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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

In the Matter of the Application of

INDEX No. 007728/10

NICOLE BANANI, as the Administrator of
the Estate of RAJESH BANANI, a deceased
shareholder of NEW MILLENNIUM
PAWNBROKERS, INC., a New York
Corporation,

MOTION DATE: Nov. 5, 2010
Motion Sequence # 002

Petitioner,

for a determination of the value of Stock held
by RAJESH BANANI,

The following papers read on this motion:

- Notice of Petition..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Motion by petitioner for an order granting her the right to inspect the books and records of respondent New Millenium Pawnbrokers, Inc. is **granted** to the extent indicated below.

This is a special proceeding to enforce a shareholder's right to receive payment for shares pursuant to § 623 of the Business Corporation Law. Petitioner Nicole Banani is the administrator of the estate of her husband Rajesh Banani, who died on February 17, 2007. At the time of his death, Rajesh owned 25% of the stock of New Millennium Pawnbrokers, Inc. The other 75% of the stock is owned by Rajesh's parents, respondents Kishin and Pushpa Banani. New Millennium operated a pawn brokerage business in Astoria. On June 6, 2001,

shortly after the formation of New Millennium, Rajesh issued an interest-free promissory note payable to Kishin and Puspa Banani in the amount of \$300,000. The note is due June 6, 2011. Respondents allege that the note was the consideration for Rajesh's interest in the corporation.

After Rajesh's death, Kishin and Pushpa continued to operate the business until New Millennium sold its assets to Modell Cash Loans, LLC pursuant to a contract dated December 24, 2007. The purchase price for the assets was \$1,063,218. Petitioner alleges that she was not given notice of the proposed sale and it was not submitted to a vote of the shareholders. Petitioner further alleges that Kishin and Pushpa have failed to account to her for her share of the proceeds of the sale as well as the profits of the corporation.

Petitioner originally sought judicial dissolution of New Millennium on the ground of oppressive conduct toward a minority shareholder and looting of corporate assets pursuant to § 1104-a of the Business Corporation Law. By order dated August 16, 2010, the court denied the petition for judicial dissolution but granted petitioner leave to serve an amended petition seeking payment of fair value for her shares. Pursuant to Bus.Corp. Law § 910, petitioner had the right to payment of fair value for her shares upon the sale of the corporation's assets, unless notice of the proposed action was given and petitioner failed to file an objection. While petitioner asserts that she was not given notice of the proposed sale, she was aware that negotiations were being conducted at least by November 23, 2007. In any event, petitioner served a "notice of dissent" to the sale on August 23, 2010.

Petitioner requests an order directing New Millennium to permit her access to the corporation's books and records for the past five years for the purpose evaluating the fair value of her shares. Petitioner further requests the court to determine the fair value of her shares or appoint an appraiser for the purpose of valuing the shares. Finally, petitioner requests the court to excuse her from the requirement of submitting her stock certificates to the corporation on the ground that certificates were never issued.

Respondents assert that petitioner is not the holder of any interest in New Millennium because Rajesh failed to repay the \$300,000 note and certain other loans which were made to him by respondents or the corporation. Respondents further object to permitting access to the books and records on the theory that the value of the corporation was fixed when its assets were sold and the "highest price" was obtained.

In order to seek appraisal for his shares pursuant to Business Corporation Law § 623, petitioner must be a bona fide shareholder (*In re Leventall*, 241 App Div 277 [1s Dept 1934]).

Petitioner may be a bona fide shareholder even though she holds the shares in a fiduciary capacity (*Rosenbloom v Gurary*, 302 AD2d 280 [1st Dept 2003]). Petitioner may be a bona fide shareholder even though her shares are uncertificated (See Business Corporation Law § 508).

Respondents offer no evidence that Rajesh, the son of the controlling shareholders, was not himself a bona fide shareholder. The court concludes that Rajesh was a bona fide shareholder of New Millennium, regardless of whether the \$300,000 note is in default or whether it is enforceable. Accordingly, petitioner, as Rajesh's administrator, has standing to seek an appraisal.

Leave of court is required in order to conduct document discovery in an appraisal proceeding (CPLR § 408; *Manhattan Marine v Hewitt*, 72 AD2d 682 [1st Dept 1979])). However, upon written request of a shareholder, the corporation shall provide an annual balance sheet and profit and loss statement for the preceding fiscal year (Business Corporation Law § 624[e]). Moreover, the court may compel production of the books and records of the corporation (CPLR § 624[f]).

The court concludes that petitioner is entitled to discovery of the books and records of New Millennium from three years before Rajesh's death through the date of the sale of assets. Accordingly, petitioner's application for discovery of New Millennium's books and records is **granted** to the extent of the years 2004, 2005, 2006, and 2007. The remainder of petitioner's application is **denied** with leave to renew upon the conclusion of discovery.

Counsel for the parties are directed to appear for a status conference on March 4, 2011 at 9:30 a.m. in Chambers of the undersigned.

So ordered.

Dated JAN 13 2011.

Stephen A. Suarez
J.S.C.
ENTERED

JAN 19 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE