STATE OF NEW YORK

SUPREME COURT : COUNTY OF CATTARAUGUS

In the Matter of the Application of Nathalie Rateau, Mirielle Rateau and Michel Rateau,

Petitioners,

vs.

Index No. 70626

For the Judicial Dissolution of Dapa Communications, Inc. Pursuant to NY BCL 1104-a et seq.

Respondents

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HIMELEIN, J.

DECISION

Petitioners commenced a special proceeding seeking the dissolution of Dapa Communications, Inc. pursuant to Business Corporation Law (BCL) 1104-a. Dapa then elected to purchase petitioners' shares as authorized by BCL 1118. When the parties could not agree on the value of petitioner's shares, a non-jury trial was held, after which the court found the liquidation value of the company to be $180,000. The court applied a discount of 30% to that figure and petitioner's 34% was found to be $42,840.

Petitioners have now moved, pursuant to CPLR 4404 (b), for an order making new findings of fact and/or conclusions of law, correcting what they call the court's "erroneous findings." Specifically, petitioners contend that the court's reference to Nathalie Rateau's payments to another company she was involved in, her removal and sale of company furniture, and her involvement in shredding company documents, was irrelevant to determining the value of the shares. They also contend that the court should not have considered the fact that inventory "languished on warehouse shelves" after the relevant valuation date. Finally, petitioners dispute the value the court assigned the company.

Initially, the court wishes to stress it's discomfort in valuing this company by its net asset value. As I noted in the August 16, 2007 decision, for BCL 1118 purposes, the overwhelming weight of authority holds that a business should be valued as a going concern (*see Matter of Pace Photographers, Ltd.*, 71 NY2d 737, 530 NYS2d 67 [1998]; *Matter of Seagrath Floral Co., Inc.*, 78 NY2d 439, 576 NYS2d 831 [1991]; *Dissolution of Penpent Corp., Inc.*, 96 NY2d 186, 726 NYS2d 345 [2001]; *Friedman v. Beway Realty Corp.*, 87 NY2d 1612, 638 NYS2d 399 [1996]; *Miller Bros. Indus., Inc. v. Lazy River Inv. Co.*, 272 AD2d 166, 709 NYS2d 162 [1st Dept 2000], *lv denied* 95 NY2d 761, 714 NYS2d 111 [2000]; *Matter of Walt's Submarine Sandwiches, Inc.*, 173 AD2d 980, 569 NYS2d 492 [3d Dept 1991], *app denied* 78 NY2d 860, 576 NYS2d 218 [1991]; *Gorzof v. Coons*, 168 AD2d 619, 563 NYS2d 218 [2d Dept 1990]). Only *Hall v. King* (265 AD2d 244, 697 NYS2d 19 [1st Dept 1999]) utilized the net asset method and the court specifically noted its use was limited to "the facts of this case."

However, the only evidence at trial evaluating the business as a going concern was Darren Graff's testimony that on that basis, the company had no value. The court could not accept that contention because the company continues to operate, although it lost more than $1.9 million

over the last four years.

Both parties introduced evidence of what the company's assets were worth at a sale. Therefore, the court evaluated this company on the basis of its liquidation value and the court gave Stanley Czock's testimony on value more weight than the testimony of Ms. Rateau.

At the trial, the allegations about Ms. Rateau were not controverted by her and they weighed into the court's credibility determination, although the court emphasizes that this issue was relevant only on credibility, not on value. However, even if the court did not weigh those issues, and for purposes of this motion it will not consider them, the court still finds Mr. Czock more credible on value. Yes, as petitioners' assert, he is an employee of the company, but that relationship is more remote than is Ms. Rateau's; her testimony on the company's value has a direct relationship to what she will receive from this lawsuit. She has far more incentive to inflate the value than Czock does to deflate it. Also, Mr. Czock was much more directly involved with the inventory than was Ms. Rateau. Further, and here the court disagrees with petitioners, the fact that these items were still unsold two years later lends credence to the claim that they did not have much value two years earlier. The court did not value the items as of 2007; it merely weighed this evidence as it impacted on their value in 2005. Finally, the court is not persuaded by advertised sale prices without any proof that the items were ever sold. As I said at oral argument, someone can advertise their car for $100,000; that advertisement does not make the car worth $100,000.

More meritorious is petitioners' contention that the court should not have applied a cost of sale discount. The court noted that it was not clear that a lack of marketability discount was appropriate when selling off hard assets but there clearly would be costs associated with such a sale. However, petitioners are correct in their contention that no proof of an appropriate discount

was introduced, and theoretically, if the company simply sold its assets, there might be little, if any, costs associated with the sale.

Accordingly, while the court believes there would be costs associated with such a sale, the lack of any proof on that issue requires the court to reconsider that finding. Upon reconsideration, the court will vacate the 30% discount previously applied, which raises petitioners' shares to $61,200. The provisions of this decision should be incorporated into the final order or judgment.

Dated: Little Valley, New York
December 4, 2007

Larry M Himelein
HON. LARRY M. HIMELEIN