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OF THE
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Re: Norberg v. Security Storage Company of Washington, et al.
C.A. No. 12885-NC
Submitted: March 2 1,2002

Dear Counsel:

This is my decision on Plaintiff John Norberg's motion pursuant to Court of Chancery Rule 60(b) for relief from judgment on grounds of newly discovered evidence. That motion reflects his continuing efforts to avoid the consequences of this Court's dismissal on summary judgment of his claims under the doctrine of

acquiescence.[1] Because I conclude that Norberg, through the exercise of "reasonable diligence," could have obtained the "newly discovered evidence" in time to defend against Defendants' summary judgment motion, Norberg's motion is denied.

I.

This action arises out of the cash-out merger of Security Storage Company of Washington ("Security Storage") into Security Acquisition Corporation ("Acquisition"). Security Storage is primarily a moving and storage company. As part of that business, however, it has acquired significant real estate holdings in the Washington, D.C., area. Warehouses have been erected on many of those parcels. Norberg, prior to the merger, owned 43 shares of Security Storage. At the time of the merger, Acquisition held 82% of the shares of Security Storage.

[1] *Norberg v. Security Storage Co.,* Del. Ch., C.A. No. 12885, Steele, J. (Sept. 19, 2000) ("*Norberg I*"); *Norberg v. Security Storage Co.,* Del. Ch., C.A. No. 12885, Noble, V.C. (Jan. 12, 2001) ("*Norberg II*"). For more recent discussions of the doctrine of acquiescence in similar contexts, see *Clements v. Rogers,* Del. Ch., C.A. No 15711, Strine, V.C. (Aug. 14, 2001); *In re Best Lock Corp. S'holders Litig.,* Del. Ch., C.A. No. 16281, Chandler, C. (Oct. 29, 2001). Norberg's present motion does not address the alternate basis – waiver – for the Court's decision to enter summary judgment against him. *Norberg I,* mem. op. at 20-22; *Norberg II,* let. op. at 4, n.7.

Norberg filed this action as a purported class action in 1993 to challenge the merger on grounds of unfair price and process and inadequate disclosure of material facts necessary to value a minority shareholder's shares. However, in April 1994, approximately 17 months later, Norberg tendered his shares and accepted the $120 per share merger price. Although Norberg was dismissed as the only plaintiff in 2000, other plaintiffs were allowed to come forward to represent the interests of the class of other former minority shareholders of Security Storage. Thus, even in Norberg's absence, this proceeding has moved forward.

Norberg's complaint focuses on the development potential of some of Security Storage's real estate, particularly a property near a Metro station in northern Virginia. The Complaint asserts that this development potential was not fairly disclosed to the shareholders at the time of the merger and that this development potential was material to efforts to value the shares. The newly discovered evidence upon which Norberg relies is that not only did the directors of Security Storage anticipate developing the real estate but they also contemplated selling the real estate.

Norberg did not learn of the potential plans of Security Storage for the sale of the real estate until the deposition of David Wright was taken in June 2001, many months after summary judgment had been entered against him. Norberg could have, but did not, take the deposition of Mr. Wright, a personal acquaintance, during the many years in which this case was relatively inactive.[2] Mr. Wright testified that Defendant Townsend Burden, III, a director of Security Storage, told him shortly before the merger that the purpose of the merger was "to reduce the number of shareholders so that we can convert it to a Subchapter S corporation so that *when we **sell** the real estate* we'll only have to pay tax once."[3] In contrast, Mr. Burden had testified in his 1996 deposition, in several instances, that the Security Storage board had never considered selling the real estate.

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[2] Norberg's motion recites: "Only earlier this year [2001] plaintiffs counsel learned of the existence of a material witness, David W. Wright, who worked as a market maker in [Security Storage] stock." Pl.'s Motion Pursuant to Chancery Rule 60, at ¶ 2. Although Plaintiffs counsel did not know of Mr. Wright, Norberg, unless Mr. Wright's otherwise uncontested (at least as to this point) deposition testimony is rejected, was aware of Mr. Wright and knew that he was a market maker in Security Storage's "thinly traded" stock. "Reasonable diligence" not only involves the lawyer; it also implicates the party's knowledge.

[3] Dep. of David W. Wright, at 8-9 (emphasis added).

Security Storage had a history of developing property itself by, for example, constructing and owning warehouses. Norberg argues that there is a difference between holding real estate for self-development and holding real estate for sale because the economic consequences of the two are different, both in terms of cash flow and risk. Security Storage, in essence, contends that holding property so that it can be sold for development by a third-party is simply one form of holding property for development. I am persuaded that, for purposes of the pending motion, there is a material difference between a contemplated sale of property and contemplated development of property by the owner.

**II.**

Court of Chancery Rule 60(b)(2) affords a disappointed litigant an opportunity to obtain judicial reconsideration of the merits of his claim on account of "newly discovered evidence."[4] In order to succeed on a motion under Court of Chancery Rule 60(b)(2), the moving party must demonstrate that:

[4] Court of Chancery Rule 60(b) provides in pertinent part: "On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence."

> [1] [T]he newly discovered evidence has come to his knowledge since the trial; [2] that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; [3] that it is so material and relevant that it will probably change the result if a new trial is granted; [4] that it is not merely cumulative or impeaching in character; and [5] that it is reasonably possible that the evidence will be produced at the trial.[5]

Although a motion under Court of Chancery Rule 60(b) "is a discretionary matter which requires the Trial Judge to weigh the facts and circumstances of each case,"[6] new trials based on newly discovered evidence "are not favored."[7] This is because Court of Chancery Rule 60(b) "implicates two important values: the integrity of the judicial process and the finality of judgments."[8]

With these factors in mind, I turn to their application.[9]

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[5] *In re Mo.-Kan. Pipeline* Co., 2 A.2d 273,278 (Del. 1938) (citations omitted) (cited in *Levine v. Smith,* 591 A.2d 194,202 (Del. 1991); *In re U.S. Robotics Corp. S'holders Litig.,* Del. Ch., C.A. No. 15580, mem. op. at 20, Strine, V.C. (Mar. 15, 1999)).
[6] *Bachtle v. Bachtle, 494* A.2d 1253, 1256 (Del. 1985).
[7] *Cole v. Kershaw,* Del. Ch., C.A. No. 13904, mem. op. at 4, Jacobs, V.C. (Sept. 5, 2000).
[8] *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.,* Del. Ch., C.A. No. 12150, mem. op. at 3, Allen, C. (Dec. 20, 1996).
[9] The defense of acquiescence turns on what Norberg knew when he tendered his shares; his Rule 60(b) motion is based upon his knowledge, as could have been acquired through "reasonable diligence," at the time of the summary judgment motion.

1. ***Newly discovered***

The newly discovered evidence has come to Norberg's knowledge since the summary judgment motion was processed. He learned of it approximately nine months after the adverse decision.

2. ***Reasonable diligence***

The question of whether Norberg could have discovered this evidence of plans to sell (as opposed to develop) the corporate real estate through "the exercise of reasonable diligence" is not free from doubt. For example, Norberg could have taken Mr. Wright's deposition sooner." On the other hand, Mr. Burden, as a director of Security Storage, testified repeatedly that there were no plans for, or consideration of, a sale of the real estate. [11]

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[10] *In Levine v. Smith,* 591 A.2d at 201, a Rule 60(b)(2) motion had been granted based on subsequent deposition testimony of two directors of one of the defendant corporations. That application, however, came after the granting of a motion to dismiss and not a motion for summary judgment where, as here, Norberg had enjoyed ample opportunity to take full discovery.

[11] The Defendants make much of the form of the questions asked by Norberg's counsel in the deposition of Mr. Burden. However, Mr. Burden did on several occasions testify that there were no plans to sell the real estate. That a question was not asked specifically about both the desire to reduce the number of shareholders for Subchapter S tax purposes and to sell the real estate (thereby linking the two factors) does not avoid, for these purposes, the numerous references by

By the time the motion for summary judgment was argued, this litigation had been ongoing for more than seven years. Other than a suggestion that counsel for Norberg did not know of Mr. Wright, there is no explanation for why Mr. Wright was not deposed sooner. Norberg had known Mr. Wright, who is a market maker in thinly traded securities, such as Security Storage, since 1991 .[12] Norberg does not contend that he was unable to take Mr. Wright's deposition before defending the summary judgment motion;[13] instead, he asserts that he did not know that Mr. Wright would testify about Security Storage's plans to sell its real estate.[14]

Mr. Norberg did not know how Mr. Wright would testify because he had not bothered to take his deposition while he had the opportunity to do so over several years. Norberg ultimately relies upon Mr. Burden's deposition testimony in 1996

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Mr. Burden that no sale was contemplated. Mr. Burden had attributed the desire to convert to Subchapter S status to an effect to improve cash flow and to avoid the annual tax consequence to the Company.

[12] Wright Dep. at 14.

[13] ***See, e.g., Giordano v. McCartney, 385*** F.2d 154 (3d Cir. 1967) (motion under F. R. Civ. P. 60(b)(2) based upon testimony of a witness who was not found before trial but was found shortly after trial did not satisfy "reasonable diligence" standard).

[14] Mr. Wright's deposition testimony was inconclusive when asked if he had told Norberg about the potential for sale of Security Storage's real estate. Wright Dep. at 37-38.

to the effect that sale of the real estate was not contemplated and argues that Mr. Burden's testimony excuses his failure to take Mr. Wright's deposition sooner. In effect, Norberg's argument is that a party exercises "reasonable diligence" when he accepts the testimony of an opposing party at face value, thereby generally allowing an opportunity for a new tial whenever material and contradictory testimony can be found after termination of the proceeding." Court of Chancery Rule 60(b)(2) is not that generous to disappointed litigants. Failure to depose in a timely fashion known and available witnesses with knowledge likely to be relevant to the proceeding is not consistent with a finding that the party exercised "reasonable diligence." In sum, I find that if Norberg had exercised reasonable diligence, the testimony of Mr. Wright to the effect that Security Storage at the time of the merger was contemplating a sale of the real estate would have been available to aid in his defense of the Defendants' motion for summary judgment?

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[15] If Norberg is merely relying upon the newly discovered evidence to impeach Mr. Burden's testimony, then his current efforts would fail under the fourth prong of the *Missouri-Kansas Pipeline Co.* analysis, *i.e.,* the newly discovered evidence would be "merely . . . impeaching in character."

[16] The infrequency of successful efforts under Court of Chancery Rule 60(b)(2) and its companion rules in other courts is largely attributable to a reluctance to interfere with the finality

*3. Probable effect*

I conclude that the newly discovered evidence is "so material and relevant that it will probably change the result." The test for evaluating an acquiescence defense is based on Norberg's knowledge at the time he tendered his shares. From the Complaint, it is clear that he had knowledge (or claimed to have knowledge) of plans to develop the property. Careful reading of the Complaint fails to reveal that he had any expectation or knowledge that the property would be sold by the corporation or that a sale was contemplated. In the context of a company such as Security Storage which historically developed its properties itself, plans to sell its real estate would be material to a shareholder in determining how to value his

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of a judgment. Judicial decisions, because of limited judicial resources and fairness to prevailing parties, are entitled to respect and should not be lightly set aside. Here, however, the very claims that Norberg brought are now being advanced by other class plaintiffs. The litigation burdens on both the Court and the Defendants will be substantially the same, whether Norberg is a party or not. The only potential material difference would be, if the Plaintiffs prevail, that the Defendants would also be liable for a per share recovery allocable to Norberg's 43 shares of Security Storage stock. Thus, the policy favoring finality, which lies at the heart of the case law applying Court of Chancery Rule 60(b)(2), has limited practical significance in this matter – only the individual claim of Norberg as to his 43 shares of Security Storage stock with its unique factual considerations for the defense of acquiescence has been "finalized."

shares.[17] Thus, this information would have been material to Norberg and, because he did not know it at the time of the tender of his shares, that additional information would "probably" have resulted in a different conclusion as to whether the Defendants had succeeded in demonstrating Norberg's acquiescence.

My conclusion, however, that the newly discovered evidence would probably alter the result is not the only inference that could reasonably be drawn from these facts. As this Court observed, "Norberg's Complaint is replete with allegations of false and misleading disclosures concerning the value of Security Storage and the fairness of the consideration."[18] Whether Norberg's decision to tender would have been influenced by knowledge about the potential for sale (in addition to the potential for development) of the real estate is something of an open question, particularly in light of what the record shows was his principal motivation for tendering: Norberg's Security Storage stock was held in an IRA

[17] A company's plans, at the time of the merger, for future business efforts may be helpful in achieving a proper valuation. *See, e.g., Cede & Co. v. Technicolor, Inc., 758* A.2d 485 (Del. 2000).
[18] *Norberg I,* mem. op. at 16.

account; his IRA custodian had refused to continue holding the shares; and Norberg was faced with the choice of taking custody of the shares and suffering adverse tax consequences or accepting the available merger consideration." Indeed, it may be that his decision to tender was independent of what he knew or did not know about Security Storage's plans for its real estate.

*4. Cumulative or impeaching*

The newly discovered evidence is not "merely cumulative or impeaching in character."[20] It adds a new basis for concluding that the information which Norberg had at the time of his tender was not complete and accurate. The alleged failure to disclose the plans for sale of the real estate would have introduced a materially different fact into the mix of facts known to Norberg.

*5. Available for merits-based evaluation*

It is more than "reasonably possible" that the evidence will be produced because Mr. Wright's testimony has been preserved through his deposition.

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[19] *Norberg II*, let. op. at 3.
[20] *See supra* note 15.

**III.**

In conclusion, although Norberg has met the burdens imposed upon him as a movant for relief under Court of Chancery Rule 60(b)(2) with respect to four of the five factors set forth in ***Missouri-Kansas Pipeline*** Co., I conclude that he has failed to demonstrate that the newly discovered evidence obtained through Mr. Wright's deposition could not have been obtained before the summary judgment motion through the exercise of "reasonable diligence."[21] Accordingly, the motion is denied.

**IT IS SO ORDERED.**

Very truly yours,

**JWN/cap**
oc: Register in Chancery-N@,

[21] I also have noted that Norberg's showing as to the probable effect of the newly discovered evidence is barely sufficient to meet the third prong of the Rule 60(b)(2) analysis prescribed by ***Missouri-Kansas Pipeline Co.***