

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

ROBERT T. SPENCER, ET. AL.,	:	August Term 2007
	:	
Plaintiffs,	:	
	:	
v.	:	No. 2066
	:	
CRAIG A. SPENCER, ET. AL.,	:	
	:	
Defendants.	:	Commerce Program
	:	
	:	
	:	Control Number 09090670

ORDER

AND NOW, this 13TH day of April 2010, upon consideration of Plaintiffs' Petition to Vacate Appraiser's Orders and to Disqualify Appraiser and all responses in opposition, it hereby is **ORDERED** that the Motion is **Granted**. The orders of Mr. Richard E. Schatz are vacated and Mr. Schatz is ordered to determine the fair and equitable distribution of AGI's assets in accordance with the 1990 Agreement. The fair and equitable distribution is to be made and completed within sixty days from the date of this order.

BY THE COURT,

ARNOLD L. NEW, J.

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OPINION

Presently pending before the court is Plaintiffs Petition to Vacate Appraiser's Orders and Disqualify Appraiser. In a letter dated December 1, 1990, Robert T. Spencer (hereinafter "Robert") and Craig A. Spencer (hereinafter "Craig") entered into an agreement concerning their on going business relationship. The letter provides in part as follows:

If at any time you cease to provide consulting services to AGI on a full time basis and continue to be obligated for 50% of all Debts, Expenses and Other Obligations of AGI, then in such case a fair and equitable distribution of the Assets of AGI to which you are entitled will be made by the then counsel to AGI (current counsel to AGI is Eric Stern of Cohen, Shapiro, et al.) and this agreement will be then considered null and void and of no further force and effect.¹

Robert retired on December 31, 2006. In August 2007, Robert instituted this action against Craig and various entities seeking redress for alleged wrongdoing on the part of Craig for failing to comply with the 1990 Agreement. On February 22, 2008, the court entered an order sustaining Craig's preliminary objections and directing the parties to conduct a fair and equitable distribution of AGI assets.

On May 9, 2008, counsel for Robert and Craig designated an appraiser and signed an agreement setting forth the procedure for conducting the fair and equitable distribution. The agreement provides in pertinent part as follows:

¹ December 1, 1990 letter.

1. Designation of Mr. Schatz as Neutral Appraiser

a. Withdrawal from Representation of Defendants

The parties agree that Mr. Schatz will withdraw as counsel on any pending matters for AGI and Craig Spencer and will not represent either for the pendency of the determination. The parties agree that Mr. Schatz's firm may represent AGI and/or Craig Spencer during the pendency of the determination as long as Mr. Schatz is not involved in that representation. The parties further agree that Mr. Schatz may represent AGE and/or Craig Spencer after the equitable distribution has been made and after any judicial review of his determination is complete.

d. Standard of Review

Mr. Schatz's determination will be reviewable under the standard set forth in the court's holding in *Boulevard Associates v. Seltzer Partnership*, 664 A.2d 983 (Pa. Super. Ct. 1995) regarding judicial review of an appraisal.²

In addition, the Agreement also set forth the procedure for submission of memoranda and exhibits supporting the various positions of Robert and Craig specifically addressing the value of the assets and liabilities of AGI and the fair and equitable distribution of that value.³ On August 4, 2009, after the parties' submission and conferences with counsel, Mr. Schatz issued his findings and determinations.⁴ As part of his finding, Mr. Schatz determined that the termination language of the 1990 Agreement was clear and unambiguous and found that the termination language represents the parties' agreement as to how their affairs are to be wound down now that Robert's participation ended. Mr. Schatz did not determine the fair and equitable distribution of the AGI assets. He concluded as follows:

With respect to each venture, the 1990 Agreement provides for wind-down over time of the joint assets, with the ultimate success or failure of a Venture determinative of whether there will be assets to divide or liabilities to allocate. With respect to the division of assets and income or return of principal, the 1990

² Agreement of Counsel as to Procedures for Equitable Distribution.

³ Id.

⁴ Findings and Determination of Mr. Schatz dated August 4, 2009.

Agreement contemplates that, at the end of the any Venture, I, or the AGI counsel then designated, will determine an appropriate division based on the initial division agreement in each Venture (if there is one) as modified by a determination of the relative contributions of the Parties toward the outcome. With respect to the allocation of liabilities, the 1990 Agreement contemplates that they will continue in the fashion as agreed upon until each Venture is wound down. (footnote omitted) Most importantly, I find that the 1990 Agreement provides that, although there may be separate Ventures, the common scheme of management and risk allocation entails treatment of all Ventures as integral parts of a single pool. Finally, because of the uncertain nature of the relative contributions of the Parties toward the success of the Ventures, I, or such designated AGI counsel, was given the discretion to value those contributions at the end of each Venture with the benefit then of hindsight.⁵

Plaintiffs filed the instant petition to vacate Schatz's decision.

DISCUSSION

The parties agreed that Mr. Schatz' determination would be reviewable under the standard set forth in the court's holding in *Boulevard Associates v. Seltzer Partnership*, 664 A.2d 983 (Pa. Super. Ct. 1995). The Superior Court in *Boulevard Associates* held as follows:

"...judicial review of appraisal is limited to fraud, misconduct, corruption or other irregularity causing an unjust result. We also hold that the reviewing court may examine the appraisers' scope of authority and whether they have exceeded it. The powers of the appraisers are determined by the submission assigned to them by the parties. Since appraisers do not have authority to decide matters not included in the submission, the trial court may review the scope of their authority." (internal citations omitted).⁶

Here, Mr. Schatz's determination exceeded the scope of his authority. Pursuant to this court's order Schatz was directed to determine the "fair and equitable distribution of the Assets of AGI" pursuant to the 1990 Agreement. Although Schatz was required to make a variety of decisions in the course of conducting the "fair and equitable distribution", Schatz failed to perform the task specifically assigned to him. Instead, Schatz read into the 1990 Agreement a

⁵ Id.

⁶ Id. at 987.

waiting period to wind down AGI Ventures before any fair or equitable distribution could be performed. The 1990 Agreement does not contemplate any such waiting period. The clear and unambiguous language of the agreement requires a fair and equitable distribution of the assets be made “at any time Robert ceases to provide consulting services to AGI on a full time basis.” Based on the language the 1990 Agreement, the court finds that Schatz exceeded the scope of his authority by failing to determine the “fair and equitable distribution” of AGI’s assets. Accordingly, Schatz’s orders dated August 4th 2009 and August 28, 2009 are vacated. Schatz is directed to determine the fair and equitable distribution of AGI as contemplated by the 1990 Agreement. This determination is to be made within sixty days from the date of this order.

CONCLUSION

For the foregoing reasons, Robert’s Petition to Vacate is granted and Mr. Schatz’s orders dated August 4th and 28, 2009 are vacated. Schatz is directed to determine the fair and equitable distribution of AGI Assets within sixty days from the date of this order.

BY THE COURT,

ARNOLD L. NEW, J.