

<b>Re/Max of N.Y. Inc. v Weber</b>
2017 NY Slip Op 33144(U)
November 22, 2017
Supreme Court, Nassau County
Docket Number: 600848/2016
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

RE/MAX OF NEW YORK, INC.,

TRIAL/IAS, PART 1  
NASSAU COUNTY

Plaintiff,

INDEX No. 600848/2016

against-

MOTION DATE: 10/10/17

Motion Sequence 004

HENRY WEBER,

Defendant.

HENRY WEBER,

Third-Party Plaintiff,

-against-

PIERRE TITLEY and GINETTE LAMBERT,  
husband and wife, jointly and severally; and CAN AM  
HOLDINGS, INC., as a shareholder of RE/MAX of  
New York Inc.,

Third-Party Defendants.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....XX
- Memorandum of Law.....X

## RE/MAX OF NEW YORK v WEBER

Index No.: 600848/16

Motion by plaintiff Re/Max of New York, Inc. for leave to reargue the order of June 5, 2017, to the extent that the court, on its own motion, struck the portion of the November 29, 2016 orders which limited Weber's holding to only 15 shares is **granted**. Upon reargument, the court adheres to its June 5, 2017 declaratory judgment, with the proviso as indicated below.

This is an action for a declaratory judgment as to defendant Henry Weber's status as a shareholder of plaintiff Re/Max of New York Inc. ("Re/Max NY"). Re/Max NY holds the franchise to issue Re/Max real estate broker franchises in New York State. On November 14, 1988, the shareholders of Re/Max NY, including third-party defendant CanAm Holdings, Ltd. and non-parties Joseph Borzillieri and Marcel St. Onge, entered into a shareholders' agreement. The agreement contains a provision that shareholders must first offer to sell their stock to other shareholders before selling it to someone who is not a shareholder.

Weber joined Re/Max NY as a consultant in 1997 and eventually became president of the company. Weber alleges that third-party defendant Pierre Titley, who is a director of Re/Max NY and the principal of CanAm, promised to sell Weber a 30% interest in Re/Max NY but did not draw up a stock purchase agreement. Nevertheless, Weber claims that he acquired a 30% interest in Re/Max NY from Titley. Weber alleges that from 1997 to 2016 he regularly voted at Re/Max shareholder meetings and attended the Re/Max Region Owners Council.

On December 11, 1998, Weber and St. Onge entered into a written stock purchase agreement, whereby Weber agreed to purchase St. Onge's 15 shares in Re/Max NY, approximately a 5% interest, for \$30,000. On December 22, 1998, St. Onge executed a stock power, purporting to transfer his 15 shares to Weber. On December 28, 1998, a stock certificate certifying that Weber was the holder of 15 shares was issued. On its reverse side, the stock certificate states that, "The shares represented by this certificate are subject to a shareholders' agreement dated as of November 14, 1988...Such shareholders' agreement provides...for certain restrictions on the sale, transfer...or other disposition of the shares..."

Weber alleges that in January, and again in November, 2015 Titley informed him that he intended to sell Re/Max NY to its parent company, which is located in Denver. In December 2015, a telephone board of directors meeting was held to approve the sale of Re/Max NY to its parent company for \$9 million. Titley and Sylvain Dansereau, another director, voted in favor of the sale, which was consummated. Believing that the price was too low, Weber voted against it. On January 22, 2016, Weber sent a letter to Re/Max NY, requesting his proportionate share of the sale proceeds.

## RE/MAX OF NEW YORK v WEBER

Index No.: 600848/16

On February 6, 2016, Re/Max NY commenced this action, seeking a declaratory judgment that Weber was not a stockholder. Re/Max NY alleges that CanAm Holdings is its sole shareholder.

On February 22, 2016, Titley and Sylvain Dansereau issued a “unanimous written consent” of the board of directors, purporting to remove Weber as president of Re/Max NY.

In his answer, defendant Weber asserted various counterclaims against RE/MAX NY and third party claims against third-party defendants Pierre Titley, Ginette Lambert who is Titley’s wife, and Can Am Holdings. On August 12, 2016, the court dismissed defendant’s third counterclaim for violation of the federal Sarbanes-Oxley Act for failure to state a cause of action. On November 29, 2016, the court dismissed defendant’s second counterclaim for wrongful termination on the ground that he had been properly removed as president by the RE/MAX NY board. Additionally, the court granted summary judgment dismissing the third party claim and dismissed defendant’s first counterclaim for “diminution in the value of his stock,” with leave to plead as a derivative claim.

In the November 29, 2016 order, the court, upon reargument and searching the record, granted summary judgment to defendant Henry Weber declaring that he was the holder of 15 shares of RE/MAX of New York, Inc.

A stock certificate is written evidence of shareholder status and ownership in the corporation (BCL § 508; **Essig v 5670 58 Street Holding Corp.**, 50 AD3d 948 [2d Dept. 2008]). As president of RE/MAX NY, Weber was not an outsider. Thus, Weber’s purchase of an interest in RE/MAX NY did not create the disruption in relationships among shareholders that the first offer provision was intended to obviate. Thus, the court concluded that the first offer provision in the shareholder agreement was waived.

In **Integrity Real Estate Consultants v RE/MAX of New York and Henry Weber**, Index No 8794/07, defendant Weber had taken the position that he was not a stockholder of RE/MAX. However, because plaintiff had not established that Weber secured a ruling in his favor in **Integrity Real Estate**, Weber was not judicially estopped from claiming to be a shareholder (**Becerril v Dept. of Health**, 110 AD3d 517, 519 [1<sup>st</sup> Dept. 2013]). Indeed, the court noted that, at this stage, defendant Weber appeared to be judicially estopped from denying in **Integrity Real Estate** that he is a shareholder.

The court noted that in determining the fair value of Weber’s shares, it would take into account the subsequent “economic impact” of the transaction as to which he objected, namely the sale of Re/Max NY to its parent company (**Friedman v Beway Realty Corp**, 87 NY2d 161, 167 [1995]).

## RE/MAX OF NEW YORK v WEBER

Index No.: 600848/16

On February 15, 2017, defendant Weber moved for leave to amend his answer, to supplement the third party summons, amend the third-party complaint, and consolidate the above action with two other actions. In its order dated June 5, 2017, the court denied defendant's various motions. However, the court, on its own motion, amended the declaratory judgment issued on November 29, 2016 to state simply that defendant Henry Weber was a stockholder of Re/Max of New York, Inc., without specifying the exact number of shares. While the court had previously determined that Weber validly acquired 15 shares from St. Onge in December 1998, it did not intend to rule as to whether Weber also acquired a 30% interest from Titley in 1997. Rather the extent of Weber's interest was to be determined within the context of a BCL § 623 proceeding. Except as modified therein, the court's order of November 29, 2016 remained in full force and effect.

By notice of motion dated August 3, 2017, plaintiff Re/Max NY moves for leave to reargue the order of June 5, 2017 to the extent that the court, on its own motion, struck the portion of the November 29, 2016 order which limited Weber's holding to only 15 shares. Plaintiff argues that the court lacked authority to alter its November 29, 2016 order. With regard to the merits, plaintiff argues that Weber is not a "dissenting shareholder," within the meaning of Business Corporation Law § 623.

CPLR 5015 provides that the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct. The Supreme Court has inherent power to vacate its own judgment in the interest of justice, and the grounds enumerated for granting such relief under CPLR 5015 are neither "preemptive nor exhaustive" and were not intended to limit that power (**Town v Black Bear Campgrounds**, 95 AD3d 1002 [2d Dept. 2012]).

While issued in the form of a short form order, the court's declaratory judgment of November 29, 2016 was in fact a "judgment." Indeed, the amended declaratory judgment which the court issued on June 5, 2017 fully resolved the controversy as to whether Weber was a shareholder of Re/Max NY. The purpose of the amendment was not a substantive amendment but simply to clarify the judgment to make clear that in determining that Weber was a stockholder, by virtue of his ownership of the shares acquired from St Onge, the court made no determination as to whether Weber had acquired any shares from Titley. The court concludes that it had authority to correct its prior order.

BCL § 623 provides a detailed procedure for a shareholder to enforce his right to receive payment for his shares, should the corporation take certain proposed "corporate action," such as a merger or sale of substantially all of the assets of the corporation. Among the procedural requirements are that the shareholder file written objection to the corporate action, including a notice of his election to "dissent" and the "number and classes" of [his] shares." The corporation must give written notice of "authorization or consent" by the other

RE/MAX OF NEW YORK v WEBER

Index No.: 600848/16

shareholders to the objecting shareholder. The statute provides that the right to receive payment for shares under BCL § 623 shall “exclude” the enforcement of any other right to which he might be entitled by virtue of “share ownership,” except it shall not exclude the right to bring an appropriate action to obtain relief on the ground that the corporate action is “unlawful or fraudulent” as to the shareholder (BCL § 623[k]). The exclusivity provision is intended only to proscribe the shareholder’s right to an action at law; it does not preempt equitable remedies (**Beard v Ames**, 96 AD2d 119 [4<sup>th</sup> Dept. 1983]). Thus, a dissenting shareholder may seek the equitable remedy of appraisal (fair value) for his shares, regardless of whether he has complied with the procedural requirements of BCL § 623 (**Friedman v Beway Realty Corp**, 87 NY2d 161 [1995]).

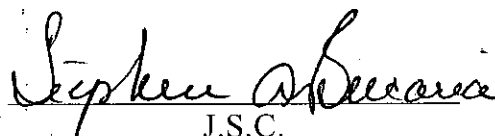
**Matter of Sikorski**, 30 AD3d 429 [2d Dept 2006]), upon which plaintiff relies, is readily distinguishable. In **Sikorski**, the shareholder brought a proceeding pursuant to BCL § 623, rather than an appraisal proceeding. Despite communicating with the corporation in two letters, the shareholder did not unequivocally state whether he dissented from the sale of the company and whether he demanded the valuation of his shares. In these circumstances, the court held that the shareholder should not be excused from the procedural requirements of BCL § 623.

Accordingly, plaintiff’s motion for leave to reargue is **granted**. Upon reargument, the court adheres to its June 5, 2017 declaratory judgment that defendant Weber is a stockholder of Re/Max of New York, Inc., with the proviso that the issues of the exact extent and fair value of Weber’s interest shall be determined either in a proceeding pursuant to BCL § 623 or an appraisal proceeding. Defendant Weber is **granted** leave to commence whichever proceeding he deems advisable within 30 days of the e-filing of this order, under a new Index Number.

Any argument not addressed herein is deemed to be without merit.

So ordered.

Date: 22 November 2017

  
J.S.C.  
XXX

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE