

Matter of Coco

2012 NY Slip Op 30985(U)

April 2, 2012

Supreme Court, Nassau County

Docket Number: 001930-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**In the Matter of the Application of James R. Coco, Sr.,
and James R. Coco, Jr., the Holders of More than
20 Percent of All Outstanding Shares of
Advanced Arch Grilles, Inc.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Petitioners,

**Index No: 001930-11
Motion Seq. No. 5
Submission Date: 3/27/12**

**For the Dissolution of Advanced Arch Grilles, Inc.,
A Domestic Corporation,**

Respondent.

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Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Prior Decision.....X**
- Appendix to Affirmation in Support - 1 of 2X**
- Appendix to Affirmation in Support - 2 of 2X**
- Memorandum of Law in Support.....X**
- Memorandum of Law in Further Support and Exhibits.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the court on the motion by Respondent Advanced Arch Grilles, Inc. (“Advanced Arch” or “Respondent”) filed January 11, 2012 and submitted on March 27, 2012. For the reasons set forth below, the Court grants reargument and, upon reargument, declines to modify its prior decision dated December 12, 2011. The Court reminds counsel for the parties of their required appearance before the Court on April 12, 2012, at which time the Court will schedule the hearing as directed therein.

BACKGROUND

A. Relief Sought

Respondent moves for an Order 1) granting reargument of Respondent’s opposition to the

initial and amended Petition as sought discovery of the financial records of Respondent and, upon such reargument, denying Petitioner's request for such discovery; 2) granting reargument of so much of the motion of Petitioner James R. Coco, Sr. ("Coco, Sr.") to amend the Petition herein as granted a hearing on the issue of whether the Non-Compete Provision of the Shareholders' Agreement governing the Respondent ("Restrictive Covenant") should be deemed unenforceable and, upon such reargument, denying the application for a hearing and dismissing Petitioners' claim that the Restrictive Covenant is unenforceable; and 3) granting reargument of the Cross Motion filed by Respondent on or about May 26, 2011 which sought, among other relief, a) dismissal of the Petition pursuant to the holding in *Matter of Doninger v. Rye Psychiatric Hospital Center, Inc.*, 122 A.D.2d 873 (2d Dept. 1986), b) dismissal of the Petition based on the false claims made by Coco, Sr. in connection with the initial Order to Show Cause in this proceeding, and c) an award of a monetary sanction, including attorney's fees; and 4) upon such reargument, granting the originally-requested relief.

B. The Parties History

In the initial Petition, Coco Sr., the owner of 39% of the outstanding common shares of Advanced Arch ("Company"), sought dissolution of the Company, pursuant to BCL § 1104-a, based on his allegation that Daniel L. Roeper ("Roeper"), a 60% shareholder in the Company, has engaged in oppressive conduct towards Petitioner.

By decision dated July 28, 2011 ("July Decision"), the Court granted Petitioner's motion to amend the Petition to add James R. Coco, Jr. ("Coco, Jr.") as a petitioner, directed Petitioner to file its Second Amended Verified Petition, and reserved decision on that branch of Petitioner's motion seeking a declaratory judgment declaring the Restrictive Covenant unenforceable. Pursuant to the July Decision, Petitioner filed a Second Amended Verified Petition ("Second Amended Petition") on August 16, 2011. The Court permitted the parties to provide the Court, with respect to other motions then pending before the Court, with supplemental submissions addressing the Second Amended Petition.

In the Second Amended Petition, which names both Coco, Sr. and Coco, Jr. as Petitioners, Petitioners seek dissolution of the Company, pursuant to BCL § 1104-a, based on the allegations that Roeper has engaged in oppressive conduct towards Petitioners who own 39% and 1% of the outstanding shares of the Company, respectively. In the Second Amended Petition, Petitioners also seek an Order 1) directing the examination and accounting of the books and

records of the Company to effectuate the dissolution including, but not limited to, obtaining financial statements necessary to oversee shareholder distributions; 2) enjoining the Company, Roeper and their agents from transferring any assets of the Company, selling shares in the Company or taking any other action outside the ordinary course of business, without the participation of Petitioners; 3) distributing commissions and unpaid distributions due and owing to Petitioners; and 4) enjoining the use of the name Advanced Architectural Grilles and the mark AAG and directing the payment of damages arising from the dilution of the name and mark.

In a decision dated December 12, 2011 (“December Decision”) (Attachment to Daw Aff. in Supp.), the Court addressed 1) Petitioner’s motion for an Order granting the relief requested in its Amended Verified Petition filed February 9, 2011 (“First Amended Petition”), pursuant to New York Business Corporation Law (“BCL”) § 1104-a, 2) Respondent’s motion for an Order a) dismissing the First Amended Petition; and b) staying the inspection and copying of the corporate financial books and records for the three (3) years preceding the First Amended Petition or, in the alternative, scheduling a hearing on the issue of whether the requested inspection and copying of corporate financial books and records was made in good faith and for a proper purpose, and 3) Respondent’s cross motion for an Order a) dismissing the First Amended Petition; b) suppressing an allegedly improperly obtained document and granting discovery, including the deposition of Coco, Jr., as well as a hearing on the issue of how the document was obtained and whether the sanction of dismissal of the First Amended Petition should be imposed for alleged misconduct; and c) awarding attorney’s fees based on Petitioner’s allegedly sanctionable conduct.

In the December Decision, the Court 1) referred Petitioner’s motion to a hearing; 2) referred Respondent’s motion to dismiss the Second Amended Petition to a hearing, and denied Respondent’s application to stay the Court-ordered inspection and copying of corporate financial books and records; and 3) referred Respondent’s motion to dismiss the Second Amended Petition, and Respondent’s application for sanctions, to a hearing.¹ The Court also referred to a hearing the branch of Respondent’s prior motion (motion sequence # 3) seeking a declaratory judgment declaring the Restrictive Covenant unenforceable.

¹ In the December Decision, the Court noted that the motion papers contained a copy of the Second Amended Petition which the Court considered in issuing the December Decision.

With respect to the motions addressed in the December Decision, Respondent argued that 1) pursuant to the Shareholders' Agreement, Petitioners have invoked the buy-out provisions by initiating this action, and Respondent has advised Petitioners that the Company accepts their offer to sell their shares (*see* Ex. A to Resp.'s Memo of Law in Further Supp.); accordingly, the Court should enforce those buy-out provisions and dismiss the Second Amended Petition; 2) the Court should enforce the Restrictive Covenant in light of Respondent's allegations regarding Petitioners' conduct which establishes that Petitioners are now "attempting to threaten [the Company's] ongoing existence in any form...and to prevent it from doing business;" 3) the Court should dismiss the action based on Coco Sr.'s false claim that he was not represented by counsel when the Shareholders' Agreement was negotiated; and 4) the Court should award counsel fees to Respondent in light of Coco, Sr.'s allegedly frivolous conduct in pursuing this litigation that involved his allegedly false statement regarding whether he was represented by counsel during the negotiation of the Shareholders' Agreement.

Petitioners disputed Respondent's assertion that Coco, Sr. was represented by counsel during the negotiation of the shareholders agreement. With respect to the motions addressed in the December Decision, Petitioners argued that 1) dissolution is appropriate in light of the allegations regarding the oppressive conduct by Roeper; 2) disclosure of the books and records of the Company is required pursuant to BCL § 1104-a(c); 3) the Restrictive Covenant is not enforceable, particularly in light of the Petitioners' return to the Company of all customer lists and business documents in their possession; and 4) they are entitled to a ruling that the Shareholders' Agreement does not mandate the valuation of the Coco shares by the "non-appealable opinion of the [C]ompany accountant," but rather by fair market value in accordance with BCL § 1118.

The Restrictive Covenant, contained in Article XVIII of the Shareholders' Agreement, provides as follows:

1. So long as either Coco Sr., Coco Jr. or Roeper are a Shareholder and/or employee of the Corporation, and for a period of three (3) years following the sale and/or transfer of his stock, and/or the termination of his employment, Coco Jr., Coco Sr. and Roeper will not, directly or indirectly, in any capacity whatsoever (whether as employee, consultant, proprietor, partner, co-venturer, stockholder, representative or otherwise) and whether individually or for a competitor or subcontractor of the Corporation, solicit or attempt to solicit business from, or engage or attempt to engage in any business with any client or customer of the Corporation, or of any affiliates of the

Corporation, or to compete with the Corporation's then existing business, within a 75 mile radius of any client, customer, or location (as defined below) of the Corporation.

2. For the purposes of this Agreement, client or customer or location shall include any and all businesses or entities, and any location, division, subdivision and/or affiliate of any business or entity, with whom the Corporation or its affiliates has either performed services for, transacted business with, or solicited in an attempt to perform services for, or transact business with, during the Shareholder's tenure with the Corporation.

3. For a period of three (3) years following the sale and/or transfer of his Stock, each shareholder will not directly or indirectly, in any capacity whatsoever, solicit for employment or employ, interfere with, or attempt to influence or entice, any employee or subcontractor of the Corporation to leave his or its respective employment and/or relationship.

Article XXII, titled "Miscellaneous," provides as follows at subdivisions 5 and 6:

In the event a Shareholder brings an action for dissolution under New York's [BCL] §1104-a, same shall be deemed an offer to sell such shares at the price and upon the terms as set forth herein upon the death or permanent disability of a Shareholder.

In the event there is a disagreement concerning any financial term or calculation under this agreement, the opinion of the Corporation's outside accountants shall be binding and non-appealable.

Article IX, titled "Death of a Shareholder," provides in pertinent part as follows at subdivision 1:

Upon the death of any shareholder, the Corporation, or if the Corporation declines, then the surviving shareholders (pro rata) shall purchase the decedent's stock from his estate, and the estate shall sell the stock to the surviving shareholders...

Article X, titled "Permanent Disability of a Shareholder," provides as follows at subdivision 1:

In the event of permanent disability of a Shareholder, the legal representative of the disabled Shareholder, or the disabled Shareholder if legally competent to do so, shall sell to the Corporation, or the remaining Shareholders (pro rata) if the Corporation declines, within sixty (60) days of the date of his appointment or of the disability becoming permanent, or insurance proceeds are received if any, whichever is later, as the case may be, all the Stock in the Corporation owned by the disabled Shareholder at the time of his permanent disability at the same value and in the same manner as prescribed for a sale of stock in the case of the death of a Shareholder.

Article VII, titled "Distribution of Profits and Losses," sets forth "other remuneration" to

which the shareholders are entitled. That remuneration includes 1) profit and loss distributions, 2) additional shares to the Coco Group if Annual Gross Sales exceed designated amounts, and 3) a commission on Annual Gross Sales.

C. The Parties' Positions

In support of its motion to reargue, Respondent argues, first, that the Court should not have scheduled a hearing on the issue of the enforceability of the Restrictive Covenant, but rather should have enforced the Restrictive Covenant. Respondent notes that the Restrictive Covenant is not being enforced against an employee, but rather against Coco, Sr., an officer of the Company who benefitted from the Shareholders' Agreement by receiving a larger share of the Company without being required to contribute additional capital. Moreover, Respondent contends, Coco, Jr. and Coco, Sr. are precluded by their duty of loyalty to the Company from competing in a business engaged in by the Company. Respondent disputes Petitioners' claim that Respondent is attempting to prevent Petitioners from pursuing their livelihood; rather, Respondent seeks only to preclude Petitioners from pursuing opportunities in the architectural grille work segment of the medical fabrication business.

Respondent argues, further, that the Court "failed to recognize the binding effect of the provisions of the Shareholders' Agreement on the viability of the Petition [and] Amended Petition" (Resp.'s Memo. of Law in Supp. at p. 6). Respondent submits that the Shareholders' Agreement reflects the parties' agreement that, in the event that a dissolution proceeding was commenced, it would be deemed an offer to sell the Petitioners' shares to Advanced Arch pursuant to an agreed-upon formula. Thus, by bringing this action, Petitioners offered their shares for sale to the Respondent Company which accepted that offer, and the Court should this dismiss this action under the reasoning of cases including *Matter of Doninger v. Rye, Psychiatric Hospital Center, Inc.*, 122 A.D.2d 873 (2d Dept. 1986).

Finally, Respondent contends that the Court should deny Petitioners' request for inspection of Respondents' financial records. Respondent submits that Petitioners are competing with Respondent in violation of the Shareholders' Agreement, and providing them with access to the financial records will facilitate that competition. Respondent also argues that Petitioners' request to inspect the financial records is made in bad faith in light of the provision in the Shareholders' Agreement prescribing the method for valuing the stock.

In its Memorandum of Law in Further Support, Respondent asserts that, as recently as

January 13, 2012, Coco, Jr. contacted a customer of Advanced Arch and expressed his desire to work with the customer's company again, making reference to specifications for prior projects in which Respondent was involved. Respondent provides a copy of the applicable email (Ex. B to Resp.'s Memo. of Law in Further Supp.).

In opposition, Petitioners submit that with respect to the Restrictive Covenant, Respondent's alleged "freeze out" of Petitioners (Pets.' Aff in Opp. at p. 2) constitutes a breach of the Shareholders' Agreement and supports a determination by the Court that the Restrictive Covenant will not be enforced. Petitioners note that, pursuant to a prior Order of the Court, they returned to Arch all customer lists and business documents in their possession. Petitioners also submit that the Court should not enforce the Restrictive Covenant in light of policy considerations that militate against the enforcement of covenants that restrict an individual's ability to earn a living.

With respect to Respondent's contention that Petitioners' filing of the instant action constituted an offer to sell their shares, which Respondent accepted, Petitioners argue that "[t]his argument is particularly absurd when placed in front of an argument that disclosure of financial books and records should be denied to the Petitioners - as is done by the Respondent here" (*id.* at p. 3). Petitioners contend that, pursuant to BCL § 1104-a(c), disclosure is mandatory.

RULING OF THE COURT

A. Reargument Standards

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992). *Accord Matter of Carter*, 916 N.Y.S.2d 821 (2d Dept. 2011).

B. Effect of Buy-Out Provision in Shareholders' Agreement

In *Matter of Doniger v. Rye Psychiatric Hospital Center, Inc.*, 122 A.D.2d 873 (2d Dept. 1986), petitioners appealed from a judgment of the trial court which dismissed the dissolution proceeding pursuant to BCL § 1104(a) and awarded respondents specific performance of a shareholders' agreement providing that each petitioner was to transfer his shares of stock in the

corporation to respondents for a designated purchase price. *Id.* Concluding that a proceeding for judicial dissolution was one of the means by which the buyout provisions in the agreement would be triggered, and further concluding that the hearing testimony supported that conclusion, the Second Department affirmed, holding that the trial court had correctly dismissed the proceeding and granted the counterclaim of the individual respondents for specific performance of the shareholders' agreement such that the petitioners were directed to transfer their shares in the corporation to the individual respondents. *Id.* at 877-888.

C. Examination of Corporate Books and Records

At common law, the right to inspect corporate books and records is qualified and can only be asserted when a corporate shareholder is acting in good faith and has established that the inspection is for a proper purpose. *Wisniewski v. Polish and Slavic Center, Inc.*, 309 A.D.2d 869 (2d Dept. 2003). In *Wisniewski*, the Second Department reversed the trial court's Order denying petitioner's motion to compel the inspection of the corporation's books and records. *Id.* Concluding that petitioner had demonstrated his good faith and proper purpose in his affidavit in support, the Second Department remitted the matter to the trial court for a hearing and determination by the court, in its discretion, as to whether inspection of all of the books and records listed in his motion was necessary and necessary for the petitioner's purposes.

D. Restrictive Covenants

Where the shareholders of a commercial enterprise sell their interest in the business for consideration, which includes payment for the good will of the business, a covenant restricting the sellers' right to compete with the purchaser is enforceable. *Hadari v. Leshchnisky*, 242 A.D.2d 557, 558 (2d Dept. 1997). The sole limitation on the enforceability of such a covenant is that its duration and scope be reasonably necessary to protect the buyer's legitimate interest in the purchased asset. *Id.* In *Haradi*, the contract of sale contained a restrictive covenant that prohibited the defendants from, *inter alia*, accepting or performing intercom installation work within the City of New York for a period of 5 years. Three years after the sale, the plaintiff commenced the action at issue alleging that defendants had breached the restrictive covenant by accepting electrical contracts within the City of New York which included the performance of intercom installation work. *Id.* at 557-558. The Second Department held that, in light of the fact that the record reflected disputed factual issues as to whether the restrictive covenant was reasonable in scope and whether the defendants breached the terms of the covenant, the trial

court properly denied defendants' motion for summary judgment dismissing the breach of contract and accounting causes of action. *Id.* at 558.

E. Breach of Contract

The elements of a cause of action to recover damages for breach of contract are 1) the existence of a contract, 2) the plaintiff's performance under the contract, 3) the defendant's breach of the contract, and 4) resulting damages. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806 (2d Dept. 2011).

F. Application of these Principles to the Instant Action

The Court is persuaded by Respondent's Argument that, pursuant to the relevant provisions in the Shareholders' Agreement, Petitioners' filing of the petition for dissolution pursuant to BCL § 1104-a constitutes an offer to sell their shares to the Respondent Company, which accepted that offer. The Court concludes, however, that dismissal of the Petition is not appropriate in light of Petitioners' allegations that 1) Respondent breached the Shareholders' Agreement by failing to pay Petitioners commissions and distributions to which they were entitled; and 2) the Court should not enforce the Restrictive Covenant which unduly burdens their ability to earn a living. In light of those allegations, the Court concludes that a hearing is necessary to address issues including 1) whether the Court should enforce the Shareholders' Agreement in whole or in part; and 2) if the Court concludes that Respondent has the right to purchase Petitioners' shares, how the valuation of those shares should proceed.

The Court also concludes that Petitioners have established that, even if production of Arch's books and records is not warranted pursuant to the BCL, production of those books and records is nonetheless appropriate. In light of Petitioners' allegations that Respondent has failed to pay Petitioners commissions and distributions to which they are entitled, and the Court's conclusion that requiring Petitioners to proceed with the hearing without the benefit of access to those books and records would be patently unfair, the Court directs Respondent to make the books and records of Arch, including financial statements necessary to oversee shareholder distributions, available to Petitioners for inspection and copying, at Petitioners' expense, on or before May 11, 2012.

All matters not decided herein are hereby denied.

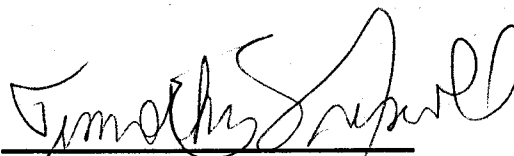
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on April 12, 2012 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein and in the prior decision of the Court.

ENTER

DATED: Mineola, NY

April 2, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**