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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT

SC Court of Appeals

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

ORDER OF JUDGMENT

vs.

Tim Roberson, Rick Thoennes, Rick
Thoennes III, and Warpath Development,
Inc.,

Defendants.

This matter is before the Court for the determination of the fair value of the plaintiff's ownership interest in Warpath Development, Inc., for purposes of the judicially forced buyout ordered by the Court in its Order of May 4, 2010. Based upon the evidence presented to the Court by both parties and by the court-appointed appraiser at the hearing held on August 6, 2013,¹ the pre-hearing submissions of the parties and the appraiser, and the post-trial submissions of the parties and the appraiser, the Court finds the fair value of the plaintiff's ownership interest is \$3,589,297. The Court orders defendants, jointly and severally, to pay plaintiff this amount within 90 days of the date on which this Order is entered, in exchange for which the plaintiff shall relinquish his shares of common stock of Warpath Development, Inc., and hereby enters judgment to this effect.

The plaintiff, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc., and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, a

¹ Prior to and at the hearing, the plaintiff moved to incorporate the record of the 2010 trial into the record of the valuation hearing. No objection was made to this request, and the prior record was so incorporated.

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restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through Mr. Ballard's efforts obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina.² All necessary permits to construct and develop the marina and related properties were obtained by the summer of 2010.

Under a Stock Purchase Agreement dated May 29, 2007, defendant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard for \$1 million, and he and the other two individual defendants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. Mr. Ballard retained ownership of 20,000 shares. Over the course of the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, only a few months after signing the Stock Purchase Agreement, the individual defendants began discussions among themselves of how to force Mr. Ballard out of the company. When they began to take steps to do so, Mr. Ballard filed suit in July 2008. The operative pleading, the Amended Complaint filed in August 2009, alleged that the defendants had engaged in majority shareholder oppression of the minority, and also sought to require the individual defendants to place in escrow or disgorge the 60,000 shares issued to them by the company, on the ground that they had not provided the services that were the consideration for the shares.

This Court tried the case and on May 4, 2010, entered an Order finding that the defendants had engaged in shareholder oppression of Mr. Ballard and ordering them to buy out his stock at fair value. The 2010 Order provided that the value for Mr. Ballard's stock would be determined at a subsequent hearing. Before that hearing occurred, however, the defendants

²The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease agreement. Lease Agreement, ¶ 1. In effect, therefore, it is a perpetual lease.

appealed, and this Court's 2010 Order was affirmed by the Supreme Court. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The matter was then remanded for the valuation hearing.

In its 2010 Order, the Court also concluded that the individual defendants had not performed the services they had contractually agreed to perform in return for the stock issued to them by the company, and ordered them to place those 60,000 shares in escrow. That holding was affirmed by the Supreme Court as well. Those shares remain in escrow, and the evidence clearly shows that the individual defendants have still not performed the services for which they received 60,000 shares of stock from the company. Thus, the current ownership structure of the company is as follows:

Andy Ballard: 20,000 shares;

Tim Roberson: 40,000 shares, half of which is in escrow;

Rick Thoennes: 20,000 shares, all of which is in escrow;

Rick Thoennes III: 20,000 shares, all of which is in escrow.

In an action such as this one for judicial dissolution, the Court, sitting in equity, has broad powers to "make such order or grant such relief, other than dissolution, as in its discretion is appropriate." S.C. Code Ann. § 33-14-310(d). Such relief expressly includes the Court ordering the majority shareholders to "purchase at their fair value [the] shares of any shareholder." *Id.* In fact, this remedy is often granted where "oppression" and the related grounds for dissolution have been found.

Although the dissolution section of the South Carolina Corporate Code does not define the phrase "fair value", the dissenters' rights section defines "fair value" to mean an equitable value "determined by techniques that are accepted generally in the financial community." S.C. Code Ann. § 33-13-101(3); see Note, *Buyout Remedy for Oppressed Minority Shareholders*, 47

S.C.L. Rev. 195, 223 (1995) (“[I]t seems likely that the definition of fair value [in section 33-13-101(3)] would also be used in dissolution cases.”). The seminal case in South Carolina determining fair value in the dissenters’ rights context is *Santee Oil Co. v. Cox*, 217 S.E.2d 789 (S.C. 1975). In that case, the Court held that “fair value means ‘intrinsic value,’” which the trial court must undertake to compute by determining the “value of the corporate property as an established and going business.” *Id.*, 217 S.E.2d 791 (emphasis added). The Court further held that “the three major factors to be considered are: (1) net asset value; (2) market value; and (3) the earnings or investment value” *Id.* Finally, “[a]fter these various factors have been considered and determined in a given case they should then be weighed as to their relative bearing upon the ultimate question of the fair value of the dissenting stock ... and a final determination of value made.” *Id.* 217 S.E.2d at 792.

The above is the approach that the court-appointed appraiser, Dr. Perry Woodside, utilized in making his calculations. Dr. Woodside determined that the present value³ of the company would be \$7,178,594 if construction of the project had begun in June 2010, when the final needed permit was obtained. The plaintiff presented substantial evidence, including statements made by the defendants themselves to third parties, tending to prove that Dr. Woodside’s valuation is, if anything, on the low side. For example, evidence introduced at the hearing showed that defendants represented to a third party in 2011 that the “current value” of the company’s property was \$6,000,000 “in its present condition.” Pl. Ex. 4(B), p.2. Defendants also repeatedly represented to third parties that the value of the company upon completion of construction would be in the range of \$28 million to \$37 million. Pl. Ex. 4(A) – 4(D). Plaintiff’s

³ More precisely, Dr. Woodside calculated what the present value of the company would have been in December 2012 if construction of the project had begun then, and alternatively what it would be at that time if construction had begun in June 2010.

appraisal expert, Dr. Charles Alford, demonstrated that the present value of a future value of this magnitude is in the range of \$9.3 million to \$12 million.

The courts uniformly recognize that the valuation of shares in a forced buyout of stock in a closely held company is a flexible, context-specific process that should be guided by the overarching goal of reaching a result that is fair to the parties. *See, e.g., Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 124, 522 S.E.2d 357, 365 (Ct. App. 1999) (“Appraisal is not an exact science, and the precise weight to be given to any factor is necessarily a matter of judgment for the court in the light of circumstances in each case.” (citation omitted)); *Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (“Obviously, the ultimate issue is what is fair between the parties in each case.”). Based on all of the evidence presented to the Court, and considering the equities of the case, the Court concludes that, for purposes of S.C. Code section 33-14-310(d), \$7,178,594 is a fair and reasonable estimate of the total economic value of the company and that it is supported by the preponderance of the evidence.

It remains to determine whether to count the defendants’ shares of stock that are held in escrow in determining the fair value of the plaintiff’s ownership interest. Section 33-6-210(e) of the South Carolina Code states that “the corporation must place in escrow shares issued for a contract for future services.” S.C. Code Ann. § 33-6-210(e) (emphasis added). The shares must remain in escrow until “the services are performed ... or the benefits are received.” *Id.* Further, “[a]ny share dividends in respect of the shares escrowed also must be placed in escrow.” *Id.* (emphasis added). If the contract for future services is not completed, the escrowed shares “may be canceled in whole or in part, and the corporation may reclaim the distributions.” *Id.* (emphasis added). South Carolina’s statute differs from the Model Business Corporation Act and the statutes of most other states, which provide that a “corporation may place in escrow shares issued

for a contract for future services." *See, e.g.*, Model Bus. Corp. Act § 6.21(e) (emphasis added); Conn. Gen. Stat. § 33-672(e).

The South Carolina General Assembly's substitution of "must" for "may," and the resulting statutory mandate that shares issued in consideration for future services and any dividends issued thereon be held in escrow, shows that the General Assembly intended to prohibit the value of a shareholder's investment from being unfairly diluted through the issuance of stock to other shareholders in exchange for future services which may be never delivered. As the commentary for Section 33-16-210 notes, "this problem is particularly acute if the persons providing [future] services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors," which is exactly the case here. Furthermore, Section 33-16-210(e) specifically provides that "if the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed and the distributions credited may be canceled in whole or in part and the distributions escrowed may be reclaimed by the corporation."

In light of these provisions of the South Carolina Code, the Court finds that Mr. Ballard's stock ownership should not be diluted by giving the individual defendants the benefit of the escrowed shares in determining the value of the plaintiff's shares. The parties' Stock Purchase Agreement was a binding contract in which the individual defendants committed themselves to provide certain elements of value to the company in exchange for the shares of stock issued to them. As to defendant Roberson, he was to supply the capital necessary to obtain long-term financing for the company; as to the Thoenneses, they were to assist with obtaining long-term financing and carry out the development of the project once the financing had been obtained. It is undisputed that these defendants have failed to carry out those contractual commitments.

They have failed to bring the value to the company that they agreed to provide in exchange for their shares. Accordingly, for purposes of assessing the fair value of Mr. Ballard's stock ownership under section 33-14-310(d), the escrowed shares should not be counted, and plaintiff's ownership percentage should be treated as 50% of the value of the company as a whole. As a result, the fair value of his stock is 50% of \$7,178,594, or \$3,589,297.

The Court finds that 90 days is a fair and reasonable period of time for the defendants to meet the terms of the buyout hereby ordered. While they have requested a lengthy payout period, the Court finds that this would be neither equitable nor practical. The defendants have had over six years now to satisfy their contractual obligations under the Stock Purchase Agreement, and have known for at least three years (since the 2010 Order) that they were facing the possibility of having to buy out the plaintiff. Thus, they have had enough time already to prepare for this moment. Instead of attempting to find ways to squeeze out the founder of the company, if they had merely done what they had agreed to do in the first place, or alternatively marshaled their assets so as to be ready to pay a reasonable buyout price, they would not now be in the predicament they claim to face. He who seeks equity must do equity, and it would be unfair to the plaintiff to allow this 5-year-old dispute to continue to drag on through a lengthy pay-out period.

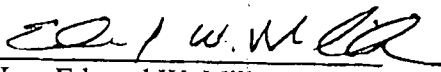
Moreover, after the Court issued its 2010 Order, the plaintiff attempted to proceed with the valuation hearing ordered by the Court. Defendants refused to do so, however, and stated that they would not engage in the valuation until they had exhausted their appeal. They had the right to pursue their appeal, but having done so and lost, they should not be allowed to benefit from further delay, particularly since they have failed to prove that having more time will make any difference. Indeed, given the history of the parties' relations, it is highly likely that allowing

them additional time to buy out Mr. Ballard under a structured payment arrangement, including provisions for interest, security, and remedies on default, will simply end up in further litigation.

Therefore, it is hereby ordered and decreed that defendants pay the plaintiff \$3,589,297 within 90 days of the date of entry of this Order, and judgment in this amount is hereby entered for the plaintiff against the defendants jointly and severally. Upon receipt of such payment, the plaintiff shall relinquish his shares of stock in Warpath Development, Inc., to the defendants, and the judgment shall be satisfied.

It is so ordered.

Dated: 10/2, 2013
Greenville, SC


Hon. Edward W. Miller
Judge, South Carolina Circuit Court

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Paul B. Wickens
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 10/3/13

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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
IN THE COURT OF COMMON PLEAS

SC Court of Appeals

Andrew P. (Andy) Ballard,)
C.A. No. 2008-CP-23-5739

Plaintiff,)
DEFENDANTS' MOTION FOR)
RECONSIDERATION, TO ALTER)
OR AMEND, AND/OR)
FOR A NEW TRIAL/HEARING)

v.)

Tim Roberson, Rick Thoennes, Rick)
Thoennes III, and Warpath Development,)
Inc.,)
)

Defendants hereby move for reconsideration of the Court's Judgment/Order and/or new trial/hearing of the above captioned matter pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure.

The Court's Judgment/Order was signed by Judge Miller on October 2, 2013 and stamped entered by the clerk's office on October 3, 2013. A copy of the Judgment/Order was subsequently received by counsel for Defendants on October 4, 2013. Defendants hereby formally set forth their objections and concerns to the Court's judgment/order.

Specifically, Defendants move on the following grounds:

1. As a matter of law, the court erred in fixing the overall company value of Warpath Development at \$7,178,594.
2. In the alternative, the court's setting of the overall company value of Warpath Development at \$7,178,594 is inequitable and an abuse of discretion.
3. As a matter of law and equity, the court erred, rendered an inequitable result and abused its discretion by finding an overall company value of \$7,178,594 that is built on a fiction that site development and construction began in 2010. This fiction is not based on any actual contractual promise or requirement, management's business judgment to not begin construction in 2010 or the reasons construction did not begin in 2010 was not properly

before the court, and, assuming the issue was properly before the court, there was no evidence presented to cause the court to properly set aside or look beyond management's business judgment. Including the fiction that construction should have begun in 2010 without any basis in fact, equity or law in order to increase the overall company value in 2012 is error and an arbitrary, inequitable and unjustified finding by the court.

4. As a matter of law, the court erred in fixing the value of Andy Ballard's 20,000 shares in the company at \$3,589,297 or 50% of the company value.
5. In the alternative, the court's fixing of the value of Andy Ballard's shares at \$3,589,297 or 50% of the company value is inequitable and an abuse of discretion.
6. The court erred as a matter of law in forfeiting the 60,000 shares of Roberson, Thoennes and Thoennes III in its finding of value.
7. In the alternative, the court's forfeiture of the 60,000 shares of Roberson, Thoennes and Thoennes, III is inequitable and an abuse of discretion.
8. As a matter of law, the court erred in considering any and all arguments that the 60,000 shares of Roberson, Thoennes and Thoennes, III should be forfeited or not considered in the valuation because, by Plaintiff's own admission in brief, the issue is moot.
9. As a matter of law or equity, the court erred in considering Plaintiff's assertion that the court should not consider or forfeit the 60,000 shares of Roberson, Thoennes and Thoennes, III in reaching the valuation of his 20,000 because by Plaintiff's own arguments and repeated admissions of counsel before this court, Plaintiff is judicially estopped from making such assertions. In considering Plaintiff's assertion, the court has erred as a matter of law, rendered an inequitable result and has abused its discretion.
10. The court's order is inequitable and/or an abuse of discretion in that in fixing the overall value the court assumed that the Defendants had met all conditions precedent to receiving the full value of the escrowed shares, but, in fixing the value of Plaintiff's 20,000 shares the court forfeited the escrowed shares. It is inequitable for the Plaintiff to on one hand receive the value of the services to be rendered in fixing the overall company value, but in the same expression ignore that those values had been received in fixing the value of his individual shares.
11. As a matter of law, the court erred in displacing the business judgment of Warpath's management without proper notice, evidence or sufficient legal basis.
12. As a matter of law, Defendants' due process rights were violated by the court improperly and without sufficient notice displacing the business judgment of Warpath's management.

13. As a matter of law, Defendants' constitutional rights to a jury trial were violated as they are entitled to a jury trial on the issue of whether or not Warpath's management's business judgment is subject to being displaced.
14. In the alternative, as a matter of law, even if Warpath's management's business judgment was properly before the court, the court erred because Plaintiff failed to meet its burden by failing to present any evidence that management's decisions were in violation of any contractual obligation or that management's business judgment accorded under South Carolina law should be set aside or looked beyond in the consideration of value.
15. As a matter of law and equity, South Carolina law provides that the valuation of Plaintiff's shares should be fixed as is, where is. The Court's valuation fails to meet that standard. As such, the court's valuation is in error as a matter of law, inequitable and an abuse of discretion.
16. As a matter of law and equity, the court's order of a buyout within 90 days is an error of law as based on the evidence the remedy fails of its essential purpose and is inequitable and an abuse of discretion.
17. Based on the evidence before the court, the court's order of buyout within 90 days is inequitable and an abuse of discretion.
18. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result, and abused its discretion in arbitrarily fixing the buyout to occur within 90 days of the order.
19. The court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to cause the further examination of Defendants financial ability prior to structuring the arbitrary buyout within 90 days.
20. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in ordering a buyout remedy that the court had full knowledge would fail.
21. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in ordering a buyout remedy that the court had full knowledge would result in a forfeiture.
22. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to fix a remedy in the alternative to the ordered buyout within in 90 days of the court's order.
23. If as the court's order states, despite all of the evidence before the court indicating that a 90 day buy out cannot be achieved, the court does not wish to order an extended buyout,

the court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to default to the statutory remedy of dissolution.

24. As a matter of law or equity, the court's order unfairly misrepresents, misstates and/or mischaracterizes the testimony and evidence presented.

In support of this motion, Defendants rely upon the record at trial, a memorandum of law and exhibits to follow, and such oral argument as the Court may permit.

Respectfully submitted,

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October 11, 2013
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