Matter of Mattone Group Spripgnex LLC v CFM Dev. LLC
2021 NY Slip Op 31958(U)
June 28, 2021
Supreme Court, Queens County
Docket Number: Index No. 719775 2020
Judge: Leonard Livote

Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Justice

IA Part 33

In the Matter of
Mattone Group Springnex LLC,

Petitioner,
-against-

CFM DEVELOPMENT LLC,

Respondent,

For a Determination of the Fair Value of Respondent's Interest in Mattone Group Springnex LLC under Article 4 of the Civil Practice Law and Rules, Section 1005 of the New York Limited Liability Company Law, and Section 623 of the New York Business Corporation Law.

Index Number 719775 2020

Motion Date February 2, 2021

Motion Seq. No. 1

The following numbered papers were read on this application by Mattone Group Springnex, LLC (the Company) seeking, among other things, a judgment determining the fair value of a former interest of CFM Development, LLC (CFM), pursuant to LLCL 1005 (b) and BCL 623 (h); and a cross motion by CFM seeking, among other things, dismissal, pursuant to CPLR 3211 (a) (1).

	Papers Numbered
Notice of Petition - Petition -Exhibits	E1-E21
Notice of Cross Motion - Affirmation - Affidavit - Exhibits	E26-E37
Reply Affidavits	E38-E42

Upon the foregoing papers, it is ordered that this motion by petitioner for, iner alia, a determination of the fair value of the former interest of respondent; and this cross

motion for dismissal, pursuant to CPLR 3211 (a) (1), are determined as follows:

In 2000, the Company entered into an Amended & Restated Operating Agreement, which was further amended in April 2010, and in September 2020. Said Amended Operating Agreement listed Carl F. Mattone ("Mattone") with a 28.5% membership interest in the Company. Petitioner contends that in 2013, Mattone assigned his 28.5% interest to CFM, an entity wholly- owned by Carl, for tax purposes. No formal written assignment exists.

In September 2020, the holders of a majority interest in the Company consented to buy out CFM, and agreed to a merger with a "wholly-owned subsidiary," MGS SUB, LLC. The Company agreed to pay the amount of $4,000,000.00 to CFM for its share. On September 30, 2020, the merger became official by the filing of a Certificate of Merger with the State. On October 2, 2020 the Company sent CFM a Notice of Merger and Dissenters' Rights, pursuant to LLCL 407 and 1007, and CFM served the Company with an Election to Dissent, on October 21, 2020. The next day, the Company served a formal Offer to Purchase Membership Interest, in the amount of $4,000,000 as the stated "fair value," pursuant to LLCL 1005 (a), which was rejected, and petitioner brought this proceeding.

The Court will first address the respondent's cross motion to dismiss. "A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Farro v Schochet*, 190 AD3d 689, 693 [2d Dept 2021] quoting *Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 804 [2d Dept 2020]; *see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100 [2018]; *Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Berkovits v Berkovits*, 190 AD3d911 [2d Dept 2021]; *Qureshi v Vital Tranp., Inc.*, 173 AD3d 1076 [2d Dept 2019]; *Anderson v Armento*. 139 AD3d 769 [2016]). "To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (*Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2017]; *see Pacella v RSA Consultants, Inc.*, 164 AD3d 806 [2d Dept 2018]; *Philips v Taco Bell Corp.*, 152 AD3d 806 [2017]).

The cross motion contends that Mattone did not assign his interest in the Company to CFM, arguing that there is no written assignment document in existence; that any such assignment would be "null and void," as the March 26, 2000 Operating Agreement, at §

6.1, does not permit a member to transfer a membership interest; and that, contrary to petitioner's claim, the K-1 tax forms fail to establish the assignment to CFM. While the Operating Agreement does not allow a member to transfer a "membership interest," it does not specifically prohibit the assignment of an "economic interest." Said Operating Agreement contains a definition of an "economic interest holder," and, in Art. 1, provides for "economic interest holder" status in the Company. LLCL 603 (a) (1) states that a member may assign an economic interest, in whole or in part, with the only affect being "to entitle the assignee to receive ... distributions and allocations of profits and losses to which the assignor would be entitled" (603 [a] [3]), and, upon assignment, "a member ceases to be a member and to have the power to exercise any rights or powers of a member" (603 [a] [4]; *see Behrend v New Windsor Group, LLC*, 180 AD3d 636 [2d Dept 2020]; *Born to Build, LLC v Saleh*, 43 Misc.3d 1213[a] [S. Ct., Nas. Cty., 2014]). Such statute does not require a formal written assignment to effect such economic interest transfer. In opposition, petitioner contends that it does not allege that CFM obtained a "membership interest" in the Company, but merely became an "economic interest holder," and refers to the language of the Notice of Merger and Dissenters' Rights, which states, in relevant part, that the unspecified "interests of the Company held by CFM ... shall be converted for the consideration set forth," and refers to the other merger documents, which reflect that the subject assignment would make CFM only a "non-member holder of Mattone's economic interest" in the Company.

Additionally, "contractual rights may be waived if they are knowingly, voluntarily, and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *see 159 MP Corp.v Redbridge-Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). Such abandonment may be established by "affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, at 104, quoting *Gen, Motors Acceptance Corp. v Clifton-Fine Cent. Sch. Dist.*, 85 NY2d 232, 236 [1995]; *see County of Suffolk v Ironshore Indem., Inc.*, 187 AD3d 1137 [2d Dept 2020]; *Village of Kiryas Joel v County of Orange*, 144 AD3d 895 [2d Dept 2016]). Respondent has failed to establish that, through its actions and/or conduct since 2013, it did not waive such contractual prohibition herein.

Respondent attempts to support that branch of its cross motion regarding the import of CFM's tax records with an affidavit from Sydney E. Unger, CPA, who, initially, notes that the subject Operating Agreement distinguishes between "members" and "economic interest holders," but then solely proceeds to opine with respect to the non-transfer of a "membership interest" herein. As stated previously, petitioner asserts that only an "economic interest" was assigned in this matter, a consideration not addressed by Mr. Unger. Further, Mr. Unger's conclusion, *i.e.*, that the proffered New

York State and New York City tax returns "are not inconsistent with CFM's position that the alleged assignment of Mattone's membership interest did not take place," is both ambiguously and equivocally worded, and falls far short of an indisputable opinion, which could necessarily support a dismissal herein. Additionally, while "[a] tax return can constitute evidence of a written assignment (*Rosin v Schnitzler*, 2018 NY Slip Op. 32320[U], *2 [S. Ct., Kings Cty. 2018]), tax records do not constitute "documentary" evidence, as they lack the essential qualities of undisputed authenticity and undeniability (*see Berkovits v Berkovits*, 190 AD3d911; *Qureshi v Vital Tranp., Inc.*, 173 AD3d 1076; *Anderson v Armento*. 139 AD3d 769).

Both sides agree that "[a] party to litigation may not take a position contrary to a position taken in an income tax return ... (which has been) made under the penalties of perjury on income tax returns" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *see Kalaijian v Grahel Assoc., LLC*, 193 AD3d 832 [2d Dept 2021]). Such a tax estoppel may apply herein, as respondent has failed to credibly resolve this critical issue of fact.

The evidence proffered in the instant matter, taken alone, fails to incontrovertibly support cross-movant's claims and/or utterly refute petitioner's factual allegations (*see Goshen v Mutual Life Ins. Co. of NY,* 98 NY2d 314, 326 [2002]; *Arnell Construction Co. v New York City School Construction Auth.* , 177 AD3d 595 [2d Dept 2019]; *U.S. Bank National Assoc. v Hunte*, 176 AD3d 894 [2d Dept 2019]), and, therefore, fails to sustain respondent's claims for dismissal, based on the documentary evidence proffered. As such, the cross motion herein, seeking dismissal pursuant to CPLR § 3211(a)(1), is denied.

Pursuant to CPLR 404 (a), the branch of Respondent's cross-motion to be permitted to serve an answer to the petition herein is granted. Respondent shall serve same within five (5) days of the service upon it of a copy of this decision and order with notice of entry (*see Ford v Pulmosan Safety Equip. Corp.*, 52 AD3d 710 [2d Dept 2008]).

Turning now to the main motion, Petitioner's request for a judgment pursuant to LLCL 1005 (b) and BCL 623 (h) is denied. Petitioner has demonstrated that it has, facially, complied with the procedural and notice requirements of LLCL 1005 and BCL 623; that respondent has dissented to the offer proposed; that the subject merger has come to fruition; and that petitioner has properly instituted this special proceeding "to determine the rights of dissenting shareholders and to fix the fair value of their shares." However, the fact that neither side has indisputably demonstrated that CFM is, or is not, a proper party defendant herein, as each party's contention is bolstered by opposing expert opinions, raises a triable issue of fact, and such determination cannot be made on the

instant papers (*see Hamlin v PFNY, LLC.*, 179 AD3d 1027 [2d Dept 2020]), but will be an issue requiring proof at the proceeding to be held pursuant to BCL 623. Additionally, petitioner has proffered no evidence/basis to uphold a finding that the offer made should be considered "fair value' for the contested "28.5% interest."

Any request, by either party, for pretrial disclosure must be made to this Court, in writing, on or before thirty (30) days from the date of service of an answer to the petition, or, if no answer is served, on or before forty (40) days from service upon respondent of a copy of this decision and order with notice of entry.

The parties' remaining contentions and arguments either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the petition is granted only to the extent that a proceeding pursuant to BCL 623 is warranted herein, with any judgment, including possible costs, expenses, or attorney's fees, abiding such proceeding. The branch of respondent's cross motion seeking dismissal, pursuant to CPLR 3211 (a) (1), is denied. The branch of the cross motion seeking permission to file an answer to the petition, pursuant to CPLR 404 (a), is granted, as above-stated.

Dated: June 28, 2021

FILED
6/29/2021
COUNTY CLERK
QUEENS COUNTY

J.S.C.