Diamond v. Southern Vermont Orchards, Inc., Docket No. 239-7-06 Bncv (Wesley, J., June 4, 2007)

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON SUPERIOR COURT
DOCKET NO. 239-7-06 Bncv

Harold DIAMOND,)
Plaintiff)
)
v.)
)
SOUTHERN VERMONT)
ORCHARDS, INC. d/b/a)
The Apple Barn,)
Defendant)

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Harold Diamond was an employee and officer of Defendant Southern Vermont Orchards before his termination in late 2005. He remains a shareholder in this closely-held corporation. Having been terminated, and presently embroiled in divorce proceedings with Lia Diamond, the president of the corporation, Plaintiff is endeavoring to sell his interest in the corporation. In an effort to conduct an accurate valuation and secure a fair price for his shares, Plaintiff requested access to a variety of SVO's corporate records, which it refused to provide. Plaintiff subsequently filed suit in this Court to compel SVO to provide access to the requested records. Currently pending before the Court are Plaintiff's Motion for Summary Judgment and SVO's Cross-Motion for Summary Judgment. These motions address the entitlement of shareholder access

to two classes of corporate records under 11A V.S.A. § 16.02. Based on the following analysis, Plaintiff's motion is **GRANTED**, and SVO's cross-motion is **DENIED**. As discussed below, although it upholds Plaintiff's substantive right to access, the Court somewhat limits the scope of the relief requested.

Both parties have presented distinct arguments addressing the two classes of records. Regarding the first class, for which a shareholder has more unfettered rights of inspection under

§ 16.02(a), Plaintiff argues that he is entitled to access because he is a shareholder, provided sufficient written notice of his intentions and requested only discoverable records. Regarding the second class, Plaintiff argues that he was entitled to access under § 16.02(b) because he is a shareholder, provided sufficient written notice, requested only discoverable accounting records and stated a proper purpose for his request; namely, the valuation of shares. He asserts that SVO improperly refused to grant these requests, and asks the Court to issue an order directing SVO to provide access to the documents and to pay or reimburse production costs and attorney's fees. In opposition, SVO disputes that it received sufficient written notice of Plaintiff's request to inspect § 16.02(a) records, but claims that it is presently willing to allow access if the statutory conditions are satisfied. Regarding records for which access is governed by § 16.02(b), SVO argues that Plaintiff had previously signed a Stockholders' Agreement that set the value of his shares and rendered unnecessary any independent valuation. SVO also states that if the Court does order access to any of these records, it should limit Plaintiff's access and SVO should not have pay any of Plaintiff's costs because it refused inspection in good faith.

Unless otherwise noted, the following facts are undisputed. SVO is a Vermont corporation with its principal place of business, The Apple Barn and Country Bake Shop, in Bennington, Vermont. Lia is the president of the corporation and one of its four shareholders. The other shareholders are Harold Albinder, Natasha Diamond and Plaintiff. Plaintiff is a minority shareholder and former employee of SVO, which terminated his employment around December 31, 2005. Lia and Plaintiff are presently married, but are separated and a divorce is pending. Plaintiff is a resident of Bennington.

On May 15, 2002, all SVO shareholders, including Plaintiff, signed a Stockholders' Agreement. Paragraph 3(a) of the Agreement provides that if a shareholder wishes to sell his stock and/or his employment is terminated, he must give SVO "written notice of such desire or such event . . . [which] shall contain the identity of the purchaser and the price and the terms of such proposed sale or the date of such termination of employment . . ." The corporation and other shareholders thereafter have hierarchical rights to purchase the shareholder's stock following notice of intent to sell and/or termination. Paragraph 4(b) governs the purchase price to be paid by SVO or its shareholders in such event, and provides that "[i]n the event of a sale of stock [to SVO or its shareholders under Paragraph 3(a)], the purchase price of all of the shares of stock . . . shall be the book value of such shares as determined from the balance sheet of [SVO] submitted as part of [its] Federal income tax return for the fiscal year immediately preceding the date of exercise of the option or date of termination of employment . . ." If neither SVO nor the shareholders purchase the stock within eighty

days of the triggering event, then the selling shareholder "may sell his stock free of the restrictions of [the] Agreement, to the person and on the terms and at the price described in the original notice," provided that he does so within ninety days after the failure to purchase. If he does not sell under these terms, he must re-offer the stock to the corporate hierarchy. Under the same failure-to-purchase scenario, if the shareholder was terminated, "he may retain his stock in [SVO] after such termination of employment, . . . [but] any subsequent sale of his stock shall be subject to the terms of [the] Agreement." On February 10 and May 22, 2006, Plaintiff sent letters to SVO demanding to inspect and copy some of its corporate records. Plaintiff requested that inspection take place on February 21st and June 1st, respectively. SVO claims that it does not know when it received these letters and disputes that receipt was timely. SVO also states, in opposition to Plaintiff's contention, that it may not have received adequate notice of his request. Plaintiff further avers that SVO has not made the requested records available. In response, SVO contends that the records have been made available and that Plaintiff has not taken the initiative to inspect and copy the records. However, given SVO's inconsistent and contingent qualifications as to its professed willingness to allow Plaintiff access to the records, both in its cross-motion for summary judgment and during oral argument, the Court concludes that SVO has never made such an unequivocal response to Plaintiff's request as would have made this ruling unnecessary. In both demand letters, Plaintiff sought production of a wide variety of corporate records. These records included two classes of information. The first class included the following: articles or restated articles of incorporation and all amendments to them currently in effect; bylaws or restated bylaws and all amendments

to them currently in effect; resolutions adopted by SVO's board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding; minutes of all shareholders' meetings and records of all actions taken by shareholders without a meeting; all written communications to shareholders generally within the past three years, including financial statements. The second class included the following: corporate tax returns, accounting financial statements and corporate balance sheets for the past ten years; specific listing of corporate fixed assets currently owned; internal accounting records; internal financial statements and budget parameters generated in the past five years; financial projections generated in the past three years; business financial statements prepared by an independent accounting firm; and copies of bank statements for all bank accounts. Plaintiff justified his request as "a good faith effort to assist [him] in establishing the value of the corporation . . . [and his] shares." SVO disputes that this was Plaintiff's purpose in requesting the records.

"To prevail on a motion for summary judgment [under V.R.C.P. 56(c)(3)], the moving party must show there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law." *Gordon v. Bd. of Civil Auth. for Town of Morristown*, 2006 VT 94, ¶ 5, 17 Vt.L.W. 300. The court does not weigh the evidence, but merely determines whether a triable issue of fact exists. *Berlin Dev. Assocs. v. Dept. of Soc. Welfare*, 142 Vt. 107, 111-112 (1982). This is a stringent test, as "the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences." *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26 (1992); *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

A shareholder of a corporation may inspect and copy certain records of the corporation as a matter of right. These records, to be inspected and copied "during regular business hours at the corporation's principal office," include "any of the [corporate records described in 11A V.S.A. § 16.01(e)] if the shareholder gives the corporation written notice of [his] demand at least five business days before the date on which the shareholder wishes to inspect and copy." 11A V.S.A. § 16.01(a). Section 16.01(e) lists seven types of records: (1) articles or restated articles of incorporation and all amendments presently in effect; (2) bylaws or restated bylaws and all amendments presently in effect; (3) resolutions adopted by the board of directors that create classes of shares and establish the essential characteristics of the shares, if the shares are outstanding; (4) minutes of all shareholders' meeting and records of all actions taken by shareholder without a meeting; (5) all written communications delivered within the past three years, including financial statements, to shareholders by the corporation; (6) list of names and business addresses of current directors and officers; and (7) latest annual report from the corporation to the Vermont secretary of state.

The first class of records requested by Plaintiff corresponds exactly to the parameters of § 16.01(e). Nonetheless, SVO contends that Plaintiff's original requests were improper because it did not receive sufficient advance notice of Plaintiff's request to inspect these records. SVO has made no evidentiary showing to make a disputed fact as to its timely and adequate receipt of Plaintiff's request for records. When a party properly addresses and sends a letter, there is a presumption that it was delivered in due course. See *Estey v. Leveille*, 119 Vt. 438, 439 (1957). The expected date of

delivery may reasonably depend on the circumstances. For instance, in *Sexton v. Neun*, 131 Vt. 372, 378-379 (1973), the Supreme Court found to be reasonable the trial court's assumption that a letter sent from Northfield, Vermont on December 1, 1970 was delivered to Brookline, Massachusetts before December 5, 1970. The distance between Northfield and Brookline is approximately one hundred and eighty miles.[1]

[1] Under V.R.E. 201, a court may, sua sponte, take judicial notice of the distance between two places. See *Fine Foods, Inc. v. Dahlin*, 147 Vt. 599, 604 (1986).

As applied to this case, *Estey* and *Sexton* establish a presumption that Plaintiff's letters to SVO were delivered in sufficient time to provide the statutorily required five days notice. Plaintiff's February 10 letter, sent on a Friday, requested inspection on February 21, and his May 22 letter, sent on a Monday, requested inspection on June 1.[2] Given that these were local letters, it is reasonable to assume that the postal service delivered Plaintiff's letters in two days or less and that the notice period ended the day before inspection was to take place. SVO has not presented any evidence or alleged any facts that might rebut this presumption of timely delivery and statutory compliance. Therefore, SVO was obligated to allow Plaintiff to inspect the records at the designated times.

SVO apparently believes that its present expressed willingness to allow Plaintiff to inspect the records make this element of the case moot and precludes the Court from ordering the inspection and/or awarding costs to Plaintiff. Such a change in position does not automatically create mootness. "[A] case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." See *Hunters, Anglers and Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 15, 17 Vt.L.W. 415. As previously indicated, SVO's ostensible tender of the records appears to the Court to have been continuously contingent. But even if the tender could now be considered unequivocal, Plaintiff would still have a legally cognizable interest in an award of costs and attorney's fees related to the initial refusal. Thus, to resolve any doubts created by SVO's protracted

[2] A court may also take judicial notice of what day of the week a particular date falls on. See *Roddy v. Fitzgerald's Estate*, 113 Vt. 472, 474 (1944).

recalcitrance, the Court now orders SVO to allow Plaintiff to inspect the first class of documents. It addresses below the subject of costs and attorney's fees.

Shareholder access to the second class of records requested by Plaintiff is governed by a more general standard, providing SVO with somewhat greater latitude in resisting production. Under § 16.02(b), a shareholder may inspect and copy, "during regular business hours at a reasonable location specified by the corporation," the accounting records of the corporation and the record of shareholders if he complies with the statutory requirements. Again, the shareholder must provide written notice of at least five business days to the corporation. Three additional factors must be present under § 16.02(c) for the shareholder to be entitled to inspection and copying. First, the shareholder must establish that his demand "is made in good faith and for a proper purpose." 11 V.S.A. § 16.02(c)(1). "To be proper, a purpose must be reasonably relevant to one's interests as a shareholder." *Towle v. Robinson Springs Corp.*, 168 Vt. 226, 228 (1998). Examples include the valuation of shares, investigation of possible mismanagement, and inquiry into corporate performance. *Id.* A shareholder may not request records in order to harass the corporation or satisfy mere curiosity, but an improper purpose does not necessarily preclude inspection. *Id.* "Hostility between parties . . . is not itself sufficient to prevent access to corporate records." *Id.* at 229. The corporation must show that fulfilling the improper purpose was the shareholder's primary purpose or that he otherwise acted in bad faith. *Id.* at 228. Second, the shareholder must describe the records sought "with reasonable particularity." 11 V.S.A. § 16.02(c)(2). Third, "the records [must be] directly connected with the shareholder's purpose." *Id.* at § 16.02(c)(3). If the shareholder desires inspection for the purpose of

valuing his stock, the scope of the accessible records necessarily depends upon the circumstances. See *Towle*, 168 Vt. at 228.

In this case, as neither SVO nor any of its remaining shareholders exercised the right to purchase Plaintiff's shares during the eighty day period after his termination, he presently has the right to seek a purchaser and negotiate a price for his shares. His stated purpose in requesting access to SVO's records, the valuation of his shares, is therefore proper.[3] Assuming *arguendo* that Plaintiff's request could have been predicated in part on hostility stemming from his impending divorce or from a desire to gain information about his wife's financial assets beyond the scope of Family Court discovery, SVO has shown no facts from which it could plausibly be inferred that the indulgence of such hostility/inquisitiveness was either Plaintiff's primary purpose in submitting the request, or a bad faith purpose. Indeed, it is apparent that issues underlying the divorce action are intertwined with the circumstances of Plaintiff's termination from SVO; thus, the fact that his legitimate need for establishing the value of his stock after the termination of his employment overlaps with a desire to gain similar information to inform his assertion of property rights in a divorce does not render the initial purpose improper.

Notwithstanding the Court's conclusion that Plaintiff is entitled to inspect and

[3] SVO's argument to the contrary is premised on its conviction that any attempt by Plaintiff to sell his shares will be limited by the exercise of its option, or that of the remaining shareholders, to repurchase Plaintiff's shares at the price established by the Stockholders' Agreement. Yet, as they did not repurchase Plaintiff's shares within the initial window following his termination, the terms of that very agreement are not triggered again until Plaintiff presents SVO with notice of his intent to sell , including "*the identity of the purchaser and the price and the terms of such proposed sale".* Thus, it is patent that Plaintiff has a valid purpose for acquiring information that will enable him to structure adequate notice to SVO, and on the most advantageous terms possible should SVO for some reason fail to protect its rights.

copy all of the desired accounting records, his request for access to corporate tax returns, accounting financial statements and corporate balance sheets for the past ten years is too broad, because it seeks some material that is too likely attenuated from his stated purpose, and more likely to verge into an area where improper motive is more readily inferred. Plaintiff has made no compelling showing that he needs such extensive records in order to conduct a present valuation of the company. Rather, the Court holds that it will be sufficient for SVO to allow him access to these records for the past five years only.

The superior court is statutorily empowered to order a corporation to allow the inspection and copying of documents and to allocate expenses between parties. See 11A V.S.A. § 16.04. If the corporation does not allow a shareholder to inspect § 16.02(a) records that he is entitled to inspect, the court may order the corporation to pay the cost of inspection and copying. *Id.* at § 16.04(a). The court may also order the corporation to allow shareholder access to § 16.02(b) records. See *id.* at § 16.04(b). If the court orders inspection and copying of either § 16.04(a) or (b) records, "it shall also order the corporation to pay the shareholder's costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." *Id.* at § 16.04(c). See also *Towle*, 168 Vt. at 230.

In light of the foregoing, the Court orders SVO to allow Plaintiff to inspect the records that he requested under 11 V.S.A. §§ 16.02(a-b), within the five-year limit discussed above. Furthermore, the Court concludes that SVO has advanced no

reasonable basis for refusing to the allow the inspection. Its contention that it does not know when it received Plaintiff's demand letters has little merit, and its argument that the Stockholders' Agreement precluded any independent valuation of the stock is contradicted by the Agreement's terms. Thus, SVO will pay for the costs associated with inspection and copying, together with Plaintiff's reasonable attorney's fees associated with these proceedings.

Based on the foregoing, it is hereby **ORDERED**:

Plaintiff's Motion for Summary Judgment is **GRANTED** as provided herein.

Defendant's Cross-Motion for Summary Judgment is **DENIED**.

DATED , at Bennington, Vermont.

John P. Wesley
Presiding Judge