

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1519

CA 08-00574

PRESENT: MARTOCHE, J.P., SMITH, GREEN, AND PINE, JJ.

IN THE MATTER OF THE APPLICATION OF NATHALIE
RATEAU, MIREILLE RATEAU, AND MICHEL RATEAU,
PETITIONERS-RESPONDENTS,
FOR THE JUDICIAL DISSOLUTION OF DAPA
COMMUNICATIONS, INC., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

KEENAN AND STONE, PLLC, HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR
RESPONDENT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (LARRY KERMAN OF COUNSEL), FOR
PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered
December 28, 2007 in a proceeding pursuant to BCL article 11. The
judgment awarded petitioners the sum of \$76,247.24 against respondent.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs and the matter is
remitted to Supreme Court, Cattaraugus County, for further proceedings
in accordance with the following Memorandum: Respondent, DAPA
Communications, Inc. (DAPACom), appeals from a judgment entered
pursuant to Business Corporation Law § 1118, contending that Supreme
Court erred in determining the fair value of petitioners' shares in
DAPACom, a closely held corporation. Contrary to DAPACom's
contentions, we conclude that the court properly valued DAPACom " 'as
an operating business' " (*Matter of Pace Photographers [Rosen]*, 71
NY2d 737, 748; see *Matter of Friedman v Beway Realty Corp.*, 87 NY2d
161, 168; *Matter of Seagroatt Floral Co. [Riccardi]*, 78 NY2d 439,
445), and that the court properly used the net asset valuation method
(see e.g. *Friedman*, 87 NY2d at 167; *Matter of Endicott Johnson Corp. v
Bade*, 37 NY2d 585, 587-588; *Hall v King*, 265 AD2d 244). We further
conclude that the court's valuation of DAPACom falls "within the range
of testimony presented" and should not be disturbed (*Matter of
Cortland MHP Assoc. [PetraliapBurnham]*, 267 AD2d 1013, 1013 [internal
quotation marks omitted]; see *Matter of Ashford Mgt. Group*, 261 AD2d
863).

We agree with DAPACom, however, that the court erred in failing
to apply a discount for the lack of marketability of petitioners'
shares in DAPACom (see *Seagroatt Floral Co.*, 78 NY2d at 445-446;
Amodio v Amodio, 70 NY2d 5, 7; *Hall*, 265 AD2d 244; cf. *Matter of
Whalen v Whalen's Moving & Stor. Co.*, 234 AD2d 552, 554; *Matter of
Quill v Cathedral Corp.*, 215 AD2d 960, 963, lv dismissed 86 NY2d 838).

We therefore reverse the judgment and remit the matter to Supreme Court to determine the fair value of petitioners' shares following application of a discount for lack of marketability.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court