

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT POLIAK,	§
	§ No. 478, 2012
Defendant Below,	§
Appellant,	§ Court Below – Court of Chancery
	§ of the State of Delaware
v.	§ C.A. No. 7109
	§
ROBERT D. KEYSER, JR., FRANK	§
SALVATORE and SCOTT SCHALK,	§
	§
Plaintiffs Below,	§
Appellees,	§
	§
and	§
	§
ARK FINANCIAL SERVICES, INC.,	§
	§
Nominal Defendant Below,	§
Appellee.	§

Submitted: April 10, 2013

Decided: May 6, 2013

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

ORDER

This 6th day of May 2013, it appears to the Court that:

1) This is an appeal by the defendant-appellant, Albert Poliak (“Poliak”), from the July 31, 2012 Memorandum Opinion, and the August 3, 2012 Order and Final Judgment of the Court of Chancery in an action under title 8, section 225 of the Delaware Code to determine the composition of

the board of directors of Ark Financial Services, Inc. (“Ark”). The complaint was filed on December 13, 2011, by plaintiffs-appellees, Robert D. Keyser, Jr., Frank Salvatore, and Scott Schalk (collectively the “Plaintiffs”), who alleged they comprised Ark’s board of directors by virtue of a stockholders’ consent signed on December 13, 2011 (the “2011 Written Consent”).

2) The holders of a majority of Ark’s common stock acted by written consent on December 13, 2011, to remove the existing Ark board and to elect the Plaintiffs as Ark’s directors. The defendants – three directors removed by the 2011 Written Consent and Poliak, a former director and CEO of Ark – submitted that the stockholder consent was ineffective because Poliak held super-voting Series B preferred stock.

3) The Plaintiffs argued that the 2011 Written Consent was effective because Ark’s Series B Preferred Stock held by Poliak should not be counted in determining what constituted a majority of the Ark stock outstanding and entitled to vote. Poliak caused ARK to issue that Series B Preferred Stock one year earlier, in December 2010, to block a prior takeover attempt by Keyser.

4) Following the 2010 issuance of the Series B Preferred Stock, the groups contending for control of Ark negotiated a series of agreements

that ultimately led to Ark issuing \$4,000,000 of new Series A Preferred Stock to third party investors. In the Series A Preferred Stock Offering materials, Ark informed these investors that Poliak controlled Ark through the Series B Preferred Stock. The sale of the Series A Preferred Stock permitted Ark to negotiate settlements with its creditors on its past-due, multi-million debts and remain in business.

5) Following expedited proceedings, the Court of Chancery held a two-day trial on March 14-15, 2012. After trial, the Court of Chancery determined that Poliak, while serving as Ark's sole director in December 2010, had violated his fiduciary duty of loyalty by causing the super-voting preferred stock to be issued to himself for the admitted purpose of thwarting holders of a majority of Ark's common stock from removing him as a director. Specifically, the Court of Chancery concluded that "Poliak's self-dealing was motivated by a desire to prevent Ark's shareholders from electing a new Board . . .," that Poliak's issuance of super-voting preferred stock "to himself at a bargain price in order to gain control of the corporation and prevent its stockholders from removing him (or those aligned with him) from office" was not entirely fair, and that the issuance of the preferred stock was therefore invalid. Accordingly, the Court of Chancery concluded that holders of "a majority of Ark's common stock, the

only valid and outstanding class of Ark stock entitled to vote in a Board election, executed the 2011 Written Consent, and that consent elected the Plaintiffs to the Board and removed [the prior directors].”

6) Poliak is the only defendant who appealed. He has not contested the Court of Chancery’s ruling that he violated his fiduciary duty of loyalty by issuing super-voting preferred stock to himself for the admitted purpose of preventing his own removal. Instead, in this appeal, Poliak asserts that the Court of Chancery erred in rejecting several equitable defenses – laches, ratification, acquiescence, and waiver.

7) First, Poliak argues that “[s]tockholders who are fully informed about the issuance of a control block of a corporation’s stock and who accept the benefits of a subsequent sale of corporate stock to third party investors that is based on the existence and identity of the controlling stockholder may not later attack the issuance of the control block of stock.” According to Poliak, “[l]aches bars that attack.” Second, Poliak contends that “[s]tockholders who accept the benefits of a corporation’s sale of its stock with full knowledge ratify, acquiesce or waive objections to the transaction that made that sale of stock possible.”

8) The legal issues in this case present mixed questions of law and fact. The applicable standards of appellate review in this context are well

established.¹ After a trial, findings of historical fact are subject to the deferential “clearly erroneous” standard of review.² That deferential standard applies “not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”³ Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated. We review the trial court’s legal conclusions *de novo*.⁴

9) The Court of Chancery concluded that laches does not bar Plaintiffs’ challenge to the validity of the super-voting preferred stock. The Court of Chancery made factual findings that the Defendants had failed to show unreasonable delay and had failed to show any prejudice. Those findings of fact are entitled to deference on appeal.⁵ The record reflects that the Plaintiffs filed suit the same day they delivered to Ark the 2011 Written Consent electing a new board, and one year after Poliak caused the super-

¹ *Hall v. State*, 14 A.3d 512, 516-17 (Del. 2011).

² *Id.*

³ *Id.* at 516-17.

⁴ *Id.* at 517. *See also Blake v. State*, 954 A.2d 315, 317-18 (Del. 2008).

⁵ *See Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002).

voting preferred stock to be issued to himself. The Court of Chancery found that the Plaintiffs did not file suit sooner due to good faith efforts to negotiate a settlement. Poliak's argument that third-party investors detrimentally relied on a belief that he would control Ark through the super-voting preferred stock is not supported by the record.

10) The Court of Chancery concluded that the Plaintiffs did not ratify or acquiesce in Poliak's self-dealing conduct, and had not waived the right to challenge Poliak's self-dealing issuance of super-voting preferred stock to himself. The Court of Chancery found that Keyser had reserved the right to challenge the preferred stock issuance. The Court of Chancery also found that the Defendants had failed to show that third-party investors made their investment because they wanted to have Poliak as a controlling stockholder or that they believed the self-dealing issuance of preferred stock to Poliak could never be challenged.

11) The Court of Chancery held that "none of the equitable defenses raised by the Defendants has any merit." That holding, which was based on the trial court's findings of historical fact and its conclusion that Poliak had failed to carry his burden of proof with regard to any of the affirmative equitable defenses he asserted, is entitled to deference on appeal.

12) Having considered this matter after oral argument and on the briefs filed by the parties, the Court has determined that the final judgment of the Court of Chancery should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its July 31, 2012 Memorandum Opinion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Court of Chancery be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice