STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 1, 2013)

ANDREW JENKINS; JEFFREY JENKINS, JR.	:	
Plaintiffs,	:	**C.A. No. PB 12-0915**
v.	:	
ESTATE OF JEFFREY B. JENKINS, SR.; KRISTIN A. LOUNSBURY JENKINS; and LEONARD'S ANTIQUES, INC.	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Plaintiffs Andrew Jenkins (Andrew) and Jeffrey Jenkins, Jr. (Jeffrey) (collectively, Plaintiffs) have filed this suit against the Estate of Jeffrey B. Jenkins, Sr. (Jenkins, Sr.), their father's estate, Kristin A. Lounsbury Jenkins (Kristin), their father's wife, and Leonard's Antiques, Inc. (Leonard's), the family business (collectively, Defendants). Before the Court are Plaintiffs' and Defendants' cross motions for summary judgment. The Plaintiffs and Defendants dispute shareholder ownership of the company as well as membership of the Board of Directors.

I

Facts & Travel

Leonard's is a corporation organized under the laws of the Commonwealth of Massachusetts, engaged in the business of selling antiques. At issue is which parties are the

current shareholders and directors of this close corporation.[1] The corporation was originally founded in 1933 by Lester and Hazel Leonard. In 1988, Leonard's was purchased by Jenkins, Sr. from his father Bob Jenkins. Jenkins, Sr. divorced the mother of Andrew, Jeffrey, and Aaron Jenkins (Aaron)[2] (referred to collectively as the Jenkins Brothers) in 1996. Jenkins, Sr. later married Kristin (a former employee of Leonard's) and had two daughters, Victoria and Violet, with her. Jenkins, Sr. passed away on December 20, 2011.

Between the time of Jenkins, Sr.'s divorce and his death, Leonard's experienced various successes and failures and changes to corporate structure. Until 2007, Jenkins, Sr. was the sole shareholder of Leonard's. Experiencing great financial success at the time, Jenkins, Sr. found it prudent to establish an Estate Plan which would facilitate the transfer of Leonard's to the Jenkins Brothers. On March 14, 2007, Jenkins, Sr., the Jenkins Brothers, and Leonard's entered into a stockholders' agreement (the Agreement). To effectuate the Agreement, Leonard's adopted a Plan of Recapitalization. The Plan of Recapitalization provided for the issuance of one voting share to each of the Jenkins Brothers, while Jenkins, Sr. would retain the other 997 voting shares. The stated purpose was:

> "The Plan of Recapitalization is deemed necessary for both the future growth and stability of the Corporation. The shareholders of the Corporation would like to arrange for greater flexibility in the management and capital structure of the Corporation. The current shareholders may desire over time to relinquish control while retaining a strong financial interest for the immediate future. After approval and implementation of this Plan of Recapitalization, the shareholders will have greater options for the transfer of their stock, thus benefiting the shareholders and the Corporation. It is expected that the shareholders will gradually transfer stock so that

[1] A close corporation in Massachusetts is "typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 511 (Mass. 1975).

[2] Aaron is not a party to this action.

> a new generation of owners and managers will have ownership and responsibility at the retirement or death of the current owner. As stated, this plan will facilitate the transfer of management and ownership without conflict and will assure future development of the Corporation."

Lastly, on the same day the Agreement was entered into, each of the Jenkins Brothers was elected to the Board of Directors of Leonard's, along with Jenkins, Sr.

The Agreement contained several provisions with respect to the transfer of stock under different scenarios. Two scenarios specifically accounted for were: (1) the transfer after a shareholder's death and (2) the right of Leonard's to call the stock of shareholders. Pursuant to § 1.3 of the Agreement, Leonard's was entitled to call the stock of any shareholder when the interest of Leonard's and its stockholders would be best served by such a call. Section 1.6 governs the transfer of stock after the death of a stockholder and allows Leonard's to purchase the stock within sixty days of the death, or if Leonard's does not timely exercise its right to purchase, then the remaining shareholders must agree to buy the stock within thirty days thereafter. Under either scenario, the purchase price of the stock is governed by § 2, which sets forth that the "Agreement Price" shall be the fair market value "as determined by the independent certified public accountant ('CPA') regularly employed by LEONARDS . . . ."

Leonard's experienced financial hardships shortly after this Agreement was executed. From March 2007 to November 2011, the Jenkins Brothers, Kristin, and Jenkins, Sr. all worked at Leonard's in some capacity. In each year, starting with 2008, Leonard's suffered losses. In July 2010, Citizen's Bank called its loans to Leonard's of over $2 million. Leonard's obtained replacement financing from Mechanics Cooperative Bank (Mechanics). Pledged as security for the loan from Mechanics were Jenkins, Sr. personal residence, the Jenkins Realty Trust (a trust established by Jenkins, Sr. that held the real estate where Leonard's is located), and assets and

receivables from Leonard's. Additionally, Jenkins, Sr. personally guaranteed the loan, and Mechanics required the assignment of Jenkins, Sr.'s life insurance death benefit.

In December 2010, Jenkins, Sr. amended his Living Trust, so as to substitute Kristin, Victoria, and Violet as beneficiaries in place of the Jenkins Brothers who were the former beneficiaries. Shortly after this, Jenkins, Sr. began asking the Jenkins Brothers to return their stock to Leonard's. The Jenkins Brothers refused to sign over their shares to Leonard's and maintained both their shares and their roles on the Board of Directors.

On November 2, 2011, counsel for Leonard's sent Jenkins, Sr. and the Jenkins Brothers a Notice of Special Meeting of Shareholders. The meeting was to be held on November 17, 2011, and the purpose was: "[t]o remove Aaron J. B. Jenkins, Andrew R. Jenkins and Jeffrey B. Jenkins, Jr., as Directors of the Corporation, effective immediately [and] [t]o appoint Kristin A. Lounsbury Jenkins a Director of the Corporation." On November 17, 2011, Jenkins, Sr., Kristin, Andrew, and Aaron were present at the meeting. It is disputed by the parties what actually occurred at this meeting and the purported subsequent Board of Directors meeting. What is clear is that minutes, which had been prepared before the meetings ever took place, were signed and filed with Leonard's counsel. The minutes of the Shareholders meeting indicate that votes were taken to: (1) remove the Jenkins Brothers as Directors of the Corporation, effective immediately; and (2) appoint Kristin a Director of the Corporation, effective immediately. The minutes of the Board of Directors meeting indicate that votes were taken to: (1) exercise the Corporation's call option to recall the stock of the Jenkins Brothers for $10 a share; (2) terminate the Agreement; and (3) elect Kristin as Vice President of the Corporation, effective immediately.

To complete the call of the stock, Leonard's counsel sent notice to each of the Jenkins Brothers asking each of them to complete the necessary paperwork and providing to each of

them a check for the value of their stock interest as determined by Ralph Palumbo, Leonard's accountant and a certified public accountant, who issued his opinion that the fair market value of the stock was a negative value.[3] The Jenkins Brothers never executed the paperwork that was sent to them and never cashed the checks. Jenkins, Sr. passed away the next month, in December 2011. On February 17, 2012, Andrew and Jeffrey filed the Verified Complaint. Plaintiffs moved for partial summary judgment as to whether the alleged stock call was in the best interest of Leonard's and its stockholders, and Defendants moved for summary judgment as to Count I, the appointment of a Special Master, and Count II, declaratory judgment as to whether the Jenkins Brothers are still shareholders and directors. This Court heard oral arguments on the cross motions for summary judgments, which are now before this Court.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Association, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there

[3] The issue of whether the price offered for the Jenkins Brothers' stock was "fair value" in accordance with the Agreement is not addressed by the Court in this Decision. Plaintiffs' Rule 56(f) motion to reserve judgment on this issue was granted at a hearing on May 16, 2013. Plaintiffs submitted a Supplemental Objection to Defendants' Motion for Summary Judgment on the "fair value" issue on October 24, 2013.

are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of the pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in the light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Id. "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific fact showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

III

Analysis

A

Shareholder and Director Meeting

Leonard's is a corporation organized under the laws of the Commonwealth of Massachusetts and its principal place of business is located in Seekonk, Massachusetts. It is undisputed that Massachusetts law governs the substantive issues before the Court. (Hr'g Tr. 27, May 16, 2013.)

The motions of Plaintiffs and Defendants are predicated upon the action allegedly taken at the Shareholders and Board of Director's meetings on November 17, 2011. Therefore, it must be determined if there is any question of fact whether valid corporate action occurred at either meeting. A corporation's articles of incorporation dictate how that corporation and its directors may act. Chokel v. Genzyme Corp., 867 N.E.2d 325, 329 (Mass. 2007) ("[D]irectors were bound to act accordingly with respect to the performance of the obligations created in the articles."). If an action is not specifically reserved in the articles of incorporation, then it may be set forth in the corporation's by-laws. See M.G.L.A. 156B § 16 ("A corporation may make by-laws which may contain any provisions not inconsistent with law or the articles of organization for the regulation and management of the affairs of the corporation."). Here, Leonard's set out specifically in its by-laws that "the affirmative vote of the majority of the shares represented at the meeting and entitled to vote . . . shall be the act of the shareholders." However, the by-laws also state that shareholder action may be taken upon the written consent of less than all shareholders if: (a) the shareholders who consent make up a majority of all votes entitled to vote and (b) such action is authorized by the Articles of Organization. Massachusetts law also provides that:

> "(a) Action required or permitted by this chapter to be taken at a shareholders' meeting may be taken without a meeting if the action is taken either: (1) by all shareholders entitled to vote on the action; or (2) to the extent permitted by the articles of organization, by shareholders having not less than the minimum number of votes necessary to take the action at a meeting at which all shareholders entitled to vote on the action are present and voting. The action shall be evidenced by 1 or more written consents that describe the action taken, are signed by shareholders having the requisite votes, bear the date of the signatures of such shareholders, and are delivered to the corporation for inclusion with the records of meetings within 60 days of the earliest dated consent delivered to the corporation as required by this section . . . .

> (c) A consent signed under this section has the effect of a vote at a meeting and may be described as such in any document, except that if action is taken by the consent of less than all shareholders entitled to vote on the action, any document required to be filed under this chapter with respect to such action shall state that the action was taken by consent of the required number of shareholders and that any required notice has been given to other shareholders.
>
> (d) If action is to be taken pursuant to the consent of voting shareholders without a meeting, the corporation, at least 7 days before the action pursuant to the consent is taken, shall give notice, which complies in form with the requirements of section 7.05, of the action (1) to nonvoting shareholders in any case where this chapter would require such notice if the action is to be taken pursuant to a vote by voting shareholders at a meeting, and (2) if the action is to be taken pursuant to the consent of less than all the shareholders entitled to vote on the matter, to all shareholders entitled to vote who did not consent to the action. The notice shall contain, or be accompanied by, the same material that, under this chapter, would have been required to be sent to shareholders in or with the notice of a meeting at which the action would have been submitted to the shareholders for approval."

M.G.L.A. 156D § 7.04.

It is undisputed that Jenkins, Sr. clearly held a sufficient percentage of the outstanding stock, and the Articles of Organization of Leonard's provided for action by written consent by a non-unanimous majority (as required by M.G.L.A. 156D § 7.04), such that Jenkins, Sr. could have unilaterally acted by written consent to effectuate the removal of the Jenkins Brothers as directors and elect Kristin as a director. See By-Laws of Leonard's Antiques, Inc., Art. II § 13, Mar. 14, 2007. However, there was no attempt by Jenkins, Sr. to act by written consent. The only notice that was sent to the other shareholders was the notice of a special Shareholders meeting. See M.G.L.A. 156D § 7.04 cmt. 3 (stating that notice is to be sent to all non-consenting shareholders at least seven days before the action of the written consent is to become effective). Nowhere is it alleged that Jenkins, Sr. was trying to act as majority shareholder by written

consent. Additionally, the filing of meeting minutes is further proof that if any action was taken, it occurred in the form of a shareholder vote held during the meeting. See Defs.' Ex. AA, Minutes of Special Meeting of Shareholders of Leonard's Antiques, Inc., Nov. 17, 2011 (stating that motions were made and seconded and that two votes occurred upon those motions).

Therefore, it has to be determined whether a vote by the shareholders took place at the meeting. The Plaintiffs dispute the fact that a vote was ever taken at the Shareholders meeting to remove them as directors and elect Kristin. Specifically, the Plaintiffs, through deposition testimony, allege in part that the meeting was adjourned before the issue of removal was ever brought to a vote. In support of the assertion that a vote took place, Defendants rely upon the fact that minutes of the Shareholders meeting were signed by Jenkins, Sr. and later dropped off to Andrew Davis (Davis), Leonard's attorney. In his affidavit, Davis says that while he was not at the meeting to observe the votes taking place, he presumed they took place because Jenkins, Sr. had signed the minutes that stated that the votes took place. As it is clearly disputed whether a vote actually took place at the Shareholders meeting to remove the Jenkins Brothers and elect Kristin to the Board of Directors, it remains an issue of material fact, and thus the purported action at the Board of Directors meeting to call the stock is not ripe for summary judgment. See Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 750 (R.I. 2004) ("We will affirm the judgment only if, after reviewing the evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law."); see also Losinski v. Am. Dry Cleaning Co., 281 N.W.2d 884, 887-88 (Minn. 1979) (holding that when corporation prescribes that corporate action may only be accomplished through certain methods—either shareholder vote or written consent—then such methods must be used to accomplish the corporate action).

Next at issue is whether the Board of Directors acted properly in calling the stock of the Jenkins Brothers. The by-laws provide that the "act of the majority of the directors present at a meeting . . . shall be the act of the Board of Directors." As indicated above, it is unclear and disputed who the members of the Board of Directors were when the Board of Directors meeting took place. Either the purported shareholder action was valid and the two directors were Jenkins, Sr. and Kristin or, as explained above, the shareholder action was invalid and the directors were Jenkins, Sr. and the Jenkins Brothers. In either event, there could not have been a vote by the majority of the Board of Directors. The only person that may have voted was Jenkins, Sr. As to the former scenario, Kristin stated in her deposition that she did not vote as a director at the November 17, 2011 meeting. (Dep. of Kristin A. Lounsbury Jenkins, 37, Apr. 6, 2012). In the latter scenario, none of the Jenkins Brothers voted or even claim they were aware of the Board of Directors meeting on November 17, 2011. Therefore, in either scenario, a majority of the Board of Directors failed to act at the meeting. Additionally, if the Jenkins Brothers were still considered directors at the time, then no director meeting could have taken place because there would not have been sufficient directors present to establish a quorum for the meeting. Without any of the Jenkins Brothers present at the Board of Directors meeting, only one of the four purported directors would have been present, an insufficient amount to establish a quorum for a Board of Directors meeting. Accordingly, a Board of Directors meeting could not have occurred if the Jenkins Brothers were still considered directors.

B

Laches

Defendants argue that Plaintiffs' complaint should be barred by the Doctrine of Laches. "Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on

his or her rights to the detriment of a defendant." O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993). Rather, when considering the laches doctrine's applicability in a particular case, a court must determine: (1) whether there was negligence on the part of the plaintiff that led to an unreasonable delay in the prosecution of the case and, if so, (2) whether the delay prejudiced the defendant. Id. at 702. Whether there has been unreasonable delay and prejudice to the defendant, however, are both questions of fact; their resolutions dependent on the circumstances of the particular case. Raso v. Wall, 884 A.2d 391, 396 (R.I. 2005) (citing Lombardi v. Lombardi, 90 R.I. 205, 209, 156 A.2d 911, 913 (1959)). Laches, therefore, is normally not an appropriate matter for summary judgment. Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1231 (R.I. 2010) (holding summary judgment inappropriate where there is a genuine issue of material fact).

Defendants argue that Plaintiffs were negligent in not pursuing their claim because they "knew" Jenkins, Sr. (as majority shareholder and president of Leonard's) was the only person who could explain why the call of the stock would be in the best interest of Leonard's. The Plaintiffs contend that they were neither negligent in pursuing their claim nor are Defendants prejudiced by any delay. What constitutes "unreasonable delay," however, is a question of fact; its resolution dependent on the circumstances of the particular case. See Raso, 884 A.2d at 396; but see Hazard v. East Hills, Inc., 45 A.3d 1262, 1271 (R.I. 2012) (affirming summary judgment when the delay was over one hundred years). The Court agrees with Plaintiffs, that the three month time period between the special Shareholders meeting on November 17, 2011, and the filing of the complaint on February 17, 2012, does not constitute a delay which could be deemed so egregious that it is unreasonable as a matter of law. See id.

IV

Conclusion

Based on the foregoing analysis and viewing the evidence in a light most favorable to the nonmoving party, the Court denies both Plaintiffs' motion for partial summary judgment and Defendants' motion for summary judgment. Counsel may present an order consistent herewith.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Jenkins v. Estate of Jeffrey B. Jenkins, Sr., et al.**
CASE NO:	**PB 12-0915**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 1, 2013**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**W. Mark Russo, Esq.** **Moshe S. Berman, Esq.**
For Defendant:	**David E. Maglio, Esq.**