

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ASHER E. FOGEL,)
)
Plaintiff,)
)
v.) Civil Action No. 3271-CC
)
U.S. ENERGY SYSTEMS, INC., JACOB)
FEINSTEIN, RONNY STRAUSS, AND)
ROBERT SCHNEIDER,)
)
Defendants.)
)

MEMORANDUM OPINION

Date Submitted: December 3, 2007

Date Decided: December 13, 2007

Raymond J. DiCamillo, Harry Tashjian, IV, and Meghan M. Dougherty, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; OF COUNSEL: James Nespole, Andrew C. Freedman, and Edward P. Dolido, of FULBRIGHT & JAWORSKI L.L.P., New York, New York, Attorneys for Plaintiff.

Michael G. Busenkell and Margaret F. England, of ECKERT, SEAMANS, CHERIN & MELLOTT, LLC, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

This post-trial opinion answers a very narrow question: did the U.S. Energy board of directors fire petitioner Asher Fogel during a valid board meeting on June 29, 2007? If Mr. Fogel were indeed terminated at that time, his petition for an order demanding a special meeting of the U.S. Energy shareholders must be dismissed, because Mr. Fogel called for such a meeting on July 1, 2007. If, however, the board's attempted termination were ineffective, Mr. Fogel was still the CEO of U.S. Energy on July 1 and was empowered by the corporation's bylaws to call for a special meeting. Because I have concluded that the board's purported termination was legally void, I grant Mr. Fogel's petition and order a special meeting of the U.S. Energy shareholders. Because, however, Mr. Fogel has not satisfied his burden of proving the independent directors acted with the primary purpose of interfering with the shareholder franchise, I cannot grant relief on his claim for breach of fiduciary duties under *Blasius Industries, Inc. v. Atlas Corp.*¹

I. FACTUAL FINDINGS

U.S. Energy ("the Company") is a publicly traded Delaware corporation with its principal place of business in New York City.² The Company owns and operates energy producing facilities and properties. U.S. Energy was in precarious financial condition when, in August 2005, plaintiff Asher Fogel was hired to

¹ 564 A.2d 651 (Del. Ch. 1988).

² Testimony at trial indicated that the Company has been delisted by NASDAQ as of October 17, 2007 as a result of the Company's failure to file its quarterly reports with the SEC.

become CEO and joined the board of directors. Eventually becoming chairman as well, Mr. Fogel served the company until this year. The individual defendants in this action are the other members of the U.S. Energy board, Jacob Feinstein, Ronny Strauss, and Robert Schneider (“individual defendants” or “independent directors”).

Both sides agree that Fogel’s early tenure with the Company was successful. At the close of 2006, things looked good for the Company. Trouble, however, would soon follow, and the Company encountered significant problems with its operations and projects in the United Kingdom.³ The individual defendants say they first learned of this problem and the Company’s other financial woes at the June 14, 2007 board meeting.

The board determined at the June 14 meeting that it would need to hire a financial advisor or restructuring officer. The board resolved to meet again on June 29, 2007, for the purpose of interviewing potential candidates. Mr. Fogel’s assistant properly noticed the meeting for June 29, 2007 at 10:00 a.m. in the New

³ Plaintiff and defendants offered copious and unnecessary testimony about the U.K. Project. Plaintiff endeavored to show that the individual defendants were overreacting with respect to their outrage over the Company’s losses, and the individual defendants attempted to show that the failures in this project justified their termination of plaintiff. The Court need not decide which side is correct; the U.K. project’s substantive success or failure is wholly irrelevant to this case, the attention it received at trial notwithstanding. Similarly irrelevant is the parties’ dispute over the merit of awarding bonuses to the Company’s employees for their work during 2006. Because neither of these issues has anything whatsoever to do with whether or not the June 29 termination of Mr. Fogel was legally valid, I will not address them further.

York offices of Hunton & Williams LLP with the stated purpose of interviewing and hiring a financial advisor or restructuring officer.

Prior to the morning of June 29, the three independent directors communicated with each other about their concerns with Mr. Fogel's performance. Slowly, a consensus developed that the board should terminate Fogel's employment. On the morning of June 29, the three independent directors gathered in the office of Jeff Jones, a Hunton attorney and counsel to the Company, and resolutely decided to fire Mr. Fogel. The three independent directors headed in unison to the board room where the meeting was to be held in order to confront Mr. Fogel.

Mr. Feinstein told Mr. Fogel that the independent directors had lost faith in him and that they wanted him to resign as CEO and Chairman. If he would not voluntarily resign by the end of the day, Mr. Feinstein said they would fire him. Mr. Strauss and Mr. Schneider remained quiet, but both testified that they were in agreement with everything Mr. Feinstein was communicating. Mr. Fogel, upset by what he was hearing, challenged the independent directors' ability to terminate him. Mr. Strauss left the conference room to retrieve Mr. Jones, who subsequently advised Mr. Fogel that the board did indeed have the authority to terminate his employment with the firm. After being asked to turn over Company property, Mr.

Fogel left the office.⁴ The three independent directors remained and conducted the scheduled interviews. That evening, Mr. Schneider called Mr. Fogel to ask if he had decided to resign. Mr. Fogel declined to do so, and Mr. Schneider said he was therefore terminated.

On July 1, 2007, Mr. Fogel sent an email to the Company's general counsel and to the board calling for a special meeting of stockholders for the purpose of voting on the removal of the other directors and election of replacements. The Company's bylaws specifically authorized the CEO / Chairman to call for such a special meeting. Later that day, during a scheduled board meeting, the board formally passed a resolution regarding Mr. Fogel's termination. The board has ignored Mr. Fogel's call for a special meeting.

At issue here is whether or not Fogel was still the CEO and Chairman when he called for a special meeting of shareholders. If the decision of the independent directors on June 29 constituted formal action by the Company's board of directors, Mr. Fogel was terminated before July 1 and, therefore, had no authority to call for a special meeting. If, however, that decision was not valid, Fogel was not properly terminated until the formal resolution on July 1, which was passed after he called for the special meeting.

⁴ The parties disagree about whether Mr. Fogel left of his own accord or if he was asked to leave by the other directors. Because it is ultimately not dispositive, I need not resolve this dispute.

II. ANALYSIS

If there is a bedrock foundation of Delaware corporate law, it is encapsulated in section 141 of the General Corporation Law: “The business and affairs of every corporation . . . shall be managed under the direction of a board of directors,” and “[t]he vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors”⁵ In other words, for U.S. Energy to terminate its CEO and chairman, the Company’s board would have needed to take action, and the board can only take action by means of a vote at a properly constituted meeting.⁶

A. It is unclear that a meeting actually occurred when the independent directors purported to terminate Mr. Fogel.

Although the Corporation Law does not prescribe in detail formal requirements for board meetings, the meetings do have to take place.⁷ The evidence presented at trial leaves many doubts about whether the confrontation between the independent directors and Mr. Fogel on the morning of June 29 constitutes a meeting. The mere fact that directors are gathered together does not a

⁵ 8 *Del. C.* § 141(a)–(b).

⁶ Section 141(f) also permits board action by means of unanimous written consent. No one has suggested that the board terminated Mr. Fogel in this manner.

⁷ See *Lippman v. Kehoe Stenograph Co.*, 102 A. 988 (Del. 1918) (finding that a meeting never occurred, despite the existence of minutes describing the meeting); *In re Bigmar, Inc.*, C.A. No. 19289-NC, 2002 WL 550469 (Del. Ch. Apr. 5, 2002) (finding insufficient evidence that a purported meeting actually took place).

meeting make.⁸ There was no formal call to the meeting, and there was no vote whatsoever. The independent directors caucused on their own in what they admit was not a meeting and informally decided among themselves how they would proceed.⁹ Simply “polling board members does not constitute a valid meeting or effective corporate action.”¹⁰

In fact, Mr. Strauss admitted on cross examination that it was his understanding that the independent directors would ask Mr. Fogel to resign *prior to* the scheduled board meeting. When the three independent directors arrived in the conference room, Mr. Strauss and Mr. Schneider stood in silence as Mr. Feinstein relayed the decision to Mr. Fogel, who was given no opportunity to respond or defend himself. There was no discussion of the issue and no vote of the board members. Such a hasty, unhelpful gathering cannot satisfy section 141’s conception of a meeting, the primary vehicle that drives corporate action.¹¹ Meetings represent more than a mere technicality; they are a substantive protection. A proper meeting should be informative and should encourage the free

⁸ See *Box v. Box*, C.A. No. 14238, 1996 WL 73575, at *14–15 (Del. Ch. Feb. 15, 1996) (concluding that no meeting occurred even though directors were communicating with one another about company business), *aff’d*, 687 A.2d 572 (Del. 1996).

⁹ Cf. *Bachmann v. Ontell*, C.A. No. 7805, 1984 WL 8245, at *4 (Del. Ch. Nov. 27, 1984) (finding a “breakaway meeting” of certain directors invalid).

¹⁰ *Liberis v. Europa Cruises Corp.*, C.A. No. 13103, 1996 WL 73567, at *6 (Del. Ch. Feb. 8, 1996).

¹¹ Cf. *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 439 (Del. Ch. 1972) (finding a special stockholder’s meeting invalid in part because no one present at the meeting would have been able to tell voting was taking place).

exchange of ideas so that a corporation's directors—through their active, meaningful participation—may keep themselves fully informed and in compliance with their fiduciary duty of care.¹² The exchange on the morning of June 29 was unidirectional and was insufficient to constitute a meeting under Delaware law.

B. If a meeting did occur, it is void because the independent directors obtained Mr. Fogel's attendance by deception.

Even if the independent directors' confrontation with Mr. Fogel could properly be characterized as a meeting, the meeting was not properly noticed and is therefore void. Before a corporation may hold a special meeting of its board of directors, each director must receive notice as prescribed by the bylaws; to the extent such a meeting is held without notice, the meeting and "all acts done at such a meeting are void."¹³ Although there is no "hard and fast legal rule that directors be given advance notice of all matters to be considered at a meeting," there must be notice sufficient to allow directors "an adequate opportunity to protect [their]

¹² See *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1345 (Del. 1987) ("the duty of care requires a director, when making a business decision, to proceed with a 'critical eye' by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board"); Cf. 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS* § 4.12 (3d ed., 2006 supp.) ("The requirement of complete communication in such a meeting among the directors is a key provision and is consistent with the proposition that a director *qua* director may not vote by proxy but must be present to hear and participate in the discussion in order to carry out his duty of care and fiduciary responsibilities.").

¹³ *Schroder*, 299 A.2d at 435; 1 EDWARD P. WELCH, ANDREW J. TUREZYN, & ROBERT S. SAUNDERS, *FOLK ON THE DELAWARE GENERAL CORPORATION LAW* § 141.8 (2007-1 supp.).

interests.”¹⁴ Where a director is tricked or deceived about the true purpose of a board meeting, and where that director subsequently does not participate in that meeting, any action purportedly taken there is invalid and void.¹⁵

Here, the evidence at trial indicated that the independent directors had begun planning to terminate Mr. Fogel soon after the June 14 meeting. Indeed, the defendants spent a great deal of time at trial belaboring their argument that Mr. Fogel was doing a poor job as CEO, trying to indicate that he should have seen his termination coming after the disastrous meeting on June 14. Even if, however, Mr. Fogel had some reason to suspect that the others were thinking about firing him, I, like then-Vice Chancellor Berger in *Koch*, cannot help but conclude that the independent directors’ failure to inform Fogel about their plan was intentional.¹⁶ At trial, the independent directors argued passionately that they believed terminating Mr. Fogel was in the best interests of the Company and that their decision to do so was undertaken in good faith. That may be so, but deceiving Mr. Fogel about their intentions by omission is not appropriate.¹⁷

Mr. Fogel was deceived into attending this meeting because the other directors decided to keep secret their plan to terminate his employment with the

¹⁴ *Adlerstein v. Wertheimer*, C.A. No. 19101, 2002 WL 205684, at *9, *10 (Del. Ch. Jan. 25, 2002).

¹⁵ *Koch v. Stearn*, C.A. No. 12515, 1992 WL 18717, at *4 (Del. Ch. July 28, 1992).

¹⁶ *See id.* at *5.

¹⁷ *See Adlerstein*, 2002 WL 205684, at *11 (noting that directors cannot accomplish even noble goals at board meetings by means of trickery or deceit).

Company. It is, of course, true that Mr. Fogel lacked the votes necessary to protect his employment, but had he known beforehand, he could have exercised his right under the bylaws to call for a special meeting *before* the board met. The deception renders the meeting and any action taken there void.

C. Because the meeting either did not occur or was void, the purported June 29 termination could not have been ratified by the July 1 resolution.

Defendants argued that even if the June 29 meeting and termination were technically deficient, any problems were cured when the board formally ratified the actions taken on the 29th during its July 1 meeting. That is not a tenable position under Delaware law. When a corporate action is void, it is invalid *ab initio* and cannot be ratified later.¹⁸ The action taken at the July 1 meeting may have resulted in Mr. Fogel's termination, but that termination was only effective as of *that* vote. By the time the board cast that vote, however, Mr. Fogel had already issued his call for a special meeting of the shareholders of the Company.

D. The independent directors were not acting with the principal purpose of interfering with the shareholder franchise.

In addition to seeking an order compelling the Company to hold a special stockholder meeting, Mr. Fogel also alleges that the independent directors have breached their fiduciary duties by interfering with the stockholders' ability to elect

¹⁸ *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, C.A. No. 13911, 1998 WL 71836, at *9 (Del. Ch. Mar. 5, 1998) ("Holding's intentional failure to give Rogers notice of the August 23 special board meeting rendered void the board actions taken at that meeting. Consequently, the termination vote at the August 23 meeting was not ratifiable.").

new directors in order to entrench themselves in office. This Court has held that where directors act with the primary purpose of thwarting a shareholder vote, they violate the fiduciary duty of loyalty, even if such actions are taken in good faith.¹⁹ Here, the decision of the board to ignore Mr. Fogel's call for a special stockholder meeting unquestionably interferes with the shareholder's ability to cast votes, but this decision was not made with the "principle purpose of preventing the shareholders from electing a majority of new directors."²⁰ I find that the board ignored Mr. Fogel's call for a special meeting of stockholders because they believed in good faith that Mr. Fogel had been fired and lacked the authority to call for such a meeting. Mr. Fogel failed to prove that the board's primary purpose was to impinge upon the shareholder franchise.

III. CONCLUSION

The mere congregation of a corporation's directors in the same room does not necessarily result in a board meeting, and the mere fact that three out of four directors determined how they wished to proceed does not obviate the need for adherence to bylaws and the General Corporation Law. U.S. Energy's independent directors polled one another and informally decided that they should fire the Company's CEO. They communicated this predetermined conclusion to Mr. Fogel

¹⁹ *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988).

²⁰ *Id.* at 658; *see also Stroud v. Grace*, 606 A.2d 75, 92 (Del. 1992) (noting that *Blasius* is only invoked where "the 'primary purpose' of the board's action [is] to interfere with or impede exercise of the shareholder franchise").

by ambush on June 29. Either because there was no proper meeting of the U.S. Energy board or because Mr. Fogel's attendance at the meeting was procured by deceit, the board's action is void *ab initio*. Therefore, Mr. Fogel was still employed and was still authorized to call for a special election of stockholders on July 1. U.S. Energy and its board are hereby ordered to hold such a meeting. The board's decision to heretofore ignore Mr. Fogel's call, however, was not designed to impede the shareholders' franchise, and I therefore do not conclude that the board has breached its fiduciary duty of loyalty.

Counsel shall provide an implementing order within twenty days, each side to bear its own costs and attorneys' fees.²¹

²¹ Mr. Fogel's complaint requested costs, fees, and expenses, but this issue was never briefed and was not raised at trial. Indeed, Mr. Fogel appears to have dropped the issue in his pretrial brief. Absent any reason to depart from the American rule, each party shall bear its own costs.