New Jersey Law Journal

VOL. 213 - NO 10 SEPTEMBER 2, 2013 ESTABLISHED 1878

IN PRACTICE

BUSINESS ENTITIES

Affording Remedies to Minority Shareholders, Without Finding Oppression

The hands of chancery judges are no longer tied

By Dennis Smith

Many businesses are family-owned corporations in which ownership percentages are split among relatives. When intrafamily disputes arise about issues either inside or outside the business, it can threaten the orderly operation of the business and lead to a majority of family members ganging up against one shareholder — usually referred to as the minority shareholder (a person who owns 50 percent or less of the corporation).

Generally, if the minority shareholder believes that the majority shareholder(s) have acted oppressively or unfairly toward him, he may bring an oppressed shareholder action under the New Jersey Business Corporation Act, N.J.S.A. 14A:12-7(1)(c) — a.k.a. the "Oppressed Minority Shareholder Statute" — seeking, among other things, a buyout of his stock interest by the majority.

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What happens if the family members create an intolerable working environment for the minority shareholder, resulting in his voluntary exit from the company, but a court determines that the conduct does not rise to the level of oppression? Up until last week, the minority shareholders would be out of a job and own unmarketable shares in a corporation for which he cannot force a buyout.

Sipko v. Koger, Inc., No. 068417 (N.J. 2013), corrected this inequitable result, clarifying our state's oppressed shareholder jurisprudence and providing needed guidance to our chancery courts and bar on the question of the proofs necessary to trigger the availability of the panoply of remedies under the Oppressed Minority Shareholder Statute. *Sipko* involved a bitter dispute that divided a family and its successful multimillion-dollar software-development business. Plaintiff Robert Sipko became estranged from his father (George) and brother (Ras) over the choice of a woman he was dating (and later married). Their displeasure in his choice lead to an intolerable working environment, and ultimately Robert was forced to resign. At the time of Robert's resignation, all three were shareholders in a family-run business. Because the trial and appellate courts determined that George and Ras' conduct toward Robert did not rise to the level of oppression, as contemplated by the Oppressed Minority Shareholder Statute, he was unable to force a buyout of his shares, which left him out of a job and without a remedy. The Supreme Court corrected this injustice, holding that "a minority shareholder's failure to demonstrate conduct that rises to the level of oppression does not necessarily deprive him of a remedy." The court observed: "Although the determination of the trial court and the Appellate Division that Robert is not an Oppressed Shareholder within the meaning of N.J.S.A. 14A:12-7(1)(c) remains in effect, other remedies may be available in this case."

The *Sipko* court noted that because illegality, fraud, mismanagement or abusive authority may frustrate a shareholder's reasonable expectations for a company, but nonetheless, not qualify as oppression, such conduct may be actionable under the statute, even if the minority shareholder is not deemed to be oppressed. Citing to *Brenner v. Berkowitz*, 134 N.J. 488, 506-508 (1993). the *Sipko* court held:

> The [*Brenner*] court emphasized that N.J.S.A. 14A:12-7(1)(c) does not limit the equitable power of the courts to fashion remedies appropriate

> to an individual case. It commented that "the enactment of N.J.S.A. 14A:12-7 was not intended to supersede the inherent, common law power of the Chancery Division to achieve equity." The Court also enumerated a broad range of remedies available to courts adjudicating disputes over closely held corporations, including an accounting. One or more of these remedies may be appropriate to the party's dispute about Robert's interest in [the corporate entities]. (Internal citations omitted.)

In remanding the matter to the trial court to determine an appropriate remedy, the *Sipko* court expressly stated that: "Consistent with N.J.S.A. 14A:12-7(1)(c) and the principles stated in *Brenner*, the trial court has broad discretion to consider such statutory and equitable remedies as may be appropriate to this setting, including but not limited to an accounting of the income and expenditures of [the corporate entities]."

In so holding, the *Sipko* court made clear that the Oppressed Minority Shareholder Statute does not limit the equitable power of the court to fashion remedies appropriate to an individual case, inclusive of a forced buyout remedy, and chancery court judges have a broad range of remedies available to them when adjudicating disputes over closely-held corporations. The opinion makes clear that even in the absence of oppression, all of the remedies available under the statute may be implemented by the chancery court in order to ensure a just result under the circumstances of each particular case.

Notably, an unpublished decision in *Venturini v. Steve's Steakhouse*, 2006 WL 445059 (Ch. Div. Feb. 17, 2006), foreshadowed the *Sipko* court's holding that remedies available under the Oppressed Minority Shareholder Statute are available to chancery court judges, even in the absence of oppression. In *Venturini*, two nephews, each of whom owned 25 percent of a corporation that operated a steakhouse, filed a complaint against their aunt (owner of the other 50 percent) that alleged oppression and breach of fiduciary duty, and sought dissolution of the corporation. The nephews claimed that the aunt's termination of their employment and other actions constituted oppression. The court disagreed, holding that the aunt's conduct did not rise to the level of oppression as contemplated by the statute. As far as an appropriate remedy was concerned, the court would not dissolve the corporation, as it remained a viable entity, but recognizing that there had been "an irretrievable breakdown in the relationship of the shareholders," the court deemed the sale of stock to be the fairest remedy. The *Venturini,* court noted that: "The Chancery court, as a court of equity, has the power of devising and shaping the result in order to fit the circumstances of the case and the complexities involved." Consequently, "[e]ven absent a statutory violation, courts of equity appear to have the power to mandate a buyout … [and] [w]e have no doubt … that the enactment of N.J.S.A.14A:12-7 was not intended to supersede the inherent common law power of the Chancery Division to achieve equity." Ultimately, the court valued the nephews' shares and the aunt was ordered to buy them out.

Prior to *Sipko*, the *Venturini* court's holding of ordering a buyout in the absence of oppression had been questioned by the lower courts. The *Sipko* decision leaves no doubt that the *Venturini* court's interpretation of its equitable powers and application of the remedies available under the Oppressed Minority Shareholder Statute was appropriate.

In sum, the takeaway from the *Sipko* decision is that chancery court judges have authority to formulate remedies for minority shareholders who can no longer coexist with the majority but cannot prove oppression. No longer will chancery judges believe that their "hands are tied" and that absent a finding of oppression they are without authority to provide appropriate relief. The shackles have been removed.

Note: As of the date of publication, *Sipko v. Koger, Inc.*, is still pending. The author of this article, Dennis Smith, is one of the attorneys handling this matter. ■