

FILED
SARPY COUNTY
DISTRICT COURT

2016 AP 25 PM 2:05

Carol Hansen
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

THE WAYNE L. RYAN REVOCABLE TRUST, CAROL RYAN, as trustee for the Wayne L. Ryan Revocable Trust, and **DR. WAYNE L. RYAN**, an individual,

Plaintiffs,

v.

CONSTANCE "CONNIE" RYAN and STRECK, INC.,

Defendants.

DOC. CI-14 PAGE 1684

OPINION AND ORDER

On March 23, 2016, the above-captioned matter came on for hearing on the cross Motions for Partial Summary Judgment filed by Plaintiffs and Defendant Streck, Inc. Plaintiff appeared with counsel, Mr. Richard Winter, Ms. Marnie Jensen, Mr. Mark Hill, and Ms. Maureen Schoaf. Defendant Constance "Connie" Ryan ("Ryan") appeared by counsel, Mr. Larry Welch. Defendant Streck, Inc. ("Streck") appeared by counsel, Mr. Ronald Reagan, Mr. Tom Dahlk, and Ms. Vicki Beuter. Evidence was received and arguments were made. The matter was submitted, taken under advisement, and now comes on for decision.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint in this matter on October 30, 2014, alleging causes of action for I) Shareholder Oppression, and II) Breach of Fiduciary Duty. Essentially, it is Plaintiffs' contention that Defendant Ryan engaged in shareholder oppression of the Trust, as a shareholder of Defendant Streck, and breached her fiduciary duty in doing so. Plaintiffs prayed for relief in a number of different ways, including the dissolution of Defendant Streck and that Dr. Ryan's stock



✓ 2

✓

be purchased by Defendant Ryan and/or Defendant Streck or that Defendant Ryan's stock be purchased by Dr. Ryan.

Defendant Ryan and Defendant Streck each filed their respective Answers on December 15, 2014, wherein they denied each and every material allegation contained therein. They each also alleged several affirmative defenses.

At this juncture, Plaintiffs and Defendant Streck have each filed a motion for partial summary judgment alleging that no genuine issues of material fact remain with respect to the specific issues asserted in their motions, and that they are entitled to judgment as a matter of law. The Court will consider each motion separately herein.

AUTHORITY

A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. State Farm Fire & casualty Company v. Dantzler, 289 Neb. 1, 852 N.W.2d 918 (2014); Lesiak v. Central Valley Ag Co-op., Inc., 283 Neb. 103, 808 N.W.2d 67 (2012); Golden v. Union Pacific R. Co., 282 Neb. 486, 804 N.W.2d 31 (2011). In reviewing a summary judgment, a court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Brock v. Dunning, 288 Neb. 909, 854 N.W.2d 275 (2014); McFadden Ranch, Inc. v. McFadden, 19 Neb.App. 366, 807 N.W.2d 785 (2011); Chicago Lumber Co. Of Omaha v. Selvera, 282 Neb. 12, 809 N.W.2d 469 (2011); BSB Const., Inc. v. Pinnacle Bank, 278 Neb. 1027, 776 N.W.2d 188 (2009). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a genuine issue of material fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

ANALYSIS

Plaintiffs' Motion for Partial Summary Judgment

The crux of Plaintiffs' partial summary judgment motion is that discounts should not be applied to the determination of "fair value" of Plaintiffs' shares in Streck, Inc. In support of their argument, Plaintiffs cite to the Nebraska Supreme Court case of Rigel Corp. v. Cutchall, 245 Neb. 118, 511 N.W.2d 519 (1999). In Rigel, a corporation sought determination of fair value of common stock held by a dissenting shareholder in a second corporation which was merged into the plaintiff corporation. Plaintiffs assert that Rigel stands for the proposition that whether to apply discounts in an oppression case presents a question of law. With regard to said contention, the Court stated:

We are persuaded, however, that in the event of a merger, neither a minority discount nor a deduction for lack of marketability is to be given in determining the fair market value of a dissenter's shares under the provisions of § 21-2080. Only by not doing so can the statutory policy of fully compensating a dissenting minority shareholder be achieved.

The argument that Rigel decided an issue of law appears to be confirmed by the Court's holding in Camino, Inc. v. Wilson, 59 F.Supp.2d 962 (D. Neb. 1999), when it stated:

To summarize, when determining "fair value" of corporate stock under the Nebraska Dissenter's Rights statute: (1) the determination of "fair value" is equitable in nature;... (5) discounts for lack of control or lack of marketability are not proper..."

The Court finds that the Rigel analysis applies in the instant case. Allowing discounts in a case like the one currently before the Court would likely keep a minority shareholder from bringing an oppression action. Accordingly, based on the aforementioned discussion, this Court finds that discounts should not be applied to the determination of "fair value" of Plaintiffs' shares in Streck, Inc.¹ Thus, partial summary judgment is appropriate on this issue.

¹ The Court notes that the Business Corporation Act was repealed effective January 1, 2016, pursuant to Laws 2014, LB 749, § 298. Replacement provisions that specifically involve the issue asserted in this partial summary judgment motion are now contained within the Nebraska Model Business Corporation Act, Chapter 21, Article 2, effective January 1, 2016.

Defendant Streck's Motion for Partial Summary Judgment

In its motion, Defendant Streck moves for partial summary judgment as to the validity of the election made by Defendant Streck to purchase Plaintiffs' common stock of Streck filed with the Court on January 19, 2015 (the "Election"). Defendant Streck asserts that by making the Election to purchase Plaintiffs' shares, Defendant Streck provided the relief requested in the Complaint and expressly allowed by Neb. Rev. Stat. § 21-20,166. Therefore, Defendant Streck asserts that the Election was a direct result of the lawsuit filed by Plaintiffs and expressly contemplated by the statutory scheme relied upon in the Complaint. Alternatively, Defendant Streck contends that to the extent Plaintiffs seek to litigate the validity of the Election, said Election was properly made and is protected by the business judgment rule.

In the Complaint filed by Plaintiffs, they sought relief pursuant to the Nebraska Business Corporation Act, Neb. Rev. Stat. § 21-20,162(2). In the Prayer for Relief, Plaintiffs sought, among other things, the following relief:

...that Dr. Ryan's stock be purchased by Connie and/or Streck or that Connie's stock be purchased by Dr. Ryan;

Neb. Rev. Stat. § 21-20,166 provides in relevant part that:

(1) In a proceeding under subdivision (2) of section 21-20,162 to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

The evidence received at the summary judgment hearing establishes that Defendant Streck is a privately held company, and that it does not have any shares listed on a national securities exchange or is regularly traded in a market maintained by one or more members of a national or affiliated securities association. Further, after Defendant Streck determined that it was in its best interest to make the Election to purchase Plaintiffs' shares, a timely Notice of Election was filed on January 19, 2015. Therefore, this Court concludes that Defendant Streck, pursuant to § 21-

20,166, was entitled to make an election to purchase all shares of the petitioning shareholder at fair value.

For the sake of completeness, this Court will also address Defendant Streck's contention that to the extent Plaintiffs seek to litigate the validity of the Election, said Election was properly made and is protected by the business judgment rule. In the instant case, it is undisputed that Plaintiffs initiated the dissolution action and invited the exercise of the statutory election by Defendant Streck to purchase Plaintiffs' shares. When a corporation takes corporate action, the business judgment rule applies if the corporate action is made "by a majority of disinterested directors." McGill v. Lion Place Condo. Ass'n., 291 Neb. 70, 864 N.W.2d 654 (2015). Therefore, upon the filing of Plaintiffs' lawsuit, Defendant Streck's Board of Directors formed a Special Litigation Committee ("SLC"). In determining the members of the SLC, the Board of Directors analyzed which directors were independent and did not have a material interest in the outcome of the proceeding or a material relationship with a person who had such an interest.

The process that was adopted by Defendant Streck comports with Neb. Rev. Stat. § 21-20,144, which addresses the use of a committee comprised of all of the "qualified directors" to approve a corporate transaction. The Court finds that there is no evidence that the four directors comprising the SLC were anything but disinterested and independent. Accordingly, because the SLC is comprised of disinterested and independent directors, the business judgment rule protects the recommendation of SLC that Defendant Streck elect to purchase Plaintiff's shares and the Board of Directors' adoption of that recommendation. [See, specifically, Affidavits of Lisa Roskens, David Conrad, Michael Cassling, and Deborah Macdonald].

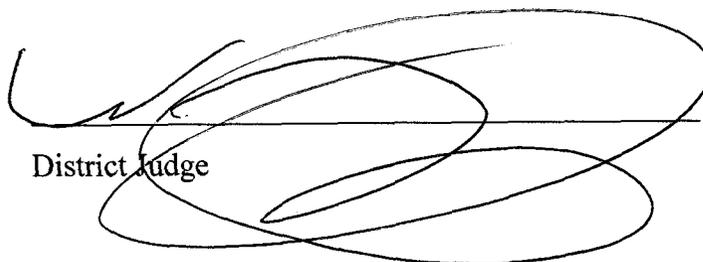
For the foregoing reasons, this Court finds that Defendant Streck should be granted partial summary judgment on the issue of the validity of the Election. The Court further finds that Defendant Streck had the right to make an election to purchase Plaintiffs' shares and that the Election was valid and not subject to a challenge as a matter of law.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiffs' Motion for Partial Summary Judgment is hereby granted.

IT IS FURTHER ORDERED that Defendant Streck, Inc.'s Motion for Partial Summary Judgment is hereby granted.

Signed and entered this 25th day of April, 2016.

BY THE COURT:



District Judge

JAN A.D. 2016

3/23/16 ✓

Plaintiff appears with Counsel, Mr. Richard Winter and Ms. Marnie Jensen, Mr. Mark Hill and Ms. Maureen Schoaf; Defendant Constance Ryan appears by Mr. Larry Welch; Streck, Inc. appears by Mr. Ron Reagan, Mr. Tom Dahlk, and Ms. Vicki Beuter, for full hearing on Cross Motions for Partial Summary Judgment. Evidence received. Matters taken under advisement.

||| X


, Judge

4/25/16

Opinion and Order signed and entered. Bailiff to mail copy of Order to Counsel.


, Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 25, 2016 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Lawrence E Welch Jr
larryjr@welchlawfirm.com

Victoria H Buter
vicki.buter@kutakrock.com

Marnie A Jensen
marnie.jensen@huschblackwell.com

Date: April 25, 2016

BY THE COURT:

Carol Kromm

CLERK

