SUPERIOR COURT OF NEW JERSEY

MARGARET MARY MCVEIGH, P.J. CH

COURTHOUSE
PATERSON, NEW JERSEY 07505-2018

April 13, 2007

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RE: Seidman v. Spencer Savings Bank
Docket No.: C-190-04

Counsel:

In August of 2004, Lawrence Seidman brought allegations concerning Spencer Savings and Loan to this Court by way of a Verified Complaint and Order to Show Cause, seeking a declaration that the bank had 1) breached its fiduciary duty to its members by adopting by- law amendment 31; 2) a declaration that the bank breached its fiduciary duty by engaging a corporate waste relating to the compensation of the Boards President and Chief Executive Officer and a Board retreat in Spain; 3) a request for counsel fees and costs. Mr. Seidman requested the Court schedule the defendant's 2005 annual meeting, and in fact supervise that meeting.

The Court on the return date of the Order to Show Cause denied the restraints and the injunctive relief. The court also denied defendants' request to dismiss the Complaint. The defendant Spencer Savings and Loan challenged this Court's jurisdiction to address the issues surrounding the by law amendment. Further, defendants alleged that Seidman failed to comply with R. 4:32-3, which requires in a derivative action, a member must state a claim for which relief can be granted with specificity.

The plaintiff and defendant each appealed this Court's decision for different reasons. I an opinion dated March 23, 2006, the Appellate Division affirmed the Trial Court's decision setting the stage for discovery and the trial that commenced in this matter on January 22, 2007.

Plaintiff has abandoned their excess compensation claim against CEO Jose B. Guerrero, but asks this Court to find that the bank and its Board of Directors breached their fiduciary duty to their membership by the amendment of by- law 31 increasing the percentage of members necessary on a petition to nominate from 10% to 20%; that the director breached their fiduciary duty and committed waste in the bank paying for the Corporate Retreat in Spain; and lastly seek the individual directors repay the bank for those Spain expenses and plaintiff's attorney fees.

The defendants' challenge to Seidman's ability to bring this derivative action also has survived for resolution by the Court.

This Court took testimony over the course of two (2) days. The Court heard from plaintiff Mr. Seidman, as well as from members of the Spencer Savings and Loan Board of Directors. The facts in this matter are really not in dispute as demonstrated by that testimony. The dispute arises from the perception of the plaintiff that Spencer Savings and Loan is governed and managed by an entrenched establishment, fostered by Mr. Guerrero and supported by his fellow members of the Board of Directors and the competing perception by the Spencer Savings and Loan Board of Directors that they govern and manage a contented institution. The institution as seen by the Board sees, values a quiet community environment, with no challenges to the Board of Directors and their policies and no desire to move their little bank away from its status as a Mutual Savings and Loan to become an institution identified by stock ownership and shareholder involvement.

Spencer Savings and Loan is a mutual bank governed by N.J.S.A. 17:12b et seq. It is an institution owned by its depositors, however they have no enfranchised right to participate in the management or operation. Mr. Seidman unabashedly admits that he is an investor in bank stocks. He invests his own funds as well as the funds that others invest with him and trust him to manage. In 1990, he became a depositor in Spencer Savings and Loan. At that time he had a conversation with some of the Directors about the bank's future. He continued to be interested in the bank's affairs.

Again, in 2004 Mr. Seidman had a discussion with Mr. Bedrin when he learned he had become a Director. He expressed concern because he learned about the Directors' trip to Spain. Mr. Seidman felt it was an abuse of their positions to "take a vacation camouflaged as a meeting." He asked about Mr. Guerrero's compensation (one million dollars) and when the bank was going public. He then sent correspondence to the Savings and Loan about these issues asking for justification for those expenses. When Mr. Seidman received no response, he had a telephone conference with Mr. Guerrero. Mr. Seidman told this Court that Mr.Guerrero gave him no answer other than the bank would probably go public in 16-18 months.

Mr. Seidman decided that the only way to address this was to seek a nomination to the Board from the depositors as the Board would not consider him as a candidate. He initially believed this nomination would take 10% of those depositors signing his petition pursuant to his old copy of the by- laws. However, he subsequently learned that there had been a recent amendment to the by- laws increasing the percentage necessary to 20%.

Mr. Seidman testified that for the 23 years that he has been involved in the banking industry and the 30 contests to the Board of Directors that he had been involved with he has never seen a procedure like the one at Spencer Savings and Loan. The Board of Directors refused to send out his petition for nomination with his reasons for seeking nominations.[1]

Mr. Seidman candidly admits his desire to see Spencer Savings and Loan become a public company and has had conversation with various people about that issue. He sees no harm in that interest. He sees no harm in individuals or companies becoming depositors in Spencer Savings and Loan with a view toward long term investment successes. This process of investing in a bank by becoming a depositor is reasonable and puts him in no better or worse position than any other depositor in the Savings and Loan if and when it did go public.

Mr. Seidman testified his desire to go on the Board was motivated by director abuse of their roles (travel, excess compensation) and was shocked at the process for gaining a nomination to Directors to the Board. He testified that statutorily, the Savings and Loan would be responsible for sending out any information about an individual seeking nomination. While it would be the responsibility of the Savings and Loan to perform the meeting it would be the cost of the person seeking the position.

This Court heard from various members of the Board of Directors of Spencer Savings and Loan. Mildred Damiano, Joseph D'Autorio and Nicholas LoRusso have been members of the Board of Directors for an extensive period of time. Ms. Damiano came on in 1992, Mr. D'Autorio in 1993 and Mr. LoRusso in 1984. Ms. Damiano did not take the trip to Spain with the other Directors but did in fact vote for the amendment to increase the percentage of signatures necessary for nomination to the Board. Her testimony was that in all the time she has been on the Board no one had ever been nominated from the general community and that all nominations came from the Board. She was a believer that in fact 20% was not enough and it should be a 2/3 vote that would be required to gain a nomination to the Board. A rather feisty individual, Ms. Damiano was at the heart of the deadlock that resulted in the Office of Thrift Supervision appointing or requiring Spencer to appoint three new directors. At the time she and a number of other directors object to the way Mr. Guerrero was managing the bank. Mr. D' Autorio came onto the Board in 1993 on an interim basis and remained on the Board

[1] Those issues were addressed by the Commissioner of Banking.

until 2006. He also indicated that the deadlock with regards to the Board was as a result of Mr. Guerrero's role and how the bank was being managed. He provided this Court with insight that there was a clear dissatisfaction with Mr. Guerrero's management style. Mr. LoRusso who interestingly enough was responsible for both Ms. Damiano and Mr. D'Autorio joining the Board of Directors for Spencer was a business associate of Mr. Guerrero's. Mr. LoRusso and Mr. Guerrero had business associations outside of their Board of Directors positions. All of this information was disclosed to the regulators and no dispute was found with regard to that issue. Mr. LoRusso provided this Court with some insight on trips taken by the Board of Directors for retreat type events in the past indicating that the Spain trip was not the first time the Board of Directors had taken a trip outside the continental United States, paid for by Spencer Savings and Loan.

Mr. D'Autorio is one of the Board of Directors who testified he did not vote for the amendment to increase the percentage necessary for nomination to the Board. He testified that the Board was not given any information as to why 20% was necessary nor how many depositors would compromise 20%. The amendment appeared to be directed against unwelcome Directors – those individuals who did not have the bank's best interest at heart but were seeking their own personal advantage.

The testimony of the various Directors made it very clear to this Court that there was a concern there were individuals who had positions as depositors who might want to push the bank in a different direction. Mr. LoRusso knew a great deal about the plaintiff Mr. Seidman as a result of attendance at various meetings. He described him as an individual who opened accounts in many banks looking to convert them to a public stock. Mr. LoRusso also echoed the sentiments of the other Directors that the trip to Spain was a good thing for the Board of Directors because it gave them an opportunity to get to know the "three new kids" that were being added to the Board. Although they had an opportunity to interact at various board meetings the ability to actually know the individuals in a setting different from a board meeting was important to those who testified before this Court.

Gerald M. Bedrin was one of the Directors who came on to the Board in 2002 as a result of the recommendations of the Office of Thrift Supervision.

Some of the most important testimony in this case however, came from Raymond Baumkirschner. Mr. Baumkirschner is an individual with extensive experience in the financial world. His 30 years working in the financial world and various public corporations was a fresh view on the situation that existed and exists at Spencer Savings and Loan. It can best be described as rather parochial. He was very aware that he came on to this Board to break up a dead lock. His initial view was that there was just too much emotion and not enough business perspective with the Board. Mr. Baumkirschner felt the bank was well capitalized but one of the things that was necessary for this bank

was a succession plan and an upgrade of management. He recognized Mr. Guerrero was a flash point among the various members of the Board. He had been told he was terrible to work with and strong willed but he had been in the role for an extended period of time. He and Mr. Guerrero had a discussion about what to do to introduce everyone and develop a plan for not only the Board but for the Bank Management. Mr. Guerrero mentioned the idea of a retreat. Previously there had been a retreat out of the country. Mr. Baumkirschner felt this was an excellent idea as it would give an opportunity to see how everyone worked with each other and how they could get along and it inspired creativity. Although it was an expense, it provided distance from the environment that was causing problems. Mr. Baumkirschner felt it gave him a better opportunity to move forward in his role because he was more comfortable not only with the directors but with the bank managers. He advised the Court that while he realized there may have been cheaper places to go on retreat that this type of a retreat had the ability to eliminate cell phone interruptions (not many people had international service) and took everyone out of their normal environment.

Mr. Baumkirschner was also one of the individuals who opposed the increase in the percentage of signatures necessary for a nomination for the Board of Directors. While the minutes (he discovered) indicate that he abstained, his testimony was that this was inaccurate as he voted against it. This amendment was part of a package that you were required to vote in favor of all or vote against all. This was an inappropriate way to conduct a vote. Additionally, there was no basis given that would explain the need to increase the number of individuals necessary to vote.

This Court then heard from Mr. Guerrero who may have without realizing ~~it~~ become the focal point of the dispute in this matter. Mr. Guerero in essence, has grown up with Spencer Savings and Loan. He joined the bank in 1979 and worked his way up through the ranks. It is clear from his testimony that he is committed to Spencer Savings and Loan. Mr. Guerrero did not attempt to keep from this Court the intent of the amendment to By- Law 31. Mr. Guerrero testified very clearly and without regret that the amendment was his idea and that he did it to protect "his Savings and Loan from investors who want to rape my bank – take it public, convert and sell." He provided no other basis for the purpose of the amendment other than to block applications from the those type of investors. His testimony was consistent. He knew who Mr. Seidman was there had been attempted interaction between Mr. Seidman and himself with regard to what was going on at Spencer Savings and Loan, and that he was uncomfortable with Mr. Seidman's interest in the bank's management. The testimony was not clear on the specifics of those discussions but the Court has inferred that he believed Mr. Seidman wanted to merge Spencer Savings and Loan with Interchange Bank.

The amendment to By-Law 31 was just part of a regular review of the by-laws performed by Mr. Guerrero with corporation counsel, the Board as well as other managers. This was an opportunity to take the action necessary to protect the bank's

interest. Mr. Guerrero however, could not provide this Court with a rationale basis as to why the 20% figure was necessary when the bank already had in place a 10% signature requirement. The only reason he provided the Court was "... more was better.

Mr. Guerrero saw Mr. Seidman and his consulting group as a threat to the institution. While he reviewed many of the documents that were marked into evidence, Mr. Guerrero could not provide any specific information he gathered from any particular document or set of documents. "I am not a student of details" is how Mr. Guerrero classified himself. His lack of knowledge of details was even more apparent in his testimony about Spencers' depositor. He had no idea how many accounts and/or depositors there were at Spencer Savings Loan nor did he have any idea how that calculation could be accomplished. Even with this Court giving the defendant the opportunity to supplement the record with Mr. Guerrero's certification, this Court is still not satisfied that Spencer Savings and Loan has any idea how many depositors it would take to comprise 20% of those depositors in order for an individual to gain a nomination for the Board of Directors.

This Court has canvassed the testimony of the witnesses who were present in Court, those deposition portions submitted by various counsel and the exhibits marked by both plaintiff and defendant as evidence. Both plaintiff and defendants submitted written summations to this Court and this Court is satisfied it has a complete and full record in order to make a decision in this matter.

Initially, this Court will address the defendants' position that Mr. Seidman lacks standing and fails as a representative member of the class depositors. The defendants allege Mr. Seidman has failed to meet his burden pursuant to R. 4:32-3 to specify the nature of his derivative claims or that he even had the right to bring this as a derivative action.

"The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." R. 4:32-3. This Court is satisfied that Mr. Seidman both in his initial pleadings and in the proofs that were presented on plaintiff's case established the two claims that were the focus of this trial i.e., waste involved in the Spain retreat and breach of fiduciary duty by depositor disenfranchisement are in fact actions that are subject to a derivative claim. In Strasenburgh v. Straubenmuller, the Supreme Court has established that wrong committed by a fiduciary become a wrong against all individuals with an interest in the institution. Strasenburgh v. Straubenmuller, 146 N.J. 527, 551-53 (1996). While the Strasenburgh case dealt with the rights of shareholders, it is clear that the idea of fiduciary responsibilities and the derivative right of any one member to that institution has the right to bring this action. The allegations raised by Mr. Seidman with regard to

waste and member disfranchisement are the types of issues that our court has consistently recognized as being derivative. See e.g. In re PSE & G Shareholder Litigation, 173 N.J. 258, 281 (2002) (finding that "[o]ne recognized infringement on director autonomy is the shareholder derivative action. As the name implies, '[a] shareholder derivative action permits a shareholder to bring suit against wrongdoers on behalf of the corporation, and it forces those wrongdoers to compensate the corporation for the injury they have caused'").

One of the most troubling bits of testimony this Court heard concerned the rapidly declining member participation at annual meetings and votes. All of the directors testified to the declining attendance at those annual meetings and the declining participation in actions the Savings and Loan took. What the Board of Directors sees as contentment, this Court sees as apathy and Mr. Seidman sees as entrenchment.

Based upon all of the above this Court is denying the defendants' claim for dismissal of the action on the basis of failure to state a derivative claim.

With regard to Mr. Seidman's issue that the corporate retreat to Spain and those expenses in excess of $90,000.00, this Court is unable to find or to classify that retreat as corporate waste. "Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration. If reasonable, informed minds might disagree on the question, then in order to preserve the wide domain over which knowledgeable business judgment may safely act, a reviewing court will not attempt to itself evaluate the wisdom of the bargain or the adequacy of the consideration." Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. Div. 1993). The deposition transcript and the testimony presented to this Court establish a reasonable basis for the directors' decision to even involve themselves in a retreat and even more so to do it in a fashion that they felt would be helpful to them. This may not have been a location that the Court would have chosen for a directors' retreat for a local Passaic County Savings and Loan, but it is not appropriate for this Court to substitute its judgment for that of an experienced Board of Directors. There has been no proof presented to this Court that a retreat at a resort anywhere in the United States or a conference center anywhere in the United States would necessarily have been less expensive or more productive in reaching the set goal of a evaluating corporate management, getting to know new members of the Board of Directors and providing an atmosphere to operate the bank going forward. Plaintiff has failed to meet its burden to establish for the Court at the time of trial that this trip constituted waste and was not based on good faith principles. However, throughout this litigation that expenditure and that trip was suspect to this Court. While this Court cannot sustain a finding of waste from the evidence presented to it, the Court does find that it was unwise.

The final issue before this Court is the allegation that the amendment to the by-law to increase the required percentage of signatures to gain nomination to the Board of Directors to 20% constituted entrenchment and breach of fiduciary duty. It has been established that "a board may take certain steps . . . that have the effect of defeating a threatened change in corporate control, when those steps are taken advisedly, in good faith pursuit of a corporate interest, and are reasonable in relation to a threat to legitimate corporate interests posed by the proposed change in control." Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. Div. 1988). Here, the facts on the issue are simply not in dispute. With the exception of Mr. Guerrero there was not a single member of the Board who was 100% clear as to the reason or the necessity for the increase in this percentage of signatures. Ms. Damiano testified that there had never been an attempt by anyone to nominate someone to the Board if the Board Directors themselves had not nominated the person for Directorship. Mr. D'Autorio, Mr. Bedrin and Mr. Baumkirschner had no idea why there was a need to increase the percentage from 10 to 20%. In fact Mr. D'Autorio and Mr. Baumkirschner both testified that they lacked sufficient information on this issue to vote in favor of it. Mr. D'Autorio, when he testified finally admitted that he was told that the reason the amendment was being proposed was to keep unwelcome outsiders off the Board of Directors. Mr. Guerrero was very direct that the amendment was drafted in order to block any attempt on the behalf of Mr. Seidman to gain a seat on the Board of Directors.

Most troubling to this Court was the testimony from each and every Director that there was no idea of how many votes would comprise the 20% because there had never been a calculation as to how many depositors (not accounts but depositors) there were at the bank. As a result of the Court's questions about the number of depositors and the defendants' inability to calculate the numbers necessary, Mr. Guerrero subsequently had to prepare a certification to advise the Court there were mechanisms through the banks computer system to calculate the number of depositors.

This amendment bears absolutely no rationale relationship to any of the issues involving bank governance or operation. While it is touted as a way to keep out un-welcomed wealthy outsiders, this amendment has a deleterious affect on the efforts of the common, every day depositor to gain a seat for themselves on the Board of Directors if they are unknown to the current nominating committee. Whether it was 10% or 20% of the depositors to gain a nomination, investors such as Lawrence Seidman would not hesitate to seek seats on the Board. It would be a business decision for them. Investors at that level had access to whatever funds or resources are necessary to mount a challenge. There was absolutely no consideration given to how an amendment of this type would impact the regular depositor looking for an opportunity to serve on the Board. Faced with the task of soliciting anywhere from 6 to 6,000 depositors is an intimidating prospect for a homeowner or small business person looking to become involved in the governance of this mutual company.

This Court finds that the Board has breached their fiduciary duty to their depositors in their paternalistic attempt to keep "outside investors" from gaining participation on the Board of Directors in order to maintain their own positions. Whether one approves or disapproves of Mr. Seidman and his investment strategies the Board's attempt to shut down discourse by erecting an insurmountable barrier to those not part of the inner circle, is short sighted and improper. See Durkin vs. National Bank of Olyphent, 772 F2d 55, 61 (3rd Cir. 1985) (reasoning "[a] national bank may not enact and apply by-law amendments in a manner that eviscerates 12 U.S.C.S. § 61 nominating rights and then escape the consequences of its actions simply because the nominating shareholder declines to undertake the dubious task of recruiting a qualified and willing nominee on unreasonably short notice, or to perform the empty exercise of naming a candidate for whom there is no time to garner support"). This Court recognizes the case law focus' on shareholder rights, but the analogous fiduciary responsibility to members must apply here.

Spencer Savings and Loan's Board of Directors, with its By-Law committee , and corporate counsel shall revisit By- Law 31, examine their need to amend the 10% requirement previously in place and set forth reasons for any changes recommended or passed.

This Court has within its discretion the right to grant or allocate the costs of attorneys' fees when breach of fiduciary duty is found. Pursuant to R. 4:42-9, it is within the authority of the Court to award attorneys' fees in various actions. "The court in its discretion may make an allowance out of [a fund] in court, but no allowance shall be made as to issues triable of right by a jury." Id. The New Jersey Courts have held that "the allowance or disallowance [of attorneys' fees] is within the sound discretion of the trial judge in light of the surrounding circumstances." Zyck v. Hartford Insurance Group, 150 N.J. Super. 431, 435 (App. Div. 1977). "Fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). In the case at hand, Mr. Seidman chose to shake up the contented or the entrenched, on behalf of the depositing member. It now up to the depositors and regulators to determine the course Spencer Savings and Loan will take. The cost of all of this litigation to all parties will each parties individual responsibility.

Very truly yours,

Margaret Mary McVeigh, P.J.Ch.

MMM:rlg

FILED

APR 13 2007

Margaret Mary McVeigh, P.J.Ch.

PREPARED BY THE COURT:

LAWRENCE B. SEIDMAN

Plaintiff,

vs

SPENCER SAVINGS BANK, S.L.A.
RAYMOND BAUMKIRCHNER, GERALD M. BEDRIN, JOSEPH C. AUTORIO, MILDRED P. DAMIANO, JOSE B. GUERRERO, PETER J. HAYES, EVERETT E. KUNKEL, NICHOLAS LORUSSO AND ROBERT MOTTA,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PASSAIC COUNTY
DOCKET NO.: C190-04

ORDER

This matter having been brought before this Court for Trial, Peter R. Bray, Esq. appearing on behalf of the plaintiff, and Richard A. Beran, Esq., appearing on behalf of the defendant, the Court having considered pleadings filed by all parties, documents introduced as evidence, and the Court having heard all relevant testimony, and for the reasons set forth in this Courts Opinion of April 13, 2007,

IT IS ON THIS 13 DAY OF April, 2007; HEREBY

ORDERED;

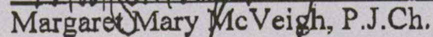
The plaintiff's request for a finding of breach of Fiduciary Duty by Defendant Board of Directors and or individual members of the Board on the basis of Corporate Waste is DENIED; it is further

ORDERED The plaintiff's request for a finding of breach of Fiduciary Duty by Defendant Board of Directors on the basis of member disenfranchisement is GRANTED; it is further

ORDERED Defendant Board of Directors together with Corporate counsel shall revisit By Law 31, examine the need to amend the 10% requirement previously in place and set forth reasons for any changes recommended or passed; it is further

ORDERED Plaintiff's request for Counsel Fees and Costs are hereby DENIED said costs are the responsibility of the parties individually.

A copy of this Order is to be served upon counsel within 7 days of the date of this Order.



Margaret Mary McVeigh, P.J.Ch.