

Matter of Trio Asbestos Removal Corp. v Marinelli
2010 NY Slip Op 31823(U)
July 21, 2010
Supreme Court, Queens County
Docket Number: 410/2010
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

In the Matter of the Application of x
TRIO ASBESTOS REMOVAL CORP.,

Petitioner,

For a Judgment Pursuant to Article 76 of the
New York Civil Practice Law and Rules,

- against -

NICHOLAS MARINELLI,

Respondent.
x

Index
Number 410 2010

Motion
Date May 5, 2009

Motion
Cal. Number 18

Motion Seq. No. 1

The following papers numbered 1 to 19 read on motion by petitioner Trio Asbestos Removal Corp. for an order confirming the valuation of Nicholas Marinelli's shares in said corporation.

	<u>Papers</u> <u>Numbered</u>
Order to Show Cause - Verified Petition - Exhibits (A-Z)	1-3
Supporting Affidavit - Exhibit (1)	4-5
Affidavit of Service	6
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Memorandum of Law	
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Upon the foregoing papers this motion is determined as follows:

Christopher Horan and Nicolas Marinelli are each 50 percent shareholders in Trio Asbestos Removal Corp. (Trio). Trio previously brought an action in this court for the specific performance of an agreement between it and Nicholas Marinelli, for the sale of Marinelli's shares of stock in said corporation, entitled *Trio Asbestos Removal Corp. v Marinelli*, Index Number 19333/2003. The Hon. Simeon Golar, in an order dated March 30, 2004, inter alia, directed specific performance of the agreement, with Marinelli's shares to be valued as of August 1, 2003, by a method set forth in the parties' shareholder agreement. Pursuant to section 3.4 of the shareholders agreement, valuation of shares in the corporation shall be determined "[b]y the accountants servicing the Corporation using normal and usual accounting practices."

Trio thereafter moved to confirm the valuation of Marinelli's shares and for specific performance of the parties' agreement for the sale of the shares at the price determined by the valuation, and the Hon. Joseph G. Golia, in an order dated February 23, 2005, confirmed the valuation and directed specific performance of the agreement for the sale of Marinelli's shares at the share price determined by the valuation. Justice Golia denied Marinelli's cross motion to vacate Justice Golar's order directing specific performance based on the valuation, and other relief sought therein.

On February 6, 2007 the Appellate Division, Second Department, modified Justice Golia's order by deleting the provision which granted Trio's motion to confirm the valuation and substituted a provision denying the motion. The Appellate Division determined that the language of the shareholder agreement did not permit the corporation's accountants to retain an outside expert to perform the valuation. Rather, the shareholder agreement expressly provided that the corporation's regular accountants actually determine the valuation of the shares themselves. Since the corporation's regular accountants relied wholly on the outside expert's report, and did not form an independent opinion of their own, the Appellate Division found that the valuation should not have been confirmed. The Appellate Division stated that it was not addressing Marinelli's contention that the court should have granted him access to the corporation's books and records, which he sought on his cross motion only in the alternative (*Matter of Trio Asbestos Removal Corp. v Marinelli*, 37 AD3d 475 [2007]). The Appellate Division affirmed Justice Golia's order to the extent that it denied Marinelli's cross motion to vacate Justice Golia's order directing specific performance of the parties' agreement to sell Marinelli's shares of stock.

Following the Appellate Division's order, Mr. Marinelli moved for an order finding Trio in breach of the shareholder agreement by failing to provide the valuation of his shares as required by section 3.4 of said agreement and dismissing the proceeding, or permitting him to inspect the corporate books and records. Trio cross-moved for an order confirming the valuation of the shares and directing respondent to specifically perform his obligations under the shareholder's agreement. The Hon. Augustus Agate, in an order dated April 25, 2008,

and a memorandum decision of the same date, determined that the new valuation performed by Gabriel & Sciacca was identical to the valuation performed by the outside expert and that these accountants had relied upon the expert's report, and thus did not comply with the Appellate Division's order. Justice Agate found that Trio had breached section 3.4 of the shareholder's agreement, and therefore was not entitled to the remedy of specific performance pursuant to CPLR 7601 against Marinelli. Marinelli's motion for an order finding Trio in breach of the shareholder's agreement by failing to provide the valuation of the respondent's shares required by section 3.4(d), and dismissing said proceeding was granted, and the remainder of Marinelli's motion and the cross motion were denied.

Following the Appellate Division's order of February 6, 2007 and Justice Agate's order of April 25, 2008, Trio terminated the services of Gabriel & Sciacca, and hired new accountants, Castellano, Korenberg & Co. (Castellano, Korenberg) a certified public accounting firm. Castellano, Korenberg performed a new valuation and issued a report on November 20, 2008, in which it concluded that the fair market value of Marinelli's shares, as of August 1, 2003 is \$661,500.00. Trio then commenced another proceeding to confirm the valuation of Marinelli's shares on December 26, 2008 entitled *Matter of Trio Asbestos Removal Corp. [Marinelli]*, Index No. 30693/2008. Mr. Marinelli separately moved to dismiss said proceeding. The Hon. Frederick D. R. Sampson, in an order dated November 24, 2009, granted Marinelli's motion to dismiss said Article 76 proceeding, without prejudice, and denied Trio's to confirm the November 20, 2008 valuation and for specific performance. Justice Sampson determined that Trio had failed to establish that its accountants Castellano, Korenberg, performed any services for Trio other than the valuation, and therefore had not established that the November 20, 2008 valuation was performed by the accountants servicing the corporation, as required by section 3.4 of the parties' shareholder agreement. In addition, Justice Sampson rejected the valuation prepared by Frank Scala, CPA, a partner of Castellano, Korenberg, as it improperly combined the financial interests of two corporations, Trio and Kenico, although Mr. Marinelli only tendered his shares of stock in Trio. Justice Sampson noted that Mr. Scala, in anticipation of the court's rejection of the November 20, 2008 valuation, had attached to his reply affidavit a new valuation dated May 2009, which did not combine Trio's finances with that of Kenico, and opined that Mr. Marinelli's share of Trio's value is \$454,000.00, or approximately \$7,567.00 a share. The court declined to consider said valuation, as Trio had not sought to amend its pleadings in order to seek confirmation of this new valuation, and had not been established that Castellano, Korenberg are the regular accountants servicing the corporation.

Trio appealed Justice Agate's order and the Appellate Division, Second Department, in an order dated December 15, 2009, affirmed said order and the judgment entered thereon, stating that:

“[t]he Supreme Court properly denied the petitioner’s cross motion, inter alia, to confirm the valuation of the respondent’s shares provided by the petitioner’s accountants, inasmuch as that valuation was not the independent work of the ‘accountants servicing the [petitioner] Corporation,’ as required by section 3.4(d) of the shareholder’s agreement (*see Matter of Trio Asbestos Removal Corp. v Marinelli*, 37 AD3d 475, 477). Moreover, the Supreme Court properly dismissed the proceeding on the ground that the petitioner breached the subject shareholder’s agreement by repeatedly failing to obtain and provide a valuation of the respondent’s shares by means provided for in the shareholder’s agreement (*see* CPLR 7601). We reject the petitioner’s contention that it could not be liable for breach of the contract because the accounting firm was a third party over which it had no control. To the contrary, the petitioner controlled which accounting firm was retained to service it, and was not required to continue to employ accountants who would not, or could not, provide an independent valuation” (*Matter of Trio Asbestos Removal Corp. v Marinelli*, 68 AD3d 1008 [2009]).

Trio commenced the within proceeding to confirm the value of Marinelli’s shares on January 7, 2010, and served an order to show cause and supporting verified petition dated January 11, 2010. Trio now seeks to rely on the May 2009 valuation, and asserts that Castellano Korenberg valued the shares by themselves and did not rely upon a third party expert’s report; that Castellano Korenberg has been and continues to function as Trio’s regular accountants; and that the May 2009 valuation only pertains to Trio, and therefore should be confirmed. In support of the petition, Frank Scala, CPA, states in an affidavit that he is a partner in Castellano Korenberg and that his firm was retained by Trio on November 6, 2008 as its outside certified public accounting firm, and to estimate the fair market value of Marinelli’s interest in Trio as of August 1, 2003. He states that in addition to performing said valuation, Castellano Kornberg has served and continues to serve as the regular accountants servicing Trio, using normal and usual accounting practices, and that it has rendered the following accounting services: “a review of the Company’s books and records and preparation of an audited financial statement for the year ending December 31, 2008; preparation of the Company’s 2008 income tax returns; review of the Company’s books and records and preparation of reviewed financial statements for the six-month period ending June 30, 2009.”

Mr. Marinelli, in opposition, asserts that Justice Agate previously dismissed on the merits Trio’s claim for specific performance of the agreement to tender his shares in the corporation, that said dismissal on the merits was affirmed by the Appellate Division, and that Trio is now barred by the doctrine of res judicata from resurrecting its claim for specific performance by seeking confirmation of a new valuation. He further asserts that Trio’s newly hired accountants should be rejected because they were not the accountants servicing

Trio at the time of the tender, or within a reasonable time thereafter; and that the valuation is grossly deficient, improperly performed, and riddled with errors.

In view of Justice Agate's memorandum decision and order of April 25, 2008, and the Appellate Division's affirmance of December 15, 2009, the court finds that the within proceeding pursuant to CPLR 7601 is barred by the doctrine of res judicata. Justice Agate's determination that Trio had breached its obligations under the parties' shareholders' agreement as regards the valuation of Marinelli's shares of stock, and therefore was not entitled to the remedy of specific enforcement, constitutes a decision on the merits. Said determination was explicitly upheld by the Appellate Division. Having been found to be in breach of the parties' shareholder's agreement, Trio may not simply seek to cure said breach and thereby reinstate its claim for specific performance by commencing a new valuation proceeding pursuant to CPLR 7601.

Furthermore, even if the within proceeding was not barred by the doctrine of res judicata, Mr. Scala's affidavit is insufficient to establish that Castellano Korenberg are the accountants regularly servicing the corporation. These accountants were not retained until November 2009, at which time they performed the valuation rejected by Justice Sampson. The written proposal of services to be provided by the accountants includes the assignment of an individual to perform day to day activities, annual and semi-annual reviews, yearly tax preparation, and yearly written confirmation of the retention of the accounting firm. Trio and Mr. Scala has failed to submit any evidence that Castellano Korenberg assigned any person to Trio's account and performed day to day activities; conducted any reviews after June 2009; performed any tax preparation for any period other than the tax year ending December 31, 2008; and provided yearly confirmation of its engagement as Trio's accountants. It is noted that although Mr. Scala's initial affidavit dated January 2010 was served along with the order to show cause, this motion was not fully submitted until May 5, 2010, and Mr. Scala's supplemental affidavit only addressed Mr. Marinelli's objections to the May 2009 valuation. Trio, therefore, cannot establish that the May 2009 valuation was performed by the accountants regularly servicing the corporation, as required by the parties' shareholders' agreement.

Accordingly, petitioner's request for a judgment confirming the valuation of Marinelli's shares is denied and this proceeding is dismissed.

Dated: July 21, 2010

J.S.C.