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ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN CIANCI and CONNIE CIANCI,

Plaintiffs,)
)
v.) Civil Action No. 16419-NC
)
JEM ENTERPRISE, INC.)
t/a SERVICEMASTER COMMERCIAL)
SERVICES, a Delaware corporation,)
and JEFFREY E. MINNER,)
)
Defendants,)

MEMORANDUM OPINION

Submitted: July 11, 2000
Decided: August 22, 2000

Edward F. Eaton, Esquire and M. Edward Danberg, Esquire, of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, Attorneys for Plaintiffs.

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LAMB, Vice Chancellor

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I. INTRODUCTION

'This opinion resolves a family business dispute. In 1991, John Cianci and his son-in-law, Jeffrey Minner, agreed to combine their commercial janitorial businesses and operate the combined enterprise as equal partners. In March 1997, Cianci and Minner reached an agreement relating to the dissolution of the partnership and payment to Cianci of a 5-year annuity as compensation for his partnership interest. This agreement was performed by Cianci, but Minner then repudiated it, claiming that his assent was obtained by duress.

John Cianci and his wife filed this action, seeking enforcement of the agreement or, in the alternative, half the value of the business as of March 3 1, 1997, when the partnership was effectively dissolved. The matter was tried on May 15-17, 2000. I conclude that even if the buyout agreement was procured by duress, Minner ratified that agreement by his subsequent acceptance of its benefits. Thus, I will enter judgment for breach of contract in the amount of $120,000 plus prejudgment interest at the legal rate in plaintiffs' favor.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiffs John Cianci and Connie Cianci are husband and wife and reside in the State of Delaware. Defendant Jeffrey E. Minner is also a resident of this state. Minner is married to plaintiffs' daughter, Marie. Defendant JEM

Enterprises ("JEM") is a Delaware corporation with offices located in Wilmington, Delaware. Minner has been President of JEM at all times relevant to this matter.

B. Cianci and Minner Independently Purchase Franchises

ServiceMaster is a commercial janitorial services company with franchises located throughout the nation, In February of 1989, Cianci purchased a ServiceMaster franchise at a cost of approximately $12,000 (hereinafter the "Talleyville franchise"). The Talleyville franchise was a "Small Business Service Franchise," meaning it served mainly smaller commercial locations. Cianci operated the Talleyville franchise as a sole proprietorship.

On August 29, 1990, Minner purchased from ServiceMaster a "Contract Service Franchise, " serving larger corporate and commercial sites, for approximately $28,000. Mirmer made a small down payment and financed the remainder through ServiceMaster. In September 1990, Minner formed JEM, through which he operated his ServiceMaster franchise.

C. **Cianci and Minner Agree to Operate Their Franchises Together**

In the summer of 1991, Cianci and Minner discussed consolidating their respective operations. In July 1991, they reached an oral agreement and began working together (the "1991 Agreement"). Minner brought in 20-25 accounts while Cianci contributed approximately six.

Both men were unsophisticated in business practices and found it unnecessary to document the 1991 Agreement or to seek advice about the legal or tax ramifications of their deal. Thus, they never defined the exact nature of their consolidation beyond the basic agreement to (1) split profits and losses evenly; (2) run their operation through JEM; (3) maintain the Talleyville franchise; and (4) have Minner handle sales and Cianci handle operations. Cianci's recollection of this 1991 Agreement consists of a handshake with Minner and a mutual understanding that they were 50/50 partners.

There was an issue raised at trial whether the parties also agreed that, at the end of five years, Cianci would retire and turn over his share of the partnership to Minner. The weight of the evidence does not support finding such an additional term.[1] Minner's testimony was unpersuasive on the subject. Moreover, Minner's conduct was inconsistent with the existence of such an agreement. Most strikingly, at the end of the five year period, Minner did nothing to invoke the benefit of such an agreement, even though he wanted Cianci out. At most, the record suggests that Cianci agreed that at the end of sorne time, perhaps five years, he would consider retiring and would allow

[1] I also note that this theory of the case does not appear in Minner's answer or cross-claim.

Minner to buy him out rather than give the business to his son Guy, with whom Minner did not want to work.[2]

Another area of factual (and legal) dispute at trial related to Cianci's claim to 50% stock ownership of JEM, either as legal owner or by application of principles of equitable estoppel. As to legal ownership, the record is devoid of any evidence that either Minner or JEM ever sold or agreed to sell any JEM shares to Cianci.[3]

Plaintiffs also raise an equitable estoppel argument resting on the happenstance that the parties used JEM as the vehicle both for operating and reporting taxes for the combined operation. Rather than maintain a second set of books and file a partnership tax return for the combined enterprise, all revenues, profits and losses from the consolidated business were reflected on JEM's tax returns. JEM filed a subchapter S election with the IRS in 1992, stating that Minner acquired 500 shares of JEM in September 1990, and that Cianci acquired 500 shares in January 1991. All federal and state income tax forms for the years 1991-1997 then listed Cianci as owning 50% of JEM's stock. He also received

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[2] Cianci testified that he never agreed to leave the business after five years. He also testified that this issue was not raised at the time the agreement to consolidate was reached. Cianci further testified that he did intend to sell his interest in the consolidated business to Minner when he was ready to retire and that he had told Minner this to quell Minner's concerns that Cianci might leave his interest in the business to Guy Cianci.

[3] Although not the subject of contention in this case, Jeff never produced any proof that JEM actually issued shares to him before this dispute arose. JEM did not comply with any of the basic corporate formalities typically required by the statute.

forrns K-1 from JEM for those years reporting his 50% share of JEM's profits and losses and included those amounts on his individual tax returns.

No doubt, this method of tax reporting further evidences the parties' lack of attention to business formalities. Cianci contends that it also represented to him a state of fact: i.e., that he owned 50% of JEM. There is no evidence, however, either that he had contracted to acquire any such stock interest or that he relied to his detriment on the JEM tax reporting documents showing such an ownership interest. Because JEM was a subchapter S corporation, it reported taxes more or less in the same way that a partnership would have done. Thus, Cianci did not even prove that he paid taxes exceeding what he would have paid had a partnership tax reporting form been used.

D. The Business Grows But the Partners Fall Out

Minner and Cianci worked full time in the business and succeeded in increasing revenues and profits. As the business grew, so did the tension between them. Cianci refused to handle administrative matters, especially paperwork, limiting himself to supervising a floor crew, repairing equipment and trucks and doing laundry. Although Cianci was a skilled technician able to operate equipment, his refusal to handle administrative tasks forced Minner to assume added responsibilities. Minner also handled the sales and managerial aspects of the business.

Connie Cianci provided administrative and bookkeeping services for the business, including preparation of the payroll and payroll taxes, accounts payable and receivable management, and other administrative duties. [4] Eventually, Minner came to view Connie's contribution to be more valuable than mat of her husband. Minner's father, Frank, provided other services to the business, particularly the preparation of tax returns.[5]

As per their agreement, Minner and Cianci divided the profits from the business equally. In 1996, each reported total compensation from JEM of $79,850. Since the partners took virtually all of the profits out of the business, it was difficult to make needed capital investments. Minner occasionally suggested lowering the partners' draw, but Cianci resisted. Frank Minner advised his son that since Connie received no compensation, payments to John up to $75,000 were high but acceptable. Once the salary exceeded that amount, however, he suggested that the Ciancis were being overpaid for their contributions to the business.

As of the fall of 1996, Minner and Cianci had been partners for over five years, or longer than Minner maintains they had originally agreed. The business

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[4] Connie was not compensated for her services separately from her husband. Cianci testified that keeping Connie "busy" at work helped divert her attention from her various personal health problems. She obviously shared this view.

[5] Frank Minner is the former CFO of Rollins Environmental Co. and holds a degree in finance and business administration from the Wharton School of Business of the University of Pennsylvania.

had grown to the point where JEM required a full-time operations manager. Although he had never before prepared a formal annual report, Minner prepared a letter to the Ciancis during Christmas 1996 that discussed the state of the business and Minner's plans for growing it in the future. The letter clearly implied that Minner planned to operate the business for aggressive growth and that Cianci should take a smaller role, as well as a lower salary. Connie read the letter before her husband came home and immediately called her daughter Marie. In response to Marie's angry reaction to his perceived mistreatment of her father, Minner called Connie and instructed her to throw the letter away and never to mention it to Cianci.[6]

Although Cianci never read the letter, the partners' relationship further deteriorated to the point that they barely spoke, even about business. Minner felt pressured by his wife and mother-in-law to resolve the situation. In early 1997, Minner spoke with Cianci about dissolving the partnership. Minner offered Cianci a salary of $50,000 and use of a company car for one year, during which Cianci could work as much or as little as he pleased. At the end of me year, Cianci would retire from JEM and if he chose to reopen the Talleyville

[6] There was also some evidence that Marie threw her husband out of the house on or around New Year's Day. This incident was connected to the business problems.

franchise, could select certain smaller accounts to take with him. Minner testified that Cianci accepted that offer.

Cianci testified that when he went home, he asked his wife, "Do I or do I not own one-half of JEM?" After learning of Minner's offer, Connie called Marie, explaining that Minner was trying to kick the Ciancis out of the business. Faced again with Marie's angry reaction, Minner agreed to disregard this purported agreement.

Also at about this time, the business suffered an unexpected cash flow shortfall. Minner testified that he suspected that the Ciancis were manipulating the accounts receivables to create this crisis but was not able to discover any evidence to support his suspicion. In order to keep the business adequately funded, Minner was forced to go to his father for a $25,000 loan. Frank Minner again urged his son to eliminate the Ciancis from the business.

E. The Burger King Offer

After some time passed, Cianci recommended to Minner that they meet at the Concord Pike Burger King to negotiate terms to split amicably. At this meeting, Cianci presented Minner with a piece of paper outlining two buyout offers. Cianci told Minner the deal cut both ways (meaning mat either Minner could buy out Cianci or vice versa). Cianci then emphatically told Minner that "If we don't do this deal, I will burn the barn down."

According to Minner, Cianci would not explain what this meant, but merely repeated the statement. Cianci explained at trial that he did not mean to threaten arson or physical harm but rather to explain the he would leave the business and take customers with him.[7] Minner testified that his father-in-law had never previously spoken to him in a threatening manner.

Minner reviewed the written offer and said he would select the option of selling his interest in JEM to Cianci for $500,000.00.[8] Cianci then retracted the offer and told Minner that he should have his father, who was more sophisticated in business and financial matters, review the proposals. The two departed Burger King without an agreement. After the meeting, Mimrer contacted his father, wife, insurance agent and ServiceMaster about Cianci's comments that he would "burn the barn down. " Mimrer also updated his insurance policies, lowered his deductibles and placed gas cap locks on all company vehicles.

F. The Stanley's Agreement

After the Burger King meeting, Minner contacted Greg Thompson, who acts as the liaison between ServiceMaster and its Delaware and Maryland

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' Much of Cianci's testimony lacked credibility. Based on my trial impressions, I think it likely that Cianci intended to be vague about his statement, partially to support Minner's perception of threatened physical harm.

[8] The document actually reads "$5000,000." The parties agree that this was a typo.

franchises. Minner advised Thompson of the problems between the "partners" and asked for Thompson's help in finding a solution.

Sometime thereafter, Thompson visited Cianci at home to discuss the situation. Thompson suggested mat, as a general "rule of thumb," ServiceMaster franchises are valued at three months of receipts. Thus, Cianci could divide that figure by half to estimate the value of his share of the business. After explaining this rule of thumb, Thompson explained why that method might not apply to JEM due to its relatively low margin mix of business.

Cianci used Thompson's suggested method to calculate the number of $159,000.00 as the value of half of the business. Cianci told Thompson, "Tell Jeff I'll take $150,000." Thompson suggested to Cianci that Minner would need time to pay and Cianci offered to accept $2,500.00 per month for 5 years, without interest. Thompson communicated Cianci's offer to Minner.

Less than one month after the Burger King meeting, Cianci asked Minner to meet again and they met for lunch at Stanley's Restaurant. By this time, the partners' dispute was having a markedly harmful impact, not only on the two families, but also on the business. During this meeting Cianci demanded $150,000.00 for his one-half interest in the business, paid out at $2,500 a month

for five years,[9] together with selected smaller accounts for his Talleyville franchise. In exchange, Cianci would surrender his ownership interest, he and his wife would resign from all offices held by them at JEM and turn over all books and records of the business.

Cianci accompanied his demand with, in words or substance, the following statement: "This deal, meaning the money, my daughter and your kids, is your bulletproof vest. If anything gets in the way, you take off the bulletproof vest."[10] Cianci admitted making this statement. Cianci testified that he never intended to threaten Jeff Minner and would not have harmed him. Cianci asserted that far from trying to intimidate, he made the statement about the bulletproof vest to calm Minner down.[11] According to his own testimony, Minner was "shaking like a leaf."[12]

Minner testified that he felt he had no option and accepted Cianci's offer out of fear. Both agreed that Minner was too upset to stay and finish his lunch. After the Stanley's meeting, Minner took several "precautionary" steps. He

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[9] The parties substantially agreed that at a reasonable discount rate (9%), the present value of 60 monthly $2,500 payments was approximately $120,000.

[10] The record is not clear as to the exact words that Cianci used.

[11] In short, I found this testimony incredible.

[12] Cianci admitted at trial that he made the statement, but asserted that he did so well after the Stanley's meeting. Specifically, he said that he made the remark the day before Minner picked up the business records.

checked the status of his life insurance policy and installed an alarm system in his home and consulted with a private detective.

Shortly after the meeting at Stanley's, the Ciancis turned over to Minner all of JEM's books and records. They also resigned their positions with the corporation. For his part, Minner delivered to Cianci the Talleyville franchise along with accounts worth about $5,000 in total billings per month. Jeff retained the rest of the business, with revenues of between $90,000 and $100,000 per month.

Some time after the Stanley's meeting, Minner advised his father, Frank, of the nature and circumstances of the agreement. Frank instructed Minner to consult with his attorney to consider his options. When accepting the Cianci's performance and partially performing himself, Minner made no reference to his intent not to further perform the agreement or to revoke on account of Cianci's threats. Minner testified that some time after collecting the books and records, he advised the Ciancis that he would not make any payments under the agreement.

In May 1997, the Ciancis requested that the payments begin. No payments were made. With the family in disarray, on May 6, 1997, Marie Minner sent a letter to her mother. The letter implied that Minner would have honored the Stanley's Agreement, but that his father refused to let him do so, instead insisting that he confer with his lawyer. Marie's mental state while the

writing the letter is in question.[13] Nevertheless, while I do not rely significantly on this letter, Marie's observations are consistent with inferences I draw from the trial testimony.

On July 15, 1997, Cianci made a demand pursuant to section 220 of the Delaware General Corporation Law for inspection of JEM's books and records. Minner honored this request, in part, without challenging Cianci's stockholder status as a basis to refuse it.[14]

G. Frank Minner "Corrects" the Tax Returns

On December 16, 1997, Minner notified Cianci that the previously filed tax forms indicating that he was a 50% stockholder of JEM were filed in error, and would be corrected. Almost a year later, Frank Minner filed amended tax returns for the years since 1992, showing Minner as the sole owner. According to Frank, he had prepared the returns to show his son's 50% ownership because he was ignorant as to filing a joint venture's tax returns. Although Frank amended the corporation's K-l forms, Minner did not file amended personal tax returns and Frank failed to provide Cianci with amended K-l forms.

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[13] Marie testified that at the time she wrote this letter, she was under extreme stress (since she and her children had effectively lost their relationship with the Ciancis) and was taking psychotropic medications to calm her nerves. Thus, she says that she only vaguely remembers writing the letter and could not confirm the truth of its contents.

[14] Jeff explained that he allowed the Ciancis to look at the books for two reasons: the Ciancis created those records and in order to a facilitate settlement.

G. The Valuation Evidence

Both parties presented expert valuation reports at trial. Plaintiffs' expert, Timothy D. Humphreys, CPA, primarily advises clients with respect to mergers and acquisitions in the building services contractor industry. Humphreys used a derived multiple of recast earnings before interest and taxes to establish a sale price for the entire business. He testified that, contrary to defendants' expert's use of a five-year weighted average, the industry norm was to apply twelve-month trailing earnings to establish reliable valuations.

Humphreys recast JEM's prior twelve months of earnings by reclassifying and/or normalizing various costs and expenses. This is expected when dealing with a self-owned and operated business in which the salaries paid to the principals and various expenses paid by the business would vary significantly if ownership and operations were separated. For example, Humphreys eliminated the substantial personal and family related vehicle expenses charged to the business. More importantly, he adjusted Cianci's and Minner's salaries to reflect their true market value. For example, although JEM's books indicated $159,700 in "Management Wages," Humphreys allocated $50,000 to a general manager's salary and $25,000 to a branch administrator's salary. Humphreys credibly testified that he based his assumptions on information obtained from industry and ServiceMaster representatives and that he generally erred on the side of being more conservative. Ultimately, Humphreys concluded that JEM

was worth between $293,000 (at a 3.0 multiple of recast earnings) and $342,000 (at a 3.5 multiple) as of December 31, 1996.

After trial, plaintiffs conceded that Humphreys's number should be lowered by about $30,000 to properly account for the repayment of various JEM liabilities.[15] Plaintiffs explained, however, that their expert report is only secondarily intended to provide a basis to value the business. Plaintiffs present their valuation report primarily as evidence to support a finding that $120,000 represented fair value for one-half of the business as of March 31, 1997, thus bolstering their contention that the Stanley's agreement, even if the product of duress, was fairly priced on a present value basis.[16]

Defendants' expert was Gregory A. Crump, CPA, CVA, who has experience in valuing business for litigation and business purposes but has no special expertise in the contract services industry. Crump primarily relied on an approach similar to Humphreys's, except instead of using a multiple to earnings, he capitalized earnings using the correlative capitalization rate. In fact, Crump's capitalization rate implied a marginally higher multiple than Humphreys used.

Certain critical assumptions in Crump's analysis led to his conclusion that JEM was worth only $80,672 as of April 1, 1997. First, he applied a five-year

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[15] The proceeds of an asset sale incorrectly assumed that certain liabilities would disappear. Rather, those liabilities would have to be paid out of the proceeds.

[16] *See* n. 9, *supra*.

weighted average of JEM's earnings. At trial, Crump agreed that at least for the first two or three years of operation, JEM was a startup company. Thus, there is reason to question giving any weight to the results from those years, as only the last 24 months were truly indicative of JEM's value on a going concern basis.[17] Also, he applied a "key man discount," based on the assertion that Minner's contributions to the business were so important that a new owner could not expect to extract the same value from the business without Minner's help. Humphreys testified convincingly that it is highly unlikely that a key man discount is ever appropriate in this industry, as the level of sales and operational skills required are not personalized or unique.

Crump made no adjustment to Minner's salary. Without explaining in detail his explanation for taking this approach, I conclude that it was fundamentally flawed and will not rely on it.[18] Rather, I accept Humphreys's testimony that it would cost $50,000 to hire a manager to do Jeff Minner's work. Certainly, it is wholly unreasonable to suppose that an owner hiring a manager would ever pay as much as Minner paid himself.

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[17] Also, defendants could not challenge Humphreys's assertion that the industry uses the trailing twelve months as a matter of course in valuing businesses.

[18] Crump relied on a number reported in Robert Morris and Associates that is plainly not reliable because it relates to the salary paid to the principals acting as managers. Crump's other source of data was an e-mail he received from the owner of a ServiceMaster franchise in San Diego, California.

After adjusting Crump's numbers to make them reliable, $120,000 is squarely in the range of fair values for Cianci's one-half interest in JEM.[19]

III. THE PARTIES' CONTENTIONS

Plaintiffs present several bases for relief. First, they assert that Cianci became me owner of 50% of JEM's stock. In the alternative, they argue that Minner and JEM are equitably estopped from denying Cianci's stock ownership.

Plaintiffs' next argue that, whether they were partners or equal stockholders, the Stanley's agreement is binding and that Minner breached it. While :not conceding duress, plaintiffs point out that the agreement, in any event, would merely have been voidable, not void. As such, they say, Minner ratified it by accepting the Ciancis' performance of their obligations under the agreement, i.e., giving up possession of the books and records and terminating their employment with the company and by his own partial performance. If the agreement is not upheld, plaintiffs argue that Cianci is entitled to one-half of the company's value as of March 31, 1997.[20]

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[19] I arrive at this conclusion as follows: (1) I use two years of equally weighted results, not a five year weighted average; (2) I adjust those results to reflect Humphreys's normalization adjustments (other than those made only to shift expenses from one year to another). For example, I reduce expenses to eliminate amounts paid relative to the personal use of automobiles and telephones. Importantly, I adjust executive compensation according to Humphreys's analysis. (3) I disregard Crump's key man discount. (4) I then assumed either Crump's 15% marketability discount or Humphreys's 10% marketability discount. After dividing the derived total in half, $120,000 is well within the range of fair values.

[20] Plaintiffs also made a claim, based on *quantum meruit* principles, for compensation for Connie Cianci's work and certain damage done to the Ciancis' home while JEM used the

Defendants view is that the 1991 Agreement envisioned John Cianci's retirement at the end of five years. They argue that Cianci was supposed to leave the business to his son-m-law or simply take back his franchise and several smaller accounts to work during his semi-retirement. Minner asserts that at the end of the five years, he expected Cianci to leave the business, and did not know precisely what to do when Cianci did not perform his end of that agreement. As to the Stanley's agreement, Minner claims that he was coerced into agreeing to pay $150,000 over five years to "buy out" his father-in-law. As a result, he asserts that the agreement is invalid.

Minner also claims that Cianci was paid far more than he deserved for his contributions to the business. Thus, he asserts a right to a setoff against any amounts awarded to Cianci in the amount of $229,815, representing damages for Cianci's supposed breach of the 1991 Agreement. I will not address this claim beyond noting that the 1991 Agreement orally created a 50/50 partnership without any real delineation of the partners' respective rights and obligations. Absent some contractual provision making the partners' relative ownership

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garage as an office. When it became clear that John was entitled either to enforcement of the contract or one-half of the value of the enterprise, plaintiffs abandoned this claim.

percentages contingent on a certain level of performance or output, no setoff based solely on inadequate productivity shall be granted.[21]

IV. ANALYSIS

A. Cianci Never Became a Stockholder of JEM

"'The Delaware General Corporation Law requires that the board of directors of a company approve any issuance of stock . . . at a duly held meeting."[22] The sole stockholder/director of JEM never took any action that literally or by implication satisfies this requirement. Indeed, there is little proof that he ever intended to do any such thing.

According to John Cianci himself, the 1991 Agreement contemplated that Cianci and Minner would consolidate their franchises and operate as "50/50 partners." It became quite clear at trial that neither Cianci nor Minner really appreciated the differences between a corporation, a joint venture, a partnership or other type of business entity. Indeed, at oral argument, the Cianci's counsel admitted as much and basically conceded that John Cianci, though he knew that he was a half owner of *something*, did not consider whether that something was really a corporation until this litigation was imminent. An agreement to operate

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[21] Of course, although Minner attacks Cianci's abilities, he explicitly acknowledged his work ethic, and his good faith effort to provide value.

[22] *Box* v. *Box,* Del. Ch., C.A. No. 14238, mem. op. at 19, Allen, C. (Feb. 15, 1996) (citing 8 *Del. C.* §§ 141, 152, 153).

a business as 50/50 partners, equally sharing profits and losses, is generally understood to create a partnership.[23] Cianci faces trouble in claiming stock ownership when no corporate act, formal or informal, can be identified as creating such a relationship. His argument clings only to the representation of share ownership reflected in various tax reports.

As Vice Chancellor Jacobs recently explained, "our statutory scheme envisions a model for the issuance of corporate securities that is premised upon a certain degree of formality, specifically, formal board authorization to issue stock at a duly called meeting of directors, or in lieu thereof, by unanimous written consent."[24] In that case, the court implicitly recognized that strict compliance with the statute might, in a certain instance, "work a manifest injustice."[25]

In this case, I cannot say that requiring strict compliance with the statute results in any injustice. Plaintiffs counsel recognized this point at oral argument. If, in fact, Cianci is a 50% stockholder, he is entitled to one of three remedies: (1) injunctive relief ordering the issuance of 500 shares of JEM, (2) the

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[23] *See 72 Del. Laws, c.* 151, §§ 1506, *1.507, superceded by 6 Del. C.* § 15 (1999). This case is clearly controlled by the prior act (hereinafter "DUPA"). See 6 *Del. C.* §15-1206.

[24] *Kalageorgi v. Victor Kamkin, Inc.,* Del. Ch., C.A. No. 17111, mem. op. at 17-18, Jacobs, V.C. (Sept. 10, 1999).

[25] *Id.* at 21. The court's decision, however, rests on the fact that because the board later ratified the issuance of the stock, the defects in issuance were cured.

monetary value of those shares, or (3) enforcement of the Stanley's agreement as a negotiated buyout of those shares.

If, on the other hand, John is a one-half partner in a joint venture that operated through JEM, his rights are similar. Either John gets one half of the value of the partnership's assets at the time of its dissolution in April 1997 or enforcement of the Stanley's agreement as a negotiated dissolution agreement. Since the Ciancis no longer seek equitable relief, it does not really matter to the outcome of this dispute whether John is a stockholder or a partner.

I will proceed based on the conclusion that the 1991 Agreement made John Cianci and Jeffrey Minner partners in the combined ServiceMaster franchises that operated through JEM. Thus, I will not further consider plaintiffs' claim that Minner is equitably estopped from denying Cianci's stockholder status.

B. Cianci Was Not Required to Leave the Business at the End of Five Years

The parties created a partnership. At this juncture, they agree on this point. Unless otherwise provided by the partnership agreement, upon dissolution, the partners were entitled to share in the partnership's property in accordlance with their interests.[26] Here, Minner plainly failed to prove that

[26] *See DUPA* §§ 1529, 1531, 1540.

Cianci agreed to withdraw from the partnership and relinquish to Minner his interest in the business at the end of five years.

Minner's testimony, the only evidence supporting this conclusion, fails to prove that any such understanding was reached. Cianci went into business with Minner and, at most, indicated his intent to retire in the future, perhaps in five years time. Minner did not prove that Cianci agreed to waive his right to seek compensation for his share of the business.[27] More importantly, considering the conceded informality with which the 1991 Agreement was reached and the lack of detail in its terms, I find it unlikely that the partners discussed and agreed on the specifics for Cianci's withdrawal from the business in five years.

Finally, at the end of the supposed five-year term, which would have been July 1996, Minner did not speak up. Some months later, in December 1966, he sent the Ciancis a letter suggesting that John take a more limited role in the business but did not mention the agreement he now claims to rely on. If Cianci had really agreed to leave the business, I would have expected Minner to be much clearer in asserting his understanding to that effect.

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[27] Indeed, Connie Cianci credibly testified that her husband would not agree to such an arrangement because he does not have enough wealth to retire comfortably.

C. The Stanley's Agreement is Enforceable

The partners initiated discussions in furtherance of an amicable dissolution and break-up and ultimately reached an agreement, but not before one partner made threatening remarks to the other. The most difficult question of this case is whether Cianci's threatening remarks coerced Minner's assent to the Stanley's Agreement and, thus, gave Minner a right to repudiate the deal.

There are three basic elements of a claim that coercion or duress taints the enforceability of a contract: (1) a "wrongful" act, (2) which overcomes the will of the aggrieved party, (3) who has no adequate legal remedy to protect himself.[28]

'The "wrongful act" is often the use of or threat to inflict immediate physical harm. This state, like many others, has broadened this element to include: a wider range of wrongful acts, including economic duress.[29] Nevertheless, under the second element, the wrongful act "must be of such a nature as to actually over-ride the judgment and will of the other party . . . ."[30] "The test for determining whether the duress produced the assent is a subjective

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[28] *See Way Road Development Co.* v. *Snavely*, Del. Super., C.A. No. 89C-DE-48, 1992 WL 19969 at *3, Toliver, J. (Jan. 31, 1992).

[29] *See, e.g., Fowler v. Mumford*, Del. Super., 102 A.2d 535 (1954) (recognizing "economic duress" as a basis to find coercion in the procurement of a contract); *Hanna Sys., Inc.* ***v. Capano Group,*** *L.P.*, Del. Ch., C.A. No. 7408, Walsh, J. (Nov. 29, 1985) (same); *E.I. DuPont de Nemours and Co. v. Custom Blending Int'l, Inc.*, Del. Ch., C.A. No. 16295, Strine, V.C. (Nov. 24, 1998) (same).

[30] *Flukarty v. Flukarty*, Del. Super., 193 A. 838, 840 (1937).

one that focuses on the state of mind of the 'victim' of the duress."[31] The third prong focuses on whether the coercive conduct creates or takes advantage of an exigent circumstance such that the victim could not reasonably be expected to resist and seek legal relief to protect his interests.[32]

1. Were the Threats Wrongful?

Restatement (Second) of Contracts provides a framework for determining when a threat is considered "improper." When "what is threatened is a crime or tort" for example, it is typically considered improper without regard to the terms of the underlying transaction.[33] Alternatively, if the terms are unfair and, for example, "the threatened act would harm the recipient and would not significantly benefit the party making the threat," the threat may also be improper.[34] The fairness of the deal itself becomes relevant in this second class because the threat itself is not facially inappropriate or unlawful. Indeed, in those cases, the threat to exercise a right that the maker of the threat clearly holds is not typically, viewed in isolation, improper.[35]

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[31] *Hanna Sys., Inc. v. Capano Group, L.P.*, Del. Ch., C.A. No. 7408, mem. op. at 7, Walsh, J. (Nov. 29, 1985) (citing *Restatement (Second) of Contracts* § *175,* cmt. c. (1981)).

[32] This prong is an outgrowth of the principal that the victim must have no reasonable alternative to accepting the bargain. *See Restatement (Second) of Contracts,* § 175(a) (1981) (hereinafter "Contracts").

[33] *Contracts* § 176(l)(a). See id. (b)-(d) for other examples of facially improper threats.

[34] *Id.* § 176(2)(a).

[35] See *id.* § 176, cmt. e, ill. 8-l 1. I note in this regard that the United States District Court for the District of Delaware recently examined Delaware's case law under theories of duress in *American Life Ins. Co. v. Parra*, 63 F.Supp.2d 480, 498-99 (D.Del. 1999). He

I am satisfied that in light of the attendant circumstances, Cianci's remarks were improper. For reasons discussed below, however, they do not amount to wrongful duress and do not render the Stanley's agreement voidable.

Cianci said to Minner, his son-in-law, that Minner's wife, his children, and the buyout money would serve as his bulletproof vest. Objectively, this comment actually provides security to Minner, who was openly frightened of and intimidated by his father-m-law. Cianci, however, added the threat that if any of those factors goes away, the bulletproof vest would as well. Notwithstanding Cianci's testimony to the contrary, I find that Cianci included and stressed the importance of the money in ensuring Minner's protection. Since this remark is reasonably understood as a threat of physical harm, it is improper.

Cianci's remarks were improper because they involve a physical threat and because Cianci knew or should have known that Minner would take those remarks seriously. Just as the test of inducement to the contract, which is discussed in the next section, is subjective in nature, determining whether particular words are wrongfully threatening must take into account the subjective viewpoint of the victim of the threat. As the Restatement notes,

> [p]ersons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it

observed that Delaware has rejected the broadest definition of duress found in the Restatement, which includes threatened breaches of the duty of good faith and fair dealing.

> does not lie in me mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims' infirmities.[36]

There is little doubt on this record of Minner's timidity in dealing with his father-in-law. At the Stanley's meeting, he was, in Cianci's words, "shaking like a leaf." Thus, it was improper for Cianci to make even the vague or veiled threat that he made.

2. Did the Threat Overcome Minner's Will?

I conclude, from the totality of the evidence and testimony, that Minner's assent to the buyout was driven by a host of external pressures and business practicalities and only to a limited extent, if at all, by Cianci's bullying remarks.

> A party's manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress. Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered . . . . [A]lthough it is not essential that a reasonable person would have believed that the maker of the threat has the ability to execute it, this may be relevant in determining whether the threat actually induced the assent.[37]

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[36] *Contracts,* § 175, cmt c, 478.

[37] § 175, cmt. c, 478 (cross-reference omitted). *Accord Hanna Sys., Inc. v. Capano Group, L.P.*, Del. Ch., CA. No. 7408, mem. op. at 7-9, Waish, J. (Nov. 29, 1985). See also *Kayne* v. *Klassman*, Del. Ch., C.A. No. 11333, mem. op. at 6-7, Berger, V.C. (May 20, 1991) (holding that where complaint alleges that the victim of threat of early employment termination agreed to amendments to contract because of reliance on advice by the corporation's counsel and accountant pertaining thereto, it was not reasonable to infer that the threat induced execution of those amendments).

Causation is a critical element because "[p]arties are generally held to the resulting agreement, even though one has taken advantage of the other's adversity, as long as the contract has been dictated by general economic forces."[38] Thus, no breaking of the will should be found where outside forces independent of and not created by the maker of the threat compel the contract's immediate acceptance, and the victim otherwise could have walked away and considered the terms more deliberately.[39] In that regard, "the availability of disinterested advice and the length of time that elapses between the making of the threat and the assent" also play into the causation analysis.[40]

Minner testified clearly at trial that the winter and spring of 1996-97 was a stressful time for him, both at home and at work. While he wanted to keep cash in his business to grow it for the future, his partner and father-in-law wanted to take as much money as possible out of the business. Each time Minner tried to convince his partner of the need for change, either his wife or mother-in-law pressured him to back away. Minner's father, Frank, who had just put $25,000 into the business, wanted Minner to terminate all business relations with Cianci. The first time that the partners met to discuss an amicable

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[38] *Contracts,* § *176,* cmt. f, 486.

[39] *See, e.g., American Life,* 64 F.Supp.2d at 499 (holding that where victim knew that he could take release with him, revise it, and have his attorneys consider it, and that he executed the release immediately because of his own precarious financial situation, the threat did not "break the victim's will").

[40] *Contracts,* § 175, cmt. c, 478.

separation, Cianci made a ludicrous offer and threatened Minner, further destroying their already precarious relationship. Finally, the partners' discord was hampering the business. Minner saw it as necessary to resolve the situation as soon as possible and achieve progress and growth for his business. He even contacted Greg Thompson to seek advice. After Thompson spoke with Cianci and advised him of a general "rule of thumb" for valuing the business, Thompson alerted Minner of the coming offer.

It is with this background that Minner went to Stanley's. There is no proof that he was surprised by Cianci's offer, and even if he was, Cianci's insistence at the Burger King meeting that Minner consult with his father makes likely tbat Jeff knew he could walk away to consider the matter.[41] Further, the offer made was clearly in the right ballpark. Although the fairness of me transaction may not be relevant in determining whether the threat is improper or not, as I noted in section C. 1, above, I surely can take it into account in determining whether Minner acceded because of that threat. I conclude that, based on the testimony and the evidence produced, Jeff accepted Cianci's demand because it made sense, from a practical perspective, to do so. In reaching this conclusion, I note the absence of evidence that Cianci's proposal

[41] The record is quite devoid of evidence of the Stanley's conversation beyond the offer and the threat. Thus, I do not know how long Jeff contemplated the offer or what other words, if any, were said that might have left Jeff with the impression that this time around he could not seek his father's advice.

took Minner by surprise or that its terms were less favorable to him than those he was prepared to consider at the Stanley's meeting.[42]

For these reasons, I conclude that the threat did not *cause* the assent. Rather, Cianci's wrongful threat succeeded only in scaring Minner into checking his insurance and installing an alarm system. The threat is still wrongful, but defendants failed to show that it actually broke Minner's will with respect to the contract at issue. Rather, Minner got precisely what he wanted out of the meeting -- a buy-out of his partner at a fair price, and the freedom to operate the business as he saw fit. Further, it was still possible that at least his wife and children might have a familial relationship with the Ciancis.

3. Did Minner Have an Adeauate Legal Remedy?

"A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it."[43] Because I have already concluded that the Stanley's agreement was not voidable due to duress, it is unnecessary for me to examine the question whether Minner's claim satisfies this last element of the defense of duress. I do note, however,

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[42] *Cf. Way Road Development* Co. v. *Snavely*, C.A. No. 89C-DE-48, Toliver, J. (Jan. 31, 1992) (refusing to grant summary judgment because despite fact that alleged victim of duress was making a rational business decision, had substantial business experience, and delayed for some time before asserting the theory of duress, the evidence was susceptible to inferences other than absence of duress). This holding is not applicable here because I have heard all of the evidence and am entitled to reject inferences that, in my view, are unsupported.

[43] *Restatements (Second) of Contracts,* § 175, cmt. b. (1981).

that his failure to seek out any source of help after the Stanley's meeting is completely consistent with my conclusion that Cianci's bullying threats did not cause Minner to assent to Cianci's proposal. It was only after his father, Frank, expressed his disapproval of the terms of the Stanley's agreement that Minner considered repudiating it.

D. Even if the Stanley's Agreement was the Result of Duress, Minner Ratified it by Accepting the Ciancis' Performance and Partially Performing Himself

If a contract is agreed to under duress, it is voidable at the option of the victim? Thus, such an agreement may be ratified and rendered fully enforceable by either side.[45] "Ratification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it."[46] Viewing the facts as a whole, the question is

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[44] *See Way Road Development,* 1992 WL 19969 at *5; *see also Fluharty v. Fluharty,* Del. Super., 193 A. 838, 839 (1937) (holding that if a marriage is procured by duress, and is thus presumptively invalid, but the aggrieved party "then freely consents, no repetition of the ceremony will be required to make it good"): *Cumberland & Ohio Co. of Texas, Inc. v. First American National Bank,* 936 F.2d 846, 850 (6th Cir. 1991) (en banc); *Contracts,* § 175(1); *Industrial Recycling Sys., Inc. v. Ahneman Assoc., P. C.*, 892 F.Supp. 547, 551 (S.D.N.Y. 1995).

[45] *Graham v. State Farm Mut. Auto. Ins.* Co., Del. Super., C.A. No. 87C-AU-11, 1989 WL 12233, at *2, Steele, J. (Jan. *26,* 1989); see *also Gallon v. Lloyd-Thomas Co., 264* F.2d 821, 825-26 (8" Cir. 1959).

[46] *Gallon, 264* F.2d at *826; see also Graham,* 1989 WL 12233 at *2.

essentially whether the party claiming duress acted reasonably under the circumstances.[47]

After leaving Stanley's, Minner stayed quiet. Some later time, he discussed the agreement with his father. Frank Minner, having just put $25,000 into JEM and harboring significant animosity towards Cianci, reacted negatively to the deal and advised Jeff to consult with his attorney. The record is not altogether clear how much time passed before Minner met with his attorney.[48]

Cianci honored his end of the bargain. He and Connie resigned from JEM effective March 31, 1997. Further, they allowed Minner to remove all files relating to the business from their home. Minner has never offered to restore the Ciancis to their corporate positions or to have Cianci return to work. "[I]t is axiomatic that a party cannot both accept the benefits which accrue under a contract on the one hand and shirk its disadvantages on the other."[49]

Minner also partially performed his own end of the bargain. Specifically, he delivered to Cianci the Talleyville Franchise and the small accounts Cianci bargained for. At none of these times did Minner announce his intent to

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[47] *Industrial Recycling,* 892 F.Supp. at 551.

[48] Minner testified that he met with his attorney almost immediately, seeking advice on how to issue the shares to Cianci so that Minner could buy them back. Marie Minner's letter explains that her husband was going to honor the agreement, but when Frank Minner learned of the payments, he insisted that Jeff consult with an attorney.

[49] *Graham,* 1989 WL 12233 at *2 (citing *Eastern States Petroleum Co. v. Universal Oil Products Co.,* Del. Ch., 49 A.2d 612 (1946)).

repudiate the contract or to free himself from its terms." Only when it came time to start paying Cianci the monthly annuity did Minner refuse to perform.

While the question of duress may be complex, the issue of ratification is quite simple. Minner accepted all of the benefits of the bargain, and even partially performed it, without asserting that the contract was tainted. Thus, he ratified it and should be bound to its terms.

At trial, the parties agreed that the present value in 1997 of the payments due Cianci under the breached contract was approximately $120,000.00. I will enter judgment in that amount plus prejudgment interest at the legal rate. I will deny all of the other claims for relief made by plaintiffs and by defendants in their counterclaim.

V. CONCLUSION

For the reasons set forth above, judgment in favor of the plaintiffs is hereby GRANTED. The parties shall confer and submit a final order in accordance with this opinion within ten (10) days.

Vice Chancellor

[50] See *Gallon*, 264 F.2d at 826-27 (holding that continued failure to assert duress defense in subsequent dealings between parties amounts to ratification of voidable agreement).