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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 602434/2005
KASSOVER, RUTH
vs
PRISM VENTURE PARTNERS,
Sequence Number : 008
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/23/13

J.S.C.
BARBARA R. KAPNICK

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39
- -x

RUTH KASSOVER, as co-executor of THE ESTATE OF NATHAN KASSOVER, and PHILIP KASSOVER, in his individual capacity,

Plaintiffs,

-against-

PVP-GCC HOLDINGCO II, LLC, THE GARDEN CITY COMPANY, INC., R. PEYTON GIBSON, as DISBURSING AGENT, RICHARD SABELLA and PRISM VENTURE PARTNERS, LLC,

Defendants.

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DECISION/ORDER
Index No. 602434/05
Motion Seq. Nos. 008 and 009

BARBARA R. KAPNICK, J.:

Motion sequence numbers 008 and 009 are consolidated herein for disposition.

In motion sequence no. 008, defendant Richard J. Sabella ("Sabella") and GCC Realty Company, LLC ("GCCR") (the successor by merger to named defendants PVP-GCC HoldingCo II, LLC ["PVP"] and the Garden City Company, Inc. ["GCC"]) move for partial summary judgment, pursuant to CPLR 3212(e), dismissing the sole remaining claim against them asserted under Business Corporation Law ("BCL") § 501(c) which seeks recovery of certain additional consideration

allegedly owed to plaintiffs.[1] Plaintiffs cross-move for leave to file an Amended Complaint reinstating their previously-dismissed Assignment Consideration claim. In motion sequence no. 009, defendants move to quash a subpoena and for a protective order pursuant to CPLR 2304 and 3103.

BACKGROUND

The background of this dispute has been set forth in various prior decisions of this Court and the Appellate Division, familiarity of which is presumed, and will be repeated here only as necessary.[2]

Additional facts relevant to the summary judgment motion have been taken from the parties' Statements of Material Fact submitted pursuant to Commercial Division Rule 19-a, the pleadings, the

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[1] Defendant Prism Venture Partners, LLC ("Prism") also originally joined in this motion. However, after the motion was submitted, FR Tax Group, LLC ("FR Tax") became the successor by merger to Prism, and by letter dated April 29, 2013, this Court was advised that FR Tax had filed for bankruptcy. Accordingly, this action and all proceedings as against FR Tax are stayed as a consequence of the automatic bankruptcy stay, and this decision can, and shall, have no effect upon FR Tax's rights or liabilities.

[2] *See Kassover v Prism Venture Partners*, LLC, 2007 WL 4562621, January 19, 2007 (the "2007 Order") *aff'd* 53 AD3d 444 (1st Dep't 2008) ("Kassover I"); and *Kassover v PVP-GCC HoldingCo II, LLC*, Order dated July 2, 2008 (the "2008 Order"), *mod.* 73 AD3d 626 (1st Dep't 2010) ("Kassover II"), *lv to app dism*, 15 NY3d 820 and 821 (2010).

affidavits and other evidentiary documents submitted in connection with this motion, and are undisputed unless otherwise indicated.

GCC was a real estate company owned and operated by members of the Kassover family. As of 2002, there were 14,367.4 GCC shares outstanding (Anker Aff., Exh. 8). Plaintiffs Ruth and Philip Kassover then controlled 21.5% of the shares. Ruth controlled 2728 shares, or approximately 19.5%, as co-executor of the estate of Nathan Kassover, and Philip owned 363 shares, or 2.5% (Id).[3] Philip also acted as the company's *de facto* CEO from 1996 until 2002.

In 2002, a merger of GCC was pursued as part of the Bankruptcy Court supervised liquidation of the assets of Lawrence Kassover (now deceased), a shareholder in the company. Defendant PVP was the entity formed to acquire GCC, which it did pursuant to a July

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[3] The other shareholders were: Lulu Kassover, 2,809 shares (19.6%); Estate of Max Kassover, 2,598.1 shares (18.01%); Estate of Samuel Kassover, 1,350.8 shares(9.4%); Lawrence Kassover, 813 shares (5.7%); Paula Kassover Fielder, 659 shares (4.59%); Morton Kassover, 648.667 shares (4.5%); Harriet K. Baime, LLC, 685.167 shares (4.77%); Slobodien Family Partnership, L.P., 685.167 shares (4.77%); Paula Kassover Rose, 314 shares (2.2%); Phyllis Anikstein, 255.5 shares (1.8%); Kathi Kassover, 251.5 shares (1.8%); Paula Beldengreen, 60 shares (0.4%); Harriette Mont, 60 shares (0.4%); Lola Kassover, 36.5 shares (0.3%); Peter Kassover, 12.5 shares (0.1%); Patricia Kassover, 12.5 shares (0.1%); Eric Baime, 12.5 shares (0.09%); and Cindy Slobodien, 12.5 shares (0.09%) (Helwig Aff., Exh. F; Anker Aff., Exh. 8).

16, 2002 merger agreement (the "Merger Agreement")(Helwig Aff., Exh. E) in the Bankruptcy Court-approved transaction (*see In Re Lawrence Kassover*, Case No. 98-43124 [BRL] [July 29, 2002 Order][the "Merger Order"][Helwig Aff., Exh. F]). Defendant Sabella was the principal owner of PVP. Defendant R. Peyton Gibson ("Gibson") was the Chapter 11 Trustee for Lawrence and the Trustee of the Liquidation Trust which succeeded to ownership of his shares. Gibson was also designated as Disbursing Agent for the funds distributed under the Merger Agreement.

Prior to the merger, in June and July, 2002, sixteen GCC shareholders entered into a total of six letter agreements (the "Letter Agreements") with Prism[4] (Helwig Aff., Exhs. N through S). Although tailored to the particular circumstances of each shareholder, the Letter Agreements were similar in that they obligated the shareholders to sell their GCC shares to a PVP affiliate and/or negotiate for an exclusive period of time for a sale, or to support a merger if it could be arranged. The Merger Order recited that the Letter Agreements were "fully enforceable and unconditional" (Merger Order ¶ 50). Philip was offered the opportunity to enter into a Letter Agreement (Helwig Aff., Exh. U)

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[4] As noted above, Prism was succeeded by merger by FR Tax. However, for the sake of clarity, the Court will refer to the entity by the pre-merger name it employed during the relevant transactions.

but declined, because he thought the price offered for the GCC shares was too low and the way the deal was structured was unacceptable to him (Philip Kassover Dep., 83:10-84:19, Jan. 26, 2010).

As is relevant here, three categories of benefits were afforded to the GCC shareholders pursuant to the Merger Agreement: (1) Per Share Merger Consideration of $2,000 per share, less expenses (the "Merger Consideration"); (2) consideration of $525 per share for assigning claims under a 1976 Shareholders Agreement (the "Assignment Consideration") and (3) an alleged $592 per share in additional consideration paid to certain shareholders other than plaintiffs (the "Additional Consideration"). Plaintiffs were granted partial summary judgment awarding them the balance of the Merger Consideration owed pursuant to the 2008 Order of the Hon. Helen E. Freedman, who handled this case before she was appointed to the Appellate Division and the case was transferred to this Court. Justice Freedman's decision was modified on other grounds by the Appellate Division, First Department, at 73 AD3d 326, *supra*; accordingly, liability for the Merger Consideration is not at issue on this motion. Defendants' motion for summary judgment seeks dismissal of the claim for Additional Consideration, and plaintiffs' cross-motion seeks to reinstate the claim for the Assignment Consideration.

The Additional Consideration Claim

Plaintiffs' claim to the Additional Consideration was first sustained, as a matter of pleading only, in the 2007 Order. As relevant here, the Court (Freedman, J.) held that plaintiffs had adequately stated a claim for unequal treatment under Business Corporation Law § 501, and also noted that:

> Defendants' argument that res judicata and/or collateral estoppel bar the claims because the merger was court-ordered and approved is without merit. Plaintiffs do not challenge the validity of the merger or the valuation of the Garden City stock. Rather, they assert that after the merger, defendants failed to pay them the contractually required monetary consideration and favored other shareholders with additional consideration. That allegation was not in issue in the prior merger approval hearings or passed upon by any of the reviewing courts . . . once again, plaintiffs do not dispute that the Merger Agreement is facially fair, but challenge whether the payout they ultimately received complied with its terms . . . a factual question still exists over . . . the validity of the $592 per share payment allegedly received by other shareholders. That dispute cannot be resolved by reference to the complaint or the underlying transactional documents.

(2007 Order at 7-8). In affirming that determination, the First Department held that:

> The court was correct when it held that plaintiffs state a valid cause of action under Business Corporation Law § 501(c), alleging that defendants failed to pay them the full $2,000 per share merger consideration and the additional $592 per share that the other shareholders received . . . as discussed above, to the extent other shareholders actually received additional consideration, plaintiffs have stated a claim due to disparate treatment.

Kassover I, 53 AD3d at 448-49.

In the 2008 Order, Justice Freedman granted plaintiffs judgment for the unpaid portion of the $2,000 per share merger consideration, but then dismissed all remaining claims against Sabella, PVP and Gibson (in her individual capacity) on the ground that those defendants "[were] not named with respect to any other cause of action" (2008 Order at 11). In modifying that Order, the First Department held:

> In granting the cross motion to dismiss as against Sabella and Prism, the motion court based its decision on a purported concession by plaintiffs that only PVP, GCC, and Gibson (as disbursing agent) were responsible for paying the $2,000 per share to plaintiffs, and its belief that plaintiffs were not seeking anything else from Sabella and Prism. Overlooked was plaintiffs' separate claims for an additional $592 per share made against all of the defendants, including Sabella and Prism, a claim subsequently sustained by this Court (53 AD3d at 448). The motion court also misread plaintiffs' purported concession, which conceded only that "the parties responsible for paying the $2000 per share to plaintiffs are defendants PVP (as buyer), Garden City as the surviving corporation, and Gibson as Disbursing Agent," and expressly stated that plaintiffs' motion for partial summary judgment on the $2,000 per share claim did not "require a ruling involving Gibson's, Sabella's or [Prism's] 'personal' or corporate liability." We find Prism's and Sabella's arguments on this point unavailing, and accordingly modify to reinstate the claim for $592 per share as against them.

Kassover II, 73 AD3d at 628-29.

As noted, in the claim in question, plaintiffs allege that other former GCC shareholders received an additional $592 per share. After discovery, it appears that the original and primary

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basis for this claim is an exhibit introduced at a Bankruptcy Court hearing in 2002 to assist that Court in determining whether to approve the merger. The exhibit was a chart entitled "Comparison of Gross Consideration in Respect of Prism and Edelman Proposals" (the "Comparison Chart") (Helwig Aff., Exh. B), and it compared PVP's offer to buy GCC with that of a competing bidder, the Edelman Group. The Comparison Chart set forth the following amounts assigned to the various elements of the purchase price offered by PVP for GCC:

Merger Consideration	$28,734,802
Assignment Consideration	$ 7,542,885
Negotiable Securities.....	$ 0
Grusetz Indemnity	$ 5,000,000
Shareholder Agreement Indemnity ...	$ 1,000,000
Other Indemnities	$ 500,000
Prism Top-up Payments Accepted	$ 763,440
Prism Top-up Payments Declined	$ 184,845
Morton Kassover Waiver	$ 400,000
Estate of Lawrence Waiver	$ 700,000
Trustee Bonus	$ 0
Trustee's Fee Paid	$ 2,700,000
Total	$47,535,972

In the Complaint, plaintiffs assign the value of $592 to the Additional Consideration. That amount is apparently calculated by subtracting, from the total price, the Merger Consideration, the Assignment Consideration, and the Trustee's fee (for a remainder of $8,558,285) and dividing it by the number of outstanding shares (14,367).[5] However, as established by the record on this motion,

[5] The quotient is actually closer to approximately $596 but the difference is not material for the purposes of this decision.

the various items of value in the Comparison Chart were rounded-up estimates, consisting mostly of non-cash benefits, and no shareholder actually ever received a per share cash payment close to the amount of Additional Consideration as described in the pleadings.

The Grusetz Indemnity

The largest item of value, the $5 million Grusetz Indemnity, relates to a Kings County Surrogate's Court action commenced prior to the merger by members of the Grusetz family. The Grusetz plaintiffs were themselves GCC shareholders. As described in the Merger Order, in that litigation the

> Estate of Anne R. Grusetz has alleged that Mrs. Grusetz's brothers, the antecedents of most of Garden City's shareholders, schemed to deprive her of 12% of the outstanding stock of the family company given to her by their father during his lifetime. The Grusetz Estate claims entitlement to 12% of the stock of Garden City, 12% of all family salaries and all dividends paid since the mid-1940's, a 12% interest in [38 parcels of New York real estate], and punitive damages of $50,000,000).

(Merger Order, ¶ 33).

The Trustee of Lawrence's estate settled with the Grusetz Estate in June 2002 for an allowed unsecured claim in the amount of $250,000 (Id.). Philip and other family members entered into a settlement agreement with the Grusetz estate in 1985, apparently before the commencement of the Surrogate's Court action (Helwig Aff., Exh. EE).

In August 2002, each of the GCC shareholders who had signed a Letter Agreement entered into an Indemnity Agreement with GCC (the "Indemnity Agreements") (Helwig Aff., Exh. X). Each Indemnity Agreement, as contemplated by the Letter Agreements, provided that GCC would indemnify the shareholder from the Grusetz claims. As Philip did not execute a Letter Agreement, he did not enter into an Indemnity Agreement. The record does not reflect that any shareholder received a cash payment pursuant to the Indemnity Agreements.

The Shareholder Indemnity Agreement

Pursuant to section 14.2 of the Merger Agreement, the Shareholder Indemnity was provided to those GCC shareholders who executed in favor of PVP an assignment of rights and claims they may have had *inter alia* under a 1976 Shareholders Agreement. In return for executing the assignments, post-merger GCC agreed to indemnify them against claims made under the Shareholders Agreement and certain other claims. A number of GCC shareholders submitted their Shareholder Assignments which are attached to defendants' motion papers (Helwig Aff., Exh. Y). As noted in the prior Orders adjudicating plaintiffs' claim for the Assignment Consideration, plaintiffs did not timely submit the assignments that the Merger Agreement required as a condition precedent to receiving the Assignment Consideration (see 2007 Order [2007 WL 4562621] at 7;

Kassover I, 53 AD3d at 448). As with the Grusetz Indemnity, the record does not reflect any cash-based Additional Consideration attributable to the Shareholder Indemnities.

Other Indemnities

The Other Indemnities refers to the estimate of the value of the general indemnities provided to all GCC shareholders, other than the Shareholder Agreement Indemnity contemplated in section 14.2(a) of the Merger Agreement, discussed *supra*. (Sabella Aff. ¶ 102). This class of indemnity was not designed to exclude plaintiff or any other shareholder. Plaintiffs do not contend that other shareholders received benefits pursuant to these indemnities.

Morton Kassover/Estate of Lawrence Kassover Waivers

These two waivers totaling $1.1 million on the Comparison Chart were specifically bargained for, and included, in the Letter Agreements executed pre-merger by Morton Kassover and the Estate of Lawrence Kassover (Sabella Aff. ¶ 105). The values assigned were included in the chart to reflect the estimates ascribed to them by the Edelman Group (Id., ¶ 104). The Morton Kassover waiver was a forbearance agreement with respect to monies allegedly owed to Morton Kassover under an old arbitration award which PVP believed to be unenforceable (Id., ¶ 106). Morton received the forbearance in exchange for delivery of an assignment (Id., ¶ 108).

The Estate of Lawrence Waiver was a waiver of a claim in that estate believed to be uncollectible, and was to be effective whether or not the merger proceeded (Id., ¶¶ 111, 113). The record does not indicate that Morton Kassover or the Estate of Lawrence Kassover ever received a liquidated, monetary, share-based benefit in connection with the waivers.

The Top-Up Payments

The Top-Up Payments Accepted were cash payments made post-merger in consideration of provisions in the Letter Agreements. A total of between $500,000 and $800,000 was paid to qualifying shareholders, with the payments made ranging from approximately $400 to $200,000 (Helwig Aff., Exh. W). The amounts paid do not appear to correlate to the number of shares owned by each shareholder who received them. Plaintiffs were offered Top-Up Payments in the Letter Agreement they rejected (Id., Exh. U). The Top-Up Payments Declined referred to Top-Up Payments which were rejected, and, therefore, not paid; the item appeared on the Comparison Chart solely to insure the offer would parallel that made by the Edelman Group (Sabella Aff., ¶ 82).

The Assignment Consideration Claim

As noted above, the Assignment Consideration claim was previously dismissed. In the 2007 Order, Justice Freedman held that "since the complaint concedes that plaintiffs failed to timely

submit the assignment that the Merger Agreement required as a condition precedent to receiving the Assignment Consideration, they may not pursue that item of damages" (2007 Order at 7). In connection with the dismissal of a fraud claim that had been asserted, the Court additionally noted that "documentary evidence submitted by defendants establishes that plaintiffs were fully aware of the actual terms of the agreement, including the requirement of an assignment" (Id. at 10). In affirming that decision, the First Department observed that "plaintiffs concede that they did not timely submit the assignment that the merger agreement required shareholders to deliver in order to receive the assignment consideration. Therefore, plaintiffs are not eligible to receive the assignment consideration". *Kassover I*, 53 AD3d at 448.

In cross-moving for leave to amend the Complaint, plaintiffs assert that discovery has produced new evidence which merits reinstatement of the Assignment Consideration claim. They rely on testimony from various shareholders which purportedly indicates that they received the additional $525 per share, solely in exchange for their shares in the merger, not for signing and submitting an Assignment Agreement (Paula Kassover Rose Dep., 23:19-21, June 8, 2010; Richard Baime Dep., 44:15-20, March 2, 2010). Additionally, plaintiffs have proffered testimony to the effect that the Assignment Agreements were a sham because some of the executing

shareholders had no claims to assign. (R. Peyton Gibson Dep., 66:19-24, February 1, 2010; Rose Dep., 87:2-88:24).

DISCUSSION

Defendants' Motion for Summary Judgment (mot. seq. no. 008)

Upon the record, as it has now been more fully developed, it is clear that plaintiffs have no entitlement to any payment related to the Additional Consideration. Defendants have demonstrated that of the alleged $592 per share due, payments averaging only a fraction of that amount were made to any shareholder. More importantly, those shareholders who did receive such payments got them as consideration for executing the Letter Agreements containing various covenants and promises, not merely for tendering their shares. Plaintiffs had an equal opportunity to sign such agreements and receive additional benefits, but declined to do so.

The basis of Justice Freedman's prior Order upholding the Additional Consideration claim on a motion to dismiss, and the Appellate Division's affirmance, was plaintiffs' claim that after the merger was completed, the other defendants "actually received" payments of $592 per share as Additional Consideration (*see Kassover I*, 53 AD3d at 449). However, of the $8.5 million that plaintiffs assert should have been available as Additional Consideration as suggested by the Comparison Chart, in fact only approximately

$500,000 to $800,000 was distributed to the other shareholders as Top-Up Payments. The remaining items on the chart were inchoate, non-cash indemnities and waivers having no readily quantifiable or distributable value.

As with the Assignment Consideration, the relatively small Top-Up Payments that were made went to those shareholders who qualified for them by providing additional consideration by entering into Letter Agreements. They were paid by virtue of those previously negotiated agreements, not arbitrarily awarded, post-merger, on a per share basis. Plaintiffs did not receive any Top-Up Payments because they were not entitled to any under the Merger Agreement or any other agreement.

Plaintiffs now attack the Letter Agreements as illusory, contending, in effect, that they constituted a disguised per share benefit under the merger for which the shareholders who received them afforded no consideration. This, however, amounts to nothing less that an impermissible collateral attack on the merger itself, and the Bankruptcy Court's declaration in the Merger Order that the Letter Agreements were "fully enforceable." As discussed above, in the 2007 Order the Court permitted the claim to go forward with the understanding that plaintiffs were "not challeng[ing] the validity of the merger or the valuation of the Garden City stock," but rather

were proceeding on the theory that "*after* the merger, defendants failed to pay them the contractually required monetary consideration and favored other shareholders with additional consideration." (2007 Order at 7-8). The First Department likewise noted that plaintiffs had "repeatedly insist[ed] that they [were] not challenging the merger itself" (*Kassover I*, 53 AD3d at 448-49).

Accordingly, having failed to identify any contractual basis for an award of Additional Consideration, plaintiffs may not mount a "backdoor" challenge to the merger (*Id* at 49). Plaintiffs nevertheless argue that defendants' conduct violated the equal treatment guarantee of BCL § 501, and more particularly the holding of *Beaumont v American Can Co.*, 160 AD2d 174 (1st Dept 1990). This contention is without merit.

First, the argument does nothing to change the fact that plaintiffs are attacking the merger itself, rather than identifying an inequality resulting from the violation of any of its specific terms. Furthermore, *Beaumont* is inapposite for a number of reasons. In *Beaumont*, small, unrelated private shareholders who had purchased the stock of a publicly-traded corporation complained that they received $2.39 less per share than certain large institutional investors. The inequality alleged related specifically and solely to the easily quantifiable per share price, as calculated on the day

of the merger. The *Beaumont* plaintiffs were not, as here, seeking damages representing the unrealized cash value of individually-negotiated instruments such as indemnities and waivers, or additional payments tied to agreements outside of the merger. *See also Matter of Cawley v SCM Corp.*, 72 NY2d 465 (1988) (easily calculated corporate tax deduction required to be spread equally among all shareholders). In short, this case does not, as plaintiffs portray it, present the same uncomplicated situation as in *Beaumont*, where some shareholders were paid more than others for the same stock. Each shareholder received differing cash and non-cash benefits for executing agreements related to the merger or other potential events.

The requirement under BCL § 501(c) that "each share shall be equal to every other share of the same class" is not so inflexible that a corporation and its shareholders are prohibited from pursuing private agreements which may in some way alter the rights related to the shares. *See, i.e., Cherry Green Prop. Corp. v Wolf*, 281 AD2d 367, 368 (1st Dept 2001) ("Defendants' voluntary waiver of their right to share in plaintiff corporation's profits, in exchange for which defendants received a valuable contract to service plaintiff's real property, is enforceable. Nothing in Business Corporation Law § 501(c) . . . prohibits such a waiver, and no public policy is otherwise implicated"). On the instant record, this case resembles

more closely *Zetlin v Hanson Holdings*, 48 NY2d 684 (1979)(cited in *Beaumont*) wherein the Court of Appeals held that absent bad faith or other misconduct, the controlling shareholders of a corporation are entitled to receive a premium for their shares in exchange for their controlling interests. Although the analogy is not exact, PVP did ultimately assemble a controlling interest in GCC by offering individualized enticements to a group of shareholders who combined held a majority of the corporation's stock. Moreover, unlike the small public shareholders in *Beaumont*, plaintiffs were corporate insiders with substantial bargaining power and sophisticated counsel, and they were not excluded from the offers in favor of larger shareholders.

Ultimately, under plaintiffs' analysis, virtually no merger involving a closely-held family company could ever survive scrutiny under BCL § 501. Such transactions inevitably require the resolution of conflicting, individualized interests, and the consequent use of separately negotiated agreements which may employ differing non-cash inducements tailored to meet each shareholder's particular situation. Dissenting shareholders could always object on the ground that their unique circumstances make the deal inequitable, or that the impact of a specific indemnity or other term offered affects them differently than other shareholders. Likewise, such shareholders could also contend that the alleged

higher "value" of a non-cash benefit is a disguised per share premium.

Accordingly, defendants' motion to dismiss is granted. Defendants have established that there is no question of material fact regarding plaintiffs' entitlement to Additional Consideration. Plaintiffs have not shown that they received a different per share price for their shares, or that they were denied any merger-related benefits other than those which they declined to accept by failing to execute the necessary contractual instrument.

Plaintiffs' Cross-Motion for Leave to Amend

Plaintiffs motion for leave to amend the Complaint to reinstate the claim for the Assignment Consideration is denied. As noted *supra*, that claim was previously rejected by this Court and the Appellate Division on the ground that plaintiffs failed to execute the assignment agreement which was the condition precedent to receiving this consideration, unlike the shareholders who did execute the assignments, and then received the Assignment Consideration. Moreover, a motion for leave to amend may not be used to reinstate a claim that has been previously been dismissed on the merits (*DiPasquale v Security Mut. Life Ins. Co. of N.Y.*, 13 AD3d 100 [1st Dept 2004]).

Contrary to plaintiffs' contention, there is no "new evidence" supporting their motion. Plaintiffs have merely submitted recent deposition testimony from a number of shareholders who received the Assignment Consideration, to the effect that they believed that consideration was merely in exchange for their shares, or that they did not remember whether it was. The new evidence is nothing more than the subjective opinions of the shareholders regarding the assignments and other agreements that were before the Bankruptcy Court in 2002 and approved by it. Accordingly, the motion to amend is simply another collateral attack on the merger, and one which relies on inadmissible parol evidence to contradict the terms of unambiguous agreements (*see Woodhouse, Drake & Carey (Trading) v Royal Int'l Trade, Inc.*, 188 AD2d 315 [1st Dept 1992][parol evidence insufficient to establish lack of consideration for promissory note]).

In view of this determination, there is no need to reach the other questions briefed by the parties regarding the liability of Sabella. However, were the Court to reach that issue, it would rule that plaintiffs have demonstrated no basis, even were any form of consideration due, to hold him liable for the payment thereof. Plaintiffs have not alleged that Sabella acted in anything but a representative capacity in his actions with respect to the merger.

Defendants' Discovery Motion (mot. seq. no. 009)

In light of this Court's decision on motion seq. no. 008, defendants' motion to quash the subpoena served on non-party KMZ Rosenman and for a protective order is now moot.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for partial summary judgment to dismiss the one remaining cause of action against defendants Richard J. Sabella and GCC Realty Company, LLC is granted, and it is further

ORDERED, that the Complaint is dismissed as to these defendants without costs or disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that plaintiffs' cross-motion for leave to amend the Complaint is denied, and it is further

ORDERED that defendants' motion to quash the subpoena and for a protective order is denied as moot.

This case is marked "Stayed" as to the only remaining defendant, FR Tax Group, LLC as successor by merger to named defendant Prism Venture Partners, LLC, pending resolution of the current bankruptcy proceeding. Counsel shall notify this Court by letter once the automatic bankruptcy stay is lifted.

This constitutes the decision and order of this Court.

Dated: September 23, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.