

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

STEVEN CONFAIR, et al.,	:	CIVIL ACTION
Plaintiffs	:	
	:	
vs.	:	Docket Nos: 07-00483
	:	
	:	
CONFAIR COMPANY, INC., et al.,	:	
Defendants	:	
	:	
	:	

OPINION AND ORDER

On June 9, 2008 this Court entered an Opinion and Order on cross-motions for summary judgment filed by the parties.¹ In its Opinion and Order, this Court granted Defendants’ Motion for Summary Judgment as to Counts I, II and III of Plaintiffs’ Complaint, but denied Defendants’ Motion for Summary Judgment as to Count IV of Plaintiffs’ Complaint. Both parties have filed Motions for Reconsideration of this Court’s June 9, 2008 Order. Defendants’ Motion for Reconsideration asserts that Count IV of Plaintiffs’ Complaint should also be dismissed. Plaintiffs’ seek reinstatement of Counts I, II and III.

In entering its summary judgment order, the principle issue before the court centered upon the interpretation and application of a Stock Purchase Agreement. This Court held that the Agreement at issue gave the Defendant Confair Company, Inc. (hereinafter “CCI”) the option to purchase shares of CCI stock from CCI shareholders “at any time.” This Court further held that shares of stock endorsed with express language which stated that the certificates were “under and subject to” the Stock Purchase Agreement were “subject to” the Agreement. Pursuant to this holding, the

Court dismissed Counts I, II and III of Plaintiffs' Complaint. The Court's rationale for dismissal was as follows:

In Counts II and III of this lawsuit, Plaintiffs claim that the majority shareholders of CCI engaged in an improper "freeze out" of the minority shareholders and breached fiduciary duties owed to Steven Confair and the Trusts by excluding minority shareholders from their proper share of corporate benefits and terminating Steven M. Confair from his employment with CCI. Because this Court finds that the Stock Purchase Agreement empowered CCI to purchase the Plaintiffs shares of stock "at any time" for the book value of the stock as determined by the Corporation's accountant, Plaintiffs claims that they were frozen out must fail. Similarly, it is undisputed that Steven M. Confair was an at-will employee and thus subject to termination at any time. (Confair v. Confair Co., Inc., et al., No. 07-00483 (June 9, 2008)(Opinion and Order at 7).

Although this Court did not include specific rationale as to its dismissal of Count I, Count I of Plaintiffs' Complaint similarly sought appointment of a custodian pursuant to Steven Confair's termination and Defendants attempt to repurchase Plaintiffs' shares of CCI Stock. (Plaintiffs' Complaint, ¶ 76). This Court's rationale for denying summary judgment as to Count IV related to Pennsylvania's recognition of a cause of action for "concerted tortious conduct" pursuant to Sovereign Bank v. Ganter, 914 A.2d 415 (Pa.Super. 2006).

Defendants' Motion for Reconsideration asserts that an action for concerted tortious conduct under Sovereign Bank, *supra*, "assumes liability for an underlying tort or breach of a duty." (See Def. Motion for Reconsideration, ¶ 9). As this Court determined as a matter of law that no tort was committed, Count IV, alleging "concerted" tort or "tort with punitive damages added" should similarly be stricken.

Plaintiffs' Motion for Reconsideration asserts that since "certain of the Plaintiffs retained their status as shareholders" the Court's ruling dismissing Counts I, II and III of Plaintiffs' Complaint was in error. Specifically, the Plaintiffs argue that because this

¹ The Opinion and Order was file-stamped June 10, 2008.

Court exempted three stock certificates from the purview of the Stock Purchase Agreement because they failed to include the express language referencing the Stock Purchase Agreement, and because shares of stock owned by the Steven M. Confair GST Trust were not at issue, these Plaintiffs retained their status as shareholders entitled to bring claims for corporate freeze out. A review of Plaintiffs' Complaint, however, reveals that Plaintiffs' "freeze out" claims or claims for "breach of fiduciary duty" relate primarily to Defendants' exercise of the Stock Purchase Agreement. Although Plaintiffs claim in their brief that a plain reading of their claims "demonstrates that the nature of Plaintiffs' claims goes well beyond the single issue of Defendants' ability to repurchase shares under the Stock Purchase Agreement,"² factual claims asserted by Plaintiff appear to be limited to Steve Confair's termination and removal from the Board, and CCI's attempted re-purchase of stock under the Stock Purchase Agreement. While other facts are alleged that may arguably sound improper, the crux of the case remains that the actual cause of alleged damages sustained by the Plaintiffs relate to the Defendants exercise of the Stock Purchase Agreement.

Plaintiffs are essentially arguing that the act of attempting to exercise an agreement, signed by Steven Confair in 1989, to purchase stock is somehow tantamount to misconduct. Notably, not one case is cited in Plaintiffs' Brief in Support of their Motion for Reconsideration. During argument, two cases were asserted for consideration by this Court – Viener v. Jacobs, 834 A.2d 546 (Pa.Super. 2003) and Nassberg v. Schultz, No. 02-00508 (Lyc.County Ct. of Common Pleas, Judge Feudale, Sr., June 2, 2006).

² Plaintiffs' Brief in Support of Motion for Reconsideration of the June 10, 2008 Opinion and Order at 7).

The facts of Viener, *supra*, were as follows: Viener and his father operated a textile business in Reading, Pennsylvania. Jacobs was employed by the Viener family business and was eventually offered a 20% ownership interest in the Viener family business. Viener and Jacobs began producing garments for a company that employed Rush, who was a college friend of Viener. Together, Viener, Jacobs and Rush began their own company, NGN, in which each owned a one-third interest. When Viener expressed concerns about questionable cash payments authorized by Jacobs of NGN funds to one of its subcontractor, N.V. Sportwear and its majority shareholder, Van Vu, Jacobs and Rush voted to remove Viener as President of NGN. Jacobs subsequently directed another subcontractor of NGN to generate false invoices totaling \$53,276.59 to reflect “price adjustments” to NGN. Jacobs caused NGN to pay the \$53,276.59 to the subcontractor, who in turn, repaid Jacobs, who then paid the money directly to Van Vu. Following Viener’s termination, door locks at NGN were changed to prohibit Viener’s access and Viener was excluded from voting on issues of employee compensation. NGN sales fell off and severe losses were sustained. Despite dwindling capital accounts, Jacobs withdrew \$202,216.67 from his loan account for the purpose of purchasing equipment. Neither the equipment purchased nor the funds used to purchase the equipment were returned to NGN by Jacobs, instead, part of the equipment was transferred to Kimmex, a second facility owned by Jacobs and Van Vu. The balance of the equipment at Amex was sold, and the funds acquired from the sale were reinvested in equipment for Kimmex. Id. at 554. Following their review of these facts, the Court held that Jacobs, in conjunction with Rush, acted to “freeze out” Viener, the minority

shareholder, from obtaining a proper share of benefits that accrued from the enterprise. Id. at 556.

In the present action, CCI shareholders voted to exercise their right to purchase stock pursuant to a Stock Purchase Agreement signed by Steven Confair in 1989. The terms of the agreement clearly provided that shares of stock could be purchased “at any time.” Valuation methods were clearly delineated in the agreement. This Court finds that CCI’s valid exercise of its option to purchase shareholder stock is not equivalent to squandering corporate assets and opportunities “in a bizarre corporate machination designed to benefit” majority shareholders. Id. Moreover, as this Court noted in its original Order regarding summary judgment, as the Plaintiff was clearly employed by CCI and on the Board of Directors for a number of years following execution of the Stock Purchase Agreement, opportunities existed for Mr. Confair to address any issues regarding the valuation of stock purchased. Moreover, remaining minority shareholders were arguably benefitted by the Defendants’ book value purchase of stock.

The second case advanced by Plaintiffs in support of their Motion for Reconsideration is Nassberg v. Shultz, et al., *supra*. At issue primarily in the Nassberg case was the valuation method of shares of stock owned by Mrs. Nassberg and her daughter’s Trust. Mrs. Nassberg alleged minority shareholder oppression and breach of fiduciary duties pursuant to her brothers alleged mismanagement of a family-owned steel mill through excessive self-compensation, engaging in self-dealing, failing to notify her of shareholder meetings, failure to provide her with financial statements, refusal to declare dividends, and by offering to purchase her stock at a value referred to as the “Hempstead” value. In its Opinion and Decree which repeatedly stated that the

plaintiff failed to sustain her burden of proof as to all issues presented, this Court held that in order to prove minority shareholder oppression, a plaintiff must prove “some intent to act illegally, fraudulently or oppressively.” Id. at 66. Moreover, this Court held that “neither a corporation nor a majority shareholder has any obligation to purchase a minority shareholder’s stock at any particular price” further holding that Mrs. “Nassberg cannot, therefore, claim to be oppressed by Jack and Pete Schultz’s decision to offer to buy her shares at the Hempstead Value.” Id. at 65-6. This Court further notes that Mrs. Nassberg did not prevail in her “self-serving and ultimately unsupported assertion of oppression,”³ but instead this Court held that “Mrs. Nassberg’s ‘reasonable expectations’ were nothing more than unreasonable posturing protestations and unsupported legal proclamations that do not sustain a cause of action.” Id. at 78. The Nassberg decision simply does not stand for any vindication of shareholder rights, but stands for the proposition that minority shareholders must provide sufficient proof of minority shareholder oppression.

As to the present action, this Court finds that there is no evidence that the Defendants acted in an illegal or fraudulent manner. In summary, no cases of alleged freeze-out cited by the Plaintiffs support Plaintiffs claim that they were “frozen out” by the majority shareholders exercise or attempted exercise of a specific shareholders agreement executed 19 years ago by the Plaintiff, Steven Confair. As this Court finds that no actionable conduct exists, there is similarly no reason for appointment of a custodian.

³ Id. at 77.

ORDER

AND NOW, this 14th day of July, 2008, for the reasons set forth above, this Court DENIES Plaintiffs' Motion for Consideration. Although this Court previously analyzed the issue of Count IV on the limited basis of whether Pennsylvania recognizes a cause of action for concerted tortious conduct, this Court failed to take the next step, which was to analyze this claim in light of Plaintiffs' underlying tort claim. As this Court finds that the actions of the Defendants in exercising and attempting to exercise a Stock Purchase Agreement and the termination of Steven Confair, an at-will employee, were legitimate and legal actions, which violated no duty to Plaintiffs, this Court agrees with Defendants' assertion that if no tortious act is found, a concerted tortious act cannot exist. Accordingly, Defendants' Motion for Reconsideration is hereby GRANTED and Count IV of Plaintiffs' Complaint is DISMISSED.

BY THE COURT,

Richard A. Gray, J.

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