Lease to use as an intermodal site, for which Harlem has had little success in obtaining income. While it is possible that the State may in the future waive such limitation on use, there was no proof of any indication of a likelihood thereof. Accordingly I find, from the limited income procured therefrom in the past and the unlikelihood of any substantial increase in the future, that the value thereof on the Valuation Date was $3 million.

The Schenectady Property

The appraisers have given relatively similar values to the property located in Schenectady, N.Y., and I conclude that the fair value is $400,000.

The City Condemnation

As indicated above, condemnation proceedings are still pending with respect to the City's taking in connection with the reconstruction of the Willis Avenue bridge. On this claim, the City offered $1,488,000 prior to the Valuation Date, and paid said sum thereafter. From the evidence it is not clear whether the City's offer related to 2.9 acres or for an additional 4.8 acres. While valuing a claim in pending litigation is fraught with difficulty, from the evidence I find the value thereof on the Valuation Date to be $2 million.

The Con Edison Easement

Prior to the Valuation Date, Harlem was offered approximately $1.2 million for the easement to bury utility lines on the Property, and there is evidence that in July 2007 Con Edison agreed to pay $4.8 million for such right. While there was no evidence as to the state of negotiations on the Valuation Date, I conclude from the little evidence as to what was known or knowable on that date that the then value thereof was $3.5 million.

Excess Management and Guarantee Fees

I do not find that it was unreasonable for Galesi to have charged Harlem a 1% fee on loans to it on which he guaranteed repayment as without such guarantees it was likely that the interest rates charged to Harlem thereon would be higher.

Further, while I have found that for the years after the Valuation Date a management fee in excess of 3% would not be appropriate, for the years prior thereto procuring tenants for the Property and observing construction work required management services far greater than later when the three net lease tenants were operating their own buildings. Hence, I conclude that such management fees during such prior period were proper charges to Harlem.

Signage

The Property, bordering City highways, is a likely source of income from the construction of billboards thereon. While there has been a controversy in the past as to the legality of such construction, I am satisfied from the proof that billboards can be erected thereon and income obtained from signage, and conclude, based on projected construction costs and operating expenses and commissions and likely income, that the value of such income on the Valuation Date was $1 million.

Excess Working Capital

I find that the amount of excess working capital on hand as of the Valuation Date was $2.5 million as asserted by respondents.

Interest

BCL §623(h)(6) provides that the final order in a proceeding under §623 "shall include an allowance for interest at such rate as the court finds to be equitable from the date the corporate action was consummated to the date of payment (and that in) determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding."

Here while there was no testimony by any party as to various interest rates that were in effect subsequent to the Valuation Date, respondents have submitted with their memorandum of law information with respect to various applicable rates, and the court independently is in a position to take judicial notice of the recent history of interest rates. While the First Department in a 2007 decision (Jersey Partners, Inc. v. McCully, 46 AD2d 256, lv. to ap. den. 10 NY3d 713), has approved the statutory 9% rate in a §623 proceeding, I find under the circumstances herein that for the period subsequent to March 12, 2007, the equitable rate of interest to be appropriately employed is 6% per annum. See, Murphy v. United States Dredging Corporation, 74 AD3d 815 (2nd Dept. 2010) (directed that a 5% interest award be remitted to Supreme Court in light of the failure of the trial court to make a finding of fact); Giaimo v. Vitale, 2011 WL 1549064, Sup. Ct., N.Y. Co. (interest of 4% awarded); Whalen v. Whalen's Moving & Storage Co., Inc., 234 AD2d 552 (2d Dept. 1996) (4% interest approved).[7]

[7]It is noted that the application of a statute providing for a rate that is equitable is different from a statute, similar to State Finance Law §16, which provides that the rate to be paid by the State on a claim "shall not exceed nine per cent per annum." In such situations, it has been held that the State has the burden of rebutting the presumption of reasonableness of the nine per cent rate. See, Denio v. State of New York, 7 NY3d 159, 168 (2006); Dubee v. New York City Housing Authority, 39 AD3d 410 (1st Dept 2007). Under §623 there is no such presumption.

<u>Conclusion</u>

Based on the values set forth above, the total value of Harlem as of the Valuation Date is calculated as follows (in millions):

<u>Operating Assets</u>:

Post	$13.49
FedEx	16.59
4th Site	10.00
Waste	29.33
Intermodal	3.00
Schenectady	.40
	72.81
Less: Marketability discount - 22.5%	16.38
Total Operating Assets	56.43

<u>Non-Operating Assets</u>:

Condemnation	2.00
Con Edison easement	3.50
Signage	1.00
Excess working capital	2.50
Waste Management shares	13.00
Total Non-Operating Assets	22.00
Total Assets	78.43
Less: Debt ($12.63 & $4.6 FedEx infrastructure costs)	17.23
	$61.20
Less Reduction of .2% due to improper management fee calculations	.12
Total Value of Harlem	$61.08

Based on a total value of $61,080.000, the value of petitioner's 4.6% interest in the corporation is $2,809,680. Petitioner is therefore entitled to judgment against HRYV for said sum less $722,128, which was previously paid, for a total of $2,087,552, plus interest thereon at 6% per annum from March 12, 2007.

Since I have found that the aforesaid value of petitioner's shares "materially exceeds" [BCL §623(h)(7)] the amount offered to it for its shares, it is entitled to also recover the reasonable value of its attorneys' fees and expenses incurred in prosecuting this proceeding. The statute provides that in making the aforesaid determination "the court may consider the dollar amount or the percentage or both, by which the fair value of the shares as determined exceeds the corporate offer."

The parties agreed that the issue with respect to attorneys' fees and expenses may be decided on submitted papers and without a hearing. Said papers demonstrate that the reasonable value of the legal services of the high quality experienced lawyers who represented petitioner in this quite complex litigation, which was vigorously contested by counsel of equal experience and quality, is $900,000, and that the reasonable amount of expenses necessarily incurred for experts is $250,000. See, in general, Quill v. Cathedral Corporation, 241 AD2d 593 (3rd Dept. 1997).

In light of the above, the Clerk shall enter judgment in favor of petitioner and against Harlem River Yard Ventures, Inc. for $2,087,552, plus interest thereon at 6% per annum from March 12, 2007, and $1,150,000 for attorneys' fees and expenses, together with statutory costs and disbursements.

This decision constitutes the order of the court.

Dated: July 11, 2011

J.H.O.