

105 Va. Cir. 86A

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Circuit Court of Virginia,
City of Norfolk.

Ortal BITON

v.

Vladislav KREINIS and New Tomorrow, Inc.

Docket No.: CL19-7991

|
May 1, 2020

Attorneys and Law Firms

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Opinion

[David W. Lannetti](#), Circuit Court Judge

*1 Dear Counsel:

Today the Court rules on Defendant Vladislav Kreinis's Motion to Determine an Alternate Valuation Date for purposes of valuing corporate shares he intends to purchase from Plaintiff Ortal Biton. The share purchase, which is pursuant to [section 13.1-749.1 of the Code of Virginia](#), is in lieu of dissolving New Tomorrow, Inc., the corporation in which Kreinis and Biton are fifty-percent shareholders. Kreinis argues that the presumptive statutory valuation date is inappropriate based on the significant damage that Biton allegedly has caused New Tomorrow since she filed her dissolution action. Biton, on the other hand, asserts that the statutory valuation date is appropriate because (1) Kreinis failed to identify a particular alternative valuation date and (2) designating an alternate date at this point in the litigation would be unduly burdensome to the parties and the Court.

The Court finds that the statutory valuation date, August 1, 2019, is both equitable and appropriate. The Court further finds that designating an alternative valuation date at this

stage in the litigation would be unduly burdensome to the parties.

The Court therefore DENIES Kreinis's Motion to Determine an Alternate Valuation Date.

Background

The current motion arises out of an action to dissolve New Tomorrow, Inc. (“New Tomorrow”), a corporation involved in the retail sale of high-end consumer cosmetics. Biton and Kreinis are the only directors of New Tomorrow, and each is a fifty-percent shareholder in the corporation. New Tomorrow's assets include retail operations at Lynnhaven Mall in Virginia Beach and at MacArthur Mall in Norfolk.

On August 2, 2019, Biton filed an action to dissolve New Tomorrow. (Mot. Determine Alt. Valuation Date ¶ 1.) Three days later, on August 5, 2019, Kreinis filed an election to purchase Biton's corporate shares in lieu of dissolution, as was his right under [section 13.1-749.1 of the Code of Virginia](#). (*Id.* ¶ 2.) Kreinis alleges that Biton has caused significant damage to New Tomorrow, through her unilateral control of the MacArthur Mall operations, since she filed for dissolution. (*Id.* ¶ 5.) Kreinis requests that the Court direct that the value of Biton's corporate shares be determined on a “date after Ms. Biton is no longer involved in the management and control of [New Tomorrow] and has returned all Company property.” (*Id.* at 3.)

Kreinis filed a Motion for an Alternative Valuation Date on September 30, 2019. On March 13, 2020, the Court heard argument on various motions, including brief argument on Kreinis's Motion for an Alternative Valuation Date. Biton subsequently requested leave to file a responsive brief, which the Court granted. Biton filed a Memorandum in Opposition to Defendant's Motion to Determine an Alternative Valuation Date on April 17, 2020.

On April 16, 2020, the Court ruled on separate Motions for Determination by both parties regarding the ownership interest of certain New Tomorrow assets. (*See* April 16, 2020, Order on Mot. Determination.) In addition to finding that the assets in question were New Tomorrow assets, the Court held that any order determining the fair value and directing the purchase of Biton's shares shall include provisions requiring Biton to “cooperate in transferring the MacArthur Mall lease and any rights thereunder to New Tomorrow,” transfer or

reimburse New Tomorrow for funds that have not been forwarded, and be held “liable to New Tomorrow for any harm she may have caused the corporation otherwise since September 2019.” (*Id.* at 8-9.)

Positions of the Parties

Kreinis's Position

*2 Kreinis contends that it would be inequitable to value the New Tomorrow shares as of the day before Biton filed the dissolution action—the default statutory date—because, according to him, Biton subsequently took actions that significantly decreased the value of the corporation. (Def.’s Mot. Determine Alt. Valuation Date ¶ 5.) Kreinis asserts that, since filing for dissolution, Biton has taken “unauthorized unilateral control” of New Tomorrow’s MacArthur Mall store location. (*Id.* ¶ 8.) He also contends that Biton took control of New Tomorrow’s point of sale and credit card processing system; diverted sales proceeds to a separate bank account; breached New Tomorrow’s license agreement; exposed the company to liability under the Virginia Consumer Protection Act or Payment Card Industry (“PCI”) compliance laws; made unilateral personnel decisions; and encouraged former corporate employees to file employment claims and discrimination lawsuits against New Tomorrow. (*Id.* ¶ 19.) Kreinis contends that Biton “strategically relied on the benefit of a statutory valuation date” to avoid liability for harm she caused after filing for dissolution. (*Id.* ¶ 12.)

Biton's Position

Biton contends that, as an initial matter, Kreinis’s motion must fail because the requested relief is impossible to grant. (Pl.’s Mem. Opp’n Mot. Determine Alt. Valuation Date ¶ 2.) Specifically, Biton points out that Kreinis failed to identify a specific alternative valuation date and that his proposal involves a hypothetical future date “after Ms. Biton is no longer involved in the management and control of the company.” (*Id.* ¶¶ 3, 4.) Biton also argues that Kreinis’s position incorrectly assumes that she had a duty to step down from the management of New Tomorrow after Kreinis elected to purchase her shares. (*Id.* ¶ 5.)

Biton further contends that it is too late to attempt to change the valuation date. (*Id.* ¶ 7.) The scheduled trial date is less than two months away, and the expert disclosure deadlines have passed. (*Id.*) According to Biton, an alternative valuation date would “work a heavy burden on the parties and on the

Court [that] is completely unjustified at this late stage of the litigation.” (*Id.* ¶ 8.) Biton asserts that the only reasonable date for the parties’ experts to use in their valuations is the statutory valuation date of August 1, 2019; at this point, any change to the valuation date would require both parties to pay for revised reports that incorporate the new date. (*Id.* ¶ 7.) In addition to the anticipated expert costs, Biton argues that the “highly irregular manner in which Kreinis has operated and kept the books at New Tomorrow” since his election to purchase Biton’s shares would likely require the parties to engage forensic accountants to fully understand New Tomorrow’s accounting records. (*Id.* ¶ 7.) Among the alleged accounting irregularities is Kreinis’s engagement in an “elaborate shell game” involving “extensive commingling of funds, extensive use of personal accounts for company business, and transfers of sale proceeds to unrelated third parties in other states.”¹ (*Id.* ¶¶ 9, 22.) Biton asserts that these irregularities began after Kreinis’s election to purchase her shares, so an alternative valuation date *after* the election date would severely complicate any effort to value the company and prepare for trial. (*Id.* ¶¶ 23, 24.)

Analysis

Legal Standard

The *Code of Virginia* provides that the Court

may dissolve a corporation: (1) in a proceeding by the shareholder of a corporation that is not a public corporation if it is established that: (a) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock.

*3 *Va. Code* § 13.1-747(A) (2007 Repl. Vol.). It also provides that “in a proceeding under ...section 13.1-747 to dissolve a corporation, ... one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares” and that such an election “shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.” *Id.* § 13.1-749.1(A).

“After an election has been filed by ... one or more shareholders, the proceeding ... may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of the petitioner’s shares, unless the court

determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.” *Id.* § 13.1-749.1(B).

“If the parties are unable to reach an agreement ..., the court ... shall ... determine the fair value of the petitioner's shares as of the day before the date on which the petition ... was filed or as of such other date as the court deems appropriate under the circumstances.” *Id.* § 13.1-749.1(D). “Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate” *Id.* § 13.1-749.1(E).

“Upon entry of an order [directing the purchase of shares], the court shall dismiss the petition to dissolve the corporation ... and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded to him by the order of the court, which shall be enforceable in the same manner as any other judgment.” *Id.* § 13.1-749.1(F).

Discussion

The Court has considered the pleadings, argument from counsel, and applicable authorities. The Court now rules on Kreinis's Motion to Determine an Alternative Valuation Date.

Section 13.1-749.1 of the *Code of Virginia* provides that the fair value of the shares elected to be purchased is to be determined as of the day before the filing of the dissolution action, unless equity dictates otherwise. *Va. Code* § 13.1-747(A) (2007 Repl. Vol.). Biton filed for dissolution of New Tomorrow on August 2, 2019; thus, unless inequitable, the share valuation date is August 1, 2019.

Kreinis argues for an alternative valuation date, alleging that Biton took “unauthorized unilateral control” of the MacArthur Mall store location after he elected to purchase her shares. Although there is little case law discussing the equitable conditions that might justify an alternate valuation date, the Supreme Court of Virginia in an unpublished opinion affirmed a trial court's assignment of an alternate date. See *Capital Foundry of Va. Inc. v. Jimenez*, No. 150517, 2016 WL 3208939, at *2 (Va. Feb. 12, 2016).² In *Capital Foundry*, neither the trial court nor the supreme court expressly stated the justification for the alternative valuation date. Of note, however, *Capital Foundry* is factually dissimilar because it involved additional controlling documents—specifically,

estate documents that controlled ownership of the shares in question—and pending litigation surrounding the assignment of interest and ownership of the shares to be valued. *Id.* Here there are no such considerations.

*4 At the outset, Kreinis has not proposed an alternative valuation date. He instead argues that Biton's shares should be valued on some date “after Biton is no longer involved in the management and control of [New Tomorrow] and has returned all Company property.” In addition to lacking specificity, the proposed date conflicts with the Court's latest Order, which provides that Biton will “cooperate in transferring the MacArthur Mall lease and any rights thereunder to New Tomorrow” pursuant to “any order entered by the Court determining the fair value of Biton's shares and directing their purchase.” The Court envisions determining the value of Biton's corporate shares *before* Biton transfers all of her corporate rights, a logical progression.

Further, Biton is not required to surrender all control and management of New Tomorrow simply because Kreinis has elected to purchase her shares. Biton's post-election statutory obligations in fact are minimal. See *Va. Code* § 13.1-749.1(B) (prohibiting the dissolution petitioning shareholder from “sell[ing] or otherwise dispos[ing] of the petitioner' shares”). Moreover, the petitioning shareholder's “rights or status as a shareholder of the corporation” do not cease until the Court enters an order directing the purchase of the petitioner's shares. *Va. Code* § 13.1-749.1(F).

The gravamen of Kreinis's motion is that Biton took certain actions *after* Kreinis elected to purchase Biton's shares. Based on his motion and argument at the hearing, Kreinis's primary concern appears to be that Biton has been unilaterally operating the MacArthur Mall location and not forwarding any revenues—or apparently any expense reimbursements—to New Tomorrow. In other words, Kreinis's claim appears to be premised on a diversion of corporate assets and not a diminution in value of the corporate entity. If Kreinis's allegations are true, the Court has already addressed this concern in its April 16, 2020, Order, in which it directed Biton, upon “any order entered by the Court determining the fair value of Biton's shares and directing their purchase,” to transfer to or reimburse New Tomorrow for any funds from the MacArthur Mall operations that properly should have been forwarded to the corporation since September 2019. The April 16, 2020, Order also directs that Biton will be held liable to New Tomorrow for any harm she caused the corporation since September 2019.

The Court also acknowledges that a new valuation date at this stage in the litigation would create an undue burden on the parties. Biton concedes that many of her allegations regarding Kreinis's "post-election shell game" lack direct proof. She nonetheless has expressed a valid concern regarding the cumulative effects of Kreinis's alleged post-election accounting irregularities on the parties' ability to prepare for trial. The expert valuations undoubtedly will be based on a specific date, which presumably—at least thus far—has been the statutory valuation date, August 1, 2019. The deadline for expert disclosures pursuant to the case scheduling order has passed, and the scheduled trial date is less than two months away. If the Court were to order a valuation date other than the statutory valuation date at this juncture, the parties would be unduly prejudiced, including but not limited to bearing the costs associated with revised expert reports and possibly engaging a forensic accounting expert to evaluate New Tomorrow's post-election accounting irregularities.

Based on the above, the Court finds that Biton's alleged actions since she filed for dissolution—even if they damaged New Tomorrow—would not make the August 1, 2019, valuation date inequitable, and any alternative valuation date at this stage in the litigation would be unduly burdensome.

Conclusion

*5 The Court finds that the statutory valuation date of August 1, 2019, is both equitable and appropriate. The Court also finds that an alternative valuation date after August 1, 2019, would impose an undue burden on the parties as they prepare for trial.

The Court therefore DENIES Kreinis's Motion to Determine an Alternative Valuation Date. Attached is an Order incorporating the Court's ruling.

Sincerely,

/s/ David W. Lannetti

Footnotes

¹ Biton concedes that she lacks direct evidence related to the alleged "laundering of profits through bloated payroll." (Pl.'s Mem. Opp'n Mot. Determine Alt. Valuation Date 13 & n.2.) She does, however, reference exhibits containing emails,

David W. Lannetti

Circuit Court Judge

Attachment

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF
NORFOLK
ORTAL BITON, Plaintiff,

v.

VLADISLAV KREINIS,

and

NEW TOMMOROW, INC., Defendants.

Civil Case No.: CL19-7991

ORDER DENYING MOTION TO DETERMINE AN ALTERNATE VALUATION DATE

Pursuant to the Court's letter opinion of May 1, 2020, the Court finds that the statutory valuation date, August 1, 2019, is both equitable and appropriate. Therefore, the Court DENIES Kreinis's Motion to Determine an Alternate Valuation Date.

Endorsements are waived pursuant to Rule 1: 13 of the *Rules of the Supreme Court of Virginia*. Any objections shall be filed within fourteen days. The Clerk shall send a copy of this Order to Jason E. Ohana, Esquire, and Nathaniel Pierce, Esquire.

Entered: May 1, 2020

/s/ David W. Lannetti

David W. Lannetti, Judge

All Citations

Not Reported in S.E. Rptr., 105 Va. Cir. 86A, 2020 WL 8837626

corporate Quickbooks files, payroll records, and expense reports supporting her allegations regarding the “elaborate shell game.” (See *id.* ¶¶ 10-24 & Exs. B-F.)

- 2 As is appropriate, the Court does not consider the unpublished Virginia Supreme Court opinion to hold precedential value. The Court instead considers the rationale offered by that court to the extent that this Court finds it persuasive. See *Fairfax Cty. Sch. Bd. v. Rose*, 29 Va. App. 32, 39 n.3, 509 S.E.2d 525, 528 n.3 (1999).